SOUTH AUSTRALIAN CRIMINAL TRIALS BENCH BOOK

Foreword to Third Edition

This third edition of the *South Australia Criminal Trials Bench Book* includes four additional chapters to address Firearms Offences (Chapter 15), Drug Offences (Chapter 16), Defences (Chapter 17) and Extensions to Criminal Responsibility (Chapter 18).

The Honourable Justice Sam Doyle
Chair of the Bench Book Editorial Committee
Supreme Court of South Australia
July 2021

Foreword to Second Edition

This second edition of the *South Australia Criminal Trials Bench Book* includes both additional and updated material.

It includes six additional chapters to address Offences against the Person (Chapter 8), Sexual Offences (Chapter 9), Child Exploitation Material Offences (Chapter 10), Public Order Offences (Chapter 12), Property Offences (Chapter 13) and Dishonesty Offences (Chapter 14). Serious Driving Offences, which were Chapter 8 have been moved to Chapter 11.

As can be seen can be seen from the Index, there are two further chapters of offences to come (Firearms Offences and Drug Offences), as well as chapters addressing defences and extensions to criminal responsibility. It is hoped that most, if not all, of these topics will be covered in a third edition of this work available in the first half of next year.

Some of the commentary in the chapters that appeared in the first edition has been updated to include reference to some decisions of significance that have been handed down in the last six months, including the decision of the High Court in *Nguyen v The Queen* [2020] HCA 23 in relation to mixed statements and the prosecutorial duty to put its case fully and fairly. Some commentary and a suggested direction addressing the accused's evidence from a previous trial have also been included.

I refer to without repeating the observations I made as to the intended use and purpose of this work, and my thanks to those involved in its preparation, set out in the foreword to the first edition.

The Honourable Justice Sam Doyle
Chair of the Bench Book Editorial Committee
Supreme Court of South Australia
September 2020

Foreword to First Edition

The *South Australian Criminal Trials Bench Book* has been prepared primarily to assist Supreme Court and District Court judges in preparing their directions for juries. However, it is also being made more generally available in the hope that practitioners may also find it useful in making submissions as to the directions that are appropriate in a given case.

The suggested directions and accompanying commentary in the *Bench Book* are not intended to constitute an authoritative statement of the law. They are intended merely as guidelines to assist judges and practitioners in the conduct of criminal trials. While care has been taken to achieve directions and commentary that accurately reflect the current state of the law, the *Bench Book* has no formal status in this respect. A direction will not necessarily be correct just because it follows the suggested directions. Likewise, a direction will not necessarily be erroneous just because it does not do so. It is to be expected, as has occurred in respect of equivalent publications in other States, that the directions and commentary in the *Bench Book* will be the subject of judicial consideration and commentary. Indeed, such consideration and commentary will assist in the drafting of future editions, and in achieving the objectives of the *Bench Book*.

It should also be emphasized that the overriding responsibility of a trial judge in a criminal trial is to ensure a fair trial. To that end, a judge's directions to the jury must be tailored to the particular circumstances of the case. While the suggested directions in the *Bench Book* are necessarily generic in their terms, it is not intended that the use of these directions will reduce a summing up to a series of formulaic directions removed from the facts and issues in the case. To the contrary, the suggested directions are intended as merely prompts and suggestions for the trial judge, and are drafted on the assumption that their content will be appropriately adapted to the facts and issues in the particular case.

The aim of a summing up is to explain to the jury the legal principles relevant to the performance of their task, and to relate these principles to the facts and circumstances of the case. With this in mind, the intention has been to draft the suggested directions in terms that are as clear and succinct as the relevant topics permit. However, with some limited exceptions, the law does not require the use of any particular form of words. Individual judges should thus feel free to adapt or depart from the style of the suggested directions as they see fit, provided of course that they do so in accordance with the law.

While it is thus expected that the suggested directions will be adapted both as to their content and style, it is nevertheless hoped that the *Bench Book* will assist judges in their preparation of directions, and reduce the risk of error in the directions that are given. In this way, it is hoped that the *Bench Book* will, over time, make a valuable contribution to the efficient administration of justice in this State.

The *Bench Book* has been prepared by an editorial committee comprised of several former and current Supreme and District Court judges, as well as several practitioners from both the Office of the Director of Public Prosecutions and the independent bar. I wish to thank them all for their valuable, and in most cases ongoing, contribution to the work involved in

preparing the *Bench Book*. I particularly wish to thank Matthew Weatherson of the Judicial College of Victoria for his work as the primary author of the *Bench Book*.

This first edition of the *Bench Book* is not complete. It has been completed through to the end of Chapter 8, and hence covers the matters of general relevance in all criminal trials, as well as matters relevant to homicide and serious driving offences. Chapters 9 to 18 are in the process of being drafted, and will address a range of other offences, as well as defences, extensions to criminal responsibility and fitness to stand trial, as set out in the index to the *Bench Book*.

The *Bench Book* should be treated as a work-in-progress, both because it is incomplete and because it is intended that it will continue to be updated, amended and improved over time. It is expected that that there will be regular new editions of the *Bench Book*.

To that end, the editorial committee welcome any comments on the *Bench Book*. Any such comments may be sent to the editorial committee via my chambers, using the email address chambers.doyle@courts.sa.gov.au.

The Honourable Justice Sam Doyle
Chair of the Bench Book Editorial Committee
Supreme Court of South Australia
March 2020

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CHAPTER 1: PRELIMINARIES

1.1 – Pre-trial case management

1.1.1 – Joinder and severance

1. The *Criminal Procedure Act 1921* (SA) provides that charges for two or more offences may be joined in a single information:[1]

> if those charges are founded on the same facts or form, or are a part of, a series of offences of the same or a similar character.

2. The court however has a discretion to sever charges from an information.[2] There are two questions which aid in the exercise of this discretion: [3]

   - are the charges in the information validly joined?; and
   - should the charges in the information be severed?

3. For the purpose of the joinder rule, offences may be founded on the same facts if there is a common factual origin to the offending, even if the different offences are separated by time or space.[4] Some form of 'nexus' is required between the different offences.[5] The nexus may arise from the cross-admissibility of evidence, but is not limited to that.[6] A nexus may also arise from a consideration of both the legal elements of the offences and the facts and circumstances in which the alleged offences occurred.[7]

4. Offences may be part of a series even though they involve different alleged victims.[8]

5. In *R v Harbach*, the Court set out three key principles:[9]

   - a joint trial should usually be held when the defendants are charged with committing the offence jointly;
   - a joint trial may be held even if it will mean that evidence inadmissible against one accused is led; and

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[1] *Criminal Procedure Act 1921* (SA) s 102(1).
[2] *Criminal Procedure Act 1921* (SA) s 102(5).
[3] *R v Armstrong* (1990) 54 SASR 207, 211-213.
[4] *Liddy v R* (2002) 81 SASR 22; [2002] SASC 19, [123].
[5] *De Jesus v The Queen* (1986) 61 ALJR 1, 9 (Dawson J); [1986] HCA 65, [8] (Dawson J); *R v Smith* (1998) 71 SASR 543; [1998] SASC 6865, [60].
[6] *Liddy v R* (2002) 81 SASR 22, [119]; [2002] SASC 19, [119].
[7] *R v Garrett* (1988) 50 SASR 392, 401.
[8] *Liddy v R* (2002) 81 SASR 22, [119]; [2002] SASC 19, [119].
[9] *R v Harbach* (1973) 6 SASR 427, 432. See also *R v Tran & To* (2006) 96 SASR 8; [2006] SASC 276; *R v Bascombe & Spilios* [2015] SASC 129; *R v Zappia & Kamleh* [2002] SASC 133; *R v Hogan & Ors* (1990) 159 LSJS 297.

- a joint trial may be held even where one defendant seeks to cast blame on the other.

6. The *Criminal Procedure Act 1921* (SA) also contains a special rule which limits the availability of severance for sexual offences. If charges relating to different victims are joined in a single information, the charges are to be heard together unless the court orders severance. The court can only order severance of a count relating to a particular victim if:[10]

> evidence relating to that count is not admissible in relation to each other count relating to a different alleged victim.

7. This is consistent with the common law rule that sexual offences should not be tried together unless the evidence on each charge is cross-admissible.[11]

8. In deciding whether to grant applications for severance, the court may also need to consider s 34 of the *Evidence Act 1929* (SA). This provision applies where there are multiple accused and a party proposes to adduce discreditable conduct evidence under Part 3, Division 3 of the *Evidence Act 1929* (SA). Where this occurs, the court must give 'strong weight to a real possibility' that the defendant may be prejudiced by:

   - evidence from the prosecution that is admissible against one defendant but not another;
   - evidence from another defendant that is not admissible against the other; and
   - the applicant's inability to lead evidence about another defendant due to s 34P of the *Evidence Act 1929* (SA).

[10] *Criminal Procedure Act 1921* (SA) s 102(6)(b).

[11] *Sutton v R* (1984) 152 CLR 528; [1984] HCA 5; *De Jesus v The Queen* (1986) 61 ALJR 1; [1986] HCA 65; *Maiolo v R* [2011] SASCFC 86, [32]–[38].

1.1.2 - Case statements and pre-trial determinations of law

9. Following amendments to the *Criminal Procedure Act 1921* (SA), that commenced on 5 March 2018,[12] the prosecution and defence must file and serve case statements which give notice of certain evidence and issues that may be led or contested.[13] The purpose of such statements is to assist in the pre-trial management of the case.

10. Matters of law that are identified in the case statements can be determined after the accused is arraigned but before the jury is empanelled.[14] Such determinations are binding on the later trial judge, unless the trial judge considers it would not be in the interests of justice for the order to be binding, or the order is inconsistent with an order made on an appeal.[15]

[12] *Summary Procedure (Indictable Offences) Amendment Act 2017* (SA). These amendments only apply to proceedings commenced on or after 5 March 2018.
[13] *Criminal Procedure Act 1921* (SA) s 123.
[14] *Criminal Procedure Act 1921* (SA) s 131.
[15] *Criminal Procedure Act 1921* (SA) s 132.

1.2 – Matters requiring notice

11. Under the *Criminal Procedure Act 1921* (SA), the defence must give notice of the following matters before trial:

    - intention to introduce expert evidence;[16]
    - intention to introduce alibi evidence;[17]
    - intention to raise any of the following:[18]
        - joinder or severance;
        - cross-admissibility of evidence;
        - challenges to the legality of searches;
        - challenges to the admissibility of any other prosecution evidence;
        - applications for stay of proceedings;
        - issues relating to the chain of custody or continuity of custody of exhibits;
        - any other points of law;
    - if required, on the application of the prosecution:[19]
        - evidence of mental incompetence;
        - evidence that the defendant acted for a defensive purpose;
        - evidence of provocation;
        - evidence of automatism;
        - evidence of accident;
        - evidence of necessity or duress;
        - evidence tending to establish a claim of right; and
        - evidence of intoxication.

12. In addition, the prosecution must give notice if it intends to lead discreditable conduct evidence.[20]

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[16] *Criminal Procedure Act 1921* (SA) s 124.
[17] *Criminal Procedure Act 1921* (SA) s 124.
[18] *Criminal Procedure Act 1921* (SA) s 123(4)(f).
[19] *Criminal Procedure Act 1921* (SA) s 134(1).
[20] *Criminal Procedure Act 1921* (SA) s 123(2)(f). But c.f. *Evidence Act 1929* (SA) s 34P(4).

1.3 – Empanelment of jurors

13. Under the *Juries Act 1927* (SA), the sheriff must, in open court, provide the proper officer of the court a list containing the names of all jury panel members, along with separate cards containing the numbers of panel members. The cards must be kept in the ballot box provided for this purpose.[21]

14. Both the judge and the sheriff may excuse a person from serving on a jury before the person is empanelled:[22]

    (a) on the ground that the person has served as a juror within the previous three years;

    (b) on the ground that the person is one of two or more partners from the same partnership, or of two or more persons employed in the same establishment, who have been summoned to attend as jurors on the same days;

    (c) because of ill-health, conscientious objection or a matter of special urgency or importance;

    (d) for any reasonable cause.

15. In practice, after the associate receives the list and the cards, the judge will provide the jury panel with some preliminary information about the case and invite panel members who wish to be excused to apply.

16. The general ground for excusing a panel member 'for any reasonable cause' is given a wide-ranging operation. In practice, the prosecution and defence are invited to tell the panel the names of the accused, any proposed witnesses and other people who may be mentioned in connection with the trial. Judges should also inform the panel of other reasons why it might be necessary to apply to be excused, such as:

    - personal commitments which would make jury service unduly burdensome; or
    - personal experiences of crime which the panel member believes would make them incapable of deciding the case impartially.

17. During empanelment, the prosecution and each defendant may issue three peremptory challenges.[23] Challenges by the defendant may be issued either by the defendant personally, or by the defendant's counsel. The challenge must be made before the juror takes his or her seat in the jury box.[24] In addition, a party may challenge a juror for cause, for example on the basis that the juror is ineligible or disqualified from acting as a juror.[25] Challenges for cause must be determined by the trial judge.[26]

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[21] *Juries Act 1927* (SA) ss 42, 43.
[22] *Juries Act 1927* (SA) s 16(2).
[23] *Juries Act 1927* (SA) ss 61, 65.
[24] *Juries Act 1927* (SA) s 64.
[25] *Juries Act 1927* (SA) s 66.
[26] *Juries Act 1927* (SA) s 68.

Jury direction #1.3A – Pre-empanelment remarks

Members of the jury panel, my name is [*insert*] and I will be presiding over this trial.

We are about to proceed with selecting jurors for this case. Before that, I am going to give you a final opportunity to apply to be excused from sitting on the jury for this trial.

It is important to ensure that a criminal trial is fair and that jurors are open-minded. Sometimes a juror knows one of the people involved in the trial, or knows something about them. Even if that juror feels capable of treating that person fairly, to the outside world it may seem likely that the juror would favour one side or the other. That would undermine public confidence in the outcome.

A similar problem arises if a juror has, or believes they have, information about the facts of the case. I therefore need to give you some information about the case and the people involved in it. Listen carefully, to see if you recognise any of the names, or have other knowledge about the case. If you do, you should apply to be excused when I invite you to do so – which I will soon do.

The accused's name is [*accused*]. The counsel involved in this case are [*names of counsel*].

You have heard the charges read out. In particular, you have heard the name(s) of the alleged victim(s) – [*alleged victims*].

[*Prosecution counsel*], would you please tell the jury the names of anyone who may be called as a witness, or otherwise identified as associated with the trial.

[*Prosecution counsel to identify witnesses and other significant people.*]

[*Defence counsel*], is there anyone else who should be identified at this time?

[*Defence counsel to indicate any additional names.*]

If you know any of these people, you should apply to be excused when I invite you to do so.

Duration of trial and personal circumstances

This trial is expected to last [*insert anticipated trial length*]. During the trial, you will need to attend court [*specify sitting days and hours, and advise of any anticipated breaks in the trial*]. Your service as a juror will no doubt involve some inconvenience. But I invite you to apply to be excused if the duration or timing of the trial would pose a particular burden for you by reason of your personal circumstances – for example, by reason of your child care obligations or your health.

Experiences and biases

There may also be some personal reason why you feel you cannot be a juror in this case. For example, in a case involving allegations of sexual offences, a potential juror might consider that the allegations in a particular case are "too close to home". The nature of the case may mean that he or she could not treat the parties to the case fairly. However, other people in similar situations serve as jurors in sexual offence cases every day, and can put aside any personal experiences, or any bias or sympathy that may arise from the fact that the case involves an allegation of a sexual offence.

[*If the trial may contain confronting material, add the following direction*:]

During this trial, there may be evidence that is confronting. [*Identify relevant evidence*]. The prosecution, the defence and I will make every effort to minimise the amount of confronting material you need to see, and to warn you before it is presented. But if any of you feel, at this point, that the material will be too distressing, you should let me know when I invite panel members to be excused, and I will decide if you should be excused. During the trial, if a juror becomes distressed by anything they see or hear in the trial, then they should feel free to approach the sheriff's officer assigned to the jury, who will be able to provide whatever assistance is required.

Applying to be excused

I urge you to apply to be excused for a personal reason only if absolutely necessary. Serving on a jury is one of the most important things that you can do as a member of the community, and our system of justice cannot operate unless people are prepared to perform this duty.

If any of you wish to be excused from this trial, please raise your hand. Each person who does so will then be asked to come forward in turn and quietly tell me the reason they should not be part of the jury panel for this case. Please do not feel embarrassed or hesitant about mentioning any matter to me. If the matter is confidential or of a sensitive nature, I will not mention it in open court. After I have heard your reason, I will decide whether to excuse you from this panel.

Jury direction #1.3B – Empanelment procedure

Members of the jury panel, we will soon select the jury for this trial. My associate has the number you have been given on cards in a ballot box. [He/She] will draw a number and call it out. If it is your number, you are to walk from your seat to the jury box. Please go to the seat furthest from the entrance and sit down.

[*Associate*], please empanel the jury.

[*Associate to give standard explanation to accused about the right of challenge and conduct the empanelment.*]

[*Associate to then place the accused in the charge of the jury.*]

1.4 – Opening directions

18. There is a range of views among judges about the degree of information that judges should give jurors at the start of a trial. The following directions are designed for use in cases where the judge believes the jury would benefit from relatively extensive opening instructions, and may be abridged in suitable cases.

19. Ordinarily the trial judge should, at the outset of the trial, direct the jury as to their obligation to decide the case only on the evidence, to not discuss the case with persons other than their fellow jurors, to not undertake their own enquiries, and to bring to the attention of the trial judge any departure from the above by any member of the jury. However, the extent to which aspects of these directions may require emphasis or elaboration remains a matter to be determined by the trial judge having regard to the circumstances of the particular matter.[27]

[27] *Warne v The Queen* [2020] SASCFC 12, [42].

Jury direction #1.4A – Role of jury, judge and counsel

Members of the jury, you represent one of the most important institutions in our community – the trial by jury. Our legal system gives any person charged with a serious criminal offence the right to have their case decided by 12 independent and open-minded members of the community – the jury.

Serving on a jury may be a new experience for some of you. To help you perform that role, I will describe your duties as jurors and the procedures we follow during the trial. I will also explain some of the principles of law that apply in this case.

If you have a question about anything I say during this introduction, please write it down, pass it to the sheriff's officer at the end, and I will address it.

Over the course of the trial, and in particular at the end of the trial, I will tell you more about the law that applies. You must listen closely to my directions and follow them carefully.

I will now describe the role that each of us has in this process.

Role of jury

The prosecution has charged [*accused*] with [*number*] offences. You heard them read out and you heard the accused plead not guilty to each of those offences.

It is your role, as the jury, to decide whether the prosecution has proved these allegations. That will require you to listen to the evidence, and decide what the facts are in this case. You are the only ones who can make a decision about the facts. Once you have decided what the facts are, you will apply the law and decide whether the accused is guilty or not guilty of the offence(s) charged.

Role of the judge

My role, as the judge, is two-fold. I must ensure the trial is fair and conducted in accordance with the law. In other words, I am the umpire who ensures the rules are followed. It is also my role to help you by explaining the principles of law that you must follow to make your decision.

When I give you a direction of law, you must accept and follow that direction.

However, it is not my responsibility to decide the case. That is yours and yours alone. So, while you must follow my directions of law, you are not bound by any comments I make about the evidence or the facts.

The purpose of any comments I make is to help you form a view about the evidence and the facts, or to suggest matters you might wish to consider. However, if you disagree with my comments, you must disregard them. Do not give them extra weight just because I, the judge, have made them. It is your view of the evidence and facts that matters, not mine.

Role of counsel

In this case, we have [*prosecutor*] appearing for the prosecution and [*defence counsel*] appearing for the accused, [*accused*]. Their role is to present the case for their respective sides. They will call witnesses, question witnesses and make arguments to you.

You do not need to accept any submissions that counsel make during their addresses. Of course, you may be persuaded by a view of the facts they put forward. But it is your view of the facts that is important. You are also not bound by what counsel say about the law. I am the judge of the law, and you must follow my directions about the law. If counsel say something different from what I say about the law, you must ignore it and follow my directions.

Jury direction #1.4B – Decide solely on the evidence

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

The first type of evidence is what the witnesses say in court.

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

Let me give you a simple example. Imagine counsel says to a witness "The car was blue, wasn't it?", and the witness replies "No, it wasn't". Given that answer, there is no evidence that the car was blue.

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

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

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

[*Add the following section if any formal admissions or agreed facts are likely to be put before the jury:*

The third type of evidence is what is called an "admission" or an "agreed fact". These are facts that the prosecution and defence agree about. When that happens, the admission is sufficient to prove that fact, and no further evidence on that topic is required. I will tell you about any admissions that have been made in this case when relevant.]

Nothing else is evidence in this case. This includes the arguments or submissions of counsel and comments about the evidence that I make.[28] The only evidence is the witnesses' testimony, [the admissions] and the exhibits.

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

No sympathy or prejudice

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

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

You are the judges of the facts. That means that in relation to the issues in this case, you must act like judges. You must dispassionately weigh the evidence, logically and with an open-mind, and not according to your feelings or emotions.

No outside information

When you retire to consider your verdict, you will have heard or received all the information that you need to make your decision.

You must not base your decision on any information you might obtain outside this courtroom. For example, you must completely ignore anything that you have seen or heard in the media about this case or the people involved in it, or which you may see or hear. You must consider only the evidence presented to you here in court.

Most importantly, you must not make any investigations or enquiries, or conduct independent research, concerning any aspect of the case or any person connected with it. That includes research about the law that applies to the case. You must not use the internet to access legal databases, legal dictionaries, legal texts, court decisions, or other material of any kind relating to the matters in the trial. You must not search for information about the case or the people involved on Google or any other internet search engine. You also must not discuss the case on Facebook, Twitter or blogs, or indeed any form of social media, or look at such sites for more information about the case. You must not visit the scene of the alleged offence. And you must not attempt any private experiments concerning any aspect of the case.

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

First, deciding a case on outside information, which is not known to the parties, is unfair to both the prosecution and the defence. The prosecution and defence will not have a chance to test the information. Similarly, I will not know if you need any directions on how to use such material.

Second, media reports, or claims made by people who are not witnesses may well be wrong or inaccurate.

Third, acting on outside information would be contrary to the oath or affirmation you took as jurors to give a true verdict according to the evidence. Your role is to decide whether the prosecution has proved its case. It is not your role to be an investigator.

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

Consequences of breaching instructions

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

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

There may also be personal consequences for the juror, as the juror could be charged with contempt of court, which is a serious criminal offence.

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

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

Warnings about discussing the case

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

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

You must also avoid talking to anyone other than your fellow jurors about the case. This includes your family and friends. You must not discuss the case on any of the various social media platforms, such as Facebook, Myspace, Twitter, blogs or anything else like that. Of course, you can tell your family and friends that you are on a jury, and about general matters such as when the trial is expected to finish. But do not discuss the case itself. It is your

judgment, not theirs, that is sought. You should not risk that judgment being influenced by their views – which will necessarily be uninformed, because they will not have seen the witnesses or heard the evidence.

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

Jury direction #1.4C – Assessing witnesses

To summarise, I've told you that your role is to decide what facts have been proved based on the evidence. I'm now going to give you some very general advice about how you assess evidence.

Most of the evidence will come from witnesses. It is up to you to decide how much or how little of the evidence of any witness you will believe or rely on. You may believe all, some or none of a witness's evidence. It is also for you to decide what weight should be attached to any particular evidence – that is, the extent to which the evidence helps you to determine the relevant issues.

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

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

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

You should keep an open mind about the truthfulness or accuracy of the witnesses until all the evidence has been presented. This is because it is only once you have heard all the evidence that you will know whether the other evidence confirms, explains or contradicts a particular witness's evidence.

In deciding whether the prosecution has proved its case, you must also consider the exhibits [and admissions]. Consider all the evidence in the case, use what you believe and reject what you do not believe. Give each part of it the importance which you – as the judges of the facts – think it should be given, and then determine what, in your judgment, are the true facts.

Jury direction #1.4D – Onus and standard of proof[29]

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

To prove the accused's guilt of a charge, the prosecution prove the essential ingredients, or "elements" of that charge beyond reasonable doubt.

You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.

This is the highest standard of proof that our law demands.

At the end of the trial, I will tell you what the essential ingredients or elements are for each charge, and what evidence the prosecution relies on to prove each element.

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

[29] If the charge contains a reverse onus provision, the second, third and fourth sentences of the first paragraph, beginning "The accused does/do not have to..." should be omitted. If a further explanation of the reverse onus provision is necessary at this time, add the following words before the sixth paragraph beginning "For now...":
"There is one exception to this general rule which applies in this case. As you will hear at the end of the trial, for one of the elements, [*identify reverse onus element*] the accused must disprove that element. For that issue only, the accused must prove that [he/she] did not [*identify relevant issue*]. The standard that applies to that issue is the balance of probabilities. That is, the accused must show that it is more likely than not that [*identify relevant issue*]. This is a lower standard of proof than the prosecution's standard of beyond reasonable doubt."

Jury direction #1.4E – Separate consideration and alternative verdicts

Members of the jury, the sheriff's officer is now going to hand you a document called an "information". This document lists the crimes that [*accused*] is charged with.

[*If the judge wishes to provide information about the elements of offences at the start of the trial, add that direction here. Otherwise, give the following direction:* I will tell you more about what each crime involves at the end of the trial. However, there are two matters I want to draw to your attention now.]

Multiple accused

[*If there are multiple accused, use the following separate consideration direction*:

In this trial there are [*insert number*] accused.[30] The prosecution says each of them is guilty. Each of them says they are not guilty. So there are really [*insert number*] trials being heard together.

It would be a great waste of time and money to hold separate trials of each accused on different occasions in different courts on this same matter.

But you must be careful not to lose sight of the fact that there are [*insert number*] different accused. They are each entitled to have their case considered separately, in light only of the evidence which applies to that accused.

You must ask yourselves, in relation to each accused, whether the evidence relating to that accused has satisfied you, beyond reasonable doubt, that [he/she] is guilty of the offence [he/she] has been charged with. If the answer is yes, then you should find [him/her] guilty. If the answer is no, then you should find [him/her] not guilty.

At the end of the trial, I will tell you if there is evidence that you can only use against one accused or another.]

Multiple charges

[*If there are multiple charges against a single accused, use the following separate consideration direction*:

In this trial, the prosecution has brought [*insert number*] charges against the accused. While these are separate matters, they are all being dealt with in the one trial.

It would be expensive, time-consuming and inefficient to hold a separate trial before a different judge and jury for each charge.

[30] If there are both multiple accused and multiple charges, then one of the two separate consideration directions should be used and adapted.

But you must be careful not to lose sight of the fact that there are [*insert number*] charges you must consider separately. It would be wrong to say that simply because you find the accused guilty or not guilty of one charge, that [he/she] must be guilty or not guilty, as the case may be, of another.

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

In most cases, it is obvious which evidence relates to which charge. However, I will give you some more help about this at the end of the trial, once we have heard all the evidence.]

Alternative verdicts

[*If there are alternative charges, use the following separate consideration direction:*

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

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

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

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

Jury direction #1.4F – Selecting a foreperson

To reiterate, I've told you that your role is to decide what facts have been proved based on the evidence. I've given you some advice on how you assess evidence. I have told you that the prosecution must prove the accused's guilt, and told you that you can only find a matter proved if it is proved beyond reasonable doubt. [I've also told you that you need to consider the evidence [on each charge/against each accused] separately.]

I'm now going to address a few practical matters before I invite the prosecution to open their case.

At some stage during the trial, you must select a foreperson. A foreperson is the jury's spokesperson. He or she will speak on your behalf. At the end of the trial, it is the foreperson who will deliver your verdict.

For some juries, the foreperson is also the person who helps keep your discussions in the jury room focussed, and makes sure everyone contributes.

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

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

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

Juries often select a foreperson on the second or third day of trial, but it is up to you when you do this. Get to know your fellow jurors, and when you are ready to do so, please give the sheriff's officer a note telling me who is the foreperson. After you choose a foreperson, it would be useful if the foreperson sat in the seat closest to me.

Jury direction #1.4G – Trial procedure

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

In a moment we will hear opening addresses from the prosecutor [and counsel for the accused].[31] Then we will proceed to hear the evidence.

Evidence from witnesses comes in three stages. First, the party who called the witness will take the witness through their "evidence-in-chief". At this stage, the party is seeking to help the witness tell you what he or she knows. Next, the other side will conduct "cross-examination". For this stage, the other side is seeking to test the witness' recollection and identify the limits of what he or she knows. Finally, for some witnesses, the first side will conduct "re-examination". This is a chance to clarify matters arising from cross-examination.

After that, there will be closing addresses from counsel. I will then instruct you about the law, the issues and the evidence. You will then go to the jury room to discuss your verdict(s).

Transcripts and note-taking

You have all been provided with notepads. Some people find that taking notes helps them understand or remember what they see and hear. For others, taking notes does not help. It is entirely up to you. However, all the evidence is being recorded and transcribed. You will have a chance to ask for the transcript if you need to be reminded of what a witness said.

You should always listen carefully to the evidence as it is given, because it is not only what the witnesses say, but also how they say it, that can be important to your assessment of the evidence. If you do take notes, you should not allow it to distract you from listening to the evidence and assessing the witnesses.

Sitting times and breaks

Our hours here in court are [*insert summary of sitting hours*].

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

[31] Under *Criminal Procedure Act 1921* (SA) s 136, the judge must invite the defendant to identify the issues in dispute after the prosecution's opening address. The defendant may accept or decline this invitation, and the invitation must take place in the absence of the jury. These opening remarks are written on the assumption that, as a matter of practice, the judge will have had this conversation with defence counsel before starting the opening remarks. If the defence elects not to make an opening address, or if the judge has not yet identified whether defence counsel will make an opening, then references to the accused's reply should be omitted.

During the trial, you may sometimes be asked to leave the court and go to the jury room. This might be because of a legal dispute about the evidence, or because of some issue with the trial procedure, such as the availability of a witness. Do not be alarmed when this occurs. We will resolve the issue as quickly as possible, and then bring you back so the trial can continue.

Opening address

We will now hear the opening address from the prosecution, who will tell you what the case is about. But remember, what the prosecution says is not evidence. That will come from the witnesses and exhibits. This opening address is merely to tell you what the case is about, and to tell you what evidence the prosecution expects to call.

CHAPTER 2: SIGNIFICANT MATTERS ARISING IN TRIALS

2.1 – Competence of witnesses/unsworn evidence

1. A witness is presumed to be capable of giving sworn evidence.[1] Unless the presumption of competence is rebutted, a witness must take an oath or affirmation before giving evidence. This presumption is not displaced merely by the assertion or the assumption of the prosecutor that a witness should not be required to give sworn evidence. Once the issue has been raised, the judge must decide whether the presumption has been rebutted.[2]

2. While concerns are often raised about the ability of young children to give sworn evidence, there is no obligation on a judge to start an inquiry into a witness' capacity to give sworn evidence merely because the witness is a child.[3]

3. However, in *R v Cheng,* Sulan and Peek JJ held that if a child under ten years of age is to give evidence affecting the criminal liability of another person, the court should enquire into whether the child can give sworn evidence.[4]

4. Where a challenge is raised to a witness' capacity to give sworn evidence:

    - the judge must determine whether the witness has sufficient understanding of the obligation to be truthful entailed in giving sworn evidence;[5]
    - the mere existence of differences in a person's account at different times does not justify conducting an inquiry into the person's understanding of the oath;[6]
    - questions about belief in God or the Bible are not relevant to capacity to give sworn evidence;[7]
    - questions about capacity must establish:
        - that the witness understands the difference between the truth and a lie;
        - that the witness understands what a lie is;

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[1] *Evidence Act 1929* (SA) s 9(1). Under s 4 of that Act, 'sworn evidence' means evidence given under oath or affirmation. For this reason, it has been suggested that it would be more useful to testimony given pursuant to s 6(1) and (3) of that Act as evidence solemnly given, and evidence taken pursuant to s 9(2) as informal evidence: *R v Lomman* (2014) 119 SASR 463; [2014] SASCFC 55, [4] .

[2] See *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [21].

[3] *R v P, BR* [2004] SASC 323, [119].

[4] *R v Cheng* [2015] SASCFC 189, [9]–[14].

[5] *R v French* (2012) 114 SASR 287; [2012] SASCFC 118, [35].

[6] *R v CH* [2016] SASCFC 112, [36].

[7] *R v Cheng* [2015] SASCFC 189, [22]; R *v Climas* (1999) 74 SASR 411; [1999] SASC 457, [134].

- that the witness understands the importance of telling the truth by reference to the moral and legal consequences or sanctions that might arise if the witness does not tell the truth;[8] and
- the importance of truthful evidence to maintaining the integrity of the trial process and ensuring the just administration of the law.[9]

5. The rules concerning sworn and unsworn evidence in *Evidence Act 1929* s 9 only apply to evidence from witnesses. The provisions do not apply directly to out-of-court statements admitted as an exception to the hearsay rule, but will be relevant if the maker of the statement is also called to give evidence.[10]

6. A witness may give unsworn evidence if:[11]

- the judge determines that the person does not have a sufficient understanding of the obligation to be truthful entailed in giving sworn evidence;
- the judge is satisfied that the person understands the difference between a truth and a lie;
- the judge tells the person that it is important to tell the truth; and
- the person indicates that he or she will tell the truth.

7. All of these preconditions must be met before unsworn evidence from a witness is admissible.[12]

8. The judge may inform him or herself about the witness' knowledge in any way he or she sees fit.[13] However, as Blue J explained in *H, SA v Police*:[14]

> This determination might be made without the judge seeing or hearing the person concerned. Ordinarily, however, the judge should hear the person questioned in court and, more often than not, the judge should conduct the questioning.

9. When a judge allows a witness to give unsworn evidence, the judge:[15]

(a) must explain to the jury the reason the evidence is unsworn; and

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[8] *R v Pascoe* (2004) 90 SASR 505; [2004] SASC 420, [50]-[54]; R *v Climas* (1999) 74 SASR 411; [1999] SASC 457, [137].
[9] *R v Lomman* (2014) 119 SASR 463; [2014] SASCFC 55, [5].
[10] *H, SA v Police* (2013) 116 SASR 547; [2013] SASCFC 86, [183]. But see 2.2.2 - Pre-recorded evidence and *R v Sparks* [2017] SASCFC 171 for a discussion of the interaction between *Evidence Act 1929* (SA) ss 9 and 13BA.
[11] *Evidence Act 1929* (SA) s 9(2).
[12] *R v Starrett* (2002) 82 SASR 115; [2002] SASC 175.
[13] *Evidence Act 1929* (SA) s 9(3).
[14] *H, SA v Police* (2013) 116 SASR 547; [2013] SASCFC 86, [127].
[15] *Evidence Act 1929* (SA) s 9(4).

(b) may, and if a party requests must, warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

10. The obligation to explain why the evidence is unsworn is linked to the earlier determination that the witness does not have sufficient understanding of the obligation to be truthful involved in giving sworn evidence. In order to comply with *Evidence Act 1929* (SA) s 9(4)(a), the judge must tell the jury:

- that the witness does not have sufficient understanding of the obligation to be truthful involved in giving sworn evidence;[16]
- the difference between sworn and unsworn evidence. This requires explaining the solemnity involved in giving sworn evidence and the sanctions which follow, both morally and legally, if the person fails to comply with that obligation;[17]
- that the judge is satisfied the witness understands the difference between the truth and a lie; and
- that the judge has told the witness it is important to tell the truth and the witness has said that he or she will be truthful.[18]

11. In *R v K, MC*, Kourakis CJ explained that the need for caution arises because:[19]

> the testimony of children, who do not appreciate the solemnity of the occasion, grasp the importance of a criminal trial, or understand the consequences of giving false evidence may, for those reasons, not be as reliable as testimony which is affirmed or sworn.

12. When giving the warning required under s 9(4)(b), the judge must not whittle down the warning by suggesting that it is given as a matter of formality, or that it is given only due to a statutory command and would not be done otherwise.[20]

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[16] *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [76]–[77].
[17] *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [41], [108]–[109]; *R v Climas* (1999) 74 SASR 411; [1999] SASC 457, [137].
[18] *R v French* (2012) 114 SASR 287; [2012] SASCFC 118, [35]; *R v K, MC* [2018] SASCFC 133, [44].
[19] *R v K, MC* [2018] SASCFC 133, [3].
[20] *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [117].

Witness direction #2.1A – Testing witness competence

The following scripts are adapted from "Child Witnesses: Testing Competency and Questioning – A Practical Guide", developed by the Judicial College of Victoria and the Victorian Child Witness Service. They are designed to help judicial officers tailor questions to a child or young person to assess their ability to give sworn or unsworn evidence.

Preliminary remarks – Orienting the witness

These preliminary remarks should be used for all witnesses, and then specific, age-appropriate, questions are provided below for testing the capacity of a witness to give sworn evidence.

General introduction

I am the Judge/Magistrate. I am the boss of/in charge of the court today. My job is to make sure everyone follows the rules.

[*If the witness is in the same room* – You have come today to answer some questions about what happened.]

[*If in the witness is in the remote witness room* – You are in a different place to me. You have [*first name of support person*] sitting with you. You have come today to answer some questions about what happened.]

Introduction of counsel

There are some other people here [*if remote* – with me]. Some of them will talk to you today. I will tell you who some of them are:

[*Prosecutor*], please stand and say hello to [*witness*]. [*Witness*], this is [*first name and surname of prosecution counsel*]. [His/her] job is to prove what happened. You may have met [him/her] before.

[*Defence counsel*], please stand and say hello to [*witness*]. [*Witness*], this is [*first name and surname of defence counsel*]. [His/her] job is to speak for [*accused*].

Mention of accused[21]

Also in the courtroom here today is [*accused*].

[He/she] is the person you told the police about.

[*If the witness is in the same room* – I will not let [him/her] talk to you today.]

[*If witness is remote* – [He/she] is sitting where you cannot see [him/her]. I will not let [him/her] talk to you today.]

Introduction to court rules

I would like to talk a little bit about rules with you.

In court, there are rules that everyone must follow. It's a bit like when we use the roads – as you probably already know, when anyone crosses the road or drives on the road, they must follow the rules.

Can you tell me one of the rules when you cross the road?

Can you tell me what the rule is when you are driving and you see a red light?

What about a green light?

That's good. The same thing applies in court – there are rules that everyone must follow, including me.

Court rules

In court, the most important rule is that everyone must tell the truth – including me and including you.

You are not in trouble here today. You are here today to tell the truth.

You must tell the truth even if you think your answer might get you or someone else into trouble.

[21] If the witness is remote and his/her age or maturity is not sufficiently developed, comments about the defendant could be confusing because of the lack of visibility of the defendant. If so, the judge should carefully consider whether it is necessary to mention the accused.

So, what will you do here today?

It's OK if you don't understand a question. I want you to tell me. All you have to say is 'I don't understand'.

And if you don't understand, what you will say?

It's also OK if you don't know the answer to a question. If you don't know the answer, all you have to say is 'I don't know.'

So if you don't know an answer, what you will say?

And if you can't remember the answer to a question, that's alright too. Just say 'I don't remember.'

If you can't remember an answer, what will you say?

If you do know the answer to a question, though, you must tell us.

And if you think someone says something that is wrong, even if it is me, I want you to say so. You will not get into trouble for saying that someone is wrong. You could just say 'No', or 'That's wrong' or 'That's not right'.

If someone says something that you think is wrong, what will you say?

Sometimes people need to have a rest. If you want a rest, just tell me or [first name of support person]. It's OK to say 'I want a rest'.

So, if you do want a rest what will you say to me or to [first name of support person]?

Testing capacity to give sworn evidence

I'm going to ask you some questions so you can get practice following these rules.

[*It is suggested the judge ask some simple questions to give the witness practice verbalising answers to questions*]

- What is your name?
- How old are you, [*name of child*]?
- What is your favourite food?
- [*Name of child*], do you have any pets?

[*If the child is aged 5-8*]

- What do you like to watch on TV?

[*If the child is aged 9-15*]

- Do you follow any sports teams?
- Do you like music?

Testing the understanding between truth and lies

[*It is suggested that the judge ask two questions requiring a negative answer and two questions requiring a positive answer. The judge should reinforce the correct answer with words such as "yes, that's right"*:

[*If the child is aged 5-8*]

Negative

- Am I wearing a red hat?
- Am I holding a bunch of flowers?
- Am I standing up?
- Am I holding a big ball?

Positive

- Is this a [*name an object which is being held up* (choose an object large enough for the child easily to see)]?
- [*If using remote witnessing*] Can you see me on a TV screen?
- [*If hands are held up/hand is waving*] Am I holding my hands up/waving my hand?
- [*If wearing glasses*] Am I wearing glasses?

[*If the child is aged 9–15*]

Negative

- If I said that my brother hit me but really he didn't, would that be telling the truth?
- If someone bought a bar of chocolate for $1.00 but said they paid $2.00, would that be telling the truth or a lie?
- If someone saw a thief take some money but they told the police they saw a car accident, would that be telling the truth or a lie?

Positive

- Is this a [*name an object which is being held up* (choose an object large enough for the child easily to see)]?
- [*If using remote witnessing*] Can you see me on a TV screen?
- [*If hands are held up/hand is waving*] Am I holding my hands up/waving my hand?
- [*If wearing glasses*] Am I wearing glasses?
- Is it true or not true that I am in charge of the court today?]

<u>Testing the understanding of the obligation to give truthful evidence [aged 5–12]</u>

- Do you know what a promise is?
- Is it important to keep a promise?
- Why is it important to keep a promise?

<u>Testing the understanding of the obligation to give truthful evidence [aged 13–15]</u>

- Do you know that everyone, including me, must tell the truth in court?
- When I say 'tell the truth', what do you think that means?
- What do you think is the opposite of telling the truth?
- What do you think is the difference between telling the truth and telling a lie?

Giving sworn evidence

When people talk to the court, we ask them to make a special promise. It is a special promise to tell the truth.

[*Name of support person]* has told me that you want to make your special promise by: [*using the Bible/the Qu'oran/other religious text OR by using special words that make a promise for court*.] Is this correct?

[*Witness is remote and sheriff is in court* – I am going to ask [*indicate name of sheriff*] to help you to make your promise. You will see [him/her] on your TV screen in a moment. All you need to do is to say what [he/she] says. That will make your special promise to tell the truth today.]

[*Witness and sheriff both in the court*] – This person here [*indicate sheriff*] is going to help you to make your promise. All you need to do is say what [he/she] says. That will make your special promise to tell the truth today.]

[*Witness and sheriff are both remote* – I am going to ask [*indicate name of sheriff*] to help you to make your promise. [He/She] is in the room with you now. All you need to do is to say what [he/she] says. That will make your special promise to tell the truth today.]

Giving unsworn evidence

Remember, the most important rule is that everyone must tell the truth – including me and including you.

Will you tell the truth today?

Explaining court process

We are now ready for you to start telling the court what happened and/or what you saw.

Now [*name of prosecutor*] is going to ask you some questions.

[Where pre-recorded evidence is being used – we will also watch the video you made with the police.]

Then [*name of defence counsel*] will ask you some questions.

And then [*name of prosecutor*] might ask you some extra questions at the end.

CHAPTER 2

Remember everything I said about answering questions. I am here to help you to do that. Tell me if you forget some of the things I have said. I will help you to remember.

Jury direction #2.1B – Unsworn evidence

Members of the jury, the next witness, [*witness*], will give evidence in a different manner. [He/She] will not take an oath or make an affirmation.

A witness who gives evidence on oath or affirmation has a special obligation to be truthful.

While you were in the jury room, I asked [*witness*] some questions about [his/her] understanding of the court process, and the importance of telling the truth.

I have found that, [*identify basis for determination under* s *9(1)*, e.g. "because of [his/her] young age"], [*witness*] does not have an adequate understanding of the moral and, for a person over the age of 10, legal, consequences that can flow if a person gives untrue evidence in court. Therefore, it would not be appropriate for [him/her] to take an oath or make an affirmation. However, [he/she] did understand the difference between a truth and a lie. I told [*witness*] that it was important to tell the truth, and [he/she] said that [he/she] would. As a result, the law allows [*witness*] to give evidence without taking an oath or making an affirmation.

[*If the s 9(4)(b) direction is required, add the following direction:*]

As a matter of law, you must take into account that in giving evidence, [*witness*] does not have the same understanding of the obligation to be truthful in a court proceeding as other witnesses, and does not understand the importance of a criminal trial or understand the consequences of false evidence. For these reasons, [*witness*]'s evidence may not be as reliable as evidence given on oath or affirmation. You must therefore exercise caution when deciding what weight, if any, you give [*witness*]'s evidence.]

2.2 - Protections for vulnerable witnesses

2.2.1 - Special arrangements

13. *Evidence Act 1929* (SA) s 12 gives a 'young child' the right to have an emotional support person present in court and in reasonable proximity to the child when the child is giving evidence. For this purpose, a 'young child' is a person under the age of 14.

14. Under *Evidence Act 1929* (SA) ss 13 and 13A, the court may order 'special arrangements' for taking evidence from vulnerable witnesses or witnesses who need to be protected from embarrassment, distress or intimidation due to the atmosphere of the courtroom or other proper reasons.

15. A 'vulnerable witness' is defined in *Evidence Act 1929* (SA) s 4 and includes a child under 16, a witness with a cognitive impairment, the alleged victim of certain offences and a witness who has been subjected to or reasonably fears threats of violence or retribution.

16. Special arrangements may include:[22]

- giving evidence by closed-circuit television;
- pre-recording evidence;
- placing a screen between the witness and the party;
- excluding the defendant from the courtroom or otherwise preventing the witness from seeing the defendant;
- allowing the witness to be accompanied by an emotional support person;
- taking measures to facilitate a witness with a physical disability or cognitive impairment giving evidence;
- taking additional breaks while the witness is giving evidence; and
- that the judge and lawyers not wear wigs or gowns.

17. Where a witness is accompanied by an emotional support person or a communication assistant, the jury must be able to see that person while the witness is giving evidence.[23]

18. When special arrangements are used, the court must warn the jury not to draw an inference adverse to the defendant from the making of special arrangements or allow the special arrangements to influence the weight the jury gives the evidence.[24]

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[22] *Evidence Act 1929* (SA) ss 13(2) and 13A(2).
[23] *Evidence Act 1929* (SA) ss 13(6) and 13A(5).
[24] *Evidence Act 1929* (SA) ss 13(7) and 13A(12).

19. This direction need not be given in the precise terms of *Evidence Act 1929* (SA) ss 13(7) or 13A(12), but must be 'fair and intelligible' and may be given without undue formality.[25] The purpose of the direction is to protect the accused from the risk that the jury might impermissibly reason that use of special arrangements show the accused is guilty.

20. The direction should identify each special arrangement. A failure to refer to one or more special arrangement that is being used may mean that the direction does not comply with the section, unless it can be inferred that the direction also covers the arrangements that are not expressly mentioned.[26]

[25] *R v Smart* [2018] SASCFC 123, [50].
[26] *R v Smart* [2018] SASCFC 123, [52]–[55].

Jury direction #2.2.1 – Special arrangements

The next witness, [*witness*], will give evidence in a different form.

[*Identify relevant special arrangements.*]

Giving evidence is a very stressful process for some people. These procedures are often used to help certain witnesses give evidence in a less stressful manner.

There are two warnings I must give you about the evidence you will hear.

First, you must treat this evidence the same as any other kind of evidence. Do not allow the way it is presented to influence the weight you give the evidence.

Second, this procedure says absolutely nothing about the defendant. Do not draw an inference against the defendant from the fact that the evidence is given in this way.

2.2.2 - Pre-recorded evidence

21. The law provides two mechanisms for an audio-visual recording[27] to be admitted as the evidence of a witness. [28] First, in proceedings for a serious offence against the person, the police interview may, in prescribed circumstances, be used as the evidence-in-chief of a vulnerable witness. Secondly, in proceedings for a serious offence against the person, the contravention of an intervention order or the contravention of a restraining order, the court may conduct a pre-trial special hearing for a vulnerable witness to pre-record the witness' evidence.

22. The current regime for audio-visual recordings was introduced on 1 July 2016, and applies to all proceedings from that date.[29] Unlike the previous regime, the audio-visual recording stands as the witness' evidence, rather than as admissible hearsay evidence from the witness.[30]

23. When the court admits evidence in the form of an audio-visual recording, the judge must:[31]

    (a) explain to the jury that the law allows the court to admit evidence in this form; and

    (b) warn the jury—

        (i) not to draw from the admission of evidence in that form any inference adverse to the defendant; and

        (ii) not to allow the admission of evidence in that form to influence the weight to be given to the evidence.

24. In addition, where the court allows an audio-visual recording of the witness' police interview to be used as the evidence of the witness, despite the interview not being conducted by a prescribed interviewer or not in accordance with the prescribed regulations, the court must:[32]

    (a) draw the jury's attention to the non-compliance by the prescribed interviewer; and

    (b) give an appropriate warning in view of the non-compliance,

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[27] These provisions only apply to recordings that contain both visual and audio records of the witness. Where there is no visual recording (or where the visual recording is not of the witness), the provisions will not apply, as the statute does not provide for purely audio recordings to be admitted: *R v Cronin* (2018) 131 SASR 111; [2018] SASCFC 61, [19]-[25].

[28] *Summary Offences Act 1953* (SA) Part 17, Division 3 and *Evidence Act 1929* (SA) s 13BA. For this purpose, a vulnerable witness is a witness who is under the age of 14 or who has a disability that adversely affects their ability to give a coherent account or respond rationally to questions.

[29] *Statutes Amendment (Vulnerable Witnesses) Act 2015* (SA).

[30] Compare *Evidence Act 1929* (SA) s 34CA (as in force before 1 July 2016). See also *R v Sparks* [2017] SASCFC 171, [37].

[31] *Evidence Act 1929* (SA) s 13BA(6).

[32] *Summary Offences Act 1953* (SA) s 74EC(2).

unless the court is of the opinion that the non-compliance was trivial.

25. The obligation in *Evidence Act 1929* (SA) s 34D to direct the jury about how to assess certain statements does not apply to pre-recorded evidence made admissible under *Evidence Act 1929* (SA) s 13BA.[33]

[33] *R v Cronin* (2018) 131 SASR 111, [36]; [2018] SASCFC 61, [38].

Jury direction #2.2.2 – Pre-recorded evidence

The next witness, [*witness*], will give evidence in a different form. Instead of being present in court answering questions, you will watch a video of [him/her] answering questions [in another courtroom/with a police officer]. The law allows evidence to be given in this form for certain witnesses.

There are [two/three] warnings I must give you about this evidence.

First, you must treat this evidence the same as any other kind of evidence. Do not allow the way it is presented to influence the weight you give the evidence.

Second, this procedure says absolutely nothing about the defendant. Do not draw an inference against the defendant from the fact that the evidence is given in this way.

[*If the judge must give a warning about non-compliance with Summary Offences Act 1953 (SA) s 74EC, add the following section*:

Third, in taking this evidence, the police did not follow all the rules about making this kind of recording. In particular [*explain the relevant non-compliance*]. Because of this, you must take care when assessing [*witness*]'s evidence, and you must take into account [*describe how non-compliance is relevant to the assessment of evidence.*]

2.3 – Rules relating to alleged victims in sexual offence cases

2.3.1 – Uncorroborated evidence of alleged victims of sexual offences

26. *Evidence Act 1929* (SA) s 34L(5) abolishes the common law rule that a judge must warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of a sexual offence.

27. The effect of this provision is that something more is required than the mere absence of corroboration before it will be appropriate to warn the jury that it is unsafe to convict on the complainant's uncorroborated evidence. As Kourakis CJ and Blue J explained in *R v MAS*:[34]

> the evidence of child sexual abuse will often be uncorroborated. Trials of those offences are of great consequence to the complainants, the accused and the community, and the jury is the tribunal best placed to determine those factual controversies. A judicial warning that it is unsafe to convict to a large extent arrogates to the Judge the responsibility which the criminal trial assigns to the jury.

[34] *R v MAS* (2013) 118 SASR 160; [2013] SASCFC 122, [32].

2.3.2 – Other sexual activity

28. *Evidence Act 1929* (SA) s 34L imposes limits on the admissibility of evidence of the complainant's other sexual activities.

29. First, the section imposes an absolute prohibition on questions or evidence about the sexual reputation of the alleged victim.[35]

30. Secondly, the section requires permission from the judge before any questions can be asked or evidence admitted about the alleged victim's sexual activities other than recent sexual activities with the accused.[36]

31. The section defines sexual activities to include a lack of sexual experience.[37]

32. While this prohibition applies to both the prosecution and the defence, evidence of a lack of sexual experience which is volunteered by a witness in a non-responsive answer will likely not give rise to a miscarriage of justice.[38]

33. Once the judge grants permission to question the complainant about other sexual activities, the complainant may also be cross-examined or re-examined about those active sexual activities without the judge needing to give further permission.[39]

[35] *Evidence Act 1929* (SA) s 34L(1)(a).
[36] *Evidence Act 1929* (SA) s 34L(1)(b).
[37] *Evidence Act 1929* (SA) s 34L(7).
[38] See, e.g., *R v Finn* (2014) 119 SASR 207; [2014] SASCFC 46, [37]–[48].
[39] *R v Smiles* [2018] SASCFC 98, [32]–[36].

2.3.3 - Recent and delayed complaint

34. *Evidence Act 1929* (SA) s 34M abolishes the common law regarding recent complaint. The section also prohibits any statement or suggestion to the jury by the judge or a party that delay of itself has any probative value regarding the alleged victim's credibility or consistency of conduct.[40] This prohibition does not prevent a complainant from giving evidence about his or her reason for failing to complain and does not prevent cross-examination about the truth of any reasons given by the complainant. The provision only prohibits comment on the actual delay.[41]

35. The prohibition also does not prevent the jury from using delay in complaint as a matter adversely affecting the complainant's credibility.[42]

36. The fact that s 34M(2) prohibits comment but not use can present a particular difficulty for trial judges when counsel breach the prohibition. In *R v Van Wyk*,[43] the Court acknowledged that there is no satisfactory practical remedy where counsel breach the prohibition. In responding to the breach, the judge must not tell the jury that it cannot *use* the evidence for the suggested purpose.

37. The section further provides that evidence of the making of an 'initial complaint' of an alleged sexual offence is admissible, despite any other rule of law or practice.[44] For this purpose:[45]

> "complaint", … includes a report or any other disclosure (whether to a police officer or otherwise);
>
> "initial complaint", … includes information provided by way of elaboration of the initial complaint (whether provided at the time of the initial complaint or at a later time).

38. Whether or not words amount to a complaint at all for the purposes of s 34M is a question of law and not a matter which is properly left to the jury.[46]

39. The section only provides that the 'initial complaint', as defined, is admissible. Later complaints will only be admissible if they are capable of meeting the expanded definition of 'initial complaint', which includes an elaboration of the earlier initial complaint.[47]

40. Where evidence of more than one complaint is led, the judge does not need to direct the jury in terms of an initial complaint and an elaboration of an initial complaint. Rather, the judge may direct the jury to consider whether any of the complaints were made and

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[40] *Evidence Act 1929* (SA) s 34M(2); *R v H, T* (2010) 108 SASR 86; [2010] SASCFC 24, [95].
[41] *R v Botten* [2017] SASCFC 73, [50]–[51]; *R v H, T* (2010) 108 SASR 86; [2010] SASCFC 24, [107].
[42] *R v Jones* [2018] SASCFC 80, [129]; *R v Van Wyk* [2018] SASCFC 138, [25], [33]–[35].
[43] *R v Jones* [2018] SASCFC 80, [105]–[129]; *R v Van Wyk* [2018] SASCFC 138, [38].
[44] *Evidence Act 1929* (SA) s 34M(3).
[45] *Evidence Act 1929* (SA) s 34M(6).
[46] *R v Crafter* [2019] SASCFC 25, [42].
[47] *Evidence Act 1929* (SA) s 34M; *R v Jones* [2018] SASCFC 80, [68], [78]; *R v Partington* [2018] SASCFC 113, [48]–[50].

whether the jury is prepared to treat the complaints as evidence of consistency of conduct.[48]

41. The prosecution must assist the judge by identifying when evidence is led as initial complaint, and, if the prosecution and defence have reached agreement about how the evidence will be led, the judge should be informed of this agreement.[49]

42. While the complaint must be referable to the charges, it is not necessary that the complaint precisely match the individual charges alleged, as it would not be realistic to expect complainants to provide that level of precision in an initial complaint.[50]

43. Where evidence of initial complaint is led, the judge must:[51]

- identify the complaint evidence;
- direct the jury that the evidence is admitted to inform the jury how the allegations came to light and as evidence of the degree of consistency of conduct of the complainant;
- direct the jury that the evidence is not admitted and cannot be used as evidence of the truth of what was alleged;
- direct the jury that there may be varied reasons why the alleged victim has made a complaint at a particular time or to a particular person; and
- direct the jury that, subject to these directions, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.

44. As these directions are mandatory, a judge cannot, at the request of counsel, depart from the matters specified in the Act. Counsel should consider the mandatory terms of the direction when deciding whether to lead evidence of initial complaint.[52]

45. In giving these directions, the judge should incorporate the statutory words into the direction.[53]

46. However, merely repeating the words of the statute will rarely be adequate. A jury needs assistance to understand how the directions apply to the evidence, particularly to

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[48] *R v Partington* [2018] SASCFC 113, [49].
[49] *R v Jones* [2018] SASCFC 80, [62], [73].
[50] See *R v El Rifai* [2012] SASCFC 98, [132]–[133]; *R v S, DD* (2010) 109 SASR 46; [2010] SASCFC 80, [4], [17]; *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [44], [48]; *R v Usher* (2014) 119 SASR 22; [2014] SASCFC 32, [50].
[51] *Evidence Act 1929* (SA) s 34M(4); *R v Jones* [2018] SASCFC 80, [164].
[52] *R v Jones* [2018] SASCFC 80, [132]–[138].
[53] *R v Jones* [2018] SASCFC 80, [164]–[165].

understand how the evidence can be relevant via consistency, but not used as evidence of the truth of what was alleged.[54]

47. A complaint can provide evidence of consistency of conduct in three ways:[55]

- by the mere making of a complaint;
- by making a complaint at the time one might expect it to be made; and
- through the consistency in the allegations made.

48. In cases of delayed complaint, there is an unresolved question about how the obligation in *Evidence Act 1929* (SA) s 34M(4)(a)(ii) – to direct the jury that it can use the complaint as evidence of consistency of conduct – should be approached. One view is that the legislation may be read down so that the direction on consistency of conduct can be omitted where it is not relevant. The alternative approach is that consistency of conduct is a question of degree and, even in cases involving delayed complaint, a jury is entitled to consider the degree of consistency between the initial complaint and the evidence given by the complainant in court, for example, any reasons the complainant gives for the delay.[56] A third approach is that an absence of relevance via consistency may be a factor leading the court to exclude the complaint evidence in the exercise of the *Christie* discretion.[57]

49. In a case where there is a significant time gap between different offences, the judge may need to direct the jury to decide whether a complaint is referable to one set of offences rather than another.[58] However, this is not required in all cases and is not required where the alleged offending occurred on a single occasion.[59]

50. Judges should exercise care in directing the jury about the potential to use a complaint as evidence of consistency by reason of the timing of the complaint, because of the prohibition on suggestions that a failure to complain is itself of probative value.[60]

51. In describing the difference between the permissible or impermissible uses of complaint evidence, the judge should not tell the jury that the distinction may appear illogical or contradictory. Judges should confine themselves to directing the jury about the permissible and impermissible uses.[61]

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[54] *R v S, T* (2017) 128 SASR 66, [149]; [2017] SASCFC 67, [150].
[55] *R v S, T* (2017) 128 SASR 66, [149]; [2017] SASCFC 67, [150].
[56] See and compare *R v H, T* (2010) 108 SASR 86; [2010] SASCFC 24, [48] (Gray J), [81]–[82] (White J) and [106] (Kourakis J).
[57] *R v Place* (2015) 124 SASR 467; [2015] SASCFC 163, [43], [51]–[52].
[58] *R v S, DD* (2010) 109 SASR 46; [2010] SASCFC 80, [7]–[9], [126]–[127].
[59] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [63]–[64].
[60] *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [26]; *R v Jones* [2018] SASCFC 80, [121]–[122].
[61] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [67]–[70].

52. Section 34M only applies to charges for sexual offences. Where a person is charged with sexual offences and non-sexual offences in the one trial, the judge must make clear that the jury can only use the evidence of recent complaint in relation to the sexual offences.[62]

[62] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [77]-[80].

Jury direction #2.3.3 – Initial complaint evidence[63]

Short version

When [*complainant*] was giving evidence, [he/she] said that [he/she] [*describe the initial complaint evidence*]. I must give you the following direction of law about this evidence.

You cannot use this evidence to demonstrate the truth of what was reported. You must have regard to [*complainant*]'s evidence given in this court for that purpose. Rather the evidence is before you for a more limited purpose. That is, to inform you of how the allegations came to light and to allow you to consider the degree of consistency of conduct on the part of [*complainant*].

When you are assessing [*complainant*]'s evidence of telling [*witness*] about the offences, you must take into account that there may be many reasons why [*complainant*] told [*witness*] about these alleged offences at a particular time, or why [*complainant*] chose to tell [*witness*], rather than another person.

But, other than bearing these directions in mind, it is up to you to decide what weight to give this evidence in the circumstances of this case.

[63] *The following two directions provide different ways of explaining the limited use of initial complaint evidence. Judges should consider whether, in the circumstances of the case, the jury needs additional guidance so they can give effect to the exclusion of hearsay evidence for a testimonial purpose.*

Long version

When [*complainant*] was giving evidence, [he/she] said that [he/she] [*describe the initial complaint evidence*]. I must give you the following direction of law about this evidence.

You can only use [*complainant*]'s evidence of telling [*witness*] about these alleged offences for a limited purpose. The evidence allows you to understand how the allegations first came to light. The evidence also allows you to consider the degree to which [*complainant*] has acted consistently. That is, to what extent did [*complainant*] complain about the offending at the time you would expect, and to what extent has [*complainant*]'s account remained consistent from when [he/she] first reported these alleged offences.

You cannot use this evidence to demonstrate the truth of what is alleged. To decide the truth of what occurred, you must rely on [*complainant*]'s first-hand evidence in court. To understand this distinction, I'll use an example.

Suppose I was giving evidence and I said, "last week, someone broke into my house". That would be first-hand evidence someone broke into my house. Now suppose that I said, "last week, I told my associate that someone broke into my house". That would not be first-hand evidence, because I am merely reporting a conversation I had outside court with my associate.

The same principle applies here. You must decide whether [*complainant*]'s first-hand account proves the charge(s) beyond reasonable doubt. For this purpose, you can use the evidence of [*complainant*]'s complaint to [*witness*] to assess [*complainant*] as a witness, but you cannot use it as evidence of what [*accused*] did.

When you are assessing [*complainant*]'s evidence of telling [*witness*] about the offences, you must take into account that there may be many reasons why [*complainant*] told [*witness*] about these alleged offences at a particular time, or why [*complainant*] chose to tell [*witness*], rather than another person.

Provided you follow these rules, it is up to you to decide what weight to give this evidence in the circumstances of this case.

2.3.4 – Distress

53. In most cases, evidence that the alleged victim of a sexual offence was distressed immediately after the alleged offence is admissible only for the purpose of showing consistent behaviour and so may help the jury assess the credibility of the complainant's evidence. It is not evidence of the accused's guilt.[64] In such cases, evidence of distress is relevant to credibility, as opposed to reliability.[65]

54. While a direction will often be necessary to inform the jury of the limited use of evidence of distress soon after the alleged offence, directions on distress are not required when distress is shown when making a complaint. In the latter case, the distress is connected with the complaint, and so directions on assessing complaint evidence are sufficient.[66]

55. In exceptional circumstances, evidence of distress may be used as independently supportive evidence of guilt. This will likely only be possible where:[67]

    - the evidence of distress comes from a witness other than the complainant;
    - there is no possibility that the distress was fabricated; and
    - the distress is reasonably explicable only on the basis of the sexual assault having occurred.

56. However, these cases will be rare and, where they arise, the judge must consider warning the jury about the limited weight of such evidence.[68]

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[64] *R v Baltensperger* (2004) 90 SASR 129; [2004] SASC 392, [55]; *Dinedios v Police* [2016] SASC 146, [68]; *Luha v Police* [2012] SASC 17, [31].
[65] *R v Brady* [2014] SASCFC 7, [50]–[53].
[66] *R v El Rifai* [2012] SASCFC 98, [91].
[67] *R v Schlaefer* (1984) 37 SASR 207, 215–218.
[68] *R v Schlaefer* (1984) 37 SASR 207, 215–218.

Jury Direction #2.3.4A – Distress – Relevant to credibility

You heard evidence that [*describe relevant evidence of distress*]. I must give you the following direction about how you can and cannot use this evidence.

Evidence that [*complainant*] was distressed when [*describe relevant time*] is only relevant to help you decide whether [he/she] has acted in a consistent manner, and so decide whether [*complainant*] is a truthful witness. It is not evidence that independently supports [his/her] statement that [*accused*] [*describe relevant offending conduct*].

[*Refer to prosecution and defence submissions about distress.*]

Jury Direction #2.3.4B – Distress – Use as supporting evidence

You heard evidence that [*describe relevant evidence of distress*].

The prosecution says that you can use this as indirect evidence to show that [*describe the issue the evidence may support* (*e.g.* "[*accused*] sexually penetrated [*complainant*] [without his/her consent]")]. In other words, the prosecution says that the distress supports a conclusion that [*complainant*] suffered a traumatic event. Given the timing of the distress, the prosecution say that the traumatic event was the alleged [*identify relevant offence*].

When you are assessing this evidence, you should consider whether the distress was feigned, or whether it arose from some other cause, such as [*identify any competing hypotheses consistent with innocence based on the defence case*]. These matters may affect the weight you give this evidence.

[*Refer to prosecution and defence submissions about distress.*]

2.4 – Views and demonstrations

57. Under *Juries Act 1927* (SA) s 88, a judge may order a view of any place or property by the jury, and give directions necessary for the purpose of the view.

58. The law draws a distinction between a "view" and a "demonstration".

59. A jury is not permitted to use a view as evidence in the case:[69]

> a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence.

60. In contrast, a jury can use a "demonstration" as evidence. However, unless there is a statutory basis for it, a demonstration can only be conducted with the consent of both parties.[70] In *R v Ireland (No 1),* Bray CJ doubted that *Juries Act 1927* (SA) s 88 provides that statutory basis.[71]

61. Where there is a demonstration, the court will need to consider whether the conditions of the demonstration are substantially the same as the conditions which existed at the time of the event in issues.[72]

62. When a view is conducted, the judge should put the contents of the view on the record by summarising, in the presence of the jury, what was observed during the view by recording where the jury was taken, what was inspected and from what vantage points. The summary should also record any questions the jurors asked during the view and what answers were given. In some cases it may be appropriate or prudent to have the view video-recorded.

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[69] *Scott v Numurkah Corporation* (1954) 91 CLR 300, 313; [1954] HCA 14, citing *Unsted v Unsted* (1947) 47 SR (NSW) 495.

[70] *Scott v Numurkah Corporation* (1954) 91 CLR 300, 309; [1954] HCA 14; *R v Ireland (No 1)* [1970] SASR 416, 426.

[71] *R v Ireland (No 1)* [1970] SASR 416, 426.

[72] *Scott v Numurkah Corporation* (1954) 91 CLR 300; [1954] HCA 14 ; *R v Alexander* [1979] VR 615, 623.

Jury direction #2.4A – View not used as evidence

You will soon be taken to look at [*insert location*]. [*Explain the relevance of the location to the case*]. You will be accompanied by [*identify all those who will attend the view, such as the judge, counsel for the parties, the accused, and any sheriff's officers*].

What you observe during the course of the view is not evidence in the case. Rather, the purpose of this visit is to help you understand and assess the evidence you will hear presented to you in this court room.

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

Do not speak to anyone other than a fellow juror or a court officer, and do not let anyone other than these people speak to you. If you have a question concerning the visit, you should write it down and give it to the sheriff's officer, who will pass it to me.

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

Jury direction #2.4B – Demonstration used as evidence

You will soon be taken to look at [*insert location*]. [*Explain the relevance of the location to the case*]. You will be accompanied by [*identify all those who will attend the demonstration, such as the judge, counsel for the parties, the accused, and any sheriff's officers*].

The purpose of the visit is to show you [*describe relevant demonstration*].

The law allows you to use your observations during this demonstration as evidence in the case. It is an exception to the usual rule that you may only act on evidence presented in the courtroom.

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

Do not speak to anyone other than a fellow juror or a court officer, and do not let anyone other than these people speak to you. If you have a question concerning the visit, you should write it down and give it to the sheriff's officer, who will pass it to me.

At the start of the trial, I told you that you must not make any private investigations or enquiries about this case. You are jurors and not investigators. That direction still applies, and means that you must not visit the [*describe demonstration location*] a second time. All visits must be conducted under court supervision.

2.5 - Directed verdicts

63. At the end of the prosecution case, the defence may submit that, as a matter of law, the defence has no case to answer. The test for a 'no-case' submission is whether:[73]

> if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

64. The test must be applied by taking the prosecution evidence at its highest.[74] Where the case involves circumstantial evidence, that means the judge must draw those inferences most favourable to the prosecution case which are open on the evidence.[75]

65. The test for a no-case submission at common law does not involve the judge deciding whether a guilty verdict would be unsafe or unsatisfactory,[76] or whether the prosecution witnesses are credible or persuasive.[77]

66. Under the *Evidence Act 1929* (SA) s 34KC, there is a limited expansion to the common law concerning a no-case submission. Section 34KC applies where:[78]

> (a) the case against the defendant is based wholly or partly on a statement not made in oral evidence in the proceedings (an "out of court statement"); and
>
> (b) the evidence provided by the out of court statement is so unconvincing that, considering its importance to the case against the defendant, a conviction of the offence would be unsafe,

67. In a case where the test for 'no case' has been made out, the judge must either direct an acquittal or, if the court considers there should be a retrial, discharge the jury. It is difficult to conceive of circumstances where it would be appropriate to merely discharge the jury and not direct an acquittal.

68. Where the judge upholds a no-case submission, the judge must direct the jury to return a verdict of not guilty in relation to any affected charges. It is not permissible for the judge to bypass the jury and directly enter the verdicts himself or herself.[79]

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[73] *Doney v The Queen* (1990) 171 CLR 207, 214-215; [1990] HCA 51, [17].
[74] *Case Stated by DPP (No 2 of 1993)* (1993) 70 A Crim R 323, 326.
[75] *Question of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1; *R v Bilick* (1984) 36 SASR 321, 337.
[76] *Doney v The Queen* (1990) 171 CLR 207, 212-213; [1990] HCA 51, [11].
[77] *Prasad v The Queen* (1979) 23 SASR 161, 170-171.
[78] *Evidence Act 1929* (SA) s 34KC(1).
[79] *R v Paprounas* [1970] VR 865, 866.

Jury direction #2.5 – No case submission upheld

Members of the jury, we have now heard all of the prosecution's evidence. While you were in the jury room, I made a ruling that, as a matter of law, the prosecution has not called sufficient evidence for you to convict [*accused*] in relation to charge(s) [*identify relevant charges*]. Specifically, [*relevant charge*] requires proof that [*identify deficiency*] and there is no evidence to prove that matter.

As a result, I must now direct you, as a matter of law, that you must find [*accused*] not guilty of charge(s) [*identify relevant charges*]. As I told you at the start of the trial, you are required to follow my directions of law.

I therefore ask that you formally find [*accused*] not guilty of charge(s) [*identify relevant charges*].

Because this is a direction of law, I will not ask you to go to the jury room to consider your verdict. Instead, I will ask you to quickly check you are all in agreement while you remain in the jury box, and I will then ask my associate to take your verdict.

[*If there are any remaining charges on the information, add the following*:

After you have delivered your verdict on these charges, I will ask the defence if they wish to call evidence on any of the remaining charges, charge(s) [*identify relevant remaining charges*].]

2.6 – *Prasad* invitation

69. At common law, it was once thought that a jury had a right to acquit an accused at any time after the close of the prosecution case, and that a judge could inform the jury of this right in a case where the evidence was especially weak.[80]

70. This supposed right, and the associated practice of trial judges informing the jury of it, has now been held to be contrary to law. If the evidence is legally capable of sustaining a conviction, the jury is not equipped to reach a verdict until it has heard all the evidence in the case, counsel's submissions and the judge's summing-up.[81]

[80] *R v Prasad* (1979) 23 SASR 161, 163.

[81] *DPP Reference No. 1 of 2017* [2019] HCA 9, [55]–[57].

2.7 – Hostile witnesses

71. The test for a trial judge finding that a witness is hostile is:[82]

> whether the witness is deliberately withholding material evidence by reason of an unwillingness to tell the whole truth at the instance of the party calling him or for the advancement of justice.

72. This may occur when a witness deliberately gives false answers, or if the witness refuses to answer questions.[83] In assessing whether the witness is hostile, it is not necessary to consider the witness' motives.[84]

73. When a party seeks to establish that a witness is hostile by reference to prior inconsistent statements, the party must:

- put the precise terms of the statement to the witness and ask whether the witness has made such a statement, or words to the same effect; and
- if necessary, prove the making of the inconsistent statement through admissible evidence which is limited to the statement in question.[85]

74. However, a trial judge must be cautious in using prior inconsistent statements as a basis for finding that a witness is hostile, as not every witness who gives inconsistent evidence can be regarded as hostile.[86]

75. Where the judge rules that a witness is hostile, the judge may explain why that decision was made and the significance of any issues arising from cross-examination, such as the use of prior inconsistent statements.[87]

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[82] *R v Hutchison* (1990) 53 SASR 587, 592.
[83] See, e.g., *THG v Western Australia* [2012] WASCA 139, [20].
[84] *R v Hutchison* (1990) 53 SASR 587, 592.
[85] *Price v Bevan* (1974) 8 SASR 81, 87–88.
[86] *McLellan v Bowyer* (1961) 106 CLR 95, 103; [1961] HCA 49, [8]; *Baira v R* [2009] QCA 332, [31].
[87] *R v Hawkins* [2003] SASC 419, [33]; *KC v R* (2011) 32 VR 61, [67]; [2011] VSCA 82; *R v Lam (No 9)* [2005] VSC 283, [38]. But compare *Lee v R* [2009] NSWCCA 259, [38], where the New South Wales Court of Criminal Appeal held that a jury should be told not to treat a ruling that a witness is unfavourable as relevant to the assessment of credibility.

Jury direction #2.7 – Hostile witnesses

Members of the jury, you will have noticed that the prosecutor, [*Name of Prosecutor*], questioned the last witness in a different manner to other witnesses. Generally, the party that calls a witness is not allowed to question the witness in the manner used in cross-examination. [He/She] cannot challenge the witness' answers, or ask whether the witness agrees that a specific event occurred.

However, in this case, I allowed [*Name of Prosecutor*] to question [*witness*] in this manner because it appeared that [*witness*] was not willing to fully answer questions asked in the usual manner.

The prosecution and the defence will have the chance to say how you should approach [*witness*]'s evidence at the end of the trial.

[*If the hostile witness admits the truth of a prior inconsistent statement, add the following section*]

When [*Name of Prosecutor*] cross-examined [*witness*], [he/she] admitted that he had previously said [*identify relevant prior statement*] and that was true. You may use this statement as evidence in the case, and it will be up to you to decide what weight you give [*witness*]'s evidence overall.

[*If the hostile witness does not admit the truth of a prior inconsistent statement, add the following section*:

When [*Name of Prosecutor*] cross-examined [*witness*], [he/she] admitted that he had previously said [*identify relevant prior statement*], but [he/she] did not admit it was true. You may take into account that previous statement when you are assessing [*witness*] as a witness, but since [he/she] said on oath that [his/her] earlier statement was not true, you could not use the earlier statement as evidence of what happened.]

2.8 – Witness warning regarding self-incrimination

76. Where a witness claims the privilege against self-incrimination, it is a question of law for the judge to determine whether the claim is bona fide. The judge must determine whether there is a real and appreciable danger that answering the question may incriminate the witness.[88]

77. The onus is on the witness to put sufficient information before the judge to support the claim of privilege.[89]

78. It will be straightforward to determine that the claim is bona fide where the question asks the witness about conduct which is itself criminal. However, the privilege may also be raised where the question itself is apparently innocuous, but could require the witness to give evidence which may be incriminating circumstantial evidence.[90]

79. The fact that a witness has claimed the privilege against self-incrimination is not relevant to any fact in issue. A jury cannot use the fact that the witness has claimed the privilege as a basis for drawing any inference adverse to the witness, or the party who called the witness. For this reason, the taking and determination of the privilege should generally be determined in the absence of the jury, as otherwise there is potential for the jury to misuse the claim of privilege.[91]

[88] *Brebner v Perry* [1961] SASR 177, 180; *Jackson v Gamble* [1983] 1 VR 552, 555–556.
[89] *Zappia v The Registrar of the Supreme Court* (2004) 90 SASR 193; [2004] SASC 375, [39].
[90] *R v Roberts; R v Urbanec* (2004) 9 VR 295; [2004] VSCA 1, [81]–[82].
[91] *R v Roberts; R v Urbanec* (2004) 9 VR 295; [2004] VSCA 1, [83]–[84] and cases cited therein.

Witness direction #2.8A – Availability of privilege against self-incrimination

[*Witness*], before you give evidence, [*Name of Counsel*] has asked that I inform you about the privilege against self-incrimination.

In this case, you will be asked questions about [*identify relevant topic*].

The law says that a person may object to answering questions because the answer may incriminate him or her.

What this means is that if you are asked questions which you believe would require you to admit that you committed a crime, or which might provide evidence to show you committed a crime, then you may say "I object to answering that question".

Depending on the question, I will then need to decide whether your objection is appropriate. I will make this decision while the jury is not in the courtroom.

Jury direction #2.8B – Exercise of privilege against self-incrimination

While [he/she] was giving evidence, [*witness*] objected to answering certain questions. [In your absence], I upheld [his/her] objection.

I now give you the following directions of law. You must not speculate about the reasons for [his/her] objection. It is not evidence in the case. It is not relevant to your assessment of [*witness*] as a witness. Do not treat [*witness*]'s evidence as less credible or reliable, or of less weight, because I allowed [*witness*] to object to answering certain questions.

CHAPTER 3: STANDARD FINAL DIRECTIONS

3.1 – Judge's obligations in final directions

1. In crafting final directions, the judge must decide what the real issues are in the case and direct the jury on only as much of the law as they need to guide their decision on those issues. The judge must not only refer to the facts, but explain how the law applies to the particular factual issues in the case. This may require more than merely referring to how the prosecution and defence put their respective cases.[1]

2. Each judge has their own style in giving final directions, with different preferences in the level of detail that is appropriate. Trial judges have a fair degree of leeway in deciding on this respect. Ultimately, the test is whether the judge has fairly put the substance of the defence case, related the defence case to the evidence and explained or summarised the evidence to the extent required in the circumstances of the case.[2]

3. As Blue J explained in *R v Ferguson*:[3]

> It is a matter of individual style whether a trial judge summarises the prosecution case and then separately summarises the defence case (which is the more common practice) or the trial judge summarises both the prosecution and defence cases in relation to each issue or matter before moving on to the next one (which is less common but is adopted on occasions, particularly when there are many ultimate issues in the case). As the High Court said in *Castle v The Queen*, "[h]ow the judge structures the summing-up and the extent to which the judge reminds the jury of the evidence is a matter for individual judgment and will reflect the complexity of the issues, and the length and conduct of the case".

4. The obligation to put the defence case does not require the judge to refer to every piece of evidence or every argument relied on in support. As King CJ explained in *R v Perks*:[4]

> Each judge has his own style of summing up. It is always possible to criticise the omission of reference to some piece of evidence or argument relevant to a defence. But it is no part of the duty of the trial judge to argue the case for the defence any more than it is his function to argue the case for the prosecution. What is required is that the judge put the substance of the defence to the jury and explain its bearing upon the elements of the charge. Generally an adequate presentation of the defence will require some reference to the version of the critical incidents given by an accused person who has given evidence. In the more complex cases, it may also require some reference to other evidence and the bearing of that evidence upon the issues of the case and the defence to the charge. Just how far it is necessary to go must depend upon the circumstances of each case and upon the judgment of the trial judge.

5. Doyle CJ explained some of the dangers of longer directions in *R v Allen*:[5]

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[1] *Alford v Magee* (1952) 85 CLR 437, 466; [1952] HCA 3, [28]; *R v Saleh* [2017] SASCFC 75, [28]; *R v Tropeano* (2015) 122 SASR 298; [2015] SASCFC 29, [23]–[24].
[2] *R v Allen* (2011) 109 SASR 396; [2011] SASCFC 40, [3]; *England v R* (2013) 116 SASR 589; [2013] SASCFC 79, [22].
[3] *R v Ferguson* [2018] SASCFC 130.
[4] *R v Perks* (1986) 43 SASR 112, 116–117. See also *Domican v R* (1992) 173 CLR 555, 561; [1992] HCA 13, [9].
[5] *R v Allen* (2011) 109 SASR 396; [2011] SASCFC 40, [4], [96]–[97].

> The concern is that greater detail and greater length can be counterproductive. Juries' powers of concentration may be exhausted. The issues to be decided may be concealed or buried in the detail.

6. In making any comments upon the evidence, the trial judge should bear in mind the observations of the High Court in *McKell v The Queen*.[6] While the plurality in that case (Bell, Keane, Gordon and Edelman JJ) acknowledged the judicial right or discretion to comment upon the evidence, their Honours emphasised the need to do so with circumspection and only as an aspect of the trial judge's duty to assist the jury with a fair and accurate statement of the case presented by each party. This would extend to comments necessary to maintain or restore the balance of fairness between the parties, for example, by correcting a mistaken impression of the evidence created by a submission by counsel.[7]

7. However, in making any comment upon the evidence the trial judge should not offer any opinion or suggestion as to how questions of disputed fact should be resolved by the jury. To do so would involve a risk of a miscarriage of justice because such questions are the exclusive province of the jury.[8] This risk extends to such comments even when expressed in terms that suggest to the jury what they "might think" about an aspect of the facts and accompanied by either a direction to the effect that they should feel free to ignore this suggestion if they think differently,[9] or a reminder that they are the sole arbiters of the facts.[10] The vice with such comments lies not in the risk that the jury might be confused as to their role as sole arbiters of the facts, but rather that they may be swayed in that task, or persuaded to a conclusion, by the judge's comment.[11]

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[6] *McKell v The Queen* [2019] HCA 5.
[7] *McKell v The Queen* [2019] HCA 5 at [47], [53]–[54].
[8] *McKell v The Queen* [2019] HCA 5 at [46], [49].
[9] *McKell v The Queen* [2019] HCA 5 at [50]–[51].
[10] *McKell v The Queen* [2019] HCA 5 at [40].
[11] *McKell v The Queen* [2019] HCA 5 at [40], [42], [50]–[51].

3.2 – General final directions

8. When delivering final directions, it is customary to remind the jury of general matters covered in the opening directions, such as:

    - the role of judge and jury;
    - the obligation to decide the case only on the evidence;
    - how to assess witnesses;
    - the presumption of innocence and the onus and standard of proof; and
    - the obligation of the jury to consider each charge separately.

9. The model directions provided here assume that the judge has instructed the jury at the start of the trial in accordance with the directions provided in Chapter 1. If the judge has not given those preliminary directions, or if the trial has been especially long, the judge will need to elaborate on the following directions.

Jury direction #3.2 – General final directions

Members of the jury, you have now heard all of the evidence that will be called in this case, and you have heard the closing arguments from the prosecution and defence.

I will now give you my final directions to help you reach your verdict. There will be two parts to my directions.

First, I will remind you of the general rules that I told you about at the start of the trial.

Then I will tell you what the elements or ingredients are for each charge. As part of that, I will remind you of some key parts of the evidence and give you directions about how you approach certain pieces of evidence. I will not cover everything, and just because I do not mention a piece of evidence does not mean that evidence is not important, or that you don't need to consider it. I will also remind you of the key parts of what the prosecution and defence say in relation to each offence.

At the end of this process, you will have heard all of the evidence and instructions you need to consider your verdict and decide whether the prosecution has proved guilt beyond reasonable doubt.

I will now briefly reiterate five fundamental rules or matters that you must bear in mind when undertaking that task.

First, each of us has a different role in the trial. Your role is to be the judges of the facts. By listening to the evidence and applying the directions I am giving you, it is for you to decide what has been proved. My role has been to ensure the trial is conducted fairly and to explain the principles of law that you must apply. Remember, it is not my place to decide the case. While you must follow my directions of law, you are not required to follow my comments about the evidence. The role of counsel has been to present the case for each side by calling and questioning witnesses and making arguments to you.

The second fundamental matter I told you about at the start of the trial was that you must decide the case by considering only the evidence. That is, you must make your decision based on the answers witnesses gave and the exhibits.[12] You must not base your decision on anything else. You must not base your decision on any information you might obtain outside this courtroom, whether through the media or otherwise. And you must not let your decision be influenced by any sympathy or prejudice.

Third, when evaluating witnesses, you should consider a witness' credibility – that is, their honesty or truthfulness, and their reliability – their accuracy. And you can accept all, some or none of what a witness says.

[12] If there are any formal admissions, then this sentence should be modified to also refer to formal admissions.

The fourth matter is to remind you of the presumption of innocence; that the accused is presumed innocent. The accused does not have to prove anything.

To prove the accused's guilt, the prosecution must prove each of the elements of the charged offence(s) beyond reasonable doubt. You have heard these words before, and they mean what they say – proof beyond reasonable doubt. This is the highest standard of proof that our law demands.

If the prosecution has not proved all of the elements of a charged offence beyond reasonable doubt, then you must find the accused not guilty.

Finally, the fifth matter is that you must consider each charge on the Information separately. You must ask yourself, in relation to each charge, whether the evidence admissible on that charge has proved that charge beyond reasonable doubt.

3.3 – Onus and standard of proof

10. It has been accepted that a reasonable doubt is not just any doubt that the members of a jury as a reasonable jury might entertain, but is rather what a reasonable jury considers to be a reasonable doubt.[13]

11. However, it is generally unwise to attempt elaboration of the onus of proof, or to otherwise depart from the time-honoured formula, to the effect that the words 'beyond reasonable doubt' mean what they say, at that it is for the jury to decide whether they are left with a reasonable doubt.[14]

12. As the High Court said in *The Queen v Dookheea*:[15]

> … as authority stands, it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing that the expression means what it says and that it is for the jury to decide whether they are left with a reasonable doubt (and in certain circumstances explaining that a reasonable doubt does not include fanciful possibilities), the practice ordinarily followed in Victoria, as it was in this case, and often followed in New South Wales, includes contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities. That practice is to be encouraged. It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged. What is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt.

[13] *The Queen v Dookheea* (2017) 262 CLR 402; [2017] HCA 36, [39]-[40].
[14] *R v Jones* [2018] SASCFC 80, [41].
[15] *The Queen v Dookheea* (2017) 262 CLR 402; [2017] HCA 36, [41].

3.4 – The *Liberato* direction – conflicting defence evidence

13. The source of the so-called *Liberato* direction is the (dissenting) reasons of Brennan J (with whom Deane J agreed) in *Liberato v The Queen*:[16]

> When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issues which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue.

14. More recently, the High Court has clarified that, whatever may have been the practice when *Liberato v The Queen* was decided, it is not appropriate for a trial judge to frame the issue for the jury's determination as involving a choice between conflicting prosecution and defence evidence: in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt.[17]

15. However, there will still be occasions calling for a *Liberato* direction. The *Liberato* direction serves to clarify and reinforce directions on the onus and standard of proof in a case in which there is a risk that the jury may be left with the impression that the evidence on which the accused relies will only give rise to a reasonable doubt if they believe it to be truthful, or that a preference for the evidence of the complainant suffices to establish guilt. A *Liberato* direction should be given in a case in which the trial judge perceives that there is a real risk that the jury might view their role in this way.[18]

16. This risk, and the need for a *Liberato* direction, is more likely to arise in a trial in which there is conflicting sworn evidence. The reason for this is that when an accused gives, or calls, evidence there is a natural tendency for the focus to shift from the assessment of the capacity of the prosecution case to establish guilt to an assessment of the perceived strengths or weaknesses of the defence case.[19]

17. However, it may also arise in a case in which the conflicting defence version of events is not given on oath, but is before the jury, typically in the accused's answers in a record of interview. If the trial judge perceives that there is a real risk that the jury will reason that the accused's answers in his or her record of interview can only give rise to a reasonable doubt if they believe them, or that a preference for the evidence of the

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[16] *Liberato v The Queen* (1985) 159 CLR 507, 515; [1985] HCA 66.
[17] *De Silva v The Queen* [2019] HCA 48, [9]; *Douglass v The Queen* (2012) 86 ALJR 1086, [12]–[13]; *Murray v The Queen* (2002) 211 CLR 193, [23], [57].
[18] *De Silva v The Queen* (2019) 94 ALJR 100; [2019] HCA 48, [10].
[19] *De Silva v The Queen* (2019) 94 ALJR 100; [2019] HCA 48, [11].

complainant over the accused's account in a record of interview suffices to establish guilt, a *Liberato* direction should be given.[20]

18. Whether a *Liberato* direction is required will depend upon the issues and the conduct of the trial. At a trial where there has been no suggestion, whether express or implied, that the jury's determination turns on which of conflicting prosecution and defence versions is to be believed, there may be no need to expand on conventional directions as to the onus and standard of proof. The expression 'reasonable doubt' may be apt to convey that a juror who is left in a state of uncertainty as to the evidence should not convict.[21]

19. As to the terms of a *Liberato* direction, the Court in *R v Alwazan*[22] held that as part of a trial judge's directions on the onus of proof, the jury should be told, in the words of Brennan J in *LIberato v the Queen* that "even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence, if that evidence gives rise to a reasonable doubt as to that issue".

20. Put another way, the jury should be told that even if do not accept, or indeed reject, some or all of the defence evidence, this does not relieve them of the task of looking at the prosecution evidence in order to determine whether the prosecution has proved each and every element of the offence(s) beyond reasonable doubt[23].

21. A possible shortcoming in using Brennan J's statement in *Liberato* as a template for the direction is that a jury may completely reject the accused's evidence and thus find it confusing to be told that they cannot find an issue against the accused if his or her evidence gives rise to a 'reasonable doubt' on that issue. In *De Silva v The Queen*, Kiefel CJ, Bell, Gageler and Gordon JJ said that it is preferable that a *Liberato* direction be framed along the following lines:[24]

> (i) if you believe the accused's evidence (if you believe the accused's account in his or her interview with the police) you must acquit; (ii) if you do not accept that evidence (account) but you consider that it might be true, you must acquit; and (iii) if you do not believe the accused's evidence (if you do not believe the accused's account in his or her interview with the police) you should put that evidence (account) to one side. The question will remain: has the prosecution, on the basis of the evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

22. In South Australia, there is uncertainty as to the desirability or appropriateness of giving a related direction intended to assist in the application of the criminal standard of proof, referred to as a *Calides* direction.

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[20] *De Silva v The Queen* (2019) 94 ALJR 100; [2019] HCA 48, [11].
[21] *De Silva v The Queen* (2019) 94 ALJR 100; [2019] HCA 48, [13].
[22] *R v Alwazan* [2016] SASCFC 155, [3].
[23] *R v Colbert* [2016] SASCFC 12, [87]; *R v Daniel* (2010) 207 A Crim R 449; [2010] SASCFC 62, [22], [37].
[24] *De Silva v The Queen* (2019) 94 ALJR 100; [2019] HCA 48, [12].

In *R v Calides*,[25] in considering a situation where there are two competing versions of events, Wells J said:

> … there are really, for all practical purposes, three possibilities: the jury may be completely satisfied with the evidence led from the Crown, in which case, assuming all other matters to be properly established, the verdict will be guilty; the jury may be perfectly satisfied with the version presented by the accused, in which case there will inevitably be a verdict of not guilty; and there is a third possibility, which must never be overlooked, and that is that the jury, after full and careful consideration, may arrive at the result that they are unable to say where the truth lies, or that they are unable to say who is telling the truth. If that is the situation then, of course, the verdict must also be not guilty.

23. More recently, it has been questioned whether such a direction assists. In *R v Lavery*,[26] the Court cautioned against the uncritical addition of a *Calides* direction to the end of a summing up as some sort of failsafe explanation of the jury's task.

24. The Court in *R v Lavery* suggested, however, that in a case where there was a risk that a juror might view the case as involving a choice between two opposing bodies of evidence, a suitable approach might be to supplement the usual directions as to the criminal burden and standard of proof with a direction akin to the 'third limb' of a *Calides* direction.[27] The direction might be in terms that:

> It follows that if after full and careful consideration, you are unable to decide where the truth lies or who is telling the truth, the prosecution will have fallen short of proving its case beyond reasonable doubt and your verdict would be not guilty.

[25] *R v Calides* (1983) 34 SASR 355, 358.

[26] *R v Lavery* (2013) 116 SASR 242; [2013] SASCFC 46, [10], [40].

[27] *R v Lavery* (2013) 116 SASR 242; [2013] SASCFC 46, [11]–[13], [54].

Jury direction #3.4 – The *Liberato* direction – conflicting defence evidence

The accused's evidence included [insert reference to denial of complainant's allegation].

If you believe the accused's evidence in relation this matter, then you must acquit.

Even if you do not accept that evidence, but you consider that there is a reasonable possibility it is true, then you must acquit.

On the other hand, if you reject the accused's evidence, you should put that evidence to one side. However, the question will remain: has the prosecution, on the basis of the evidence that you do accept, proved the guilt of the accused beyond reasonable doubt?

3.5 – The *Markuleski* direction – qualification to separate consideration

25. In *R v Markuleski*[28] the New South Wales Court of Appeal held that it is desirable that the traditional direction as to treating each count separately is supplemented in a word against word case. Some reference ought to be made to the effect upon the assessment of the credibility of the complainant if the jury finds itself unable to accept the complainant's evidence with respect to any count.

26. However, although holding that some form of direction assisting the jury in this respect is desirable, Spigelman CJ went on to say that its absence is not necessarily fatal. Furthermore, the 'general rule' does not apply when the peculiar facts of the case do not suggest the need for a warning to restore a balance of fairness.[29]

27. The Full Court of the Supreme Court of South Australia has generally concluded that such a direction at trial is unnecessary; that the jury can be expected to understand that a doubt about credibility or reliability on one count could impact upon another without any need for a direction.[30]

28. At the same time, the Court has recognised that in exceptional circumstances it may be desirable or even necessary for a *Markuleski* direction to be given.[31]

29. It has also been observed that where a *Markuleski* direction is to be given, this raises the question of whether a counterbalancing direction would also be required. As Vanstone J (with whom Nyland and Bleby JJ agreed) said in *R v Hare*:[32]

> It is undesirable to burden juries with unnecessary directions. That is particularly so where such a direction may introduce an imbalance which would need to be redressed. Because just as an infirmity could adversely affect judgment of credibility as a whole, so an acceptance of a complainant's account of a disputed event (and rejection of the version of an accused person) could flow through to other counts in a way which assisted the prosecution case. If a [*Markuleski*] direction as sought upon this appeal is to be given, then it raises the question of whether a counterbalancing direction would also be required.

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[28] *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290.
[29] *R v Markuleski* (2001) 52 NSWLR 82; [2001] NSWCCA 290, [187].
[30] *R v Jones* [2018] SASCFC 80, [52]; *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [184]; *R v B, P* [2006] SASC 229, [6].
[31] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [184].
[32] *R v Hare* [2007] SASC 427, [22].

3.6 – Inferences

30. The jury does not need to rely solely on "direct evidence" – the evidence of what a witness personally saw, heard or did. They may also rely on inferences drawn from that evidence.[33]

31. A direction on the nature of inferences that distinguishes inferential reasoning from speculation is relevant in most criminal trials. Such a direction should ordinarily be given. However, a *Peacock* direction, that the jury must find the accused not guilty if there is a reasonable explanation consistent with innocence, is only necessary if the case is entirely or substantially circumstantial.[34] For a discussion of *Peacock* directions, see 3.7 – Circumstantial evidence.

32. Given the high standard of proof required in criminal trials, it is important that the jury only draws inferences which can be properly deduced from the direct evidence, rather than making guesses or engaging in speculation. There is a difference between using guesswork or speculation to find that something occurred, and recognising the existence of alternative possibilities or explanations.

33. Inferences concerning states of mind are often drawn from finding what the accused has done and the surrounding circumstances.[35]

34. When giving directions on intention, a judge must not direct the jury that there is a presumption that a person intends the natural consequences of his or her acts. Such a direction risks reversing the burden of proof.[36]

35. The process of drawing inferences is a question of fact for the jury. Any instructions about inferential reasoning must not transform propositions of fact into directions of law.[37]

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[33] *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72.
[34] *R v Gillard and Preston* (2000) 78 SASR 279; [2000] SASC 454, [267]–[271]; *R v Thompson* [2018] SASCFC 104, [71]–[73].
[35] *Kural v The Queen* (1987) 162 CLR 502, 504; [1987] HCA 16, [2].
[36] *Stapleton v The Queen* (1952) 86 CLR 358, 365; [1952] HCA 56, [11]; *Smyth v The Queen* (1957) 98 CLR 163, 166; [1957] HCA 24, [2].
[37] *Kural v R* (1987) 162 CLR 502, 505; [1987] HCA 16, [3]. See also *Smith & Afford v R* (2017) 259 CLR 291; [2017] HCA 19, [8].

Jury direction #3.6 – Inferences

As I have told you, you must determine the facts in the case, and you must do this by considering the evidence.

Some evidence will prove a fact directly. If you accept the evidence of what a witness saw or heard, then what he or she saw or heard is a fact.

But often in a criminal trial there is no direct evidence for some issues. For example, there is often no direct evidence of what an accused person was thinking at the time of the alleged offence.

To find facts when there is no direct evidence, you are allowed to draw inferences or conclusions from other facts established by direct evidence.

This process of drawing inferences is something we do every day. If you wake up in the morning and see that the street and trees outside are wet, then you might infer it rained overnight.

In a criminal trial, you can draw inferences, but you must not guess or speculate. There must be a logical and rational connection between the facts you find and the inferences you draw. It is part of your role to apply your common sense and life experience to decide when you can draw a logical inference, and when it would be guesswork.

So, for example, if you call someone and they don't answer the phone, you usually can't draw any inferences from that alone. They might have been driving, or in the shower, or in a meeting, or didn't hear their phone, or many other possibilities. To pick one of those possibilities would be guesswork, and would not be a logical inference.

In the end, your task is to weigh all the evidence, decide what evidence you accept and what inferences you can draw from the evidence you accept, and then decide whether the prosecution has proved the accused's guilt beyond reasonable doubt.

3.7 – Circumstantial evidence

36. Circumstantial evidence gives rise to the potential need for directions:

- explaining that matters can be proved by circumstantial evidence and by logical inferences;
- explaining how the standard of proof applies to matters proved by circumstantial evidence (a *Peacock* direction); and
- in an appropriate case, explaining that the standard of proof applies directly to a particular item or items of circumstantial evidence (a *Shepherd* direction).

3.7.1 – Explaining the probative value of inferences

37. In general, no particular standard of proof applies to circumstantial evidence. The jury is permitted to act on items of circumstantial evidence if it 'accepts' the evidence, without needing to decide whether the matter is proved beyond reasonable doubt.[38] Similarly, a jury may draw logical inferences from the evidence without needing to apply the standard of 'beyond reasonable doubt', unless the inference in question is an element of the offence.

38. There is one exception to this general rule. Where the case involves indispensable intermediate facts,[39] the jury cannot act on those facts unless they are proved beyond reasonable doubt (a *Shepherd* direction, discussed below).[40]

3.7.2 – The *Peacock* direction

39. In cases that are wholly or substantially based on circumstantial evidence, it is customary and helpful for the judge to direct that guilt must not only be a rational inference, but must be the only rational inference from the circumstances.[41] It is customary to also point out the corollary that the prosecution cannot prove guilt unless it can exclude, beyond reasonable doubt, any reasonable hypothesis consistent with innocence.[42]

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[38] See *Pringle v R* [2017] SASCFC 9, [88]; *R v Singh* [2019] SASCFC 51, [84].

[39] "Indispensable intermediate facts" are "facts which constitute indispensable links in a chain of reasoning towards an inference of guilt": *Shepherd v R* (1990) 170 CLR 573, 579; [1990] HCA 56, [5] (Dawson J).

[40] Following *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [80], [86], uncharged sexual acts are no longer in a special category of evidence requiring proof beyond reasonable doubt. Compare *R v M, RB* (2007) 172 A Crim R 73; [2007] SASC 207, [73] (Debelle J), [111] (Sulan J) and [57] (Doyle CJ, dissenting).

[41] See *Peacock v R* (1911) 13 CLR 619, 634; [1911] HCA 66; *Plomp v The Queen* (1963) 110 CLR 234, 252; [1963] HCA 44, [10] (Menzies J); *Barca v The Queen* (1975) 133 CLR 82, 104, 109; [1975] HCA 42; *Shepherd v R* (1990) 170 CLR 573, 578 (Dawson J); [1990] HCA 56, [2] (Dawson J); *R v Hodge* (1838) 2 Lewin 227; 168 ER 1136.

[42] See *Pringle v R* [2017] SASCFC 9, [67]; *Peacock v R* (1911) 13 CLR 619, 630; [1911] HCA 66.

40. This direction is an amplification of the rule that guilt must be proved beyond reasonable doubt.[43] However, in cases where circumstantial evidence is of little significance, such an elaboration may be more confusing than helpful.[44] Similarly, where the *actus reus* is proved by direct evidence, this direction should not be given.[45]

41. While a direction that the prosecution must exclude any reasonable hypothesis consistent with innocence is desirable, a direction that the jury must ask if there is any reasonable hypothesis consistent with innocence undermines the onus of proof and should not be given.[46]

42. While the *Peacock* direction is often given, there is no rule of law requiring it in all cases. The need for the direction depends on the issues in the case and an assessment of whether the direction is necessary for the jury to properly perform its task.[47]

43. The rule that the jury must exclude competing hypotheses consistent with innocence is not to be applied piecemeal. It is a rule that, subject to the need for a *Shepherd* direction, the jury applies at the end of its analysis, rather than as an intermediate step in deciding whether to accept or act on certain evidence. For example, in *R v Wildy*, the accused was alleged to have paid money to a person he had committed sexual offences against to buy his silence. The Court rejected an argument that the jury needed to exclude other possible reasons for the payment before it could consider that evidence as part of the whole of the prosecution case.[48]

44. In some cases, it will be necessary to give a *Peacock* direction in order to ensure that the jury, avoids the human tendency to leap to conclusions, and to ensure that the jury moves past the initial impression left by the evidence to a closer analysis of it.[49] But whether that will be so in a particular case will depend upon the nature of the issues and circumstantial evidence in that case.[50]

45. In giving the *Peacock* direction in a case where the accused, in a police interview, put forward an innocent explanation for the pieces of circumstantial evidence, it is not appropriate to speak of explanations put forward by the accused as potential inferences. Similarly, it is not correct to speak of the accused's explanations giving rise to a reasonable doubt. The question is whether the jury is prepared to infer guilt beyond reasonable doubt, despite the explanations offered by the accused. Another way of

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[43] *Plomp v The Queen* (1963) 110 CLR 234, 252; [1963] HCA 44, [10] (Menzies J); *Knight v The Queen* (1992) 175 CLR 495, 502; [1992] HCA 56, [21].
[44] *Shepherd v R* (1990) 170 CLR 573, 578 (Dawson J); [1990] HCA 56, [2] (Dawson J).
[45] *R v Thompson* [2018] SASCFC 104, [71]–[73].
[46] *R v Story* (2004) 144 A Crim R 370; [2004] SASC 32, [107]–[112].
[47] *Shepherd v R* (1990) 170 CLR 573, 578 (Dawson J); [1990] HCA 56, [2] (Dawson J). See also *Grant v R* (1975) 11 ALR 503, 504; *R v Southon* (2003) 85 SASR 436; [2003] SASC 205, [59]; *BNM v The Queen* [2020] SASCFC 10, [87].
[48] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [37].
[49] *R v Gebert* [2019] SASCFC 37, [54].
[50] *BNM v The Queen* [2020] SASCFC 10, [88]–[94].

putting this is that the jury cannot convict unless it rejects the explanation offered by the accused and any other explanations consistent with innocence beyond reasonable doubt.[51]

[51] *R v Grant* (2006) 95 SASR 152; [2006] SASC 221, [6]–[7] (Doyle CJ), [95]–[97] (Vanstone J), [40]–[44] (Gray J, dissenting).

Jury direction #3.7.2 – Nature of circumstantial evidence

The prosecution [substantially] bases its case against the accused upon what is known as circumstantial or indirect evidence.

Circumstantial or indirect evidence is to be distinguished from direct evidence which is the evidence of a person who witnessed the actual offence. Circumstantial evidence, as its name suggests, is evidence of the circumstances surrounding the alleged offence from which the prosecution asks you to infer beyond reasonable doubt that the accused committed that offence.

To speak of evidence in a case as circumstantial does not imply that the evidence is necessarily weak or unsatisfactory. Circumstantial evidence can afford very secure grounds for a conclusion of guilt. You will be aware that many crimes are committed in secret, or without anyone being present. It is often necessary, therefore, that courts and juries act on circumstantial evidence. Nevertheless, I need to give you some directions regarding the approach which you should take to circumstantial evidence.

The amount of circumstantial evidence required to prove a charge beyond reasonable doubt varies from case to case. The number of circumstances proved can vary enormously, and so can the weight of the various circumstances that are proved. A case which depends substantially upon circumstantial evidence is sometimes likened to a rope and the many strands which go to make it up. A rope has the combined strength of all of its strands. Some of the strands may be strong while some of them may be weak. When they are all twined together, they may produce a total effect and strength which is greater than the strength of any one of the strands. The weight of a case which is based [substantially] upon circumstantial evidence ultimately depends upon the combined strength of all the evidence that you accept.

As the prosecution case rests [substantially] upon circumstantial evidence, you cannot return a verdict of guilty of any charge unless the circumstances exclude any reasonable explanation consistent with innocence. In other words, before you can be satisfied that the accused is guilty of any offence, you must be satisfied, not only that [his/her] guilt is a rational inference, but that it is the only rational inference that the circumstances you find proven enable you to draw.

It is important to understand that your approach to the circumstantial evidence in this case requires two steps. First you must look at the items of circumstantial evidence the prosecution relies upon, and decide which facts you accept are established by that evidence.

The next step, as I have also said, is to consider what inference or inferences you are prepared to draw from those facts. This step requires you to consider the combined strength of the established facts. To return to the analogy of the rope, when all the established strands of fact are twined together, they may produce a strength which is greater than the strength of any one of the individual strands. But continuing the analogy, a rope of very weak strands may still be very weak. In other words, the combined strength

of all the established facts may still not be enough to prove the prosecution case beyond reasonable doubt.

Remember that in order to infer guilt on the part of an accused, this must be the only rational inference which the established facts enable you to draw. You cannot return a verdict of guilty unless the facts exclude any reasonable explanation consistent with innocence.

3.7.3 – The *Shepherd* direction – indispensable intermediate facts

46. In *Shepherd v R*, the High Court stated that in general circumstantial evidence does not need to be proved to any particular standard. The jury can assess evidence holistically and decide whether, on the basis of the evidence it accepts, the offence has been proved beyond reasonable doubt.[52]

47. However, there are some facts which, given the nature of the matters in issue, are an indispensable step in the process of reasoning the guilt. These are referred to as "indispensable intermediate facts".

48. Indispensable intermediate facts can be either primary facts, or matters to be proved by inference.

49. Any indispensable intermediate facts must be proved beyond reasonable doubt.[53]

50. In determining whether, in a particular circumstantial case, a *Shepherd* direction is appropriate, it will be necessary to consider the role and significance of the particular evidence or fact in respect of which the direction is potentially appropriate. If, by reason either of the inherent role or significance of that evidence or fact in the case, or in light of the way in which the case has been conducted, it forms an indispensable link in the chain or reasoning towards the defendant's guilt, then such a direction may be appropriate.[54]

51. Courts have adopted differing approaches to identifying indispensable intermediate facts. One approach has been to treat the matter as a question of logic and decide as a question of law whether a fact is indispensable to guilt.[55]

52. Other courts have taken a more prudential or cautious approach, giving a *Shepherd* direction where there is a significant possibility of the jury treating a fact as indispensable, even if it is not logically essential to a finding of guilt.[56] However, even under this approach, a direction about indispensable intermediate facts is only necessary if the facts are in the nature of "links in a chain" rather than "strands in a cable".

53. One suggested way of identifying an indispensable intermediate fact is to consider whether, in the context of the case as a whole, the prosecution case must collapse if that fact is not proved.[57]

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[52] *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J); [1990] HCA 56, [4] (Dawson J). See also *Chamberlain v The Queen* (1984) 153 CLR 521, 535 (Gibbs CJ and Mason J); [1984] HCA 7, [14]; *R v Singh* [2019] SASCFC 51, [83]–[85].
[53] *Shepherd v R* (1990) 170 CLR 573, 579 (Dawson J); [1990] HCA 56, [5] (Dawson J). See also *R v Gassy (No 3)* (2005) 93 SASR 454; [2005] SASC 496, [353].
[54] *R v Singh* [2019] SASCFC 51, [89].
[55] *Kotzmann v R* [1999] 2 VR 123; [1999] VSCA 27; *Velevski v R* (2002) 187 ALR 233; [2002] HCA 4, [43]–[44].
[56] *R v Tartaglia* (2011) 110 SASR 378; [2011] SASCFC 88, [12]–[24]; *R v Merritt* [1999] NSWCCA 29, [70]–[71]. See also *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [86].
[57] *R v Tartaglia* (2011) 110 SASR 378; [2011] SASCFC 88, [10]–[11]; *R v Singh* [2019] SASCFC 51, [90]–[100].

54. Whether a judge must direct the jury about the standard of proof for indispensable intermediate facts will depend on the facts and issues in the case. A direction is only required if there is such an indispensable intermediate fact and, even then, where the nature of that fact is obvious, the direction may not be helpful.[58]

[58] *Shepherd v R* (1990) 170 CLR 579 (Dawson J); [1990] HCA 56, [5] (Dawson J).

Jury direction #3.7.3 – Indispensable intermediate facts[59]

I now need to give you a direction about how these ideas apply to [*identify indispensable intermediate fact*].

You may only act on [*identify indispensable intermediate fact*], and may only have regard to it in your consideration of the circumstantial evidence as a whole, if you are satisfied it has been proved beyond reasonable doubt. This is not because [*identify indispensable intermediate fact*] alone proves the guilt of the accused, but because it is an essential step in the reasoning that the prosecution asks you to follow in order to establish its case.

Unless that fact is proved beyond reasonable doubt, the reasoning relied upon by the prosecution must fail and you must return a verdict of not guilty.

However, if you are satisfied that this fact has been proved beyond reasonable doubt, it remains for you to consider this in combination with all the other facts you find established in determining whether the prosecution has established the accused's guilt beyond reasonable doubt.

[59] Note: This direction will rarely be required, as most cases do not involve any indispensable intermediate facts. It is designed to be given immediately after the jury direction – 'Nature of circumstantial evidence' (above).

3.8 – Taking verdicts

55. As part of the closing directions, the judge should tell the jury how the court will take the jury's verdict.

56. At common law, the judge is prohibited from dictating the order in which the jury deliberates about the various charges.[60]

57. However, under the *Juries Act 1929* (SA), where there are alternative counts open on the evidence but not charged on the information, the jury must consider whether the accused is guilty of the greater offence before considering whether the accused is guilty of the alternative offence.[61] See 5.1 – Alternative verdicts for information on the judge's obligation to leave alternative verdicts. This overrides the common law rule, but only for uncharged alternatives.

58. Under both the common law and the *Juries Act 1929* (SA), a jury cannot deliver a verdict on an alternative charge before it delivers a verdict on the greater offence.[62] This recognises the right of the prosecution to have a verdict on the primary charge and has the effect that, where the jury cannot agree, the proper course is to discharge the jury.[63]

59. If the jury convicts the accused of the greater offence, the judge should not take a verdict on the alternative charge. Instead, the alternative should remain on the court file. This allows an appellate court to substitute the alternative charge, or to order a retrial on the whole information.[64]

60. *Juries Act 1929* (SA) s 57(3) states:

> Where an accused person is charged with a particular offence (the ***major offence***) and it is possible for a jury to return a verdict of not guilty of the offence charged but guilty of some other offence for which the person has not been charged (the ***alternative offence***)—
>
> …
>
> (b) if the jury reaches a verdict (either unanimously or by majority) that the accused is not guilty of the major offence but then, having been in deliberation for at least 4 hours, is unable to reach a verdict on the question of whether the accused is guilty of the alternative offence—
>
> (i) the accused must be acquitted of the major offence; and
>
> (ii) the jury may be discharged from giving a verdict in respect of the alternative offence; and

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[60] *Stanton v R* (2003) 198 ALR 41; [2003] HCA 29, [35], [70]; *LLW v The Queen* (2012) 35 VR 372; [2012] VSCA 54, [13].

[61] *Juries Act 1929* (SA) s 57(3)(a); *R v Stakaj* (2015) 123 SASR 523; [2015] SASCFC 139, [81].

[62] *R v Thomas* [1996] SASC 5911, [3]. Cited with approval in at *R v Stakaj* (2015) 123 SASR 523; [2015] SASCFC 139, [81]. See also *R v Sessions* [1998] 2 VR 304; *R v Weeding* [1959] VR 298.

[63] *Stanton v R* (2003) 198 ALR 41, [22].

[64] *Ryman v R* (1991) 162 LSJS 7; [1991] SASC 3061, [2]. See also *LLW v The Queen* (2012) 35 VR 372; [2012] VSCA 54, [11].

(iii) fresh proceedings may be taken against the accused on a charge of the alternative offence.

61. This provision does not affect the common law rules regarding when an alternative charge is available. Instead, it regulates the procedure that applies where the jury wish to acquit on the major offence and cannot reach a verdict on the alternative offence so that the acquittal can be recorded as the verdict of the jury and a retrial held on the alternative offence.[65]

[65] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [49]; *R v Stakaj* (2015) 123 SASR 523; [2015] SASCFC 139, [48].

Jury direction #3.8 – Taking verdicts[66]

Charges [*insert principal charge*] and [*insert alternative charge*] relate to the same event. They are before you as alternatives. The prosecution does not say the accused is guilty of both, but of one or the other.

When you are delivering your verdicts, my associate will first ask you for your verdict on [*insert principal offence*], which is the more serious charge. If your verdict of charge [*insert principal offence*] is guilty, then we will move on to [*identify next non-alternative charge*]. However, if you find [*accused*] not guilty of charge [*insert principal offence*], then you will be asked for your verdict on charge [*insert alternative offence*].

In other words, you will only be asked for your verdict on charge [*insert alternative offence*] if you reach a verdict of not guilty on [*insert principal offence*].

[66] *Note: This direction must be modified if there are uncharged alternative offences left to the jury, in which case the judge must direct the jury to consider the more serious offence before considering the alternative charge.*

3.9 – Procedure for questions and closing remarks

62. Judges should tell the jurors to not communicate or reveal their votes or voting patterns in favour of conviction or acquittal.[67]

63. If the jury does provide voting numbers, the judge should not disclose those numbers to the parties.[68]

64. Subject to this exception regarding voting numbers, judges must disclose the precise terms of any jury question to the parties.[69]

[67] *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27, [32]–[35].
[68] *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27, [44]–[56].
[69] *R v Black* (2007) 15 VR 551; [2007] VSCA 61, [16]; *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27, [58].

Jury direction #3.9 – Procedure for questions and closing remarks

While you are deliberating, you may ask me to repeat or explain any of the directions I have given you. It is important that you understand the principles you must apply, so do not hesitate to ask for assistance if you need it.

You can do this by handing a note to the sheriff's officer. [He/She] will pass it to me and, after discussing the matter with counsel, we will reassemble in court to help you.

When you are writing this note, do not include any information about any voting numbers within the jury, such as the number in favour of conviction or acquittal. Such information must remain confidential to you, and must not be given to me in a note.

You can also ask me to remind you of any of the evidence that has been given. Like with questions about the directions, you should give a note to the sheriff's officer outlining the parts of the evidence you are interested in. The sheriff's officer will pass the note to me. I will discuss the matter with counsel, and we will reassemble in court to help you. Usually, I will do this by reading the relevant passages of the court's transcript to you.[70]

The final matter I want to mention concerns how you go about deciding on your verdict. Every jury must decide for itself how it structures its decision making process. What I'm about to say is not a direction but are some suggestions to help you get started.

Some juries like to start with a general discussion about the evidence. They identify what parts of the evidence they accept, and what parts of the evidence they reject. Then they move on to considering the elements of each offence, and deciding whether, based on the evidence, those elements have been proved beyond reasonable doubt. Other juries start with the elements. They work through each element, discussing the relevant evidence at each stage. Each way can work, and it is up to you to decide how you approach your task.

Like any group discussion, it can be helpful to have someone chairing or overseeing the discussion. Someone who can identify what needs to be discussed next, makes sure everyone gets a chance to speak and keeps the discussions focussed on the issues you need to decide. Sometimes this is your foreperson, but it does not need to be. This person has no special power to break deadlocks or decide the outcome.

Remember, you must strive to reach a unanimous verdict, but you each took an oath or made an affirmation as individuals. While you should listen to each other, and discuss any differences you have, each of you must decide whether the verdict should be guilty or not guilty according to your own conscience. And it is only when all of you, as individuals, agree on the verdict that you can return a verdict, whether it is a verdict of guilty or not guilty.

[70] Practices vary among judges on whether to provide the jury with transcript. Some judges provide transcript extracts when the jury ask to be reminded of particular passages, and some judges provide the jury with the full transcript at the start of deliberations. If either of those practices are followed, this paragraph must be modified.

It is therefore helpful to decide how you know when you have agreed on a verdict. Most juries do this by voting. Either by raising hands, going around the table to take a ballot, or by a secret ballot. It is up to you to decide how you wish to proceed.

Finally, it may be helpful to have someone take notes during your deliberations, so you can identify what you've agreed on, and what you want to come back to later.

I have now completed my summing up.

After you go the jury room, I will ask the prosecution and defence if there are any further directions I need to give you. If they raise anything, I may ask you to come back into the courtroom. Don't be surprised if this happens. But otherwise you can settle in and get started on your deliberations.

Please go to the jury room to consider your verdict(s). When you have reached a verdict or if you have a question, please send a note to the court through the sheriff's officer. Thank you.

CHAPTER 4: DIRECTIONS AND WARNINGS ABOUT PARTICULAR TYPES OF EVIDENCE

4.1 – Alibi evidence

1. Alibi evidence is a class of evidence which casts doubt on the prosecution's proof of guilt by showing that the accused was not at the location of the alleged offending at a particular time.[1]

2. If the defence wishes to call evidence of alibi, the defence must file a notice of intention to introduce the evidence at the same time the defence case statement is filed. Notice of proposed alibi is not necessary if the alibi is said to arise from evidence received in the accused's committal proceeding.[2]

3. If the defence fails to comply with the obligation to file a notice of intention to introduce alibi evidence, the judge may inform the jury of the obligation to give notice of intention, the purpose of the notice of intention process and may comment on the consequences of the accused's failure to comply.[3]

4. As a consequence of the need to prove guilt beyond reasonable doubt, the prosecution must disprove any claimed alibi.[4] This may occur either where the jury disbelieves the evidence tendered to support the alibi, or where the prosecution can show that the accused could have committed the alleged offence even if the suggested alibi evidence were true.[5]

5. To avoid the rule against the prosecution splitting its case, the prosecution must call evidence to rebut any expected alibi before it closes its case.[6]

6. Where the defence advises that it will not be calling alibi evidence, the notice is irrelevant and should not be tendered (unless the prosecution is permitted to use the statement as evidence of consciousness of guilt). In such cases, the rebuttal evidence will also be irrelevant. The judge should then direct the jury to disregard the rebuttal evidence and not speculate about why it was led.[7]

7. The ability of the prosecution to tender an alibi notice is unclear. While this has occurred in previous cases,[8] those cases involved the tender of a Director's certificate under

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[1] *R v Glastonbury* (2012) 115 SASR 37; [2012] SASCFC 141, [98].
[2] *Criminal Procedure Act 1921* (SA) s 124(3).
[3] See *R v Erasmus* [2006] QCA 245, [50]–[56]; *R v GJH* (2001) 122 A Crim R 361; [2001] NSWCCA 128, [67]–[72].
[4] *R v Merrett* (2007) 14 VR 392; [2007] VSCA 1, [15]–[16].
[5] See, e.g., *R v Liewes* (Unreported, Victorian Court of Appeal, Phillips CJ, Phillips JA, Harper AJA, 10 April 1997).
[6] *Killick v The Queen* (1981) 147 CLR 565, 569–570; [1981] HCA 63, [6]–[7].
[7] See, e.g., *R v Glastonbury* (2012) 115 SASR 37; [2012] SASCFC 141, [107]–[127].
[8] See *R v Henstridge* (1998) 198 LSJS 147, 165; [1998] SASC 6710; *R v Glastonbury* (2012) 115 SASR 37; [2012] SASCFC 141, [102]–[118]; *R v Taheri* [2017] SASCFC 92, [64]–[65].

Criminal Law Consolidation Act 1935 (SA) s 285C(7). That provision was repealed when the case statement provisions in the *Criminal Procedure Act 1929* (SA) were introduced, and there is no equivalent to the Director's certificate.[9] Under the current provisions, it is therefore unclear whether an alibi notice can be tendered.

8. Where the accused calls alibi evidence, the jury must be directed in clear terms that:[10]

- there is no onus on the accused to prove the alibi; and
- the jury must acquit if there is a reasonable possibility that the alibi is true.

[9] See *Criminal Procedure Act 1929* (SA) ss 123, 124, 125.

[10] *Mohammadi v R* (2011) 112 SASR 17; [2011] SASCFC 154, [40], [80], as explained by *R v Ahmadi* (2018) 131 SASR 64; [2018] SASCFC 39, [67]–[77].

Jury direction #4.1A – Alibi evidence

I now want to turn to [*witness*]'s evidence that [*accused*] was [*describe alibi evidence*]. We often call this kind of evidence 'alibi evidence'. It is evidence that is led to show the accused could not have committed the offence charged, as [he/she] was not at the place where the alleged offence was committed.

There are two important rules you must follow when you are considering alibi evidence.

First, you must remember that the prosecution has the job of proving guilt and the accused does not need to prove [his/her] innocence. The defence therefore do not need to prove the truth of the alibi.

Second, if there is a reasonable possibility that the alibi is true, then you must acquit [*accused*]. In other words, a reasonable possibility that the alibi is true means you have a reasonable doubt about the accused's guilt.

[*Refer to relevant prosecution and defence arguments about alibi evidence.*]

Jury direction #4.1B – Failure to serve alibi notice[11]

Under our law an accused person must give notice of any intention to introduce evidence of an alibi at his trial. This is to allow the prosecuting authorities to investigate the alibi before the trial and be ready to call any other evidence which might be relevant.

In this case, the prosecution has argued that [*accused*] did not give notice of intention to introduce the alibi evidence you heard.

You are entitled to take this into account when you are assessing the weight you give that evidence and whether it gives rise to a reasonable doubt about the accused's guilt.

[*Refer to prosecution evidence and arguments on the nature of the defect and inferences available from that defect.*]

The defence say [*refer to relevant defence evidence and arguments*].

[11] Note: This direction is designed to be given immediately after the direction on alibi evidence.

4.2 – Motive

9. Evidence that the accused had a motive to commit the offence is relevant and admissible to prove both intent (if that is relevant) and that the accused committed the offence charged.

10. Similarly, absence of motive is a circumstance that favours the accused.[12] However, while there may be no evidence of motive, there will rarely be evidence to prove an absence of motive.[13]

11. In most cases, directions on motive will be adequate if the judge tells the jury that motive is not an element of the offence and so does not need to be proved by the prosecution.[14] Directions on motive should be brief, because the relevance of motive is fundamentally a jury question.[15]

12. If the judge directs the jury on the fact that there is no evidence of motive, it may be appropriate to direct the jury that there is a difference between an absence of evidence of motive and an absence of motive. This is a direction that will likely not assist the defence.[16]

13. Motive is a type of circumstantial evidence. In accordance with the principles that apply to circumstantial evidence, motive will rarely need to be proved beyond reasonable doubt.[17]

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[12] *De Gruchy v R* (2002) 211 CLR 85; [2002] HCA 33, [28]; *Plomp v R* (1963) 110 CLR 234, 250; [1963] HCA 44, [6] (Menzies J).
[13] *De Gruchy v R* (2002) 211 CLR 85; [2002] HCA 33, [30].
[14] *De Gruchy v R* (2002) 211 CLR 85; [2002] HCA 33, [32].
[15] *De Gruchy v R* (2002) 211 CLR 85; [2002] HCA 33, [57].
[16] *De Gruchy v R* (2002) 211 CLR 85; [2002] HCA 33, [32]. See also *R v Castle & Bucca* [2015] SASCFC 180, [31].
[17] *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [72]–[81]. See also *R v Gassy (No 3)* (2005) 93 SASR 454; [2005] SASC 496, [362].

Jury direction #4.2A – Evidence of motive[18]

> In [his/her] submissions, [*name of prosecutor*] suggested that [*accused*] [*describe relevant conduct*] because [*identify relevant motive*]. In other words, the prosecution say that [*accused*] had a motive to [*identify relevant conduct*].
>
> [*Refer to relevant evidence or arguments about motive.*]
>
> It is up to you to decide whether [*accused*] had this motive, and whether that is significant. The prosecution is not required to prove that [*accused*] had a motive. It is just another piece of evidence you may consider, when deciding whether the prosecution has proved its case beyond reasonable doubt.

Jury direction #4.2B – No evidence of motive

> In [his/her] submissions, [*name of defence counsel*] suggested that the prosecution had not identified any reason for [*accused*] to [*describe relevant conduct*]. In other words, the defence say that [*accused*] had no motive to [*identify relevant conduct*].
>
> As a matter of law, the prosecution is not required to prove that [*accused*] had a motive. Sometimes a person commits a crime and no one can identify a motive.
>
> But you are entitled to consider the fact that the prosecution has not led any evidence that [*accused*] had a motive to [*identify relevant conduct*] when you are deciding whether the prosecution has proved its case beyond reasonable doubt.

[18] Note: If evidence of motive is proved by discreditable conduct evidence (e.g. sexual interest in the complainant), then the discreditable conduct evidence directions should be used instead. See 4.12 – Discreditable conduct evidence.

4.3 – The accused as a witness

14. The accused is a competent witness in his or her own defence.[19]

15. There are three directions that may be necessary in relation to the accused as a witness:

    - a direction that the jury cannot draw an adverse inference from the accused's choice not to give evidence;
    - a direction about how the jury should assess the evidence from an accused who chooses to give evidence; and
    - a direction about how the jury can use the evidence of a police interview with the accused.

16. See also 3.4 – The *Liberato* direction – conflicting defence evidence.

[19] *Evidence Act 1929* (SA) s 18.

4.3.1 – Silence of accused at trial

17. Where the accused exercises the right to remain silent at trial, the prosecution is prohibited from commenting on that fact.[20] Further, to protect against the risk of the jury misusing the fact that the accused remains silent, the majority in *Azzopardi v R* explained that:[21]

> It follows that if an accused does not give evidence at trial it will almost always be desirable for the judge to warn the jury that the accused's silence in court is not evidence against the accused, does not constitute an admission by the accused, may not be used to fill gaps in the evidence tendered by the prosecution, and may not be used as a make-weight in assessing whether the prosecution has proved its case beyond reasonable doubt.

18. While this is not a formula which must be repeated in every case, it will often be advantageous to do so.[22]

19. When giving a direction on this topic, the judge should avoid referring to a "failure" to give evidence, because this suggests the accused has failed to live up to some expected standard.[23]

[20] *Evidence Act 1929* (SA) s 18(1)(b). Breach of that prohibition will likely constitute a substantial miscarriage of justice which cannot be solved by judicial direction: *R v S, G* (2011) 109 SASR 491, [107]; [2011] SASCFC 48, [107].
[21] *Azzopardi v R* (2001) 205 CLR 50; [2001] HCA 25, [51].
[22] *R v Inston* (2009) 103 SASR 265; [2009] SASC 89, [117]
[23] *Weetra v R* (2010) 108 SASR 232; [2010] SASCFC 52, [89].

Jury direction #4.3.1 – Accused does not give evidence

The next direction is about the accused. [He/She] did not give evidence. That is [his/her] right. Because it was [his/her] right, you must not use the accused's silence against [him/her]. You must not treat [his/her] silence as an admission. You cannot use it to fill gaps in the prosecution's evidence. It does not make the prosecution's evidence stronger, or more persuasive. Using the accused's silence against [him/her] would, in practical terms, deprive [him/her] of [his/her] right to remain silent. You must always bear in mind that it is for the prosecution to prove its case beyond reasonable doubt.

4.3.2 – Accused who gives evidence

20. When the accused chooses to give evidence, there are restrictions on the scope of cross-examination concerning evidence that the accused has committed other criminal offences, or is otherwise of bad character.[24]

21. Where the accused gives evidence, it is desirable to tell the jury to treat the accused like any other witness. This reduces the risk that the jury will think that it should, as a general matter, give the accused's evidence less weight.[25] While this direction is not always necessary as a matter of law,[26] it is likely to be necessary where the accused's gives evidence putting forward positive defences.[27]

22. It is permissible to invite the jury to give such weight as it thinks fit to the fact that the accused gave evidence, as he or she was not obliged to do so,[28] but such a direction is not mandatory.

23. Where the accused gives evidence, the judge must not give any direction or make any comment which undermines the presumption of innocence.[29] One aspect of this prohibition is that the judge must not invite the jury to treat a person's interest in the outcome of proceedings as a factor relevant to assessing the witness' evidence. Such a direction undermines the presumption of innocence because the accused has the greatest interest in proceedings, and so invites the jury to give his or her evidence special scrutiny solely due to his or her status as an accused person.[30] However, it will often be undesirable to specifically prohibit the jury from reasoning in this way, because it will draw undue attention to the issue and invite the jury to adopt a path of reasoning which is contrary to their ordinary experience.[31]

24. It is not permissible to direct the jury that it is common for an accused person to deny the charge, as this suggests that an accused will often falsely deny a charge.[32]

25. It is also dangerous to invite the jury to generally assess witnesses by reference to whether they have a motive to lie, except where it has arisen as an issue at trial. This is especially dangerous where, because of the conduct of the case, the accused is the only witness who is suggested to have such a motive.[33]

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[24] *Evidence Act 1929* (SA) s 18(1)(d), (2), (3).
[25] *R v Copeland* (1997) 194 LSJS 1, 7–8; [1997] SASC 6286.
[26] *Beauregard-Smith v R* (1995) 180 LSJS 188.
[27] *R v Ong* (2001) 80 SASR 537; [2001] SASC 437, [10].
[28] See *R v Parsons* [2015] SASCFC 183, [7]–[8].
[29] *Hargraves v The Queen* (2011) 245 CLR 257; [2011] HCA 44, [46].
[30] *Robinson v R* (1991) 180 CLR 531, 535; [1991] HCA 38, [6]; *R v Haggag* (1998) 101 A Crim R 593, 598; *Hargraves v The Queen* (2011) 245 CLR 257; [2011] HCA 44, [46].
[31] *R v Parsons* [2015] SASCFC 183, [29]–[30].
[32] *R v Hickman* (1993) 60 SASR 415, 421; [1993] SASC 3993, [14].
[33] *R v Parsons* [2015] SASCFC 183, [75]–[83].

26. In exceptional circumstances, it may be necessary to refer to the fact that the accused has an interest in the outcome of the case as a matter of fairness to the accused. In those circumstances, the judge's directions should be limited to reminding the jury that the accused is presumed innocent and that it would be wrong and unfair to give the accused's evidence less weight simply because, as the accused, he or she has an interest in the outcome of the case.[34]

[34] *Stafford v R* (1993) 67 ALJR 510; *R v Parsons* [2015] SASCFC 183, [82].

Jury direction #4.3.2 – Accused gives evidence

I will next say something about the accused's evidence. [He/She] chose to give evidence. [He/She] was not required to. [He/She] could have remained silent, and left you to decide whether the prosecution proved its case.

Otherwise, you should assess the accused's evidence in the same way as any other witness. You must not treat [his/her] evidence as deserving less weight simply because [he/she] is the accused.

4.3.3 – Evidence of police interview

27. This commentary only examines the permissible hearsay use of an accused's statements in a police interview. For a discussion of the use of silence or selective silence in a police interview, see 4.15.1 – Silence to police.

28. A record of the police interview of the accused is often received in evidence. The inculpatory parts are admissible as a statement against interest – a recognised exception to the hearsay rule. However, a practice has developed that also allows receipt of interviews that contain both inculpatory and exculpatory statements ('mixed statements'), with both parts admissible for the truth of their content.

29. The rationale for this practice is one of fairness. It is a reflection of the prosecution's obligation to put its case fully and fairly. It follows that where a police interview contains both inculpatory and exculpatory statements, the prosecution may not "pick and choose" which parts to tender.[35] Indeed, the prosecutor's obligation to put its case fully and fairly will oblige the prosecutor to tender any mixed statement unless there is some positive reason for not doing so.[36]

30. There may be circumstances where it would be unfair to an accused to tender a record of interview, for example where the accused has refused to comment.[37]

31. Where the interview is tendered, both the inculpatory and exculpatory parts can be used as probative of the truth of the matters asserted.[38]

32. Trial judges should usually direct the jury about the use they can make of a police interview.[39]

33. The need for a direction depends on how the case is presented. The judge will need to decide whether there is a risk that the jury will not realise that they can use both exculpatory and inculpatory parts of the accused's out-of-court statement.[40]

34. A direction about the use of a police interview should usually explain:

    - that the jury can use the exculpatory and inculpatory parts of the statement; and
    - that it is for the jury to assess the weight to give the statement.

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[35] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [27].
[36] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [38], [41].
[37] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [41].
[38] *Spence v Demasi* (1988) 48 SASR 536, 540; *Mule v R* (2005) 79 ALJR 1573; [2005] HCA 49, [23]; *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [23].
[39] *Weetra v R* (2010) 108 SASR 232; [2010] SASCFC 52, [13].
[40] *Weetra v R* (2010) 108 SASR 232; [2010] SASCFC 52, [14]; *R v Hajistassi* (2010) 107 SASR 67; [2010] SASC 111, [117]. But compare *R v Allen* (2011) 109 SASR 396; [2011] SASCFC 40, [26]–[29].

35. Where the police interview contains exculpatory statements, the judge should explain that those statements do not have the status of sworn evidence which has been tested by cross-examination; and that unlike any admissions, the exculpatory statements are not against the accused's interest and the jury may give those statements less weight than admissions. This avoids the risk that the jury will think they need to give all statements in a police interview equal value.[41]

[41] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [24], [59]; *Weetra v R* (2010) 108 SASR 232; [2010] SASCFC 52, [15]-[18] (White J), [79]-[81] (Peek J); *Mule v R* (2005) 79 ALJR 1573; [2005] HCA 49, [21]; *R v Allen* (2011) 109 SASR 396; [2011] SASCFC 40, [25].

Jury direction #4.3.3 – Police interview

As part of the prosecution's evidence, you saw a recording from when police interviewed [*accused*]. As you heard, the prosecution relies on some parts of the interview, and the defence relies on other parts. Both the parts that help the prosecution and the parts that help the defence are evidence in the case. As with all witnesses, you may accept some parts of what the accused said, and reject other parts. You must decide what weight you give the accused's statements, and you are entitled to give different weight to what the accused said at different times in the interview.

I also make the following comment about this evidence. Unlike evidence from other witnesses, the police interview is not sworn evidence that has been tested by cross-examination. You may think that in some parts of the statement, the accused's statements are self-serving. You are entitled to consider these matters when deciding what weight you give the accused's statements.

4.3.4 – Accused's evidence from a previous trial

36. In some cases it is appropriate to allow the prosecution to tender evidence of what the accused said in a previous trial.[42]

37. Whether such evidence should be admitted may be influenced by the reason for the subsequent trial. Admitting the previous trial evidence may not be contentious where the previous trial was inconclusive. However, where the subsequent trial follows a successful appeal against conviction, the court will need to consider whether it would be unfair to allow the prosecution to gain a forensic advantage from the earlier proceedings which were held to give rise to a substantial miscarriage of justice. In deciding whether there would be relevant unfairness, it is not necessary to show that the substantial miscarriage of justice affected the course of the earlier trial, or the accused's decision to give evidence.[43]

38. Evidence from a previous trial is often presented by reading the transcript of evidence to the jury.[44]

39. Where evidence from a previous trial is admitted, it is customary to give the jury directions about:[45]

    - the use of the previous trial evidence;
    - the accused's right to silence;
    - assessing the previous trial evidence.

40. The accused's statements from the previous trial can be used both for and against the accused, and it is desirable to tell the jury about both inculpatory and exculpatory uses of the evidence.[46]

41. When directing the jury about how it assesses the accused's previous trial evidence, it is permissible to remind the jury that it has not had the opportunity of seeing the accused give evidence and be tested under cross-examination; that is, to explain that while they have the appellant's evidence from the first trial, they have not heard the accused give that evidence or been able to assess the accused's demeanour.[47]

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[42] See *Stewart v The King* (1921) 29 CLR 234; [1921] HCA 17.
[43] See *R v Eastman (No 15)* [2017] ACTSC 143, [57]–[58].
[44] See *R v Machin (No 2)* (1997) 69 SASR 403.
[45] *Van de Wiel v The Queen* (unreported, Supreme Court of South Australia Court of Criminal Appeal, 3 August 1995, Doyle CJ, Duggan and Nyland JJ); *R v Kostaras (No 2)* (2003) 86 SASR 541, [108].
[46] *Van de Wiel v The Queen* (unreported, Supreme Court of South Australia Court of Criminal Appeal, 3 August 1995, Doyle CJ, Duggan and Nyland JJ); *M v The Queen* (1994) 62 SASR 364.
[47] *Van de Wiel v The Queen* (unreported, Supreme Court of South Australia Court of Criminal Appeal, 3 August 1995, Doyle CJ, Duggan and Nyland JJ); *R v Machin (No 2)* (1997) 69 SASR 403, 405, 411.

Jury Direction #4.3.4 – Accused's evidence from a previous trial

The next direction is about the accused.

In this trial, you heard [identify speaker] read out a transcript of the examination and cross-examination of the accused giving evidence in a previous trial.

When you consider the evidence the accused gave in a previous trial, there are three matters you must consider.

First, the evidence from the previous trial was given on [oath / affirmation]. It is solemn evidence, and you can give it whatever weight you consider it deserves. You have heard what the prosecution and the defence say about this evidence. [Insert competing submissions as to significance of the evidence.] It is for you to decide what you make of this evidence, and the weight you attach to it.

Second, it was [accused]'s right not to give evidence before you. Because it was [his/her] right, you must not use the accused's choice not to give further evidence against [him/her]. You must not treat [his/her] choice not to give evidence as an admission. You cannot use it to fill gaps in the prosecution's evidence. It does not make the prosecution's evidence stronger, or more persuasive. Using the accused's choice not to give further evidence against [him/her] would, in practical terms, deprive [him/her] of [his/her] right to remain silent. You must always bear in mind that it is for the prosecution to prove its case beyond reasonable doubt.

Third, when you are assessing the evidence the accused gave in the previous trial, you can bear in mind that you have not had the opportunity to see and hear the evidence given by the accused personally. You have not had the opportunity to assess his/her demeanour when s/he was tested in cross-examination. Despite this, you should do the best you can to assess the evidence from the accused's previous trial in the same way as other witnesses. You must not treat this evidence as deserving less weight simply because the witness is the accused.

4.4 – Good character evidence

42. Evidence of the accused's good character is admissible for two purposes:[48]

    - to support the accused's credibility either as a witness or in any statement made to the police; and
    - as a factor making it less likely that the accused committed the offence charged.

43. While it is desirable to direct the jury about the uses of good character evidence,[49] there is no rule of law that requires the judge to give directions on good character in every case. A judge has a discretion whether to direct the jury about one, both or neither of the uses of good character evidence, based on the probative value of the evidence.[50]

44. Character evidence varies in its strength. In some cases, it may consist of little more than evidence that the accused has no criminal record. In other cases, it may consist of testimonials from people who know the accused and assert that he or she has a reputation for being moral, trustworthy or a person of integrity.[51]

45. While there is no legal obligation to give a good character direction in all cases, a failure to give the direction in a case where the direction is appropriate can be the basis for a successful appeal.[52]

46. A direction about the second use of good character evidence must make clear that it relates to the probability of the accused, as a person of good character, committing the offence charged. A direction that the evidence is relevant to whether the prosecution has proved its case may not be sufficient to bring this issue to the jury's attention.[53]

47. Where a judge does tell the jury about the uses of good character evidence, the judge may also remind the jury that people do commit crimes for the first time, and evidence of good character cannot prevail against evidence the jury finds convincing notwithstanding the accused's good character.[54] However, it is undesirable to express this issue by simply saying that "every criminal at some time commits his first crime", as that may suggest that good character evidence can be readily put aside because any first time offender is likely to be a person of good character.[55]

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[48] *R v Trimboli* (1979) 21 SASR 577, 578; *R v Melbourne* (1999) 198 CLR 1; [1999] HCA 32, [30]; *R v C, CA* [2013] SASCFC 137, [107].
[49] *R v Trimboli* (1979) 21 SASR 577, 578.
[50] *R v Melbourne* (1999) 198 CLR 1; [1999] HCA 32, [30], [51]–[52].
[51] See, eg, *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [78], [83].
[52] See *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [88].
[53] See *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [85]–[88].
[54] *R v Trimboli* (1979) 21 SASR 577, 578.
[55] *R v Blobel* [2001] SASC 374, [39].

Jury direction #4.4 – Good character[56]

I'm now going to turn to the evidence of [*describe relevant good character evidence*].

This evidence is before you for two purposes.

First, it is relevant to the probability that the accused committed [*describe relevant offences*]. The defence argues that [*accused*] is a person of good character, and so is less likely to have committed these offences, as it is not in [his/her] nature.

Second, you can use it when you are assessing [the evidence [*accused*] gave/what [*accused*] told the police]. The defence say that this evidence shows that [*accused*] is an honest person and you should take that into account when assessing the credibility of [*accused*]'s [evidence/statement to police].

Of course, this does not mean that you must find [*accused*] not guilty even if you accept that [he/she] is a person of good character. You may nevertheless accept other evidence that leads you to conclude beyond reasonable doubt that [accused] is guilty. Sometimes, a person who was previously of good character is found to have committed a crime for the first time.

[56] Note: This direction assumes that both limbs of a good character direction are appropriate. If only one limb is appropriate, the direction should be modified accordingly.

4.5 – Confessions and admissions

48. The nature of directions required in relation to confessions depends on all the circumstances of the case. Different directions may be required depending on whether the issue is whether the confession was made, or whether the confession was true.[57]

49. Where the accused makes inculpatory statements in a police interview, it may be necessary to tell the jury that it is only the accused's statements which can be used as evidence. Questions by investigating police, including assertions by police about what other people have said, can be used only to give content to the accused's responses, and cannot be used as evidence to support the truth of those assertions.[58]

[57] *Burns v The Queen* (1975) 132 CLR 258, 261; [1979] HCA 21, [4].

[58] See *R v Waterhouse* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, 20 June 1990).

Jury direction #4.5 – Confession[59]

I now want to address the evidence that [*describe relevant confession evidence*].

You will need to consider what was said, what it meant and what weight you can give the evidence.

First, you should consider whether [*witness*] is a credible and reliable witness. Was [his/her] evidence about what [accused] said credible and reliable?

Second, you will need to consider what [*accused*] meant. Even if [he/she] said [*identify relevant words*], is [he/she] admitting that [*identify relevant act*]? Or is there another explanation for [him/her] saying those words, such as [*identify competing explanations, such as gratuitous concurrence, unwarranted bragging, etc.*]

You must also take into account this direction. What [*witness*] said to [*accused*] is not evidence – only [*accused*]'s statements can be used as evidence. Though [*witness*]'s statements may provide context or help explain what [*accused*] meant.

[*If the case involves a pretext conversation, add the following direction:*

In particular, you cannot use [*witness*]'s statements in the phone call as somehow adding to [his/her] evidence in court. [*Witness*]'s evidence is not stronger just because [he/she] made similar accusations in the phone call. [*witness*]'s statements in the phone call were not on oath, were out of court, and [*witness*]'s evidence gains nothing from that fact that [he/she] has repeated certain matters on other occasions.]

[59] Note: As explained in *Burns v The Queen* (1975) 132 CLR 258; [1979] HCA 21, the need for directions about confessions depends on the issues in the case. This direction is designed for a case where the making of the confession is in issue and, even if made, the confession may not have been true. This direction will need to be adapted to the issues in the case.

4.6 – Motive to lie

50. A witness' motive to lie, where it exists, has substantial probative value in relation to that witness' credit. For this reason, counsel cross-examining a witness can attempt to establish that the witness has a motive to lie.[60]

51. It is not appropriate for the prosecution to cross-examine an accused on whether the accused can identify any motive for the complainant or other people to make false accusations. Because the onus of proof is on the prosecution, a witness' evidence does not gain any support from the inability of the defence to identify a motive for the witness to lie. Such an absence of evidence is neutral.[61]

52. Similarly, it is improper for the prosecution to make closing submissions which invite the jury to consider why the complainant would lie, or which draw attention to the fact that the defence did not advance a motive to lie.[62]

53. However, where the accused does put forward a motive to lie, the prosecution may cross-examine the accused about that motive and may, in closing submissions, attack that motive, and invite the jury to both reject the asserted motive and accept the witness' evidence.[63]

54. Where a witness, perhaps in frustration during cross-examination, makes a statement such as "why would I lie?", and the prosecution reminds the jury of this during closing address, the judge must give the directions to avoid possible misuse of this evidence. The directions must emphasise the standard of proof, remind the jury that it is not for the accused to prove a motive to lie, that there may be many reasons for a person to lie, that a witness' evidence does not gain any support from the absence of evidence of a motive to lie, and the jury must not speculate that simply because there is no evidence of motive to lie, the witness does not have a motive to lie and must therefore be telling the truth.[64]

55. Where there is evidence of a motive to lie, it is appropriate for the prosecution and defence counsel to make submissions about how the jury should treat that evidence. The judge should then direct the jury that:

    - it may take that evidence of motive to lie into account when assessing the credibility of the witness and when determining whether to accept the witness' evidence;

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[60] *Palmer v The Queen* (1998) 193 CLR 1; [1998] HCA 2, [6]–[7]; *R v Sluczanowski* [2008] SASC 185.
[61] *Palmer v The Queen* (1998) 193 CLR 1; [1998] HCA 2, [6]–[7].
[62] *Doe v The Queen* (2008) 187 A Crim R 328; [2008] NSWCCA 203, [59].
[63] *R v Uhrig* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Newman and Ireland JJ, 24 October 1996); *R v Geary* [2003] 1 Qd R 64; [2002] QCA 33, [29].
[64] *T P v The Queen* [2012] VSCA 166, [37]; *R v Costin* [1998] 3 VR 659, 667, quoted with approval in *R v Sluczanowski* [2008] SASC 185, [43].

- rejection of a suggested motive to lie does not strengthen the prosecution case. It is neutral. The complainant's account gains no credibility from the jury rejecting a suggested motive to lie. The witness may have a motive to lie which has not been discovered; and
- the accused has no onus to prove a motive to lie.[65]

56. A direction that the rejection of a suggested motive to lie does not itself prove the prosecution's case is not sufficient, as this does not address the risk of the jury treating the witness' evidence as strengthened by the rejection of that motive.[66]

57. Where the defence has identified a motive to lie, the judge must not direct the jury not to speculate about whether the witness had a motive to lie. Such a direction tends to invite the jury to disregard the evidence of motive.[67] However, a direction not to speculate about possible motives is appropriate where the issue of motive to lie is raised by the witness in the form of a responses such as "why would I lie?".[68]

[65] *R v Botten* [2017] SASCFC 73, [67]–[68]; *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [93]; *R v Sluczanowski* [2008] SASC 185, [42]–[43]. See also T *P v The Queen* [2012] VSCA 166, [39]–[40]; *R v Uhrig* (Unreported, New South Wales Court of Criminal Appeal, Hunt CJ, Newman and Ireland JJ, 24 October 1996); *R v PLK* [1999] 3 VR 567; [1999] VSCA 194, [20].

[66] *R v P, S* (2016) 261 A Crim R 329; [2016] SASCFC 97, [94].

[67] *R v Sluczanowski* [2008] SASC 185, [48]–[49].

[68] *R v Sluczanowski* [2008] SASC 185, [49]

Jury direction #4.6A – No evidence of motive to lie[69]

I now need to give you some directions about how you assess [*witness*]'s evidence.

[*Witness*] is an important witness for the prosecution, and the defence says that you cannot believe [*witness*]'s evidence.

Remember, it is the duty of the prosecution to prove [*accused*]'s guilt. That means the prosecution must convince you that [*witness*]'s evidence is true and accurate. It is not for the defence to show that [*witness*] is wrong, or is lying.

There can be many reasons why a witness may lie, and you must not speculate about those. You must not treat [*witness*]'s evidence as more credible, or more believable, just because there is no evidence that provides a reason why [*witness*] might be lying. You must not conclude from the absence of any such evidence that [*witness*] has no reason to lie and therefore is telling the truth. That line of reasoning would be wrong and unfair.

Instead, you must look at all the evidence and decide whether you accept that [witness]'s evidence was credible and reliable.

[69] Note: This direction is designed for cases where there is a risk that the jury will reverse the onus of proof by treating a complainant's evidence as stronger because there is no evidence of a motive to lie.

Jury direction #4.6B – Motive to lie

I now need to give you some directions about how you assess [*witness*]'s evidence.

The defence argued that you should not believe [*witness*]'s evidence; that that [he/she] may be lying to you and that one possible reason for that is [*identify relevant motive to lie*].

You must take into account this argument, and the evidence that [*refer to relevant motive to lie evidence*] when you are assessing [*witness*]'s evidence. You must decide whether that affects whether you can accept [*witness*]'s evidence.

But I must also give you some directions about what happens if you reject this argument from the defence.

Remember, it is for the prosecution to prove [*accused*]'s guilt, and as part of this it is for the prosecution to satisfy you that [*witness*]'s evidence is credible and reliable. It is not for the defence to show that [*witness*] is wrong, or is lying.

If you reject this suggested reason for [*witness*] to lie, that does not mean [*witness*] is telling the truth. It does not strengthen the prosecution's case. There can be many reasons why a witness may lie. The defence have suggested one possible reason, but if you reject one reason, there may be another. You must not treat [*witness*]'s evidence as more credible, or more believable, just because you have rejected one possible reason for [*witness*] to be lying. There may be other reasons that no one has identified. Even if you find that there is no evidence that [*witness*] [has a motive to lie/lied for a particular reason], you must not conclude that [*witness*] has no reason to lie and therefore is telling the truth. That line of reasoning would be wrong and unfair.

4.7 – Consciousness of guilt

58. "Consciousness of guilt" is a term used to describe conduct that demonstrates the accused knew that he or she had committed a criminal offence.

59. A distinction is often drawn between two different types of evidence of consciousness of guilt:

    - lies; and
    - other conduct (such as flight, disposing of evidence or laying a false trail).

60. The law of consciousness of guilt often arose in parallel with the law of corroboration, as the principle of consciousness of guilt provided a means by which the accused's own conduct could be used to satisfy legal or practical requirements for corroboration.

61. Consciousness of guilt is an area which frequently causes problems. To ensure evidence is appropriately identified and to avoid miscarriages of justice, the prosecution should be required to identify, in the absence of the jury:[70]

    - any evidence which it seeks to rely upon as evidence of consciousness of guilt;
    - the issue(s)[71] to which the evidence of consciousness of guilt relates; and
    - in respect of each of those issues, the facts and circumstances in addition to the consciousness of guilt conduct itself which are said to show that the conduct demonstrates consciousness of guilt as to that issue.

62. In some cases, it may not be appropriate to use evidence of consciousness of guilt to draw an inference of one culpable state of mind compared to the state of mind required for a lesser offence. In deciding whether evidence is "intractably neutral" in this way, the court must consider the prosecution case in its entirety, rather than assessing whether the consciousness of guilt evidence alone allows a particular inference to be drawn.[72]

63. The judge has an important role in examining each item of evidence said to be probative of a consciousness of guilt, and deciding whether that evidence can be used for that purpose.[73] The mere fact that a prosecutor disclaims reliance on a piece of evidence or a line of argument as involving consciousness of guilt reasoning is not determinative,

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[70] *R v Ciantar; Director of Public Prosecutions v Ciantar* (2006) 16 VR 26; [2006] VSCA 263, quoted with approval by Blue J in *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [182]–[185].

[71] Consciousness of guilt might be used to prove a particular element of the offence, or the whole offence.

[72] *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [121]–[122], quoting *R v Ciantar* (2006) 16 VR 26; [2006] VSCA 263, [50]–[58], [61]–[67].

[73] See, e.g., *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37 for a case where problems arose due to statements being wrongly left to the jury as consciousness of guilt lies.

and the judge must decide whether there is a real risk of the jury adopting consciousness of guilt reasoning.[74]

64. If the prosecution has not invited the jury to use consciousness of guilt reasoning, the judge should only give a direction on that path of reasoning if the judge sees a real danger of the jury applying that line of reasoning.[75]

65. Where it is unclear whether the prosecution is relying on consciousness of guilt reasoning, the judge should ask the prosecutor whether they rely on this reasoning and, if so, to identify the specific evidence they are relying on and the basis on which a jury could conclude that the evidence demonstrates a consciousness of guilt.[76]

66. The need for directions on consciousness of guilt will depend on the conduct of the parties at trial. Rigid prescriptive rules cannot be comprehensively stated because of the risk of giving the issue of lies undeserved prominence, compared to how the parties have chosen to run the case.[77] In some cases, the directions can be very brief, while in other cases longer directions are necessary.[78]

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[74] *R v B, FG* (2013) 115 SASR 499; [2013] SASCFC 24, [17], [29].

[75] *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, [34] (Gleeson CJ and Hayne J); *Roberts v R* (1994) 178 LSJS 131; [1994] SASC 4753 (Perry J, Prior J concurring). See also *Zoneff v The Queen* (2000) 200 CLR 234, [16].

[76] *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, [17].

[77] *R v Thomas* [2015] SASCFC 55, [39].

[78] *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [189].

4.7.1 – Lies as consciousness of guilt

67. Ordinarily, the telling of a lie will only be relevant to a witness' credit. However, lies by an accused can go further and, in some situations, either corroborate other witnesses or involve an implied admission of guilt.[79]

68. Lies which are likely available as probative of a consciousness of guilt include false denials of being in the company of the alleged victim, or at the scene of the alleged crime at the relevant time, where the lie is told at a time when the accused could not have known about the significance of that person or place unless he or she had been involved in the offending.

69. A direction about lies as consciousness of guilt will not be necessary if the conclusion that the accused lied is only available as a conclusion from a finding of guilt, such as where the alleged lies relate to the accused's general denial of the offence. For this reason, lies will likely only be available as evidence of consciousness of guilt when the alleged lie relates to a discrete issue, and not the general issue of guilt or innocence.[80]

70. Where the prosecution invites the jury to reject the accused's denial of offending as a lie, it is unlikely, without more, that this involves an appeal to consciousness of guilt reasoning. Rather, it is an argument that the jury should reject the accused's exculpatory statements as a matter of credibility alone.[81]

71. The use of statements as lies demonstrating consciousness of guilt can apply to both statements made in evidence, and out-of-court statements.[82]

72. In relation to out-of-court statements, it is rare that lies told after the accused knows he is under suspicion for the relevant crime can be used as probative of a consciousness of guilt, because of the tendency for any person under suspicion to distance themselves from the relevant events.[83]

73. When considering whether to allow in-court statements to be used as consciousness of guilt lies, the judge will need to consider the risk of circular reasoning that arises where the jury conflates rejection of the accused's evidence with a consciousness of guilt lie.

74. In cases where the accused gives evidence, the judge should not allow the prosecution to argue that the accused's statements (either in-court or out-of-court) are lies

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[79] *Edwards v The Queen* (1993) 178 CLR 193, 208-209 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

[80] *Roberts v R* (1994) 178 LSJS 131; [1994] SASC 4753 (Perry J, Prior J concurring).

[81] *R v Thomas* [2015] SASCFC 55, [55]-[65]; *R v Burns & Collins* (2001) 123 A Crim R 226; [2001] SASC 263, [68]; *Roberts v R* (1994) 178 LSJS 131; [1994] SASC 4753 (Perry J, Prior J concurring). See also *R v B, FG* (2013) 115 SASR 499; [2013] SASCFC 24, [174].

[82] *Edwards v The Queen* (1993) 178 CLR 193, 208-209 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

[83] *Harris v The Queen* (1990) 55 SASR 321, 323; *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [104], [309].

demonstrating a consciousness of guilt unless the prosecution has complied with the *Browne v Dunn*[84] rule of fairness by cross-examining the accused about the alleged lie.

75. A jury may only use a statement as a lie demonstrating evidence of consciousness of guilt if they accept that:[85]

    1. the defendant made a statement;
    2. the statement was false;
    3. the false statement was a lie, i.e. a deliberate untruth;
    4. the lie was about a material issue; and
    5. the defendant told the lie because he or she knew that the truth of the matter about which he or she lied would implicate him or her in the offence or an element of it, and as a corollary the possibility that the lie was told for some other reason, such as out of panic or to escape an unjust accusation, or because of guilt of some other lesser wrongdoing, to protect some other person or to avoid a consequence extraneous to the offence, is excluded.

76. It is generally not necessary that these matters be established beyond reasonable doubt. Unless the consciousness of guilt evidence is the only evidence of guilt, or is an indispensable link in a chain of reasoning to guilt, the evidence is used as circumstantial evidence and the usual rules of proof of facts for the purpose of circumstantial and inferential reasoning applies.[86]

77. In relation to the third requirement, there may be reasons the accused has made an untruthful statement without lying. These include confusion or lack of recollection.[87]

78. As part of the directions on the fifth requirement, the jury must be told that there may be reasons for lying apart from a realisation of guilt. These may include panic, to escape an unjust accusation, to protect another person, guilt of a lesser offence or to avoid some consequence which is not related to the alleged offence. If the jury accept that the lie may have been told for one of these other reasons, it cannot use the alleged lie as evidence of guilt.[88]

79. The fifth requirement, that the motive for the lie is a realisation of guilt and a fear of the truth, has been criticised as inviting circular reasoning. However, because a lie is used in

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[84] *Browne v Dunn* (1893) 6 R 67.

[85] *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [169] (Blue J), [289] (Lovell J).

[86] *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63 ; *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [24]–[26], [109]; *Velevski v The Queen* (2002) 187 ALR 233 (Gleeson CJ and Hayne J); [2002] HCA 4, [43]; *R v Franco* (2009) 105 SASR 446; [2009] SASC 370, [26]–[33]; c.f. *R v Thomas* [2015] SASCFC 55, [35]; *R v Ciantar; Director of Public Prosecutions v Ciantar* (2006) 16 VR 26; [2006] VSCA 263, [87].

[87] *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

[88] *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

this way as a piece of circumstantial evidence, the jury generally do not need to apply any particular standard of proof to the five requirements.[89] This means the jury can conclude that a lie stems from a consciousness of guilt before concluding, on the basis of all the evidence, that the prosecution has proved guilt beyond reasonable doubt.[90]

80. When directing the jury about lies as consciousness of guilt, the lie must be precisely identified, along with the circumstances said to indicate that it constitutes an admission against interest.[91] This is to avoid the risk of the jury treating themselves as being at large in looking for relevant lies.

81. When developing directions on lies as consciousness of guilt, it may be useful to consider the following questions. Has the judge:[92]

- precisely identified the alleged lie?
- told the jury what the defence says about the alleged lie?
- told the jury to determine whether the statement was made, was false and was a deliberate lie?
- identified how each statement is alleged to be false?
- identified the evidence that shows whether each statement is false?
- told the jury to determine whether the statement related to a material matter?
- told the jury to determine whether the only explanation for the accused telling the lie is because the truth would implicate him or her in the offence or an element of the offence?
- told the jury that they must consider other explanations for the lie, such as panic, to escape an unjust accusation, protect some other person or avoid other consequences?
- identified the circumstances and events which are said to show that the accused told the lie for an inculpatory reason?
- warned the jury not to engage in circular reasoning?

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[89] Where the lie is the only evidence of guilt, or an indispensable link in the chain of reasoning, then the character of the lie will need to be established beyond reasonable doubt: *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63. For more information on the standard of proof of circumstantial evidence, see 3.7 – Circumstantial evidence / 3.6 – Inferences.

[90] *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

[91] *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63.

[92] Adapted from *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [188].

- warned the jury not to assume that if the accused lied, then he or she must be guilty?

82. Where the telling of a lie is used as corroboration, the nature of the statement as a lie must be proved by evidence independent of the witness to be corroborated. The mere preference of an unreliable witness' evidence over the accused cannot provide corroboration for the unreliable witness.[93]

[93] *Edwards v The Queen* (1993) 178 CLR 193 (Deane, Dawson and Gaudron JJ); [1993] HCA 63; *R v Power* (1996) 87 A Crim R 407, 412–413.

Jury direction #4.7.1 – Use of lies as consciousness of guilt

I move now to another category of evidence – suggested lies by the accused. In [his/her] address to you, the prosecutor submitted that the accused told lies to [*identify context of asserted lies*]. It was submitted that these suggested lies are important, and I need to give you special legal directions on how you may use this evidence.

The following directions only apply to the following statements by the accused:

[*Specifically identify alleged lies and the evidence the prosecution points to which can show that the statement is a deliberate lie on a material issue for no reason other than consciousness of guilt.*]

The prosecution argues that all of these statements are lies, and they are lies that show the accused knew [he/she] was guilty of [*identify relevant offence*].

You can only use these alleged lies in this way if you accept the following five matters.

First, that the accused made the alleged statement.

Second, that the statement was false.

Third, the false statement was a lie. In other words, the accused made the statement knowing that it was false.

Fourth, the lie was about an important issue connected with the alleged offence.

Fifth, the accused told the lie because [he/she] knew that telling the truth would help show [he/she] had committed the offence charged.[94] In other words, you must rule out the possibility that the accused told the lie for some other reason, such as [*identify other possible reasons that are relevant in the case, such as panic, to escape an unfair accusation or, to protect another person*].

If you are satisfied of these five requirements, then you have concluded that the accused told that lie because [he/she] knew that the truth would tend to implicate [him/her] of [*identify relevant offence*].

You can only use a lie as evidence of guilt if you accept that these five requirements have been met. If the requirements are not met, you can only use a lie by the accused when you are considering [his/her] credibility. For example, you might think that the accused telling a lie affects whether you think [his/her] evidence on other matters is credible or true. But remember, the prosecution bears the onus of proof. The prosecution always has to prove the accused's guilt beyond reasonable doubt.

[94] If the direction concerns an in-court lie, replace the words "show [he/she] had committed" with "prove [his/her] guilt of".

You must take into account that people might lie for all sorts of reasons. You cannot conclude the accused is guilty simply because you find that [he/she] told a lie.

4.7.2 – Use of lies for credit only

83. As the High Court recognised in *Edwards v The Queen*, ordinarily the telling of a lie by the accused is relevant only to credibility.[95]

84. In some cases, the jury will require a direction that a lie can be used only for credibility purposes, and cannot be used to show consciousness of guilt (a *Zoneff* direction).[96] The terms of the direction identified as appropriate in *Zoneff* were:[97]

> You have heard a lot of questions, which attribute lies to the accused. You will make up your own mind about whether he was telling lies and if he was, whether he was doing so deliberately. It is for you to decide what significance those suggested lies have in relation to the issues in the case but I give you this warning: do not follow a process of reasoning to the effect that just because a person is shown to have told a lie about something, that is evidence of guilt.

85. This direction is often required where the prosecution seeks to have evidence of an accused's lies admitted, but does not want to rely on those lies as evidence of consciousness of guilt.

86. A *Zoneff* direction should be considered when there is a risk of the jury misunderstanding the significance of possible lies, such as when evidence is led of significant lies and the prosecution does not argue for the lies to be used as consciousness of guilt.[98]

87. A *Zoneff* direction is not required every time the prosecution asserts that the accused has made an untrue statement, or that an accused's statement reflects adversely on his or her credibility. *Zoneff* was an unusual case, where a direction was necessary because of the risk of the jury misunderstanding the significance of the possible lies.[99]

88. Further, a *Zoneff*-style direction will only be appropriate in cases involving a lie or lies by the accused. In *OKS v The State of Western Australia*,[100] the High Court held that it was inappropriate to give an analogous direction in respect of a complainant's evidence (to the effect that the jury should not follow a process of reasoning to the effect that just because she was shown to have told a lie, all her evidence could not be rejected as dishonest and not reliable). It was within the jury's province to find that her lies without more precluded acceptance of her evidence of the offence, and the direction given impermissibly took this line of reasoning away from the jury.

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[95] *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63.
[96] *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28.
[97] *Zoneff v The Queen* (2000) 200 CLR 234; [2000] HCA 28, [23].
[98] *R v Thomas* [2015] SASCFC 55, [40].
[99] *Dhanhoa v The Queen* (2003) 217 CLR 1; [2003] HCA 40, [33]–[34].
[100] *OKS v The State of Western Australia* [2019] HCA 10, [19], [27].

Jury direction #4.7.2 – Use of lies for credit only

I move now to another category of evidence – suggested lies by the accused. Counsel for the prosecution has submitted that the accused has told lies to [*identify context of alleged lies*]. Whether the accused has told any lies is a question for you.

If you find that the accused has lied, then you can use that when you are deciding whether [his/her] [evidence / police statement] is credible or believable. Much would depend on how significant the lie is, and any explanation for it.

But you cannot use a conclusion that the accused told lies as evidence of guilt.

Finding that the accused lied may affect your assessment of the truth of what the accused said, but it does not of itself add to the prosecution's evidence.

Even if you reject all of [*accused*]'s evidence, you must carefully assess whether the prosecution has proved its case beyond reasonable doubt.

4.7.3 - Use of other post-offence conduct as consciousness of guilt

89. The *Edwards* direction about the use of lies as consciousness of guilt was developed to address the risk of the jury misusing evidence of lies and jumping to a conclusion of guilt.[101]

90. Courts around Australia have taken different approaches to whether the same risks arise in relation to post-offence conduct other than lies.[102]

91. In South Australia, the prevailing practice is that a direction about inferring consciousness of guilt from conduct other than lies is only necessary if there is a danger of the jury misusing the evidence, in the circumstances of the case. This may occur where there is a risk of the jury overlooking other innocent explanations for the post-offence conduct in question. However, where the competing explanations for the conduct have been clearly identified by prosecution and defence counsel, then a direction on post-offence conduct other than lies will likely not be necessary.[103]

92. One class of evidence which has often attracted directions is flight, either from the jurisdiction or from the scene of the alleged offence. Directions on this topic must start with identifying why flight is probative and how any risk of unfair prejudice arises. The judge must direct the jury about the probative value of flight and warn against the risk of unfair prejudice. [104] The warning against unfair prejudice will often require the jury to consider other explanations for the conduct and to consider whether the jury can draw the inference that the flight demonstrates a consciousness of guilt.[105]

93. As with directions on lies, it is not necessary to prove any matters relating to the conduct beyond reasonable doubt unless the conduct is the only evidence of guilt or is an indispensable link in a chain of reasoning to guilt.[106] In most cases, the existence of other explanations for the conduct consistent with innocence must be considered as part of the assessment of the circumstantial case in its entirety.[107]

94. However, there are some cases which suggest that a different approach is necessary for evidence of flight, and that the jury can only use flight as evidence of consciousness of guilt if it excludes other explanations beyond reasonable doubt.[108] These cases do not explain why the jury must treat flight as different from other forms of circumstantial

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[101] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [29].
[102] See *R v Curran* (2008) 100 SASR 71; [2008] SASC 30, [42]-[48].
[103] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [30]; *R v Adamson* [2018] SASCFC 114, [111]; c.f. *R v Chang* (2003) 7 VR 236; [2003] VSCA 149.
[104] *R v Burns* (2009) 103 SASR 514; [2009] SASC 105, [79].
[105] *R v Power* (1996) 87 A Crim R 407; *R v Melrose* (1987) 30 A Crim R 332.
[106] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [26].
[107] *R v Burns* (2009) 103 SASR 514; [2009] SASC 105, [82]-[84] (Kourakis J).
[108] See *R v Power* (1996) 87 A Crim R 407; *R v Burns* (2009) 103 SASR 514; [2009] SASC 105, [38] (Gray and Sulan JJ), c.f. [84]-[86] (Kourakis J).

evidence, or why the principles in *Shepherd*[109] regarding the operation of the standard of proof or the statement regarding the standard of proof for lies as consciousness of guilt in *Edwards*[110] do not apply.

95. In some cases, the use of other post-offence conduct as evidence of consciousness of guilt can be adequately addressed through a direction on circumstantial evidence. In such cases, the test for the jury will be whether the prosecution has excluded other explanations for the conduct consistent with innocence.[111]

96. Use of a general circumstantial evidence direction may even be appropriate where there is a mixture of lies and other post-offence conduct, where the lies and post-offence conduct are both directed to a common end, and are both addressed by a defence hypothesis consistent with innocence.[112]

[109] *Shepherd v The Queen* (1990) 170 CLR 573, 579; [1990] HCA 56.

[110] *Edwards v The Queen* (1993) 178 CLR 193; [1993] HCA 63.

[111] See *R v Loader* (2004) 89 SASR 204; [2004] SASC 234, [38]–[41].

[112] See, e.g., *R v Loader* (2004) 89 SASR 204; [2004] SASC 234, where, on the defence case, the accused disposed of bodies and laid a false trail to prevent police from investigating his warehouse where he was growing cannabis and not because he killed the two deceased.

Jury direction #4.7.3 – Use of flight as consciousness of guilt[113]

I move now to another category of evidence – evidence that the prosecution says shows that the accused left the [*jurisdiction/ scene of offending*]. I need to give you legal directions on how you can use this evidence.

You heard evidence that [*summarise the evidence of flight*].

The prosecution calls this "flight", and argues that this behaviour shows the accused knew [he/she] was guilty of [*identify relevant offence*].

To decide whether to use this evidence of alleged flight, you must consider two matters.

First, do you accept that the accused did flee the [*jurisdiction / scene of offending*]?

Second, did the accused flee the [*jurisdiction / scene of offending*] because [he/she] knew that [he/she] had committed [*identify relevant offence*]? In other words, could the accused's flight have been for some other reason, such as [*identify other possible reasons that are relevant in the case, such as panic, to escape an unfair accusation, a pre-planned trip, to escape from reprisals*]?[114]

By considering these two questions, you will be able to decide whether to use the accused's alleged flight as part of the prosecution's case against the accused. If you do think the accused's flight is evidence of guilt, then you must still consider all the evidence when deciding whether the prosecution has proved guilt beyond reasonable doubt.

[113] While this direction is written to address risks associated with use of flight as consciousness of guilt, it may be adapted to other forms of post-offence conduct where the general circumstantial evidence direction is not sufficient.
[114] In appropriate cases, the judge should also mention the possibility that the flight related to some other offending.

4.8 – Prosecution or defence failure to call evidence (*Jones v Dunkel*)

97. The commentary in this section must be used with caution. It describes a direction that should only be given in exceptional circumstances.

98. The *Jones v Dunkel* direction informs a jury that, where a party has not called a witness whom that party might be expected to have called, the jury can infer that the witness' evidence would not have assisted that party. This can be relevant both to whether to accept other evidence that has been called and when deciding what inferences to draw from evidence that is accepted. However, a jury cannot speculate on the evidence the absent witness would have given, and the witness' absence cannot be used to fill gaps in the evidence.[115]

99. Because the direction relates to the process of fact-finding, the direction can only inform the jury of its right to use the absence of a witness in a particular way. It is not appropriate for the judge to direct the jury that it must draw the relevant inference.[116]

100. While the reasoning underlying a *Jones v Dunkel* direction is available in both criminal and civil trials, it will rarely be appropriate to give the direction in a criminal trial.

101. In the case of a defence failure to call evidence, such a direction tends to undermine the burden of proof, the right to silence and the prosecutor's duty to call all material evidence. In the case of the prosecution, the direction will only be necessary if the prosecution breaches its obligation to call material witnesses.[117]

102. In deciding whether the direction is necessary due to the prosecution failing to call a witness, the judge should consider: [118]

- whether the defence has asked the prosecution to call the witness, or make the witness available for cross-examination;
- whether there is any basis in the material available at the trial to suggest that the absent witness' evidence would assist in the resolution of any contentious issues in the trial; and
- whether the prosecution has given a satisfactory reason for not calling the witness.

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[115] See *Jones v Dunkel* (1959) 101 CLR 298; [1959] HCA 8; *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [8], [53]; *Spence v Demasi* (1988) 48 SASR 536, 547.

[116] *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [20].

[117] *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [11], [15]; *Dyers v The Queen* (2002) 210 CLR 285, [5]-[13] (Gaudron and Hayne JJ); *R v Bolte* [2010] SASC 112, [123], [137]-[140]. See *R v Apsotilides* (1984) 154 CLR 563; [1984] HCA 38 and *R v M, RS* (2018) 131 SASR 24; [2018] SASCFC 37 for information on the prosecution's duty to call material witnesses.

[118] *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [16]-[18], [63].

103. It is for the prosecutor to determine what evidence will be called and how the prosecution case will be presented.[119] The discretion is not reviewable, and the tender of evidence by the prosecution cannot be compelled by a trial judge.[120] That said, in practice a trial judge might suggest that the prosecutor reconsider a decision not to tender certain evidence, particularly where that judge foresees that a failure to tender the evidence may result in a miscarriage of justice.[121]

104. Indeed, because a failure to call evidence may result in a miscarriage of justice, and a new trial, it is possible to speak of a prosecutor being bound, or under a duty, to call all available material witnesses.[122] But it is not strictly a duty owed to an accused. It is an aspect of the function of a prosecutor.[123]

105. The mere failure of police to take a statement from a witness is not a sufficient explanation for a failure to call a witness. But an inability to locate a witness despite taking reasonable steps to do so can be a sufficient explanation.[124]

106. The authorities have recognised a number of circumstances in which the prosecution will have a good reason for not calling a witness, including:

- where the credibility or reliability of the evidence is demonstrably lacking;[125]
- where the witness is a child with a developmental delay who would possibly suffer emotional harm by giving evidence;[126]
- where the interests of justice require that the prosecution have the ability to cross-examine the witness;[127]
- where the witness is unavailable;[128] and
- where the witness has a demonstrated history of bias and is prepared to do anything to assist the defence case.[129]

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[119] *Richardson v The Queen* (1974) 131 CLR 116, 119; [1974] HCA 19.
[120] *Richardson v The Queen* (1974) 131 CLR 116, 119; [1974] HCA 19; *Whitehorn v The Queen* (1983) 152 CLR 657, 674; [1983] HCA 42.
[121] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [35].
[122] *Whitehorn v The Queen* (1983) 152 CLR 657, 674–675; [1983] HCA 42.
[123] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [35].
[124] *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [64].
[125] *Nguyen v The Queen* (2020) 94 ALJR 686; [2020] HCA 23, [44].
[126] *R v Jessop* [2016] SASCFC 93.
[127] *Richardson v The Queen* (1974) 131 CLR 116; [1974] HCA 19; *R v O'Brien* (1996) 66 SASR 396; [1996] SASC 5589.
[128] *Diehm v Director of Public Prosecutions (Nauru)* (2013) 88 ALJR 34; [2013] HCA 42.
[129] *R v Chimirri* [2010] VSCA 57; *Tran v Magistrates' Court of Victoria* [1998] 4 VR 294.

107. Where the direction relates to a prosecution failure to call a witness, the judge should inform the jury that this is a factor the jury can consider when deciding whether the prosecution has proved its case beyond reasonable doubt.[130]

[130] *Police v Kyriacou* (2009) 103 SASR 243; [2009] SASC 66, [63]; *Mahmood v Western Australia* (2008) 232 CLR 397, 406; [2008] HCA 1.

Jury direction #4.8 – Prosecution failure to call evidence[131]

Members of the jury, during the trial you heard [*name of absent witness*] mentioned from time to time and you might have expected that the prosecution would call [him/her] as a witness. They did not do so.

If you choose, you can infer the prosecution did not call [*name of absent witness*] because [his/her] evidence would not have helped the prosecution's case. This might affect whether you accept the evidence from other witnesses and what inferences you think it is safe to draw. In turn, that may affect whether the prosecution has proved its case beyond reasonable doubt.

However, you must not speculate about what [*name of absent witness*] would have said. While you may infer that [*name of absent witness*]'s evidence would not have helped the prosecution, you cannot be any more precise about what [he/she] might have said.

[*Refer to relevant evidence and arguments from prosecution and defence.*]

[131] *Note: This Bench Book only contains a direction on the prosecution's failure to call evidence. A direction on the defence failure to call evidence should only be given in exceptional circumstances.*

4.9 – Failure to challenge evidence – *Browne v Dunn*

108. The commentary in this section must be used with caution. It describes a direction that should only be given in exceptional circumstances.

109. In *Browne v Dunn*, Lord Herschel stated that:[132]

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

110. This has given rise to 'the rule in *Browne v Dunn*' that, as a matter of professional practice and fairness, a party cross-examining a witness must:[133]

- put any matters concerning his or her own case that are inconsistent with a witness' evidence to that witness;
- put any allegations or imputations that he or she intends to make against a witness to that witness; and
- give the witness an opportunity to respond to those inconsistencies, allegations or imputations.

111. While the rule applies in criminal trials, its application must take account of the accusatorial nature of criminal trials. As Gummow, Kirby and Callinan JJ stated in *MWJ v The Queen*, "reliance on the rule in *Browne v Dunn* can be both misplaced and overstated." It is not for the defence to clean up inconsistencies in the prosecution's case.[134]

112. In many instances, a party that is taken by surprise by a breach of the rule can overcome the prejudice by offering or seeking to recall the witness, so that the matter can be put to the witness. This is subject, however, to the rule that the prosecution must not split its case.[135]

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[132] *Browne v Dunn* (1893) 6 R 67, 70–71. See also *Reid v Kerr* (1974) 9 SASR 367, 376.

[133] *Browne v Dunn* (1893) 6 R 67; *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74. Because the rule involves a failure to *challenge* evidence, it does not apply where there has been a failure to cross-examine in a way that means supportive evidence has not been led: see *Theophilus v Police* (2011) 110 SASR 420, [47] fn 26; [2011] SASC 135.

[134] *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74, [40]–[41]. See also *Gray v Police* [2010] SASC 246, [19]–[26].

[135] *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74, [39]–[41].

113. A breach of the rule in *Browne v Dunn* is usually only relevant to assessing the weight of the evidence. It is very difficult to use it as a basis for inferring that an accused's evidence was recently invented, because an inference of recent invention requires:[136]

- rejecting the possibility that the evidence was omitted from the accused's instructions by an oversight; and
- rejecting the possibility that the evidence was provided to counsel, but that counsel overlooked the importance of the evidence or misunderstood his or her instructions when cross-examining the other witnesses.

114. Where the judge does leave the possibility of recent invention to the jury, the judge should tell the jury about other possible explanations for the failure besides the conclusion of recent invention.[137]

115. Whether any directions are required when counsel breach the rule in *Browne v Dunn* depends on the circumstances of the case.[138]

116. Any directions must not withdraw an issue of fact from the jury, or instruct the jury that it must make a particular conclusion of fact.[139]

117. Similarly, a breach of the rule does not provide a basis for precluding a particular argument, such as highlighting an inconsistency in a witness' evidence. However, the court can take the failure to give the witness an opportunity to reply to arguments about inconsistencies or omissions into account when assessing those arguments.[140]

118. In the case of a breach of the rule by the defence, the judge should only give directions about the rule if the prosecution has offered to recall the witness and the defence have declined that offer.[141]

119. Where the prosecution wishes to argue that the defence failed to comply with the rule because the accused's evidence is a recent invention, the rule requires the prosecution to cross-examine the accused about the failure to put matters to earlier witnesses and give the accused the chance to respond to the allegation of recent invention.[142]

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[136] *Theophilus v Police* (2011) 110 SASR 420; [2011] SASC 135, [41]; *R v Manunta* (1989) 54 SASR 17, 23-24; [1989] SASC 1628.
[137] *R v Manunta* (1989) 54 SASR 17, 23-24; [1989] SASC 1628.
[138] *R v Anderson* (2017) 128 SASR 550, [49]; *R v Morrow* (2009) 26 VR 526; *R v Costi* (1987) 48 SASR 269, 270-271.
[139] *R v Costi* (1987) 48 SASR 269, 270-271.
[140] *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74, [18]-[19].
[141] *MWJ v The Queen* (2005) 80 ALJR 329; [2005] HCA 74, [41].
[142] *R v Thompson* (2008) 21 VR 135; [2008] VSCA 144, [115]-[116].

Jury direction #4.9A – Prosecution failure to comply with the rule in *Browne v Dunn*[143]

I now need to give you a direction about a rule relating to cross-examining witnesses.

This rule says that a party must give a witness a chance to respond to allegations that party intends to make about the witness. This is a rule of fairness, so that you can see how the witness responds to the [allegation/asserted inconsistency].

The prosecution did not comply with this rule by [*identify relevant conduct*].

You can take the fact that [*witness*] did not have an opportunity to respond to [*identify relevant allegation or asserted inconsistency*] into account when you are assessing [his/her] evidence and when you are deciding whether the prosecution has proved its case beyond reasonable doubt.

[143] *Note: This direction is designed for use in a simple case where there is a clear failure to comply with the rule in Browne v Dunn. If the case is more complex, where there are arguments on both sides whether the rule was breached, the direction must be modified.*

Jury direction #4.9B – Defence failure to comply with the rule in *Browne v Dunn*[144]

I now need to give you a direction about a rule relating to cross-examining witnesses.

This rule says that a party must give a witness a chance to respond to allegations that party intends to make about the witness. This is a rule of fairness, so that you can see how the witness responds to the [allegation/asserted inconsistency].

The defence did not comply with this rule by [*identify relevant conduct*].

You can take the fact that [*witness*] did not have an opportunity to respond to [*identify relevant allegation or asserted inconsistency*] into account when you are assessing [*witness*]'s evidence and what weight you give the defence argument that [*identify relevant argument*].

[144] *Note: This direction is designed for use in a simple case where there is a clear failure to comply with the rule in Browne v Dunn. If the case is more complex, where there are arguments on both sides whether the rule was breached, the direction must be modified.*
Further note: In exceptional circumstances, a judge may direct the jury that a failure to comply with the rule in Browne v Dunn can provide the basis for an inference that an accused's evidence is a recent invention. Where this occurs, the direction will need to be adapted, and the jury cautioned about other possible explanations of the defence failure to comply with the rule.

4.10 – Identification evidence

120. Distinctions are sometimes drawn between:

- positive identification evidence – where the witness asserts that the accused is the offender, based on a subsequently viewed image or appearance;
- recognition evidence – where the witness asserts that the accused is the offender based on previous knowledge of the accused's appearance; and
- similarity evidence – where the witness asserts that the accused resembles or looks like the offender, based on a subsequently viewed image or appearance.

121. The following commentary describes general principles applicable to all three types of evidence under the collective term 'identification evidence', along with specific principles applicable to positive identification, recognition and similarity evidence.

122. The admissibility of, and jury directions concerning, identification evidence is governed by a combination of the common law and s 34AB of the *Evidence Act 1929* (SA). This provision was introduced by the *Evidence (Identification Evidence) Act 2013* (SA), which commenced on 7 July 2014.

4.10.1 - Dangers of identification evidence

123. The law has long recognised the complexity of identification evidence. As Evatt and McTiernan JJ explained in *Craig v The King*:[145]

> An honest witness who says 'the prisoner is the man who drove the car', whilst appearing to affirm a simple, clear and impressive proposition, is really asserting: (1) that he observed the driver, (2) that the observation became impressed upon his mind, (3) that he still retains the original impression, (4) that such impression has not been affected, altered or replaced, by published portraits of the prisoner, and (5) that the resemblance between the original impression and the prisoner is sufficient to base a judgment, not of resemblance, but of identity.

124. Evidence from a witness that the accused 'looks like' or is 'similar' to the offender is sometimes described as 'similarity' evidence. It is not positive identification evidence, and it cannot support a finding of guilt by itself, but it may have some probative value as circumstantial evidence.[146]

125. In-court identification and single suspect identification are processes that are dangerous and should be avoided. However, depending on the case, such weak identifications may be admissible as having some probative value.[147] Where they occur, the judge should warn the jury that the processes have little probative value.[148]

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[145] *Craig v The King* (1933) 49 CLR 429, 450; [1933] HCA 41. Cited with approval in *R v King* (1975) 12 SASR 404, 410.

[146] See *Murphy v The Queen* (1994) 62 SASR 121; [1994] SASC 4674; *Festa v The Queen* (2001) 208 CLR 593, [8]-[12] (Gleeson CJ); [2001] HCA 72; *Pitkin v The Queen* (1995) 69 ALJR 612; [1995] HCA 30; *R v Tran* [2010] VSC 560.

[147] *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [15]-[18]. See also *Alexander v The Queen* (1981) 145 CLR 395; [1981] HCA 17; *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [179]-[186].

[148] *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52.

4.10.2 - Photographic identification evidence

126. When introducing the *Evidence (Identification Evidence) Act 2013* (SA), which added s 34AB, the Attorney-General explained:

> The core proposal of this Bill is, therefore to put photographic means of identification on an even footing with an identification parade. A bad photographic identification is just as bad as a bad identification parade — and a good photographic identification is just as good as a good identification parade.

127. Section 34AB(4) prohibits a judge from suggesting that identification evidence from a method other than a physical line-up is inherently or intrinsically less reliable than evidence from a physical line-up.

128. This aims to reverse common law authorities which treated photographic identification as intrinsically inferior to a physical line-up. As a result, the following paragraphs, which detail the common law view on the dangers of photographic identification, must be used with caution and cannot form the basis for any *a priori* or general directions to a jury.

129. At common law, dangers were recognised as associated with identification by photographs:[149]

- photographs differ from natural observations of a person - they are two-dimensional and static and they are generally clear and well-lit;
- the accused is not present during the identification by photograph, and so cannot report whether there was any police misconduct during the process;
- weaknesses in the probative value of photographic identification evidence; and
- a risk that use of photographs will imply to the jury that the accused had a criminal history (the "rogues' gallery effect"). This is a risk of unfair prejudice, as the inference that the accused has a criminal history is a matter that would ordinarily be excluded from the trial.

130. A further deficiency in identification by photograph compared to an in-person parade is that the collection of photographs is generally assembled at a point in the investigation when there is no suspect. As a result, there is no opportunity to ensure the other photos are of people with similar physical characteristics to the accused.[150]

131. It is undesirable for a witness to look through social media pages to find photos of the offender, as this process exacerbates the traditional risks of photographic identification and has none of the safeguards that usually apply. Evidence of identification by images on social media often has little probative value, and may be excluded under the

[149] *Alexander v The Queen* (1981) 145 CLR 395 (Stephen J); [1981] HCA 17.
[150] *Alexander v The Queen* (1981) 145 CLR 395 (Mason J); [1981] HCA 17.

unfairness discretion, or may need to be the subject of jury directions warning about the risks inherent in such evidence.

132. To reduce the risks associated with identification by social media, it is important for police to take a full description of the offender at the earliest possible time in any case where identification is likely to be in issue.[151]

133. If evidence that the witness identified the accused from social media photos is led, the prosecution should, if possible, tender the photo so that the defence and the jury can test whether the person depicted is actually the defendant.[152]

134. However, where the witness saw the social media photo before the alleged offending and that forms the basis of the witness recognising (as distinct from identifying) the accused, it is not necessary to tender the earlier photo unless there is evidence disputing that the accused was the person depicted on the earlier occasion.[153]

[151] *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [47].
[152] *R v Crawford* (2015) 123 SASR 353; [2015] SASCFC 112; *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [34]–[37], [116]–[119].
[153] *R v Hards; R v Hards; R Wilckens* [2018] SASCFC 132, [101]–[108].

4.10.3 – Comparison evidence

135. In some cases the jury may be asked to compare for themselves some depiction of the accused with what they have observed in court. This may be called 'comparison evidence'.

136. Comparison exercises generally do not have the same dangers as identification evidence, as they are not dependent on the fallible memory of witnesses. Instead, the jury might be asked to compare the current appearance of the accused with something recorded on CCTV, or compare the accused's voice with that of a voice on a recording.

137. A jury may undertake voice comparison without the benefit of expert evidence, but must be warned about any considerations which make comparison difficult and the dangers of making comparisons.[154]

[154] *Bulejcik v The Queen* (1996) 185 CLR 375; [1996] HCA 50. See also *R v Solomon* (2005) 92 SASR 331; [2005] SASC 265; *Korgbara v The Queen* (2007) 71 NSWLR 187; [2007] NSWCCA 84; *Nguyen v The Queen* (2002) 26 WAR 59; [2002] WASCA 181.

4.10.4 - Admissibility of identification evidence

138. At common law, identification evidence is prima facie admissible, but the judge has a discretion to exclude it where the evidence is weak and there is a strong risk of prejudice. In assessing the risk of prejudice, the court will take into account the risk that the evidence will be given greater weight than it deserves and the capacity of judicial directions to reduce that risk.[155]

139. Identification evidence obtained using an identity parade[156] is not admissible unless:[157]

> (a) —
>
> (i) an audio visual record of the identity parade is made and kept in accordance with the regulations; and
>
> (ii) if the regulations prescribe procedures for the conduct of an identity parade—the identity parade is conducted in accordance with the prescribed procedures; or
>
> (b) the judge is satisfied that the interests of justice require the admission of the evidence despite the failure to comply with paragraph (a).

140. When conducting an identification parade, police should not prompt or suggest that any particular member of the group is the suspect, or show the witness a number of photographs before conducting an in-person parade.[158]

141. Despite the risks caused by the displacement effect where a witness is shown photographs, at common law police were still expected to conduct an in-person parade with a witness who has previously made an identification by photograph. The in-person parade may not add much evidence, but any comments the witness made may be relevant and, in some cases, it allows the witness to correct an earlier mistake if that had occurred.[159] While s 34AB of the *Evidence Act 1929* (SA) was brought in to remove the presumptive bias against photographic identification,[160] it is not clear that it affects this part of the common law which concerned fair police procedure.

142. Evidence of what the witness said at the time of identifying the accused in a photographic or in-person parade is admissible as part of the evidence of the act of identification. This can assist the jury in assessing the strength of the identification evidence, in combination with anything further the witness says in evidence about the identification exercise.[161]

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[155] *Alexander v The Queen* (1981) 145 CLR 395, 402; [1981] HCA 17; *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [65]; *R v Hards; R v Hards; R v Wilckens* [2018] SASCFC 132, [18]-[24].

[156] Defined as a contemporaneous presentation (whether by a physical line-up or by means of images) of a number of persons to a witness for the purpose of identifying a person: *Evidence Act 1929* (SA) s 34AB(6).

[157] *Evidence Act 1929* (SA) s 34AB(2).

[158] See *Alexander v The Queen* (1981) 145 CLR 395; [1981] HCA 17.

[159] *R v Britten* (1988) 51 SASR 567, 571; *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [61]-[65].

[160] South Australia, *Parliamentary Debates*, House of Assembly, 25 September 2013, 7104-7105.

[161] *Murphy v The Queen* (1994) 62 SASR 121; [1994] SASC 4674; *R v Sutton* (1990) 159 LSJS 96; *R v Turner* (2000) 76 SASR 163; [2000] SASC 27, [6]-[14] (Doyle CJ), [27]-[38] (Perry J).

However, in some cases, it may be necessary to give the jury a limited use hearsay warning regarding statements made at the time of the identification.

143. Where the case involves closed circuit television, it may not be permissible for the prosecution to call evidence from a police officer that the officer identified the accused from the CCTV footage. Unless the police officer has special expertise in relation to describing what occurred on the footage, the evidence is irrelevant, as it is founded on the same evidence that the jury has and so cannot rationally affect the probability of a fact in issue.[162]

[162] *Smith v The Queen* (2001) 206 CLR 650; [2001] HCA 50.

4.10.5 - Directions on identification evidence

144. At common law, an identification evidence warning was required if identification evidence was disputed and was a significant part of the proof of guilt. As the High Court explained in *Domican v The Queen*:[163]

> The terms of the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed "as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case". A warning in general terms is insufficient. The attention of the jury "should be drawn to any weaknesses in the identification evidence". Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence.

145. Section 34AB(3) implements common law rules regarding identification evidence[164] as a statutory obligation. When the identity of a person alleged to have committed the offence is in issue and identification evidence is led, the judge must inform the jury:[165]

    (a) of the need for caution before accepting identification evidence; and

    (b) of the reasons for the need for caution, both generally and in the circumstances of the case.

146. As at common law, a direction under s 34AB(3) is only required in relation to positive identification evidence which forms a significant part of the prosecution case.[166]

147. In giving this direction, the judge is not required to use any particular form of words.[167]

148. The significance of the use of the term "inform" rather than "warn" in s 34AB, and the provision that no particular form of words is required has been noted, but not considered, by the Full Court.[168]

149. The need for directions on identification evidence depends on the circumstances of the case and what is necessary for the jury to properly perform its task.[169]

150. While identification warnings are usually required in the context of the identification of persons, warnings may also be required for the identification of objects where that

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[163] *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13 (citations omitted).

[164] See *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [64]; *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13.

[165] *Evidence Act 1929* (SA) s 34AB(3). See also *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [52]–[53]. As explained at [54], while several subsections in s 34AB refer to identification evidence obtained from a parade, the obligation in s 34AB(3) to give directions applies to all identification evidence.

[166] *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [31]–[34], [52]–[53].

[167] *Evidence Act 1929* (SA) s 34AB(4).

[168] *R v Parry* [2017] SASCFC 66, [177].

[169] *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [30].

identification forms a significant part of the Crown case.[170] Identification of objects might involve:

- identification of a piece of clothing worn by an offender;[171] or
- identification of a gun which the accused used or possessed.[172]

151. The existence of other evidence to support the accuracy of the identification evidence does not remove the need for jury directions about the dangers of acting on identification evidence.[173]

152. A distinction is drawn between positive identification evidence, where the witness says that the accused was the person seen at the relevant time, and evidence of resemblance or similarity, where the witness describes the offender's general appearance, or a characteristic or propensity of the offender. Resemblance evidence may not require an identification evidence warning. However, when directing a jury about similarity evidence, it may be appropriate to give many of the same kinds of warnings as apply to identification evidence – the need to consider the circumstances of the observation, the potential for mistake and the risk that the offence was committed by a person who has a similar appearance to the accused.[174]

153. In *Festa v The Queen*, McHugh J explained:[175]

> Experience has shown that juries are likely to give positive-identification evidence greater weight than that to which it may be entitled. Few witnesses are as convincing as the honest — but perhaps mistaken — witness who adamantly claims to recognise the accused as the person who committed the crime or was present in incriminating circumstances.

154. An identification warning should therefore explain to the jury that:

- a witness giving identification evidence may be honest, confident and mistaken;[176]
- identification evidence is vulnerable to suggestion;

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[170] *R v Crupi* (1995) 86 A Crim R 229; [1995] VSC 149; *R v Marijancevic* (1993) 70 A Crim R 272; *Director of Public Prosecutions (Vic) v Brownlie (No 2)* (2015) 254 A Crim R 360; [2015] VSCA 267, [60]; *R v Turner* (2000) 76 SASR 163; [2000] SASC 27, [94]–[95].

[171] *R v Crupi* (1995) 86 A Crim R 229; [1995] VSC 149; *R v Lowe* (1997) 98 A Crim R 300; [1997] NSWSC 160.

[172] *R v Seymour* [2001] NSWCCA 272, [21]; *R v Theos* (1996) 89 A Crim R 486; [1996] VSC 48.

[173] *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [79].

[174] *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [31], [34]; *R v King* (1975) 12 SASR 404, 410. See also *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [54]–[57] (McHugh J), c.f. [217] (Hayne J). Evidence of resemblance or similarity is sometimes referred to as "circumstantial identification evidence" (*Festa* at [56]). This term must be distinguished from positive identification evidence which is relied on as circumstantial evidence, such as the identifications in *R v Bartels* (1986) 44 SASR 260.

[175] *Festa v The Queen* (2001) 208 CLR 593; [2001] HCA 72, [64].

[176] As discussed in *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [124]–[126], witness confidence is not connected to accuracy of identification.

- a witness may not have had an adequate opportunity to observe and hence identify the person;[177]
- it is possible for a mistaken witness to be convincing; and
- a number of witnesses can all be mistaken.[178]

155. As part of directions on the need for caution and the reasons for caution, it is common for judges to mention that people have been wrongly convicted because of unreliable identification evidence. However, this is not a mandatory component of the direction, if the directions otherwise make the point that identification evidence calls for great care.[179]

156. The judge must decide whether to direct the jury about the "rogues' gallery" effect, as such a direction may, in some cases, highlight the prejudice.[180]

157. The warning must tell the jury about the specific factors which may affect the assessment of the identification evidence. This requires the judge to isolate and identify any significant matters which may reasonably be regarded as undermining the reliability of the evidence. The warning must be adapted to the issues in the case and have the force of the judge's office behind it. It must not be a warning in general terms. A mere reference to counsel's argument is insufficient.[181]

158. As Gibbs J explained in *Kelleher v R*:[182]

> If a warning is necessary, the duty to give it will not be satisfactorily discharged by the perfunctory or half-hearted repetition of a formula, and a warning in general terms will not alone be sufficient; the jury should be given careful guidance as to the circumstances of the particular case, and their attention should be drawn to any weaknesses in the identification evidence.

159. While the factors that affect identification evidence must be identified in each case, the following items should be considered:[183]

- whether the witness previously knew the person identified;

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[177] *Winmar v Western Australia* (2007) 35 WAR 159; [2007] WASCA 244, [10]–[14], cited with approval in *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [41].

[178] *R v Turnbull* [1977] QB 224, 228. As Peek J explained in *Strauss v Police* (2013) 115 SASR 90; [2013] SASC 3, [166]–[172], identification by multiple witness is not truly independent evidence, because of the risk that each witness makes the same error of "relative judgment" because the accused does look like the true offender and, in an identification parade, the accused may be the person who looks most like the offender.

[179] *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52, [74].

[180] *R v Doyle* [1967] VR 698. Cited with approval in *Alexander v The Queen* (1981) 145 CLR 395 (Stephen J); [1981] HCA 17.

[181] *Domican v The Queen* (1992) 173 CLR 555, 561–562; [1992] HCA 13; *Festa v the Queen* (2001) 208 CLR 593, [2001] HCA 72, [55], [75]–[76].

[182] *Kelleher v The Queen* (1974) 131 CLR 534, 551 (Gibbs J); [1974] HCA 48.

[183] See *Domican v The Queen* (1992) 173 CLR 555; [1992] HCA 13.

- how good the opportunity was for the witness to observe the person. This includes considerations such as:[184]
    - distance;
    - lighting;
    - time;
    - distractions;
    - whether the person was alleged to be wearing a disguise; and
    - whether the witness was traumatised by the events;
- how long the period was between the event and the first identification;
- what the circumstances and nature of the first identification were. This includes considerations such as:
    - whether the witness had made earlier statements about not being able to identify the person and any reason the witness gave for subsequently being able to identify the person;
    - whether the witness was presented with a cross-section of people to choose from and the nature of that cross-section; and
    - whether the witness had seen any images of the accused in the interval between the event and the first identification.

160. In a case involving 'recognition' evidence, where the person is previously known to the witness, the directions must draw the jury's attention to the causes of faulty recognition, such as:[185]

- how well the witness knew the person;
- the circumstances in which the witness had previously seen that person;
- the circumstances in which the witness observed the person at the relevant time, including the impact of:
    - distance;
    - lighting conditions;
    - emotional factors; and

[184] See *R v Turnbull* [1977] QB 224, 228.
[185] See *R v Loodin* [2015] SASCFC 74, [8].

- the time available to observe; and

- the risk of the witness jumping to conclusions.

161. Warnings about the dangers of recognition evidence are especially important where the witness claims to have recognised the accused's voice. Such cases require the same or more care than visual identification cases.[186]

162. Multiple South Australian decisions have grappled with the relationship between identification evidence and other items of evidence. Previously, it was thought that identification evidence needed to be assessed in isolation before it could be weighed alongside other evidence in the case.[187] It is now recognised that a jury does not need to reason sequentially in that way.[188]

163. The main difference between the common law obligation to direct on identification evidence and the statutory obligation is that, with the commencement of s 34AB of the *Evidence Act 1929* (SA), the judge must not suggest that identification evidence from a contemporaneous presentation of images is inherently less reliable than identification evidence from a physical line-up of people.[189]

164. This abolishes the common law view that identification by photograph is an intrinsically inferior form of identification. However, it does not appear to affect the judge's obligation to inform the jury of the reasons for caution by reference to specific issues in the case.

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[186] *R v Bueti; R v Morrissey* (1997) 70 SASR 370, 380; [1997] SASC 6479; *Li v The Queen* (2003) 139 A Crim R 281; [2003] NSWCCA 290, [100]–[101].

[187] See *R v Turner* (2000) 76 SASR 163; [2000] SASC 27.

[188] See *R v White* (2008) 102 SASR 35 (Vanstone and David JJ); [2008] SASC 265; *R v Coxon* (2002) 82 SASR 412; [2002] SASC 165; *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52.

[189] *Evidence Act 1929* (SA) s 34AB(4).

Jury direction #4.10.5 – Identification evidence

One important piece of evidence in this case is [*witness*]'s evidence that the person [he/she] saw was [*accused*]. We call this evidence of identification.

You must approach identification evidence with caution. The experience of the courts is that evidence of a witness identifying another person can be unreliable. It has led to innocent people being convicted in the past.

Honest witnesses can be mistaken. And an honest witness, who is sure [he/she] has correctly identified someone, can be a very persuasive witness. But the experience of courts is that a witness being confident about [his/her] identification is a poor guide to whether the witness is accurate.

[If applicable, add: This risk also arises when you have multiple witnesses saying that [*accused*] was the offender. With evidence of identification, multiple witnesses might all be mistaken in the same way. This might occur when the accused person looks like the real offender.]

You have probably all had the experience of seeing someone in a shopping centre, or on a street and thinking you recognise them. And then realising you are wrong. The process of identifying someone can be difficult even for people we know. But in this case, [*witness*] was trying to identify someone [he/she] only saw once before, and so the risk of error is greater.

There are three stages I want you to consider when you are reviewing [*witness*]'s evidence.

The first is the circumstances in which [he/she] saw the offender. [*Identify any relevant features from the time of the incident, including: distance; lighting; time; distractions; disguises; trauma, distinguishing marks; intoxication; or whether the witness had any reason to pay attention to the offender*].

The second stage relates to [*witness*]'s memory. [*Identify the time interval between the event and the identification, along with any events that might have contaminated [witness]'s memory during that time, such as delay; speaking to other witnesses; displacement effect.*]

The third stage is when [*witness*] made the connection between the offender and [*accused*]. [*Identify the circumstances of the identification and any factors that may have affected the reliability of the identification at that stage, such as the size of the identification parade; whether other parade members looked like the accused; a comparison between parade members and the witness' description; subconscious pressure to select someone; whether the witness expressed any reservations.*]

[*If the identification used photographs – the judge should seek submissions on what directions should be given concerning dangers in the use of photographic identification. Such directions must comply with* Evidence Act 1929 *(SA) s 34AB(4), which prohibits suggestions that photographic identification is inherently or intrinsically less reliable than*

an in-person identification parade. This provision may limit general instructions that photographs are 2D and static and so don't fully capture the person's appearance, but likely permits directions about weaknesses that are specific to the particular photographs used in the case.]

You must also take into account any other matters that cast doubt on the accuracy of [*witness*]'s evidence, such as [*identify other relevant matters, such as whether the person chosen looks like the witness' description and any evidence from other witnesses who identified a different person or failed to identify the accused when given the opportunity*].

You must take these matters into account when you are deciding whether to accept [*witness*]'s evidence, and what weight you give that evidence. If, after carefully examining [*witness*]'s evidence and considering my warnings about the dangers of identification evidence, you consider [*witness*]'s evidence to be reliable, then you can act upon this evidence.

4.11 – Forensic disadvantage warnings

165. Section 34CB of the *Evidence Act 1929* (SA) replaces the *Longman* warning[190] with a statutory warning concerning forensic disadvantage. This provides statutory recognition of the need for directions about forensic disadvantage arising from delay.[191]

166. To understand s 34CB, it is necessary to be clear about what a *Longman* warning is. In *R v Cassebohm*, Doyle CJ explained that:[192]

> I consider that s 34CB(1) must be read as abolishing a *Longman* warning in the narrow sense of a warning based on the forensic disadvantage to an accused person attributable to the passage of time. Subsection (2) of s 34CB, which is clearly a qualification on subs (1), strongly supports that conclusion. So does the consideration that unless s 34CB(1) is read in that limited sense, it becomes very difficult to know what it is that is abolished. It does not abolish the duty of a judge to give a warning called for by other circumstances, nor the power of a judge to make an appropriate comment…
>
> I conclude that s 34CB(1) abolishes the duty to warn a jury, along the lines indicated in *Crampton*, by reference to the adverse impact on the defendant's ability to defend a charge, attributable to the passage of time. The duty to warn might have arisen solely from the passage of time or … other particular circumstances of the case. The obligation arose only when the accused was at a forensic disadvantage attributable to the passage of time. The abolition of that obligation leaves open the possibility that it may be appropriate for a trial judge to comment on particular circumstances, including delay. But a trial judge should not use this as a means of resurrecting the *Longman* warning in another form. It is also necessary to bear in mind that the abolition of the obligation to give a *Longman* warning does not abolish an obligation to give a warning to a jury which might result from circumstances, other than the passage of time, that give rise to a forensic disadvantage to the accused person.

167. Section 34CB(1) does not affect any obligation on a judge to give a direction due to circumstances other than delay.[193]

168. As a warning about 'forensic disadvantage', the disadvantage must relate to the matter in court, and is concerned with the accused's ability to present a defence or test the prosecution case.[194]

169. There are two relevant forms of forensic disadvantage and, depending on the case, it may be necessary to direct the jury about both:[195]

- the disadvantage relating to the accused's inability to adequately test allegations or put together a defence, compared to the situation which would exist if the trial had occurred at a time more contemporaneous with the alleged offence. Often, in cases of significant delay, the only defence available is a blanket denial, without an ability

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[190] *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.
[191] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [175].
[192] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [24], [28].
[193] *R v N, RC* (2012) 112 SASR 399; [2012] SASCFC 37, [42].
[194] *R v T, S* (2017) 128 SASR 66; [2017] SASCFC 67, [101].
[195] *R v T, S* (2017) 128 SASR 66; [2017] SASCFC 67, [106].

to call evidence about the accused's movements, or the complainant's movements at the relevant time; and

- the disadvantage relating to the jury being asked to decide if guilt has been proved beyond reasonable doubt on evidence which has not been tested as it otherwise might have been.

170. The content of the statutory warning is governed by subsections (2) and (3):

> (2) If, in a trial of a charge of an offence, the court is of the opinion that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant, the judge must—
>
> (a) explain to the jury the nature of the forensic disadvantage; and
>
> (b) direct that the jury must take the forensic disadvantage into account when scrutinising the evidence.
>
> (3) An explanation or direction under subsection (2) may not take the form of a warning and—
>
> (a) must be specific to the circumstances of the particular case; and
>
> (b) must not include the phrase "dangerous or unsafe to convict" or similar words or phrases.

171. The section must be applied by reference to the context of a typical trial, which often occurs two or three years after the alleged offending, with the associated loss of memory by witnesses. Typically, a s 34CB direction is required where the delay is measured in decades.[196]

172. The term "forensic disadvantage" is used in both judgments and s 34CB. However, a judge should not use the term with a jury unless the judge carefully explains it.[197]

173. Section 34CB has been described as a "somewhat unusual provision" because the test for whether a forensic disadvantage warning is required is whether the judge *"holds the opinion* that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage."[198]

174. In forming this opinion, the views of counsel will be particularly important, because the existence or non-existence of a forensic disadvantage may depend on the contents of the defence brief.[199]

175. Once the judge is satisfied that the defendant has suffered a significant forensic disadvantage, the judge must give the prescribed direction.

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[196] *R v S* [2015] SASCFC 179, [69]–[70].
[197] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [27].
[198] *R v Parry* [2017] SASCFC 66, [119] (emphasis in original).
[199] *R v Parry* [2017] SASCFC 66, [123].

176. When the defence request a s 34CB direction, the judge should ask them to specify what they say are the significant forensic disadvantages and what the judge should tell the jury.[200]

177. The judge should then rule on whether the delay has led to a significant forensic disadvantage and provide brief reasons for that decision. If the judge does not find such a disadvantage, the judge may still give the jury general directions about the impact of delay, while avoiding the language of s 34CB.[201]

178. A judge may find that the passage of time has resulted in a significant forensic disadvantage if the judge concludes that the lost, missing or unavailable evidence is likely to have assisted the defence. A theoretical, hypothetical or assumed disadvantage is not sufficient.[202]

179. Determining the degree of forensic disadvantage will often require some degree of speculation.[203]

180. Types of significant forensic disadvantage include:[204]

- significant memory loss due to illness or the passage of time;
- the inability to effectively cross-examine witnesses about matters of detail, or draw attention to contradictions in the witness' testimony;
- death of witnesses who could shed light on the relationship between the accused and the complainant at the relevant time, or who could give independent evidence of key events;
- loss or destruction of witness statements or police interviews made at an earlier time; and
- loss or destruction of medical records.

181. In assessing whether there is a significant forensic disadvantage, the court will focus on the passage of time between the alleged offence and the trial. A significant forensic disadvantage may arise even if the accused was informed of the allegation soon after the alleged offending, if there is a substantial delay between the complaint and prosecution which impeded the process of collecting evidence.[205]

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[200] *R v S* [2015] SASCFC 179, [86]–[87].
[201] *R v S* [2015] SASCFC 179, [86]–[87].
[202] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [30].
[203] *R v Finn* (2014) 119 SASR 207; [2014] SASCFC 46, [31].
[204] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [30], [34]; *R v W, PK* [2016] SASCFC 5, [41]–[47]; *R v T, S* (2017) 128 SASR 66; [2017] SASCFC 67, [20]; *R v C, CA* [2013] SASCFC 137, [117].
[205] See, e.g., *R v Finn* (2014) 119 SASR 207; [2014] SASCFC 46, [27]–[34].

182. In giving directions about forensic disadvantage, the judge should tell the jury not to speculate about what the witness would have said, but to take into account the absence of evidence when deciding whether to accept the complainant's evidence and when deciding if the offence is proved beyond reasonable doubt.[206]

183. A direction that delay creates difficulties for the accused giving evidence about events from long ago erroneously confines the direction. The forensic disadvantage includes the accused's difficulty in conducting his or her case, which includes cross-examining the complainant on matters of detail and the loss of access to alibi or other exculpatory material.[207]

184. When directing about forensic disadvantage, the judge should not mention that the disadvantage also affects the prosecution, or makes it difficult for prosecution witnesses to recall details. Such a direction is likely to excuse the witness' inconsistencies and to dilute the force of the warning.[208]

185. In giving the direction, the judge must specifically refer to the circumstances of the case. A direction about delay in general terms, or a general direction about the impact of delay on memory is not sufficient.[209] However, in very short cases, a judge may be able to direct about the sources of disadvantage in less detail than would be necessary in a longer case.[210]

186. The direction must identify the matters as a disadvantage for the accused, rather than describing them as matters that are not available to the jury.[211]

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[206] *R v W, PK* [2016] SASCFC 5, [47].

[207] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [179]–[180].

[208] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [182]–[183]. Note that, at [192]–[199], Peek J reviewed, without expressing any final view, a series of Victorian authorities which held that forensic disadvantage warnings will be deficient if they are diluted by reference to how the delay also affects the police's ability to gather inculpatory evidence.

[209] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [32]; *R v N, RC* (2012) 112 SASR 399; [2012] SASCFC 37, [84]; *R v W, PK* [2016] SASCFC 5, [41]–[47].

[210] *R v T, S* (2017) 128 SASR 66; [2017] SASCFC 67, [20]–[21].

[211] *R v Cassebohm* (2011) 109 SASR 465; [2011] SASCFC 29, [37].

Jury direction #4.11 – Forensic disadvantage[212]

As you are aware, this trial concerns events that are said to have occurred in [*specify year*]. That means you are looking at events that are [*specify*] years old.

This delay has meant that:

[*identify specific aspects of forensic disadvantage caused by delay as identified in the case, such as how the impact of delay on memory has affected the accused's ability to gather evidence, the death of any relevant witnesses, the destruction of earlier witness statements and any documentary evidence.*]

[*If the judge is satisfied that the delay has also had a significant effect on the defence's ability to test the case, add the following*: This delay has had a significant impact on [*accused*]'s ability to respond to these allegations and test the case against [him/her]. Due to the passage of time, witnesses do not have good memories for details. This has impeded the ability of the defence to challenge witnesses on matters of detail or expose where a witness has been inconsistent, or wrong.]

We cannot know what evidence the accused might have been able to call. You must not speculate about what this evidence would have shown.

But you must take these disadvantages into account when you are scrutinising the evidence from the prosecution witnesses.

[*If relevant, add*: You must also take these disadvantages into account when you are considering the evidence of [the accused / witnesses called by the defence]. As you have heard, the allegations are [*specify*] years old, and that has affected [the accused's ability / the ability of witnesses called by the defence] to remember the events in question.]

You must consider whether you can be satisfied the offence has been proved beyond reasonable doubt when you do not have evidence from [*identify significant absences in evidence*].

[212] *Note: Forensic disadvantage warnings must be tailored to the issues in the case. Counsel should have made submissions about whether there has been a significant forensic disadvantage and the judge will need to have ruled on whether those matters constitute a significant forensic disadvantage. This charge may need to be amended, depending on the disadvantages identified in a particular case.*

4.12 – Discreditable conduct evidence

187. Division 3 of Part 3 of the *Evidence Act 1929* (SA) regulates the admissibility of evidence showing discreditable conduct or disposition and overrides the common law to the extent of any inconsistency. However, this Division does not apply to evidence "adduced pursuant to section 18", or "evidence of the character, reputation, conduct or disposition of a person as a fact in issue".[213]

4.12.1 – Admissibility of discreditable conduct

188. Section 34P governs the admissibility of discreditable conduct evidence:

> (1) In the trial of a charge of an offence, evidence tending to suggest that a defendant has engaged in discreditable conduct, whether or not constituting an offence, other than conduct constituting the offence ("discreditable conduct evidence")—
>
> (a) cannot be used to suggest that the defendant is more likely to have committed the offence because he or she has engaged in discreditable conduct; and
>
> (b) is inadmissible for that purpose ("impermissible use"); and
>
> (c) subject to subsection (2), is inadmissible for any other purpose.
>
> (2) Discreditable conduct evidence may be admitted for a use (the "permissible use") other than the impermissible use if, and only if—
>
> (a) the judge is satisfied that the probative value of the evidence admitted for a permissible use substantially outweighs any prejudicial effect it may have on the defendant; and
>
> (b) in the case of evidence admitted for a permissible use that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue—the evidence has strong probative value having regard to the particular issue or issues arising at trial.
>
> (3) In the determination of the question in subsection (2)(a), the judge must have regard to whether the permissible use is, and can be kept, sufficiently separate and distinct from the impermissible use so as to remove any appreciable risk of the evidence being used for that purpose.
>
> (4) Subject to subsection (5), a party seeking to adduce evidence that relies on a particular propensity or disposition of the defendant as circumstantial evidence of a fact in issue under this section must give reasonable notice in writing to each other party in the proceedings in accordance with the rules of court.
>
> (5) The court may, if it thinks fit, dispense with the requirement in subsection (4).

189. The term 'discreditable conduct' is not defined in the *Evidence Act 1929* (SA), though it is not limited to unlawful conduct.[214]

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[213] *Evidence Act 1929* (SA) s 34O.

[214] *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [14]. See also *Castle v The Queen; Bucca v The Queen* (2016) 259 CLR 449; [2016] HCA 46, [74]–[78].

190. Section 34P(1) specifies that a certain form of reasoning is impermissible. Kourakis CJ described the form of impermissible reasoning as:[215]

> the drawing of an inference of guilt from the fact that the accused has engaged in other conduct which has no relevant connection to the offence other than to share the epithet discreditable.

191. Section 34P(2) provides the two tests for admissibility. The test in subsection (a), that the probative value substantially outweighs any prejudicial effect, applies in all cases. The test in subsection (b), that the evidence has strong probative value, applies as an additional test where the discreditable conduct evidence is admitted to show the defendant had a particular propensity or disposition as circumstantial evidence of a fact in issue.[216]

192. The tests in s 34P(2) must be applied in the context of adversarial trials, and may not require the judge to intervene and exclude evidence where there is no objection. However, even where evidence is admitted without objection, the judge will still need to decide what the permissible uses of the evidence are, as that informs the necessary directions, and may need to consider whether the evidence could give rise to a miscarriage of justice.[217]

193. At common law, the probative value of evidence was sometimes found to lie in the existence of "unusual features", "underlying unity", "system", "pattern" or where it would be "an affront to common sense" to exclude the evidence. These labels no longer govern admissibility.[218]

194. In applying s 34P, the court must analyse the path(s) of reasoning which the prosecution seeks to invoke in respect of the discreditable conduct evidence, or which the evidence otherwise invites. The court must decide whether the path of reasoning uses the defendant's propensity or disposition as circumstantial evidence of a fact in issue.

195. Discreditable conduct evidence which is admissible for one purpose cannot be used for other purposes unless those purposes satisfy the tests in s 34P.[219]

196. There is no closed list of permissible uses of discreditable conduct evidence. Instead, the obligation is on the party seeking to tender the evidence to identify the proposed uses,

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[215] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [18]. See also, for another description of the impermissible reasoning, *R v C, CA* [2013] SASCFC 137, [76].

[216] *MDM v The Queen* [2020] SASCFC 80, [9], [108]–[110].

[217] *R v C, CA* [2013] SASCFC 137, [54] (Kourakis CJ); *R v C, CN* [2013] SASCFC 44; [2013] SASCFC 44, [76] (Blue J), c.f. [18] (White J); *R v C, G* (2013) 117 SASR 162; [2013] SASCFC 83, [50]–[53]; *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96, [28].

[218] *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [27]–[28]. Cited with approval in *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [133].

[219] *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [17]; *Evidence Act 1929* (SA) s 34Q.

and the judge will then consider those uses when assessing the probative value of the evidence.[220]

197. The admissibility of discreditable conduct evidence may need to be separately considered for each charge, as the probative value of the evidence and risk of prejudice may vary for each charge.[221]

198. In addition, the evidence on each charge must be analysed in accordance with s 34P to determine whether evidence of charge is admissible as discreditable conduct in proof of another charge.

199. A court cannot exclude evidence of discreditable conduct if the only reason for exclusion is that:[222]

    (a) there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant;

    (b) the evidence may be the result of collusion or concoction.

200. These provisions abrogate the rules stated in *Hoch v The Queen*[223] and *Pfennig v The Queen*[224] concerning when propensity evidence must be excluded.[225]

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[220] *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [23]–[24].
[221] *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [28]–[30].
[222] *Evidence Act 1929* (SA) s 34S.
[223] *Hoch v The Queen* (1988) 165 CLR 292; [1988] HCA 50.
[224] *Pfennig v The Queen* (1995) 182 CLR 461; [1995] HCA 7.
[225] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [13] (Kourakis CJ); *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [29]–[31].

4.12.2 - Admissibility of evidence for non-propensity uses

201. Where the use of discreditable conduct does not involve any assessment of the accused's propensity or disposition, the test for admissibility is whether the judge is satisfied that the probative value of the evidence substantially outweighs any prejudicial effect it may have.[226] This is a more onerous test than what applied at common law.[227]

202. In assessing this, the judge must consider whether the proposed use of the evidence can be kept sufficiently separate and distinct from a suggestion that the defendant is more likely to have committed the offence merely because he or she engaged in discreditable conduct.[228] The impermissible use is sometimes referred to as 'bad person' reasoning.[229]

203. Unlike the common law, the admissibility of discreditable conduct evidence for non-propensity uses does not depend on showing the evidence has a "high degree of probative force". Instead, the focus is on the comparison between probative value and prejudicial effect. This means that the degree of probative value required will depend on the risk of prejudice posed by the evidence.[230]

204. While there is no closed list of non-propensity uses, two categories of discreditable conduct evidence (that may overlap) are:

- evidence that allows for a form of improbability reasoning;[231] and
- evidence that provides important explanatory context (also known in some situations as "relationship evidence").

205. Non-propensity improbability reasoning involves a use of evidence which has probative force independent of any conclusion about the accused's disposition or proclivities. This can include:[232]

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[226] *Evidence Act 1929* (SA) s 34P(2)(a); *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [2].

[227] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [242] (Vanstone J); *MDM v The Queen* [2020] SASCFC 80, [56].

[228] *Evidence Act 1929* (SA) s 34P(3). See also *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [18]; *R v C, CA* [2013] SASCFC 137, [76].

[229] *R v C, CA* [2013] SASCFC 137, [79]

[230] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [53]-[57].

[231] Noting that some propensity uses also involve a form of improbability reasoning.

[232] *R v C, CA* [2013] SASCFC 137, [77] (similar allegations of sexual offending against two brothers and a third boy who were friends with the accused's son); *R v Ellis* (2010) 107 SASR 94; [2010] SASC 118, [43] (allegations of sexual assault by four complainants who had been residents of a home for homeless boys); *R v R, PA* [2019] SASCFC 19, [97]-[98] (similar allegations made by four sisters of the accused). For further examples, see *R v Armstrong* (1990) 54 SASR 207 (accused's car seen in the driveway or driving near a series of burglaries); *Perry v The Queen* (1982) 150 CLR 580; [1982] HCA 75 (similarity in circumstances of death of the accused's previous husbands to disprove accidental ingestion of poison); *R v Copeland* [2010] SASCFC 11 (series of robberies on one day by person with similar appearance, vehicle, weapon); *Plazeriano v Police* (2017) 128 SASR 596; [2017] SASC 106 (three customers all victims of theft during the course of a massage by the accused).

- similarity in modus operandi, which allows for a conclusion that several offences were committed by the same individual. Other evidence is then required to show that the accused is that individual;

- improbability of complainants fabricating similar accounts, which allows a conclusion that either the complainants are all telling the truth, or the similarities are the result of concoction, collaboration or innocent infection;[233] and

- presence near, involvement in or association with the circumstances of the crime, where an innocent explanation is improbable.

206. Reasoning from the improbability of several complainants fabricating similar accounts is not available to prove that multiple adult complainants did not consent to sexual activity with the accused.[234]

207. Non-propensity uses also include the use of evidence to provide important explanatory context.[235] While Kourakis CJ warned in *R v MJJ* that "resorting to generalities such as 'context', 'background' and 'underlying unity' will seldom illuminate the analysis",[236] the following commentary uses 'context' to describe the explanatory uses of evidence outlined below.

208. Permissible contextual uses of evidence include:[237]

- explaining the surrounding circumstances where evidence of the offence might otherwise present as inexplicable or improbable. This includes evidence to show that the alleged offences did not occur "out of the blue". Depending upon the number and nature of the incidents, it may also include evidence to explain why the complainant cannot recall or describe the detail of the incident(s);

- in cases involving homicide or serious violence, to allow the court to understand the interpersonal relationship between the victim/complainant and the accused;

- to explain the complainant's failure to complain or rebuff the accused, such as due to previous experiences of offending, fear of the accused, or otherwise; and

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[233] *R v C,CA* [2013] SASCFC 137, [57]–[65], [93]–[94]; *DES v The Queen* [2020] SASCFC 32, [70]; *MDM v The Queen* [2020] SASCFC 80, [14] (Kourakis CJ), [128]–[136] (Peek J).

[234] See *Phillips v The Queen* (2006) 225 CLR 303; [2006] HCA 4.

[235] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [50].

[236] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51. [19].

[237] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [19]. See also *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, [42]; *KRM v The Queen* (2011) 206 CLR 221; [2001] HCA 11, [24]; *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16, [6], [494]–[499]; *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [20]–[27] (Kourakis CJ); *R v Gardiner* [2012] SASC 160, [36]; *R v Hissey* (1973) 6 SASR 280; *R v Nieterink* (1999) 76 SASR 56; [1999] SASC 560; *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [46]; *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [33]–[36].

- to explain the accused's confidence to act as they did, such as due to previous experiences of offending against (or in the presence of) that complainant; knowledge that the victim would comply, that the victim would not complain, or that there would be no repercussions if the victim did complain; or otherwise.

209. 'Context' evidence, in the sense explained above, should not be admitted as a matter of course, but must be justified on the facts of the case and meet the admissibility test in s 34P(2)(a) of the *Evidence Act 1929* (SA).[238]

210. The discreditable conduct provisions do not apply to evidence of conduct as a fact in issue and only apply to conduct that is not "conduct constituting the offence".[239] Where evidence is led of events closely connected to the charged acts, the court will need to carefully consider whether such evidence is outside the scope of the discreditable conduct provisions.[240]

211. Evidence of a connected series of events occurring as a single transaction do not raise issues of propensity. In deciding whether events can be characterised as a single transaction, it will be necessary to consider whether the events involved the same parties, the physical and temporal proximity of the events, whether the evidence of the alleged offence can be understood without reference to the earlier events and any other relevant matters. In applying this principle, the court must also be careful to avoid bootstraps reasoning, where the events are only considered connected because of the assumed existence of a common element.[241]

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[238] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [46].

[239] *Evidence Act 1929* (SA) ss 34O, 34P.

[240] See *R v Crafter* [2019] SASCFC 25, [56]–[59] (Kelly J), [125] (Hinton J).

[241] see *O'Leary v The King* (1946) 73 CLR 566; [1946] HCA 44; *R v Fleming; R v Maher* (2017) 129 SASR 27; [2017] SASCFC 135.

4.12.3 - Admissibility of evidence for particular kinds of propensity uses

212. Where evidence is led for a propensity use, the evidence must satisfy the tests in both ss 34P(2)(a) and (b). That is, the probative value must substantially outweigh any prejudicial effect and the evidence must have strong probative value.[242]

213. In cases involving sexual offences, there is little distinction between evidence of motive (in the form of sexual interest) and evidence of propensity. In such cases, evidence that the accused had a sexual interest in the complainant and was willing to act on it is a form of propensity evidence and the heightened test in s 34P(2)(b) applies. Judges should be wary of any arguments that the evidence is relevant other than via propensity.[243]

214. The characterisation of evidence that the accused has engaged in the business of trading in controlled drugs is more difficult. In *R v Falzon*, in a decision under the Uniform Evidence Law, the High Court held that:[244]

> where an accused is charged with possession of a prohibited drug with intent to sell, circumstantial evidence that the accused was at that time carrying on a business of drug trafficking is relevant and admissible to establish the purpose for which the accused possessed the drug in issue.

215. The High Court in *R v Falzon* rejected the argument that the evidence needed to pass through the tests which govern tendency evidence under the Uniform Evidence Law.

216. In South Australia, such evidence has traditionally been characterised as relevant on the basis that it is probative of a continuing interest and involvement in the business of drug trading, but with an acknowledgment of the element of propensity reasoning inherent in this use.[245] The High Court's decision in *R v Falzon* does not appear to have changed the approach in South Australia under s 34P.[246]

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[242] *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [16] (*White J); R v C, CA* [2013] SASCFC 137, [137] (Nicholson J); *BNM v The Queen* [2020] SASCFC 10, [55] (Doyle J); *MDM v The Queen* [2020] SASCFC 80, [9] (Kourakis CJ), [108]–[110] (Peek J).

[243] *R v Zappavigna* [2015] SASCFC 8, [43]–[45]; *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [60]–[67]. See also *R v Nieterink* 76 SASR 56; [1999] SASC 560, [45].

[244] *R v Falzon* (2018) 92 ALJR 701; [2018] HCA 29, [43].

[245] *R v Soteriou* (2013) 118 SASR 119; [2013] SASCFC 114, [16]–[31].

[246] *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96, [25]–[30]; *R v Singh* [2019] SASCFC 51; *BNM v The Queen* [2020] SASCFC 10.

4.12.4 - Assessing probative value and prejudicial effect

217. The probative value of evidence is the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue.[247]

218. This will require the court to identify the facts in issue and how the discreditable conduct evidence affects the probability of the existence of one or more of the facts in issue.[248]

219. In the context of discussing similar provisions under the Uniform Evidence Law, the High Court explained that the probative value of propensity evidence involves identifying the propensity and the fact or facts in issue which that propensity is adduced to prove.[249] This requires the court to consider:[250]

> two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence.

220. The probative value of propensity evidence must be examined in the context of the prosecution case.

221. In sexual cases, probative value generally depends on the accused having both a sexual interest and a willingness to act on that interest. While the existence of interest may meet a bare test of relevance, it is unlikely to have "significant" probative value.[251]

222. In cases involving sexual misconduct against children, the High Court in *Hughes v The Queen* explained why evidence of sexual misconduct may be probative:[252]

> In the trial of child sexual offences, it is common for the complainant's account to be challenged on the basis that it has been fabricated or that anodyne conduct has been misinterpreted. Logic and human experience suggest proof that the accused is a person who is sexually interested in children and who has a tendency to act on that interest is likely to be influential to the determination of whether the reasonable possibility that the complainant has misconstrued innocent conduct or fabricated his or her account has been excluded.

223. In cases involving multiple complainants, the probative value of propensity evidence will often depend on the "frequency, duration and temporal proximity of the discreditable conduct and the similarity between the circumstances of the charged offences and the discreditable conduct."[253] While some tendencies may persist, the combination of a generally stated propensity and a substantial gap of time since the accused acted on that

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[247] *Johnson v The Queen* (2018) 92 ALJR 1018, [18]; [2018] HCA 48, [18].
[248] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [19] (Kourakis CJ).
[249] *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20, [16].
[250] *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20, [41].
[251] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [90]–[92].
[252] *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20, [40].
[253] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [39].

alleged propensity will make it unlikely that the evidence will have significant probative value.[254]

224. Where there are multiple complainants, it is necessary to find some feature to link the occasions together.[255] A willingness to offend opportunistically, where there is a high risk of discovery, can provide such a link. However, the mere fact that both complainants were teenaged boys, where the conduct was separated by 10 years, has been held not to provide a sufficient link.[256]

225. In a case involving a single complainant, discreditable conduct evidence of other sexual acts between the accused and that complainant will commonly have high probative value, as it shows that the accused has a sexual attraction to the complainant and has been willing to act on that attraction, and may assist in explaining why the complainant and accused acted as alleged. There is no need for the evidence to have special, particular or unusual features.[257] The probative value of such evidence stems from:[258]

> ordinary human experience that, where a person is sexually attracted to another and has acted on that sexual attraction and the opportunity presents itself to do so again, he or she will seek to gratify his or her sexual attraction to that other person by engaging in sexual acts of various kinds with that person.

226. The prejudicial effect of evidence is the risk that the jury will use the evidence improperly.[259]

227. One source of prejudice is the risk that the jury will be overwhelmed by the number of allegations and will fail to give the individual claims close analysis. Another is the risk that the jury will develop a prejudice or animosity against the accused because of the other allegations and the jury will more readily convict the accused regardless of the true strength of the evidence. Further, there is a risk that any prejudice or animosity engendered by the evidence will affect the jury's assessment of the complainant's credibility.[260]

228. Where the evidence is led to show propensity, forms of prejudice include the jury's failure to allow for the possibility that the accused did not act on propensity on the occasion in question or underestimating the number of people who share that propensity.[261]

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[254] *McPhillamy v The Queen* (2018) 92 ALJR 1045; [2018] HCA 52, [27].
[255] See the discussion in *MDM v The Queen* [2020] SASCFC 80, [10]–[11] (Kourakis CJ), [75] and [101]–[103] (Peek J).
[256] See and compare *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20 and *McPhillamy v The Queen* (2018) 92 ALJR 1045; [2018] HCA 52, [31]. See the discussion in *MDM v The Queen* [2020] SASCFC 80, [10]–[11] (Kourakis CJ), [75] and [101]–[103] (Peek J).
[257] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [17]; *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [48], [51]–[52].
[258] *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [51].
[259] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [19].
[260] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [42]–[43]; *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20, [17].
[261] *Hughes v The Queen* (2017) 92 ALJR 52; [2017] HCA 20, [17].

229. The fact that the evidence of some instances of discreditable conduct evidence are stronger than others is not a relevant form of prejudice. The strength of evidence to demonstrate a particular fact does not create a risk of the jury using the evidence in an impermissible manner.[262]

230. Similarly, the effluxion of time alone will not be a relevant source of prejudice, unless the passage of time either creates forensic difficulties or otherwise leads to a risk that the jury will reason *improperly* to guilt.[263]

231. In a sexual offence trial involving a single complainant, evidence from the complainant of other acts will usually not give rise to a risk that the evidence will be used other than for its legitimate use where the jury is directed as to the permissible use of the evidence and directed that they must not convict the accused of a charged act unless satisfied of guilt of that charge beyond reasonable doubt.[264]

[262] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [62].
[263] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [21].
[264] *Johnson v The Queen* (2018) 92 ALJR 1018; [2018] HCA 48, [19]–[20].

4.12.5 – Directions on discreditable conduct evidence

232. Where discreditable conduct evidence is led, the trial judge must direct the jury in accordance with s 34R:

> (1) If evidence is admitted under section 34P, the judge must (whether or not sitting with a jury) identify and explain the purpose for which the evidence may, and may not, be used.
>
> (2) If evidence is admitted under section 34P and that evidence is essential to the process of reasoning leading to a finding of guilt, the evidence cannot be used unless on the whole of the evidence, the facts in proof of which the evidence was admitted are established beyond reasonable doubt, and the judge must (whether or not sitting with a jury) give a direction accordingly.

233. This section requires the judge to direct about both the permissible and impermissible uses of discreditable conduct evidence.[265]

234. The directions on how the evidence must not be used must cover:

- a warning against "general" or "bare" disposition reasoning ("bad person reasoning") (that is, the impermissible use in s 34P(1)(a)); and
- a warning that the jury may only convict if satisfied beyond reasonable doubt of the specific charges.

235. These two warnings were described in *R v Nieterink*, in terms that remain relevant to the directions required under s 34R:[266]

> The jury had to be warned quite specifically not to reason, if they accepted the evidence about the uncharged acts, that the accused had committed similar offences and that the accused was the sort of person who might commit the crimes charged, and find him guilty on that basis. The judge should emphasise that generalised propensity reasoning of that sort is not permissible. The jury should also be particularly warned to convict only if satisfied beyond reasonable doubt that the particular conduct the subject of the relevant count has occurred. They should be specifically warned not to reason that conduct similar to that charged has occurred, and that on that basis they can convict on a particular count.

236. There is no general rule that the judge must instruct the jury to exclude the possibility of concoction or contamination before using discreditable conduct evidence. However, in cases where it is relevant, the issue of concoction or contamination should be mentioned as a matter that could rob the evidence of probative value, and in the context of putting the defence case to the jury.[267]

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[265] *R v Pringle* [2017] SASCFC 9, [74]; *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96, [41]–[42]; *R v Dhir* [2019] SASCFC 55, [57]. But, c.f. *R v Soteriou* (2013) 118 SASR 119; [2013] SASCFC 114, [38].

[266] *R v Nieterink* (1999) 76 SASR 56; [1999] SASC 560, [86]. Approved in *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [73]–[75]. See also *R v Dolan* (1992) 58 SASR 501, 503; [1992] SASC 3638; *R v Zappavigna* [2015] SASCFC 8, [58]; *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [62]; *R v Dhir* [2019] SASCFC 55, [56]

[267] *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [65]. See also *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [70]; *R v R, PA* [2019] SASCFC 19, [50].

237. The adequacy of directions is assessed by reference to whether the directions were sufficient to ensure the jury understood the permissible and impermissible uses of the evidence. This requires consideration of the way the trial is conducted and how the parties have encouraged the jury to use or not use the evidence.[268]

238. When identifying the permissible use(s) of discreditable conduct evidence, precision and specificity are generally desirable. This is so both so as to ensure that the jury are able to properly understand and employ the permissible use of that evidence, and so as to reduce the risk that they will stray into reasoning that involves an impermissible use of that evidence. It is for this reason that general descriptors of the relevance of the evidence, such as "background", "context" or "relationship" evidence, have been deprecated as seldom illuminating.[269]

239. It does not follow, however, that the articulation of the permissible use need be lengthy or detailed. Further, as the extent of the trial judge's obligation under s 34R(1) is to be determined in the context of the conduct of the particular case, it does not extend to identifying or explaining every conceivable or theoretical line of reasoning, or every aspect of the permissible lines of reasoning. Nor does it extend to instructing the jury in logic, or in what would otherwise be obvious to them. Often a quite simple and succinct identification of the permissible and impermissible uses of the discreditable conduct evidence will be appropriate and sufficient, leaving it to the jury to determine whether and to what extent they are assisted by that evidence.[270]

240. Section 34R(2) requires the judge to direct the jury that they must not use the evidence unless the relevant facts are proved beyond reasonable doubt. This direction is only required where the discreditable conduct evidence is "essential to the process of reasoning leading to a finding of guilt". Ordinarily, this condition will not be met.[271] For this reason, the model directions in this document do not specify any standard of proof associated with the use of discreditable conduct evidence.

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[268] *R v Singh* [2019] SASCFC 51, [53].
[269] *R v Singh* [2019] SASCFC 51, [69].
[270] *R v Singh* [2019] SASCFC 51, [70].
[271] See *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40, [80]; *R v Zappavigna* [2015] SASCFC 8, [56]; *R v R, PA* [2019] SASCFC 19, [116].

4.12.6 - Directions on non-propensity uses

241. Where the evidence is led for a non-propensity use, the judge will also need to instruct the jury not to use the evidence for a propensity purpose. As Peek J explained in *R v Maiolo (No 2)*, this requires that:[272]

> the jury should be directed that, even if they found that the accused had done something wrong with the complainant on some other occasion (as distinct from merely may have done so), they must not reason that he is even more likely to have (as distinct from must have) committed the offence(s) charged.

242. The directions must explain *how* the jury may use the evidence and not only *what* the jury may use the evidence for. In the case of evidence tendered to provide explanatory context, the judge must not merely say the evidence provides context, or explains the relationship between the parties, or provides background. Instead, the judge must explain the specific use of the evidence, such as to avoid the impression that the alleged acts came 'out of the blue', to answer questions that the jury might otherwise have if the evidence had not been led, or to show, by reference to previous experiences, why the accused felt confident to act in the manner alleged, or why the complainant acted the way they did.[273]

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[272] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [84].

[273] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [107]–[122]; *R v Nieterink* (1999) 76 SASR 56; [1999] SASC 560, [42]–[47]; *Roach v The Queen* (2011) 242 CLR 610; [2011] HCA 12, [47]–[48].

4.12.7 – Directions on propensity uses

243. Where the evidence is led for a propensity purpose, the directions must distinguish between permissible and impermissible propensity reasoning.

244. The difficulty of distinguishing between permissible and impermissible propensity reasoning requires the court to ensure the directions are clear in identifying and distinguishing between the two, and do not justify omitting a direction against general propensity reasoning.[274]

245. To minimise the conflict between directions about permissible propensity uses and impermissible propensity uses, the impermissible uses direction should be given in general and limited terms. In *R v M, BJ*, Vanstone J quoted with approval, as an example of how to give this direction in limited terms, the direction given by the trial judge in the 1992 case of *R v Pfennig*:[275]

> The [evidence that the accused abducted and sexually assaulted a boy 11 months after the victim's disappearance] is, of course, discreditable to the accused. He has admitted kidnapping the boy and holding him prisoner in his van and in his house, and sexually assaulting him. It is very prejudicial evidence. However, it is not led against him in this trial for the purpose of blackening his character in a general way, or so far as sexual matters are concerned. To reason in that way would be to condemn a man simply on his record — in this case his subsequent record as it were — and that would be quite wrong.

246. Where evidence of the accoutrements of drug trafficking is led, the directions on the permissible use of the evidence must rise above generalities about the evidence being circumstantial evidence to show trafficking. Instead, the directions must instruct the jury that it may use the evidence to show that the accused was conducting a *business* of trafficking, or that the accused had demonstrated an interest in using or supplying drugs and an inclination to do so. Explaining that the evidence is led to show a business, or a demonstrated interest in use or supply, and that the jury may consider that this makes it more likely that the accused had the relevant intention, distinguishes the permissible use from impermissible simplistic or general propensity reasoning that the accused is a bad person and so is more likely to have committed the offence regardless of any logical connection between the discreditable conduct and the offence charged.[276]

247. Where evidence is led for a propensity purpose, it is not appropriate to tell the jury not to reason that the evidence makes it more likely the accused is guilty of the offence(s) charged. This is precisely a form of reasoning that is permitted.[277] While the jury may use the evidence to reason that the accused is likely or more likely to have committed the offence charged, they must not assume the evidence shows the accused *must* have

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[274] *R v Dhir* [2019] SASCFC 55, [57].
[275] *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50, [62].
[276] *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96, [39]; *R v Singh* [2019] SASCFC 51, [67], [75].
[277] *R v Zappavigna* [2015] SASCFC 8, [59]; *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [79]–[86]; c.f. *R v C, CN* (2013) 117 SASR 64; [2013] SASCFC 44, [24].

committed the offence charged. The direction should explain that just because a person has a particular disposition or propensity, it does not mean the person acted on that disposition or propensity on a particular occasion.[278]

[278] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [87]–[90].

4.12.8 – Jury directions – Discreditable conduct evidence

248. Possibly more than any other evidentiary direction, discreditable conduct requires directions that are adapted to the evidence and issues in the particular case. The following illustrative directions identify a range of possible uses of discreditable conduct evidence, along with identifying past cases which involved similar uses.

249. It is not suggested that the illustrative directions which follow were approved in, or otherwise precisely reflect the circumstances of, the past cases that have been mentioned in the footnotes to the headings. Those cases, and the illustrative directions, have been provided as merely general prompts for the types of discreditable conduct evidence and permissible uses that might arise.

250. The illustrative directions are in bare-bones terms and will need to be adapted and expanded to meet the needs of the individual case. Depending upon the circumstances of the case, a trial judge may consider it appropriate to elaborate upon the distinction between the permissible and impermissible uses of that evidence, to highlight the logical connection and hence potential probative value inherent in the former and the simplistic, unfair and wrong nature of the latter.

251. The illustrative directions adopt a structure in which the judge first outlines the permissible use(s) of the discreditable conduct evidence before then identifying the impermissible use of that evidence. Some judges may prefer to restructure the direction by first instructing the jury not to make impermissible use of the evidence before then identifying the permissible use(s) that arise in the particular case. Such directions might commence by informing the jury that in the ordinary course they would not hear evidence of conduct on other occasions unless there is some potential logical connection between that conduct and the issues in the trial; and that the reason for this is that it would be wrong and unfair for them to reason – and they must not reason – simplistically to the effect that merely because someone engaged in discreditable conduct on some other occasion they are more likely to have committed the crime alleged against them. The direction would then proceed to identify the permissible use(s).

Jury direction #4.12.8A – Context evidence[279]

I now turn to the evidence that [*describe relevant context evidence*].

This evidence is before you for a specific purpose. I will first direct you on how you may use the evidence and then how you must not use the evidence.

If you accept this evidence, you may use it to help understand and assess the direct evidence of the charges. In particular, you can use the evidence to show that [*complainant*] is not saying the offending occurred out of the blue. Without this evidence, you might think it implausible that [*accused*] [*refer the alleged offending conduct*] with no lead-up. It may also help explain why [*complainant*] reacted as [he/she] says [he/she] did. Again, without this evidence, you might think it implausible that, after [*describe relevant offending conduct*], [*complainant*] behaved as if nothing unusual had happened. Finally, it might help show why [*accused*] felt able to act as [he/she] did, and did not fear that [*complainant*] would report the offending.[280]

These are the only ways you may use the evidence. You must not use it for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, [he/she] is a bad person, and therefore the sort of person who is more likely to have committed the crime(s) with which [he/she] is charged in these proceedings. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that [*accused*] has done something similar before, so that's enough to prove [he/she] committed these crimes. Again, that sort of reasoning is wrong and unfair.

[*Refer to prosecution and defence arguments.*]

[279] e.g., *R v Nieterink* (1999) 76 SASR 56; [1999] SASC 560.

[280] As mentioned in the commentary above, in an appropriate case, the evidence may also be relevant to explain why the accused did not fear that there would be any repercussions even if the complainant did report the offending. Depending upon the number and nature of the incidents it may also be relevant in explaining why the complainant was unable to recall or describe the detail of all incidents.

Jury direction #4.12.8B – Propensity evidence to prove identity[281]

I now turn to the evidence that [*describe relevant propensity evidence*].

This evidence is before you for a specific purpose to show that the person who [*refer to nature of incident,* e.g., attacked [*complainant*]] was the accused. I will first direct you on how you may use the evidence and then how you must not use the evidence.

There are two steps to using this evidence. First, the prosecution says that the evidence of [*identify relevant evidence*] shows that [*accused*] had a very specific way of offending. That is, the evidence shows that the accused [*identify specific propensity*]. Second, the prosecution says that the offending in this case involves that same very specific way of offending. From these two steps, the prosecution asks you to conclude that [*accused*]'s past acts make it more likely that the accused was the person who committed the offence charged.

This is a permissible way to use the evidence, and you may, if you accept the evidence, use it in this way. However, when you are examining the evidence, you must consider the possibility that someone else has the same tendency to commit offences in this way, or that someone else committed an offence in this way on this occasion.

This is the only way you may use the evidence. You must not use it for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things on other occasions, [he/she] is a bad person,[282] and therefore [he/she] is more likely to have committed the crime against this complainant. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that [*accused*] has done something similar on another occasion, so that's enough to prove [he/she] committed this crime. Again, that sort of reasoning is wrong and unfair.

[*Refer to prosecution and defence arguments.*]

[281] e.g., *R v Straffen* [1952] 2 QB 911.

[282] Unlike in the directions on context reasoning, this direction does not refer to "type of person" because that risks obscuring the permissible propensity use, which also relies on what "type of person" the accused is.

Jury direction #4.12.8C – Discreditable conduct to disprove innocent association[283]

At the start of the trial, I told you that you must decide each charge using only the evidence relevant to that charge.

In this case, the evidence on each charge has two uses. First, to prove that charge. Second, to support the prosecution case in relation to each other charge. I will now explain how you can use the evidence for that second purpose.

The prosecution says if you looked at the evidence of one charge alone, you might think there was an innocent explanation for the evidence, such as [*identify relevant innocent explanation*, e.g. someone else was driving the accused's car, or the accused was driving through that area, minding his own business]. However, when you look at the evidence as a whole, it shows that the accused [*identify relevant pattern*, e.g., was seen in the vicinity of each burglary soon after that burglary]. In other words, the prosecution says that you should ask yourself how likely is it that [*identify relevant improbability*, e.g., the accused happened to be driving through the area each time someone else was committing a burglary].

This is a permissible way to use the evidence, and you may, if you accept the evidence, use it in this way. However, when you are examining the evidence, you must consider the possibility that [*identify innocent explanations*, e.g., someone else was driving the accused's car, or the accused was driving through that area, minding his own business, on each occasion].

You must not use the evidence of each charge for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, [he/she] is a bad person,[284] and therefore [he/she] is more likely to have committed these crimes. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that if [*accused*] committed charge [*number*], then [he/she] must have also committed charge [*number*]. Again, that sort of reasoning is wrong and unfair.

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[283] e.g., *R v Armstrong* (1990) 54 SASR 207. *Note: This direction is designed for cases where the evidence of multiple charges is cross-admissible to disprove any innocent association due to the number of similar events.*

[284] Unlike in the directions on context reasoning, this direction does not refer to "type of person" because that risks obscuring the permissible propensity use, which also relies on what "type of person" the accused is.

Jury direction #4.12.8D – Discreditable conduct providing means of or reason for offending[285]

I now want to give you some directions about [*describe relevant discreditable conduct evidence*].

This evidence is before you for two reasons. If you accept the evidence, then first, you may use it when deciding whether the prosecution has proved charge [*number*] on the Information. Second, if you accept the evidence, it may establish [how [*accused*] acquired the means of committing / why [*accused*] wanted to commit] the conduct alleged in charge [*number*].

As I told you at the start of this trial, you must consider the evidence on each charge separately. You must not allow any conclusion you reach on one charge to prejudice your view of the accused or the evidence on another charge.

You must not use this evidence for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, [he/she] is a bad person, and therefore [he/she] is the sort of person who is more likely to have committed these crimes. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that if [*accused*] committed charge [*number*], then [he/she] must have also committed charge [*number*]. Again, that sort of reasoning is wrong and unfair.

[285] e.g., *R v Tucker* (1984) 36 SASR 135. *Note: this direction is designed for cases where past charged acts show the means of or reason for later acts. If the earlier event is not charged, then the direction must be modified.*

Jury direction #4.12.8E – Discreditable conduct in single complainant sex case[286]

I now turn to the evidence that [*describe relevant propensity evidence*].

This evidence is before you for two specific purposes. I will first direct you on how you may use the evidence and then how you must not use the evidence.

If you accept this evidence, then you are entitled to reason in the following two ways.

First, this evidence shows that [*accused*] has a sexual interest in [*complainant*] and has acted on that interest on another occasion. Therefore, you may use the evidence to find [*accused*] was inclined to act on that interest again. If so, you may think that this makes it more likely that [he/she] acted on that interest by committing the offence charged. Of course, you will need to consider all the evidence when deciding whether each charge is proved beyond reasonable doubt.

The second way you can use this evidence is to help you understand and assess the direct evidence of the charges. In particular, you can use the evidence to show that [*complainant*] is not saying the offending occurred out of the blue. Without this evidence, you might think it implausible that [*accused*] [*refer the alleged offending conduct*] with no lead-up. It may also help explain why [*complainant*] reacted as [he/she] says [he/she] did. Again, without this evidence, you might think it implausible that, after [*describe relevant offending conduct*], [*complainant*] behaved as if nothing unusual had happened. Finally, it might help show why [*accused*] felt able to act as [he/she] did, and did not fear that [*complainant*] would report the offending.

These are the only ways you may use the evidence. You must not use it for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, [he/she] is a bad person,[287] and therefore [he/she] is more likely to have committed these crimes. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that [*accused*] has done something similar before, so that's enough to prove [he/she] committed these crimes. Again, that sort of reasoning is wrong and unfair.

[*Refer to prosecution and defence arguments.*]

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[286] e.g., *R v Bauer* (2018) 92 ALJR 846; [2018] HCA 40. See also *R v Etherington* (1982) 32 SASR 230; *HML v The Queen* (2008) 235 CLR 334; [2008] HCA 16.

[287] Unlike in the directions on context reasoning, this direction does not refer to "type of person" because that risks obscuring the permissible propensity use, which also relies on what "type of person" the accused is.

Jury direction #4.12.8F – Discreditable conduct in multiple complainant sex cases[288]

I now turn to the evidence that [*describe relevant propensity evidence*].

This evidence is before you for two[289] specific purposes. I will first direct you on how you may use the evidence and then how you must not use the evidence.

If you accept this evidence, then the first way you may use the evidence as follows. The prosecution says it is most unlikely that several [witnesses/complainants], each of whom seems to be independent of the other, would give such similar accounts unless those accounts were truthful and accurate. In other words, the prosecution says it is most unlikely that several [witnesses/complainants] would independently have made the same wrong or false allegations against [*accused*].

This is a permissible way to use the evidence, and you may, if you accept the evidence, use it in this way. However, when you are examining the evidence, you must consider the possibility that the similarities are the result of collusion or contamination between the witnesses.[290] You must also consider whether the [witnesses/complainants] have actually given similar accounts. The more unusual the accounts, and the stronger the similarities are, the more unlikely it becomes that each imagined or invented their evidence independently.

The second way you may be able to use the evidence is this. The prosecution says the evidence shows that [*accused*] had a particular way of offending, which involved [*identify relevant features of offending*, e.g., gaining the trust of family members and then drugging the complainant, *or* offending in a place where [he/she] could be easily discovered]. If you accept that the evidence shows that [*accused*] had this particular way of offending, then you may find that [he/she] was inclined to offend in that way again. If so, you may think that this makes it more likely that [he/she] acted on that interest by committing one or more of the offences charged. Of course, for each charge, you will need to consider all the evidence when deciding whether that charge is proved beyond reasonable doubt.

These are the only two ways you may use the evidence. You must not use it for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, or to other people, [he/she] is a bad person,[291]

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[288] e.g., *R v C, CA* [2013] SASCFC 137.

[289] Often the evidence will only be relied upon for either 'improbability of account' reasoning or as being probative of a propensity on the part of the accused. These are quite different modes of reasoning, the former focussing upon the complainants' accounts and the latter upon the accused's propensity or tendency. The directions given will need to be tailored accordingly.

[290] If collusion or contamination are not in issue, this sentence should be omitted.

[291] Unlike in the directions on context reasoning, this direction does not refer to "type of person" because that risks obscuring the permissible propensity use, which also relies on what "type of person" the accused is.

and therefore [he/she] is more likely to have committed these crimes. Reasoning in that way would be wrong and unfair.

You will remember what I told you at the start of the trial about the need to consider each charge separately.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that [*accused*] has done something similar before, so that's enough to prove [he/she] committed these crimes. Again, that sort of reasoning is wrong and unfair.

[*Refer to prosecution and defence arguments.*]

Jury direction #4.12.8G – Accoutrements of drug trafficking to prove purpose of possession[292]

I now turn to the evidence that [*describe relevant evidence that accused was engaged in a business of drug trafficking*].

This evidence is before you for a specific purpose. I will first direct you on how you may use the evidence and then how you must not use the evidence.

If you accept this evidence, then you are entitled to reason in the following way. This evidence shows that [*accused*] has engaged in the business of drug trafficking. Therefore, [he/she] was someone who was willing and inclined to sell drugs. If so, you may think this makes it more likely that [he/she] acted on that inclination by having the [*identify relevant drugs*] for the purpose of sale, rather than for personal use, on the occasion(s) charged.[293] Of course, you will need to consider all the evidence when deciding whether each charge is proved beyond reasonable doubt.

This is the only way you may use the evidence. You must not use it for any other purpose.

In particular, you must not use the evidence to reason simplistically that merely because [*accused*] has done bad things in the past, [he/she] is a bad person,[294] and therefore [he/she] is more likely to have committed these crimes. Reasoning in that way would be wrong and unfair.

You also must not allow the evidence to distract you from the need to consider whether, for each charge, the prosecution has proved that charge beyond reasonable doubt. You cannot reason that [*accused*] has done something similar before, so that's enough to prove [he/she] committed these crimes. Again, that sort of reasoning is wrong and unfair.

[*Refer to prosecution and defence arguments.*]

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[292] e.g., *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96. See also *R v Soteriou* (2013) 118 SASR 119; [2013] SASCFC 114; *R v Falzon* (2018) 92 ALJR 701; [2018] HCA 29 and *BNM v The Queen* [2020] SASCFC 10.

[293] If a different explanation arises for the accused's alleged possession in the case, then this sentence should be modified.

[294] Unlike in the directions on context reasoning, this direction does not refer to "type of person" because that risks obscuring the permissible use.

4.13 – Corroboration directions and accomplice warnings

252. The common law recognised three categories of evidence where a warning about the need for corroboration was required:[295]

- alleged victims of sexual assault;
- children; and
- accomplices.

253. There are no further categories in which directions about the dangers of acting on *uncorroborated* evidence are required.[296] However, as discussed in – Unreliable evidence, below, a judge has an obligation to warn the jury about the risk of acting on evidence that carries hidden dangers. This obligation includes warning about two classes of people with accomplice-like motives – a prison informer and an alternative suspect.

254. The scope for directions about uncorroborated evidence of alleged victims of sexual assault and children has been limited by statute.[297] However, the common law obligations regarding directions about accomplices remain.

[295] *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [25].
[296] *R v Sinclair & Dinh* (1997) 191 LSJS 53, [11]; [1997] SASC 6127; *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [56]-[57]; *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [25].
[297] *Evidence Act 1929* (SA) ss 12A, 34L.

4.13.1 – What is corroboration?

255. The modern statement of corroborative evidence in Australia is:[298]

> The essence of corroborative evidence is that it "confirms", "supports" or "strengthens" other evidence in the sense that it "renders [that] other evidence more probable". … It must do that by connecting or tending to connect the accused with the crime charged in the sense that, where corroboration of the evidence of an accomplice is involved, it "shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused".

256. While corroboration can consist of independent evidence from which the jury can infer guilt,[299] corroboration does not need to prove itself that the crime was committed by the accused. Instead, the question is whether the corroborative evidence "confirms", "supports" or "strengthens" the truth and reliability of the evidence requiring corroboration so that it renders that evidence more probable.[300]

257. In *R v Murch; R v Logan*, the Court set out a number of propositions about corroboration in order to address misconceptions:[301]

> Corroboration need not extend to every facet of a crime. What is to be identified is independent evidence, direct or circumstantial, which supports "in a material particular" the accomplice's evidence that the accused committed the crime. Corroborative evidence need only be sought in respect of the issue or issues in the trial which are the subject of forensic contest. Corroborative evidence need not of itself prove the prosecution case and it need not prove anything beyond reasonable doubt. Further, that an item of evidence may be consistent with both prosecution and defence cases does not necessarily rob it of corroborative effect. As Zelling and Wells JJ put it in *R v Lindsay* evidence may bear a different character when viewed in relation to the prosecution case than it bears in relation to the defence case and, further:
>
> > [A]n accused person cannot, by a timely admission of facts which could otherwise amount to corroboration, deprive them of that quality …

258. Whether evidence is corroborative depends in part on the issues in the trial. Therefore, where the defence argues that the accused was not present at the time of the alleged offence, evidence that shows the accused was present may be corroborative, even if it does not also demonstrate what the accused did at that time.[302]

259. One form of corroboration is where the account of the witness who requires corroboration contains information which is independently proved and which the witness would not have known unless his or her account was truthful. This can include describing

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[298] *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51, [7] (citations omitted). See also *R v Baskerville* [1916] 2 KB 658; *Director of Public Prosecutions v Kilbourne* [1973] AC 729.

[299] See *R v Porter* (2003) 85 SASR 581; [2003] SASC 233, [93].

[300] *R v Kuster* (2008) 191 A Crim R 449; [2008] VSCA 261, [16]–[17], cited with approval in *R v E, DJ* (2012) 112 SASR 225; [2012] SASCFC 6, [24]. See also *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51; *R v Kalajzich* (1989) 39 A Crim R 415; *Conway v The Queen* (2000) 98 FCR 204; [2000] FCA 461, [214]–[215].

[301] *R v Murch; R v Logan* (2014) 119 SASR 427; [2014] SASCFC 61, [61] (citations omitted).

[302] See, e.g., *R v E, DJ* (2012) 112 SASR 225; [2012] SASCFC 6; *R v Matthews* [2005] SASC 289, [48]–[58].

features of the accused which the witness could only have learned during their interactions with the accused in the course of offending.[303]

260. Where there is more than one accused, the judge will need to consider separately the corroborative potential of any given evidence in relation to each accused. Evidence that corroborates the involvement of one accused does not necessarily corroborate the accomplice's evidence in the case of the other accused.[304]

261. Despite the need to consider the case of each accused separately, and only by reference to the evidence admissible against that accused, it has been held that a jury is entitled to take a holistic and consistent view of an accomplice's credibility informed by the evidence as a whole. Under that approach, where an accomplice is corroborated in relation to one accused (A) but not another (B), the jury may take the fact of corroboration into account in deciding whether the accomplice is credible and reliable and so whether to act on the accomplice's evidence in B's case even though it is not corroborated in the case against B.[305]

262. Out-of-court statements by a co-accused cannot be used as corroboration of an alleged accomplice, unless those statements are admissible in the case of the relevant accused. However, in some cases, it is appropriate to draw a distinction between evidence that supports a witness and evidence that corroborates a witness. For example, in *Buck v The Queen*, independent evidence was led to prove that the witness made a telephone call. This could not provide corroboration, because the mere fact of the call did not connect the accused with the alleged crime. But it was left to the jury as non-corroborative evidence which might support the witness' credibility.[306]

263. Inferences about the content of a barrister's instructions, based on the questions asked in cross-examination, are not evidence and cannot be used as corroboration.[307]

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[303] *R v Duke* (1979) 22 SASR 46, 52. See, e.g., *R v Baker* (2000) 78 SASR 103; [2000] SASC 407, [36].

[304] *R v Murch; R v Logan* (2014) 119 SASR 427; [2014] SASCFC 61, [66]. See also *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [339].

[305] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [347]-[363], [458], c.f. [122] (Duggan J). But, also, c.f. *R v Dubois & O'Dempsey* [2016] QSC 176 and *Destanovic v The Queen* (2015) 49 VR 276 (Weinberg and Beach JJA, Maxwell P contra); [2015] VSCA 113.

[306] *Buck v The Queen* (1982) 8 A Crim R 208, cited with approval in *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [339].

[307] *Lander v The Queen* (1989) 52 SASR 424; [1989] SASC 1827.

4.13.2 – Directing the jury about corroboration

264. Directions on corroboration need to explain what corroboration means, so the jury can assess whether the evidence provides corroboration.[308]

265. While judges do not need to use the precise term of "corroboration", [309] it is dangerous to use the word "supports" as a synonym where there is a legal requirement of corroboration, because of the danger that the jury will use evidence which does not meet the legal test of corroboration.[310]

266. The judge and jury have separate roles in relation to corroboration. The judge's role is to identify for the jury what evidence is capable in law of providing corroboration. It is then for the jury to decide whether it accepts the evidence that is suggested to be corroborative and decide whether that evidence does provide corroboration.[311]

267. While this distinction is well-established as a matter of law, it is not desirable to spell that out to the jury. Telling the jury that the judge has ruled that certain evidence is capable of providing corroboration creates a risk that the jury will think the judge has determined the evidence does support the accomplices' evidence. Instead, the judge should introduce the evidence by identifying the evidence as evidence which the prosecution relies upon as corroboration.[312]

268. In a simple case, the judge should identify specific items of evidence that can provide corroboration. In more complex cases, the judge should identify broad categories of evidence that can provide corroboration.[313]

269. Where circumstantial evidence is relied on as corroboration, the judge will need to identify for the jury the competing inferences that the prosecution and defence invite the jury to draw from that evidence and what inferences need to be drawn for the evidence to be corroborative.[314]

270. No particular standard of proof applies before evidence can be used as corroboration. It is not necessary for the jury to find the evidence proved beyond reasonable doubt before

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[308] *R v Byczko (No 1)* (1977) 16 SASR 506, 510, 536–537; *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [29].
[309] *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [29].
[310] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [344]. Citing with approval *R v Kehagias, Leone and Durkic* [1985] VR 107 and *R v Apostilides* (1983) 11 A Crim R 381.
[311] *R v Byczko (No 1)* (1977) 16 SASR 506, 526; *R v Murch; R v Logan* (2012) 119 SASR 427; [2014] SASCFC 61, [50]; *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [29].
[312] *R v Kendrick* [1997] 2 VR 699, 707; *Conway v The Queen* (2000) 98 FCR 204; [2000] FCA 461, [216]; *R v Small* (1994) 33 NSWLR 575, 593.
[313] *R v Sherrin (No 2)* (1979) 21 SASR 250, 255–256.
[314] *R v Byczko (No 1)* (1977) 16 SASR 506, 512.

using it as corroboration.[315] Similarly, the fact that there is a possible innocent explanation for a piece of evidence does not rob it of its capacity to be corroborative.[316]

[315] *Franco v The Queen* (2009) 105 SASR 446; [2009] SASC 370, [28]–[30]; *Doney v The Queen* (1990) 171 CLR 207; [1990] HCA 51.

[316] *R v Baker* (2000) 78 SASR 103; [2000] SASC 407, [39].

4.13.3 – Accomplices

271. Judges must warn the jury of the danger of acting on the uncorroborated evidence of accomplices who give inculpatory evidence against the accused.

272. Unlike for offences such as perjury, the accomplice's evidence does not require corroboration as a matter of law. Instead, the requirement is that the jury must be *warned* that it is dangerous to convict on the uncorroborated evidence of an accomplice.[317]

273. As part of the direction, the judge must identify the evidence which is capable of providing corroboration.[318]

274. If there is no evidence capable of providing corroboration, it is sufficient to warn the jury of the danger of acting on the accomplice's evidence and there is no need to refer to corroboration.[319]

275. The judge must also identify for the jury the main sources of unreliability and so explain the reason why it is dangerous to act on the uncorroborated evidence.[320]

276. The main source of unreliability is the tendency of an accomplice to minimise his or her role and exaggerate the role of others.[321] This was described in more detail in *Kanaan v The Queen*:[322]

> There is a motive for such a witness to construct a false version of the events in order to justify his own behaviour or to shift the blame from himself to others, by downplaying his own role and by either playing up the role of the accused or by blaming an innocent party (such as the accused) for the crime which was committed. In such a case, having given that false version to the police in order to extricate himself from criminal responsibility or to lessen the extent of his own responsibility, the witness has effectively locked himself into that version, and may feel bound, as a matter of self-respect, to repeat that false version when he gives evidence. The evidence of such a witness, moreover, is likely to have a seeming plausibility because of his detailed knowledge of the circumstances in which the crime was committed, and this plausibility may add undeserved weight to what he says about the part played by the accused.

277. In addition, where an accomplice has received a benefit, such as a sentencing discount or indemnity, by promising to give evidence against the accused, the judge may need to point out that the discount or indemnity also may leave the accomplice feeling bound by his or her previous statements, even if they are not true, as otherwise he or she will lose the discount or indemnity.[323] Whether this needs to be part of the direction will depend on whether the matter is adequately explored in evidence, or whether it needs to be reinforced with the authority of the judge's office.[324]

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[317] *Pollitt v The Queen* (1991) 174 CLR 558 (Dawson and Gaudron JJ); [1992] HCA 35.
[318] *R v Sherrin (No 2)* (1979) 21 SASR 250, 255–256; *R v Byczko (No 1)* (1977) 16 SASR 506, 512.
[319] *R v Byczko (No 1)* (1977) 16 SASR 506, 510. See also *R v Carabott* (2002) 83 SASR 293; [2002] SASC 283, [21].
[320] See *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [30].
[321] *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [30].
[322] *Kanaan v The Queen* [2006] NSWCCA 109, [165].
[323] *Kanaan v The Queen* [2006] NSWCCA 109, [166]; *R v Baartman* [2000] NSWCCA 298, [62].
[324] *R v Weiss* (2004) 8 VR 388; [2004] VSCA 73, [56]–[57].

278. In general, the evidence of one accomplice cannot corroborate another accomplice. This is because two accomplices will usually have a common interest in minimising their involvement, and so there is a possibility that the accomplices have conspired to give a common, false account. However, where there is no possibility of joint fabrication, such as where the witnesses are accomplices to different offences and are giving discreditable conduct evidence about the accused, then accomplices can corroborate one another.[325]

279. Where it is unclear whether a person is an accomplice, the judge should modify the accomplice warning to inform the jury that it may disregard the accomplice warning if it is satisfied that the person is not an accomplice. This may also be expressed by telling the jury that the warning must be followed if the jury accepts that the person is an accomplice. As part of these directions, the judge must explain the basis on which the witness might be regarded as an accomplice.[326]

280. There are conflicting decisions on whether an accessory after the fact meets the definition of an accomplice for the purpose of requiring corroboration.[327] In cases where this issue arises, trial judges will need to decide whether to give the warning and, if so, what features of the accessory's evidence make their evidence unreliable.

281. While the corroboration direction warns the jury of the danger of acting on evidence if it is not corroborated, it is not appropriate to tell the jury that the dangers disappear if the evidence is corroborated. Especially in the case of an accomplice, even if the evidence is corroborated, the jury should continue to scrutinise the accomplice's evidence, recognising that the witness is a person with a motive to be untruthful and who may have insight into the offending which allows them to construct plausible lies.[328]

282. In the case of joint trials, the judge has a discretion whether to give an 'accomplice warning' in relation to evidence from a co-accused. The judge will need to consider the interests of justice and the practicality of tailoring a warning in a way that does not unfairly disadvantage either accused. If a judge does give a warning, the judge must make it clear that the warning does not apply to the co-accused's own case, but only in the assessment of that evidence in the case of the other accused.[329]

283. While an accomplice warning must be given despite the wishes of the parties, the warning is only necessary if the accomplice's evidence is in dispute. If the evidence is not

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[325] *R v Kendrick* [1997] 2 VR 699; *Pollitt v The Queen* (1991) 174 CLR 558; [1992] HCA 35. See also *R v Schlaefer* (1992) 57 SASR 423, 442 on mutual corroboration by children.

[326] See *R v Matthews* [2005] SASC 289, [36]–[44]; *R v Murch; R v Logan* (2012) 119 SASR 427; [2014] SASCFC 61, [47]–[48]; *R v Smith and Turner (No 2)* (1995) 64 SASR 1, 26.

[327] See *R v Ready* [1942] VLR 85, 93; *R v Clark* (2001) 123 A Crim R 506; [2001] NSWCCA 494, [50]–[52]; *R v Weiss* (2004) 8 VR 388; [2004] VSCA 73, [54] and compare *R v Andrews* (1992) 60 A Crim R 137; *Davies v Director of Public Prosecutions* (1954) AC 378.

[328] *R v Baker* (2000) 78 SASR 103; [2000] SASC 407, [41]–[55]; *R v Radford* (1993) 66 A Crim R 210, 238; *R v Lawford* (1993) 61 SASR 542, 555; [1993] SASC 4247; *R v Power and Power* (1996) 87 A Crim R 407; [1996] SASC 5653.

[329] *Hay v The Queen* (1994) 181 CLR 41; [1994] HCA 30. See also *R v Rigney* (1975) 12 SASR 30.

disputed, then there is no need to warn the jury about the danger of acting on that evidence.[330]

284. A corroboration warning is not appropriate in relation to disputed oral confessions by prison informers. A disputed oral confession often occurs in circumstances where there is already some material evidence connecting the accused with the alleged offence. In such circumstances, a corroboration direction will risk suggesting that the pre-existing evidentiary material supports the truthfulness and reliability of the alleged confession. Instead, any direction about disputed oral confessions and corroboration should focus on evidence that supports the fact of the confession, rather than the accused's involvement in the alleged offending. This might consist of material which is consistent with the terms of the confession and which was not previously known to the prison informer.[331]

[330] *Jenkins v The Queen* (2004) 79 ALJR 252; [2004] HCA 57, [33].

[331] *Pollitt v The Queen* (1991) 174 CLR 558 (Deane, Dawson and Gaudron JJ); [1992] HCA 35.

Jury direction #4.13.3 – Accomplice warning

I now want to say something about [*witness*].

[*Witness*] is both an important witness for the prosecution and an alleged accomplice of [*accused*].

As an alleged accomplice, [*witness*] has an interest in minimising [his/her] role in the alleged offending. [His/her] evidence may seem plausible, because [he/she] had a detailed knowledge of the offending and so [he/she] can fit [his/her] evidence with other details you have heard.

[*Witness*] may also feel locked in to giving evidence consistent with [his/her] police statement, as otherwise [he/she] could be charged with a crime like perjury for making a false statement to police.

[*Witness*] has also received certain benefits for promising to give evidence against [*accused*]. You have heard that [*identify relevant benefit, either indemnity or sentencing discount*]. While it is perfectly proper for [*witness*] to receive a benefit for promising to co-operate, this can also lock [him/her] in to giving evidence, even if it is false, because if [*witness*] changes [his/her] evidence, then [he/she] may lose the [indemnity / sentencing discount].

For all these reasons, it is dangerous to convict [*accused*] on the uncorroborated evidence of an accomplice unless you have carefully scrutinised it and accept that it is credible and reliable

Evidence is corroborated, or confirmed, when there is independent evidence that shows the accused committed the offence charged. The prosecution relies on [*number*] pieces of evidence which can provide corroboration. These are [*identify potentially corroborative evidence*]. There are no other pieces of evidence that can provide corroboration for the purpose of this warning.

It is for you to decide whether you accept any of this evidence and whether you think it confirms [*witness*]'s evidence that the accused committed the offence charged.

If you do not accept that evidence, or do not find it supports [*witness*]'s evidence, then you must take into account my warning that it is dangerous to convict [*accused*] on the uncorroborated evidence of an accomplice unless you have carefully scrutinised it and are thoroughly convinced it is true and accurate.

If you do find that [*witness*]'s evidence is corroborated, you must still take it into account, in assessing [*witness*], that [he/she] is an accomplice, and so likely has a motivation and good opportunity to give a false account. This may be relevant to deciding whether you accept [*witness*]'s evidence.

[*Refer to relevant prosecution and defence evidence and arguments.*]

4.13.4 – Sexual offence cases

285. Section 34L(5) of the *Evidence Act 1929* (SA) provides that:

> In a trial of a charge of a sexual offence, the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

286. The predecessor to this provision removed the obligation that existed at common law to direct the jury about the need for corroboration of the alleged victim of a sexual offence, along with the law on what evidence can provide corroboration in sexual offence cases. However, a judge retains a discretion to direct the jury about how it approaches the evidence of a complainant in a sexual assault case as part of the judge's general power to provide the jury with advice about the evidence.

287. If a judge chooses to warn the jury about how it approaches the evidence of an alleged victim of a sexual offence, the judge is not bound by the common law rules regarding corroboration. The judge must also make it clear that the jury are free to reject the judge's suggested approach and that the warning is not given as a matter of law.[332] In making any comments of this nature, a judge must be careful not to convey the judge's opinion about how the jury should resolve a disputed issue of fact.[333]

288. If the judge gives a warning in a sexual offence case, the judge should avoid the language of corroboration and should instead use words like "confirmation" or "support".[334]

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[332] *R v Pahuja* (1987) 49 SASR 191, 197 (King CJ), 214–215 (Cox J), 221–222 (Johnston J).

[333] *McKell v The Queen* (2019) 93 ALJR 309; [2019] HCA 5.

[334] *R v Pahuja* (1987) 49 SASR 191, 197–198 (King CJ), c.f. 214–215 (Cox J).

4.13.5 – Young children

289. The common law rule that a jury must be warned about the dangers of convicting on the evidence of a child has been replaced by *Evidence Act 1929* (SA) s 12A. Under this section:[335]

> (1) In a criminal trial, a judge must not warn the jury that it is unsafe to convict on a child's uncorroborated evidence unless—
>
> (a) the warning is warranted because there are, in the circumstances of the particular case, cogent reasons, apart from the fact that the witness is a child, to doubt the reliability of the child's evidence; and
>
> (b) a party asks that the warning be given.

290. The power to give this warning is further limited by s 12A(2), which states:[336]

> (2) In giving any such warning, the judge is not to make any suggestion that the evidence of children is inherently less credible or reliable, or requires more careful scrutiny, than the evidence of adults.

291. Section 12A only relates to, and circumscribes the giving of, a warning that it is 'dangerous to convict' or 'unsafe to convict'. It does not remove the ability of judges to give less forceful directions or comments, such as instructing the jury to scrutinise the evidence closely,[337] or to draw attention to deficiencies in the evidence which are not the product of the witness' age,[338] or warn the jury of the danger of acting on the evidence of a single witness.[339] The section also does not prohibit judicial directions or comments to consider the age of a child complainant.[340]

292. It is unclear how s 12A operates in relation to evidence that may be corroborated. One reading is that the judge only gives the direction when the judge decides that the evidence is uncorroborated. This requires the judge to decide whether, as a threshold issue, there is evidence capable of amounting to corroboration and, if so, the judge cannot give the direction. This would be consistent with the purpose of the amending legislation as remedial legislation to alleviate a common law rule which operated unfairly on child witnesses. The alternative view is that, consistent with the common law approach to uncorroborated evidence, the question of whether the evidence is corroborated is a matter for the jury and, the focus for the judge is whether, setting aside any potentially corroborative evidence, there are 'cogent reasons' to doubt the reliability of the child's evidence.

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[335] *Evidence Act 1929* (SA) s 12A(1).

[336] *Evidence Act 1929* (SA) s 12A(2).

[337] *R v Cheng* [2015] SASCFC 189, [89], [100]–[104]; *R v Warsap* (2010) 106 SASR 264; [2010] SASC 40, [61]; *R v K, MC* [2018] SASCFC 133, [82]–[86].

[338] *R v Haak* (2012) 112 SASR 315; [2012] SASCFC 19, [32].

[339] *R v N, RC* (2012) 112 SASR 399; [2012] SASCFC 37; *R v K, MC* [2018] SASCFC 133, [82]–[86].

[340] *R v Mattson* [2011] SASCFC 114, [12].

293. In deciding whether 'cogent reasons' exist for giving a 'dangerous to convict' warning, the judge will need to consider whether there are reasons to doubt the child's reliability, such as the child's:[341]

- state of cognitive development;
- psychological immaturity;
- susceptibility to influence; or
- other youth-related circumstances.

294. Reasons will be 'cogent' for this purpose when they are 'compelling, convincing and powerful'.[342] Errors or inconsistencies in the child's evidence, a lack of detail or the presence of fanciful details, may amount to cogent reasons, depending on the facts and issues in the case.[343] The reasons for the warning must relate to the juvenile immaturity of the child and other developmental factors listed above. The existence of contrary evidence, including the accused giving evidence denying the charge and other sources of unreliability that are not related to juvenile immaturity and other developmental factors, is not relevant to whether there are cogent reasons for giving the warning.[344]

295. Due to the operation of *Evidence Act 1929* (SA) s 12A(2), any warning about the witness' cognitive development, maturity or suggestibility must focus on the infirmities of the particular witness, rather than by reference to children as a whole, or otherwise suggest that the evidence of an adult generally carries more weight than the evidence of a child.[345]

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[341] *R v Haak* (2012) 112 SASR 315; [2012] SASCFC 19, [31].
[342] *R v Mattson* [2011] SASCFC 114, [20].
[343] *R v Mattson* [2011] SASCFC 114, [20]; *R v Haak* (2012) 112 SASR 315; [2012] SASCFC 19, [31].
[344] *R v Lomman* (2014) 119 SASR 463; [2014] SASCFC 55, [51].
[345] *R v Haak* (2012) 112 SASR 315; [2012] SASCFC 19, [34].

Jury direction #4.13.5A – Dangerous to convict on uncorroborated evidence of children

[*Note: This direction may only be given when a party makes a request under Evidence Act 1929 (SA) s 12A and the judge is satisfied there are cogent reasons for giving the warning. As explained above, it is unclear how this section operates if there is potentially corroborative evidence. If the warning is available where there is potentially corroborative evidence, the judge will need to give the optional direction about assessing that evidence.*]

I will now turn to [*witness*]'s evidence.

[*Remind the jury of key parts of witness' evidence.*]

I must now give you the following warning about [*witness*]'s evidence.

Throughout the case, you heard that [*witness*] [*identify age-related factors which contributed to witness' evidence being unreliable*]. I must warn you, as a matter of law, that because of these matters, [*witness*]'s evidence may be unreliable, and so it would be unsafe to convict on [*witness*]'s evidence standing alone unless you examine [his/her] evidence carefully and, after taking into account these weaknesses in the evidence, you are satisfied beyond reasonable doubt that it is true and accurate.

[*If there is evidence that is capable of providing corroboration, add the following direction:*[346]

When you are examining [*witness*]'s evidence closely, you should consider whether there is other independent evidence to support [him/her]. For this purpose, the prosecution points to the following pieces of evidence as providing independent support. [*Identify potentially corroborative evidence*]. These are the only pieces of evidence which can provide independent support that can reduce the danger of acting on [*witness*]'s evidence.]

[346] See 4.13– Corroboration directions and accomplice warnings for information on the types of evidence that can provide corroboration.

Jury direction #4.13.5B – General direction about the need to scrutinise the evidence of child witness

[*Note: This direction is for general factors leading to the need for a direction on the need to scrutinise the evidence of a child with great care.*]

I will now turn to [*witness*]'s evidence.

[*Remind the jury of key parts of* [*witness*]*'s evidence.*]

There are aspects of [*witness*]'s evidence which require careful scrutiny. In particular [*identify relevant deficiencies in* [*witness*]*'s evidence*]. I direct you that you must carefully consider these issues when you are assessing [his/her] evidence. Ultimately, you will need to decide whether, despite these matters, [*witness*]'s evidence is true and accurate so that it is safe to convict on it.

4.14 – Expert evidence

296. The admissibility of expert evidence is principally a matter of evidence law and is beyond the scope of this Bench Book. However, where expert evidence is led, there are two directions that may be required:

- a direction about the weight a jury should give expert evidence; and
- in cases where DNA evidence is led, a warning about the permissible and impermissible uses of the evidence.

297. In general, where expert evidence is led, the judge should explain the appropriate and inappropriate uses of the evidence. This involves telling the jury:[347]

- it is for the jury to decide what significance and weight to give the evidence;
- while the jury is not obliged to act on the evidence, it must not disregard unchallenged evidence capriciously;
- relevant factors in assessing the evidence included the witness' qualifications, their partiality or impartiality, and the extent to which the expert's evidence accords with other evidence the jury accepts;
- the jury must not use the evidence as a substitute for its own satisfaction of a matter that must be proved as part of the prosecution case; and
- that the opinions are only as good as the facts on which those opinions are based. If the assumed facts are not proved, then the opinion based on those assumed facts will likely be of no value.

298. The jury may reject unchallenged expert evidence if there is other evidence casting doubt on the conclusions of the experts, or if there is evidence that casts doubt on the factual basis for the conclusions reached by the expert witnesses.[348]

299. Where expert evidence is the only evidence on an issue, and the witness' competence and honesty are accepted, the jury should be informed that they should only reject the expert evidence for good reasons.[349]

300. It is for the jury to resolve any dispute between experts and decide who should be believed. It is not necessary to take this task away from the jury because the dispute involves sophisticated or complex evidence.[350] Resolving disputes on expert evidence

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[347] *R v Karger* (2002) 83 SASR 135; [2002] SASC 294, [20]. See also *R v Klamo* (2008) 18 VR 644; [2008] VSCA 75, [44]–[50]; *R v Quist* (2017) 127 SASR 471; [2017] SASCFC 37, [53]. *R v Jaeschke* (2007) 99 SASR 300; [2007] SASC 321, [61]–[66].

[348] *Taylor v The Queen* (1978) 22 ALR 599, 608, 618.

[349] *Taylor v The Queen* (1978) 22 ALR 599, 610.

[350] *R v Velevski* (2002) 76 ALJR 402; [2002] HCA 4, [181]–[182].

includes resolving disputes on the proper procedures that should be used, whether the evidence is accurate, reliable or outmoded or any other conflict between experts.[351]

301. When assessing competing expert evidence, it is appropriate to tell the jury that "it would not be proper to find an issue against the accused by accepting one body of expert evidence and rejecting another unless there was good reason for doing so".[352]

302. Expert psychological evidence can be led to show that a witness had a condition that may lead to behaviours relevant to credibility. When this occurs, the judge must direct the jury that the expert cannot determine matters of credibility and that it is ultimately for the jury to decide whether the witness is credible and reliable.[353]

[351] *R v Pantoja* (1996) 88 A Crim R 554.

[352] *R v Velevski* (2002) 76 ALJR 402; [2002] HCA 4, [36].

[353] *Farrell v The Queen* (1998) 194 CLR 286; [1998] HCA 50, [29]–[30] (Kirby J).

Jury direction #4.14 – Expert evidence and weight

I now turn to the evidence of [*witness(es)*].

The usual rule is that witnesses can only give evidence of facts and not opinions or conclusions from other facts. Drawing conclusions from the facts and evidence is your role as the jury. One exception to that rule is that a properly qualified expert can give evidence of their opinion on matters within their expertise. This is designed to help you so you can draw on that expertise to make your findings of fact. [*Witness(es)*] gave evidence of opinion to you.

There are [two/three] key rules to remember when assessing their evidence. First, you are the judges of the facts. You must decide what evidence to accept and what weight to give it. You can accept or reject the evidence of [*witness(es)*] the same as any other witness. You must not surrender your duty to assess the evidence and blindly follow what expert witnesses say.

Second, you assess the evidence of expert witnesses in the same way as other witnesses. But there are a few other factors to also consider. What were their qualifications? Did they appear impartial, or biased? And how does their evidence sit against other evidence you accept. As part of their evidence, [*witness(es)*] were asked to give their opinion of certain facts based on assuming certain facts. If you find that the facts were different to those assumed by [*witness(es)*], then their opinion will be of limited value or no value.

[*If the evidence is uncontested, add*: Third, while you can reject the evidence of an expert, you must base your verdict on evidence. You must decide rationally. So you can only reject the evidence from [*witness(es)*] if there is a reason to doubt the evidence.]

[*Refer to relevant evidence and arguments.*]

4.15 – Right to silence

4.15.1 – Silence to police

303. The "right to silence" has been described as a "convenient shorthand reference to a collection of principles and rules".[354] One of those principles is that no adverse inference can be drawn against an accused due to his or her decision to exercise the right not to answer police questions.[355]

304. The prohibition against adverse inferences means that the jury must not use the accused's silence as the basis for:[356]

- inferring a consciousness of guilt; or
- giving a defence less weight, or treating a defence as a recent invention, due to a failure to raise that defence at an earlier time.

305. In general, no evidence should be led of the fact that the accused exercised the right to silence.[357] However, if the evidence is led, the judge must tell the jury that it cannot draw any adverse inference from the fact that the accused exercised his or her right not to answer questions. A direction that the accused exercised his or her right to not answer questions is not sufficient, as it does not make clear that the jury cannot draw any adverse inference.[358]

306. The prohibition on adverse inferences applies both to the situation where the accused does not answer any questions, and where the accused chooses not to answer certain questions. In both cases, no adverse inference can be drawn.[359]

307. The prohibition only applies to inferences from the accused's choice to exercise the right to silence. Where the accused answers all questions but lies or omits certain facts or details, those lies or omissions can be the subject of comment and adverse inference.[360] However, the judge should direct the jury about factors the jury should consider in deciding whether a lie or omission should be used adversely. This may include the timing of the police interview, the accused's emotional context and, in the case of an omission, whether there were any questions that ought to have prompted the accused to volunteer the information in question.[361]

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[354] *Tofilau v The Queen* (2007) 231 CLR 396; [2007] HCA 39, [20] (Gleeson CJ), citing *R v Director of Serious Fraud Office, Ex parte Smith* [1993] AC 1, 30. See also *R v Heness* [2009] SASC 243, [104].
[355] *Petty v The Queen* (1991) 173 CLR 95; [1991] HCA 34.
[356] *Petty v The Queen* (1991) 173 CLR 95; [1991] HCA 34; *R v Pelly* (2015) 122 SASR 84; [2015] SASCFC 25, [48]–[51].
[357] *Petty v The Queen* (1991) 173 CLR 95; [1991] HCA 34; *R v Roberts* (2011) 111 SASR 100; [2011] SASCFC 117, [56]–[64].
[358] *R v Roberts* (2011) 111 SASR 100; [2011] SASCFC 117, [64]–[70].
[359] *R v Tran* [2017] SASCFC 99, [33].
[360] *R v Tran* [2017] SASCFC 99, [31]–[42]; *R v Heness* [2009] SASC 243, [107].
[361] *R v Heness* [2009] SASC 243, [110]–[116].

Jury direction #4.15.1A – Silence to police[362]

During the trial, you heard that [*accused*] chose not to answer police questions.

That was [his/her] right and you must not use that against [him/her] in any way. You must not treat it as an admission, or as something that makes the prosecution's case stronger or more persuasive. You also must not treat it as something that makes the defence case weaker.

Remember, it is for the prosecution to prove its case beyond reasonable doubt. You must therefore not use [*accused's*] exercise of [his/her] right not to answer police questions in any way.

Jury direction #4.15.1B – Adverse inference from omissions[363]

When [he/she] was questioned by police, the accused said [*identify relevant statement*]. [He/she] did not mention [*identify relevant omission*].

During the trial, you heard [*identify accused's evidence on the omission*].

You are entitled to contrast what the accused told police with what [he/she] said in evidence. If you find that the two accounts are inconsistent, you are entitled to use that when assessing the weight you give [*accused's*] evidence, and whether that evidence gives rise to a reasonable doubt.

But I give you this warning. Even if you reject all of [*accused's*] evidence, that does not by itself prove guilt. You must still carefully assess whether the prosecution has proved its case beyond reasonable doubt.

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[362] *Note: This direction is designed for use where evidence of the accused's silence to police is admitted. Different directions are required if it is necessary to correct an improper prosecution submission.*

[363] *Note: This direction will only be suitable where the accused has given a seemingly complete account which omits some detail that is later relied upon. See and compare R v Tran [2017] SASCFC 99 at [31]–[42] and R v Heness [2009] SASC 243 at [107] on when this direction is permissible. If the prosecution relies on the omission as demonstrating a consciousness of guilt, then adapt Jury Direction – Use of lies as consciousness of guilt instead.*

4.15.2 – Silence to equal parties

308. The law relating to the right to silence only applies to questioning by a person in authority. The same principles do not apply where statements are made, or the accused is questioned by, a person on equal terms. In that situation, the accused's reaction to the questioning or accusations, including the accused's failure to respond to the third party, is a matter the jury can take into account when it is assessing the evidence.[364]

309. If evidence of silence to equal parties is led, then directions are required on how the jury may use that evidence. While the nature of these directions will depend on how the evidence is relevant to any facts in issue, the following are likely to be common:[365]

- the judge must direct the jury about what it is said the accused has admitted by their silence;
- the jury may only use silence as an admission if they are satisfied that the accused, by his or her silence, has admitted the truth of the accusation; and
- in deciding whether to use silence as an admission of truth, the jury should consider:
  - whether it is satisfied that the accused heard the statement; and
  - whether the circumstances were such that the accused should be expected to have denied the statement.

310. Where the case involves multiple charges, and the statement by the equal party alleges a general course of conduct, the judge should direct the jury that it cannot use the accused's silence as an admission of any particular charge. At most, the accused's silence may be used as any admission of context that the jury can use to assess the evidence on specific charges.[366]

311. To avoid a possible miscarriage of justice, the judge should require the prosecution to identify, in the absence of the jury, what inferences the prosecution says the jury should draw from the accused's silence. This will inform the judge's directions to the jury on the relevance of the evidence.[367]

312. Silence to an equal party can also be relevant for assessing the credibility of a defence. An accused's failure to mention an exculpatory matter to an equal party after the alleged

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[364] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [120]–[125], citing with approval *Parkes v The Queen* [1976] 3 All ER 380; *R v MMJ* (2006) 166 A Crim R 501; [2006] VSCA 226; *Woon v R* (1964) 109 CLR 529, 541.

[365] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [125]–[127], citing with approval *R v MMJ* (2006) 166 A Crim R 501; [2006] VSCA 226, [89]–[91].

[366] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [125]–[127], citing with approval *R v MMJ* (2006) 166 A Crim R 501; [2006] VSCA 226, [89].

[367] *R v Wildy* (2011) 111 SASR 189; [2011] SASCFC 131, [128]–[131].

offending is a matter the jury can consider when deciding whether the suggested defence raises a reasonable doubt.[368]

[368] *R v Singh* (2003) 86 SASR 473; [2003] SASC 344, [146]–[157].

Jury direction #4.15.2 – Silence to equal parties[369]

During [his/her] evidence, [*witness*] said that [*describe relevant evidence of silence*]. I will refer to this as [*witness's*] evidence of [*accused's*] silence.

I must give you some directions about this evidence.

The prosecution relies on this evidence to show [*identify permissible use of evidence*].

You may, if you accept the evidence, use it in this way.

To decide whether to use the evidence in this way, you must take into account the following directions.

First, you can only use [*witness's*] evidence of [*accused's*] silence if you accept that:

- one – the evidence is true;
- two – the accused heard [*witness's*] statement; and
- three – in the circumstances, the accused should be expected to have denied [*witness's*] statement.

Second, the prosecution's use of [*witness*]'s evidence of [*accused*]'s silence is to show that, by [his/her] silence, [*accused*] admitted that [*witness*]'s accusation was true.

Third, you may only use this evidence as part of the prosecution's case if you find that [*accused*], by [his/her] silence, admitted that the accusation was true. The mere fact that [*witness*] accused [*accused*] of [*identify relevant charge*] does not form any part of the prosecution's case.

[369] *Note: This direction is designed for use where the defendant has been accused of committing the offence charged by an equal party. It must be adapted if the evidence of silence emerges in other contexts.*

4.16 – Hearsay evidence

313. Subject to exceptions, hearsay evidence is inadmissible when sought to be tendered for a testimonial use.

314. The scope of the hearsay rule and its exceptions is principally a matter of evidence law and is beyond the scope of this Bench Book. However, there are four issues that hearsay evidence commonly raises for jury directions:

- statements by co-conspirators;
- limited use directions;
- evidence of prior inconsistent statements; and
- evidence of prior consistent statements.

4.16.1 - Statements by co-conspirators

315. Acts and statements by alleged co-conspirators to prove the accused's involvement in an alleged conspiracy are prima facie hearsay or equivalent to hearsay and so are inadmissible.[370]

316. However, an exception to the hearsay rule is recognised when another participant in a criminal enterprise:[371]

- acts or speaks in the accused's presence; or
- acts or speaks in pursuit of the common objective.

317. The second exception only arises if it is established that:[372]

- there was a combination of the type alleged;
- the acts were done or words were uttered by a participant in furtherance of the common purpose; and
- there is reasonable evidence, apart from the acts or words, that the accused was a participant.

318. It is for the trial judge alone to determine whether there is reasonable independent evidence to show that the accused was a participant.[373]

319. The judge will often not be able to determine whether there is reasonable independent evidence of participation until the close of the evidence. If, at the end of the evidence, the judge is not satisfied that there is reasonable independent evidence of participation, then the judge must direct the jury that it may only use the evidence for the limited purpose of deciding if there was a combination, but not whether the accused was a participant.[374]

320. A narrative statement or account of events that have taken place will seldom be something done in furtherance of the common purpose. Instead, the exception will usually relate to directions, instructions or arrangements, or statements that accompany acts to further the common purpose.[375]

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[370] *Tripodi v The Queen* (1961) 104 CLR 1, 7; [1961] HCA 22.
[371] *Tripodi v The Queen* (1961) 104 CLR 1; [1961] HCA 22; *Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39.
[372] *Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39.
[373] *Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39; *R v Gillard and Preston (No 3)* (2000) 78 SASR 279, [79]; [2000] SASC 454, [79]; *R v Karounos* (1995) 63 SASR 451.
[374] *Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39.
[375] *Tripodi v The Queen* (1961) 104 CLR 1, 7; [1961] HCA 22.

321. Where the judge allows the evidence of co-conspirators to be used to prove the accused's participation, the judge should:[376]

- direct the jury that it can use the evidence to prove the nature and extent of the accused's participation;
- identify any shortcomings in the evidence including any difficulties cross-examining the maker of the statement and the absence of corroboration; and
- warn the jury not to conclude that an accused is guilty merely upon the say so of another.

322. While this is commonly called a 'co-conspirator's' exception, it also applies to those alleged to be co-offenders for substantive offences through principles of complicity, or other substantive offences that involve multiple participants, such as drug trafficking.[377]

[376] *Ahern v The Queen* (1988) 165 CLR 87; [1988] HCA 39.

[377] *R v C, S* [2018] SASCFC 125, [20]-[23], [30]-[32], [59]; *R v Kamleh (No 2)* [2003] SASC 269, [236].

Jury direction #4.16.1A – Statements by co-conspirators (Tripodi exception established)

I now need to give you some directions about part of [*witness*]'s evidence.

In general, the law does not allow a jury to use what a person says outside court as evidence to prove the truth of what the person said. To take an example outside this case, if you heard evidence that one witness told another person they saw a blue car, you could not use that as evidence they actually saw a blue car. You would need the witness who saw the car to give evidence in court that they saw a blue car.

In this case, there is an exception to that rule. In this case, you can use [*witness*]'s evidence that [*identify out-of-court statement*] as if this was a statement given in evidence. In other words, you can use it to decide whether and how [*accused*] participated in [*describe relevant agreement*].

Like all evidence, it is for you to decide whether you accept the evidence, and what the evidence means. But it would be dangerous to convict [*accused*] if the only evidence you accept is that [*witness*] said [he/she] was part of [*describe relevant agreement*] in an out-of-court statement. You should look for other evidence that also shows that [*accused*] was part of [*describe relevant agreement*] before you could find [*accused*] guilty.

[*Identify prosecution and defence arguments about the co-conspirator's evidence.*]

Jury direction #4.16.1B – Statements by co-conspirators (Tripodi exception not established)

I now need to give you some directions about part of [*witness*]'s evidence.

In general, the law does not allow a jury to use what a person says outside court as evidence to prove the truth of what the person said. To take an example outside this case, if you heard evidence that one witness told another person they saw a blue car, you could not use that as evidence they actually saw a blue car. You would need the witness who saw the car to give evidence in court that they saw a blue car.

This means that you cannot use [*witness*]'s evidence that [*identify out-of-court statement*] as if this was a statement given in evidence. You can use it to assess whether there was some [conspiracy / agreement / arrangement], but not as evidence that [*accused*] was part of that [conspiracy / agreement / arrangement].

4.16.2 - Limited use directions

323. Where evidence of out-of-court statements is led for a non-hearsay purpose, the judge should direct the jury of the permissible and impermissible uses of that evidence.[378]

[378] See *Ingram v R* [2001] SASC 171, [44]-[47]; *R v Newman* [2011] SASCFC 36, [57]-[58]; *R v Karger* (2002) 83 SASR 135; [2002] SASC 294, [79]-[96].

Jury direction #4.16.2 – Limited use direction

I now need to give you some directions about part of [*witness*]'s evidence.

In general, the law does not allow a jury to use what a person says outside court as evidence to prove the truth of what the person said. To take an example outside this case, if you heard evidence that one witness told another person they saw a blue car, you could not use that as evidence they actually saw a blue car. You would need the witness who saw the car to give evidence in court that they saw a blue car.

This means that you cannot use [*witness*]'s evidence that [*identify out-of-court statement*] as if this was a statement given in evidence. You can only use it to [*identify permissible limited use*].

4.16.3 - Prior inconsistent statements

324. Subject to any exceptions to the hearsay rule, prior inconsistent statements are only relevant to assess the credibility of the impugned witness. The statements cannot be used in a testimonial fashion, and the judge should direct the jury accordingly.[379]

325. It is up to the jury to decide whether statements are relevantly inconsistent and whether that has any impact on its assessment of the witness.[380] While in some cases it will be necessary to warn the jury against accepting the evidence of the impugned witness, in other cases a warning is unnecessary as the potential unreliability is obvious, in the context of the case. For this reason, there is no rule requiring judges to warn juries that witnesses who have made prior inconsistent statements are unreliable.[381]

326. Where the statement is made by the accused, it is not appropriate to tell the jury that they must exercise caution in assessing the accused's evidence.[382]

[379] *Driscoll v The Queen* (1977) 137 CLR 517, 536-537; [1977] HCA 43.
[380] *R v Trabolsi* (2018) 131 SASR 297; [2018] SASCFC 57, [167].
[381] *Driscoll v The Queen* (1977) 137 CLR 517, 522, 536-537; [1977] HCA 43. See also *R v Van Wyk* (2018) 132 SASR 46, [45]; [2018] SASCFC 138, [45].
[382] *R v Van Wyk* (2018) 132 SASR 46; [2018] SASCFC 138, [45].

Jury direction #4.16.3 – Prior inconsistent statements

I now need to give you some directions about part of [*witness*]'s evidence.

In general, the law does not allow a jury to use what a person says outside court as evidence to prove the truth of what the person said. To take an example outside this case, if you heard evidence that one witness told another person they saw a blue car, you could not use that as evidence they actually saw a blue car. You would need the witness who saw the car to give evidence in court that they saw a blue car.

You have heard evidence that [*identify prior inconsistent statement*] for a limited purpose. You can only use it to assess [*witness*]'s credibility. The defence argue, in effect, that since [*witness*] has given different accounts at different times, you cannot accept the evidence [he/she] gave in court.

You cannot use the evidence of [*witness*]'s statements on other occasions for any other purpose. In particular, you cannot use [his/her] statements out-of-court as evidence of what occurred.

4.16.4 – Prior consistent statements

327. One of the main bases for admitting a prior consistent statement is where it is alleged that a witness' evidence is a recent fabrication, or the product of some motive, bias or influence that operated from a particular point in time. In that situation, evidence may be led that the witness made a consistent statement on an earlier occasion to rebut that allegation.[383]

328. Prior consistent statements are allowed only on the basis that they serve to rebut the allegation of invention or influence, by showing that the witness' evidence predates the alleged bias, influence or fabrication. Unless there is an operative exception to the hearsay rule, the prior statement cannot be used in a testimonial fashion.[384]

329. Due to the limited basis on which a prior consistent statement is admitted, the judge will need to direct the jury about the permissible and impermissible uses of the evidence.[385]

330. Evidence of complaint in sexual assault cases is a further form of prior consistent statement, and is dealt with in 2.3.3 – Recent and delayed complaint.

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[383] *The Nominal Defendant v Clements* (1960) 104 CLR 476, 494; [1960] HCA 39. See also *R v Martin (No 2)* (1997) 68 SASR 419; *R v Haydon* (1999) 204 LSJS 443; [1999] SASC 375, [13].

[384] *R v Martin (No 2)* (1997) 68 SASR 419.

[385] See, e.g., *R v R* (1998) 198 LSJS 119; [1998] SASC 6709; *Barry v R* (1995) 183 LSJS 333; [1995] SASC 5303.

Jury direction #4.16.4 – Prior consistent statements

During [*witness*]'s re-examination, [he/she] gave evidence that [*identify time and circumstance of prior consistent statement*].

You may only use this evidence in accordance with this direction.

The evidence is only before you to respond to the argument that [*witness*] invented [his/her] evidence because [*describe circumstance of recent invention*]. If you accept that [he/she] [*describe prior consistent statement*] before [*describe circumstance of recent invention*], then you could find that [he/she] did not invent [his/her] evidence because [*describe circumstance of recent invention*].

However, there is a warning I must give you about this evidence. The fact that [*witness*] spoke about [*describe relevant matter*] outside court does not make [his/her] evidence in court more likely to be true. You must assess the case based on the evidence given in-court, and statements made out-of-court do not become true by being repeated. You can only use this evidence to assess the attack on [his/her] credibility, not to enhance [his/her] credibility.

4.17 – Unreliable evidence

331. In all cases, the judge has a general duty to warn the jury about the dangers of convicting on uncorroborated, unreliable evidence. This obligation was described by the High Court in *Bromley v The Queen* as follows:[386]

> What is required, in a case where the evidence of a witness may be potentially unreliable, but which does not fall within one of the established categories in relation to which the full warning as to the necessity of corroboration must be given, is that the jury must be made aware, in words which meet the justice of the particular case, of the dangers of convicting on such evidence.
>
> …
>
> The warning should be clear and, in a case in which a lay juror might not understand why the evidence of the witness was potentially unreliable, it should be explained to the jury why that is so. There is no particular formula that must be used; the words used must depend on the circumstances of the case.

332. Cases have identified examples of witnesses where the obligation to warn about potential unreliability applies. These include:

- a witness who, soon after the alleged offending, has a schizophrenic episode;[387]
- memory recovered under hypnosis;[388]
- a witness who, due to a combination of mental illnesses and intellectual impairments, has difficulty distinguishing the truth from what he or she imagines to be the truth;[389]
- an important prosecution witness who is an alternative suspect for the offence;[390]
- evidence from prison informers;[391]
- uncorroborated evidence of an oral confession;[392]

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[386] *Bromley v The Queen; Karpany v The Queen* (1986) 161 CLR 315; [1986] HCA 49.

[387] *Bromley v The Queen; Karpany v The Queen* (1986) 161 CLR 315; [1986] HCA 49.

[388] *R v Jenkyns* (1993) 71 A Crim R 1. This is distinguished from forms of counselling aimed at addressing trauma, rather than enhancing memory – *R v Y, K* [2015] SASCFC 94, [29]–[36]. See also *R v Geesing* (1984) 39 SASR 111, raising doubts about the admissibility of memory enhanced by hypnosis in the absence of expert evidence about the reliability of such evidence.

[389] *R v Warsap* (2010) 106 SASR 264; [2010] SASC 40, [68].

[390] *R v Carabott* (2002) 83 SASR 293; [2002] SASC 283, [16]–[23]; *Director of Public Prosecutions v Faure* [1993] 2 VR 497. However, there must be some basis in the evidence for suspecting that the witness is an alternative suspect. Defence assertions or questions to the witness which are denied may not be sufficient: *R v Wanganeen* (2006) 95 SASR 226; [2006] SASC 254, [9], [75]–[85]; *R v Johnson* (2004) 89 SASR 294; [2004] SASC 241, [53].

[391] *Pollitt v R* (1992) 174 CLR 558; [1992] HCA 35.

[392] *Carr v The Queen* (1988) 165 CLR 314; [1988] HCA 47; *McKinney v The Queen* (1991) 171 CLR 468; [1991] HCA 6.

- a person with a history of giving untrue evidence in other proceedings to serve his or her personal objectives;[393] and
- where the principal prosecution witness can reasonably be suggested to have some purpose of their own to serve in giving false evidence.[394]

333. A warning about potentially unreliable evidence is only required if the potential unreliability is not necessarily obvious to a lay jury. The unreliability must stem from a factor that a judge has special knowledge, experience or awareness about.[395]

334. A warning is also not necessary if it is safe to leave the jury to rely on the arguments of counsel. The factor must be sufficiently significant that it requires a direction with the authority of the judge's office.[396]

335. For example, the impact of proven lies on a witness' credibility regarding other statements is obvious and a matter which juries can assess without the help of a judicial direction.[397]

336. Where the potential unreliability stems from a condition that the jury may be assumed to be familiar with, such as the effects of alcohol, anxiety and depression or lack of sleep, and the witness has acknowledged the effect of that condition, it is sufficient to remind the jury of that factor and it is not necessary to warn the jury of the need to scrutinise the evidence or the dangers of convicting on such evidence unless it is supported.[398]

337. Whether a direction is required about the impact of any mental illness will depend on the facts of the case.[399] While some judges have held that effects such as anxiety and depression are within the scope of a jury's understanding,[400] and that judges do not possess any special knowledge about the impact of mental illness,[401] other judges have endorsed giving a warning about the need to scrutinise with great care the evidence of a witness with a mental illness.[402]

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[393] *Hart v The Queen* [2000] WASCA 103, cited with approval in *R v Tran; R v Tran* (2009) 198 A Crim R 23; [2009] SASC 327, [12]–[14].
[394] *R v Southon* (2003) 85 SASR 436; [2003] SASC 205, [36].
[395] *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [30]; *R v Smith* (2017) 129 SASR 237; [2017] SASCFC 153, [41] (citing with approval *Winmar v Western Australia* (2007) 35 WAR 159; [2007] WASCA 244); *R v Miletic* [1997] 1 VR 593, 605–606, cited with approval in *R v Tran; R v Tran* (2009) 198 A Crim R 23; [2009] SASC 327, [4].
[396] *R v Miletic* [1997] 1 VR 593, 605–606, cited with approval in *R v Tran; R v Tran* (2009) 198 A Crim R 23; [2009] SASC 327, [4].
[397] *R v Tran; R v Tran* (2009) 198 A Crim R 23; [2009] SASC 327, [3].
[398] *R v Lindsay* (2016) 126 SASR 362; [2016] SASCFC 129, [21]–[30]; *R v Arnold* [2003] SASC 422, [77].
[399] *R v Kinnear* [2014] SASCFC 30, [45] (Stanley J).
[400] *R v Lindsay* (2016) 126 SASR 362; [2016] SASCFC 129, [21]–[30].
[401] *Bromley v The Queen; Karpany v the Queen* (1986) 161 CLR 315 (Brennan J); [1986] HCA 49; *R v Wanganeen* (2006) 95 SASR 226; [2006] SASC 254, [86]–[90].
[402] *R v V, E* [2007] SASC 162, [18]–[20].

338. The distinction between giving the jury a warning about potentially unreliable evidence and a judge putting the parties' cases to the jury and reminding the jury about important evidence may be subtle and a matter of personal practice by the judge.

339. While no particular form of words is required, it is common for the warning to instruct the jury to carefully scrutinise the evidence,[403] and examine whether there is other evidence to support the impugned witness.[404] Otherwise, the terms of the warning must be adapted to the circumstances which created the need for the warning.[405]

340. Section 12A of the *Evidence Act 1929* (SA) restricts the ability of a judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of a child. This provision does not affect the *Bromley* warning about the need to scrutinise potentially unreliable evidence.[406]

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[403] *R v Maiolo (No 2)* (2013) 117 SASR 1; [2013] SASCFC 36, [187].

[404] *R v Hunt* [2002] SASC 195, [31]; *R v Corrigan* (1998) 74 SASR 454; [1998] SASC 6684.

[405] *Bromley v The Queen; Karpany v The Queen* (1986) 161 CLR 315 (Brennan J); [1986] HCA 49; *R v Hunt* [2002] SASC 195, [22]–[23].

[406] *R v J, AP* (2012) 113 SASR 529; [2012] SASCFC 95, [29]; *R v Warsap* (2010) 106 SASR 264; [2010] SASC 40, [61]–[70].

Jury direction #4.17 – Unreliable evidence

I now want to say something about [*witness*].

The defence have argued that you should not accept [*witness*]'s evidence. In particular [*identify features of* [*witness*]'s *evidence that require an unreliability warning*].

The prosecution responds that you can accept [*witness*]'s evidence because [*identify supporting evidence and prosecution submissions*].

In relation to these arguments, I give you this warning. [*Identify key unreliability features*] can make a person's evidence unreliable, and therefore dangerous to rely on. You must carefully examine [*witness*]'s evidence, and consider whether there is any other evidence that supports [his/her] evidence, before deciding whether [*witness*]'s evidence is true and accurate.

4.18 – Recent possession

341. Discovery of stolen goods in the accused's possession, soon after the alleged theft, is described as evidence of "recent possession". In the absence of a reasonable explanation, recent possession provides a basis for the jury inferring that the accused either stole the goods or received them knowing that they were stolen. The principles concerning recent possession were described by the High Court in *Bruce v The Queen*:[407]

> Where an accused person is in possession of property which is recently stolen, the jury is entitled to infer as a matter of fact, in the absence of any reasonable explanation, guilty knowledge on the part of the accused. Such an inference will be drawn from the unexplained fact of possession of such property and not from any admission of guilt arising from the failure to proffer an explanation. It is the possession of recently stolen property in the absence of explanation or explanatory circumstances, which enables the inference to be drawn. Thus the absence of any reasonable explanation must not itself be explicable in a manner consistent with innocence.
>
> The accused must have had an opportunity to give an explanation in circumstances where, if he is innocent, an explanation might reasonably be expected.

342. Principles relating to recent possession were once considered a legal doctrine which gave rise to a presumption of guilt once the prosecution proved the accused was in unexplained possession of stolen goods. This is now seen as inconsistent with the prosecution's onus of proof, and principles relating to recent possession are now seen as an application of the rules of evidence and the rules relating to circumstantial evidence.[408]

343. Directions on recent possession must therefore be in the form of guidance on how to approach a piece of circumstantial evidence, rather than directions on a legal rule. Describing the issue in terms of "the legal doctrine of recent possession" or drawing a distinction between recent possession and circumstantial evidence has the potential to mislead the jury and suggest that the evidence has greater weight than other items of circumstantial evidence.[409]

344. When a case raises issues of recent possession, there is an antecedent question of law of whether the evidence is capable of supporting an inference of recent possession.[410]

345. In *R v Wanganeen,* King CJ explained the directions that should be given concerning recent possession:[411]

> The significance of the possession of recently stolen property is that it is a potentially incriminating fact which, if unexplained, is capable of supporting the inference of guilt of a crime in the course of which

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[407] *Bruce v The Queen* (1987) 74 ALR 219; [1987] HCA 40. See also *Trainer v The King* (1906) 4 CLR 126, 132; [1906] HCA 50.
[408] *R v Wanganeen* (1988) 50 SASR 433, 434–435, 442; *R v Beljajev* [1984] VR 657, 664.
[409] *R v Wanganeen* (1988) 50 SASR 433, 436–437.
[410] *R v Wanganeen* (1988) 50 SASR 433, 435.
[411] *R v Wanganeen* (1988) 50 SASR 433, 435–436.

> the property was stolen or at least of receiving the property knowing it to have been stolen. No special rule of law is required to validate that process of reasoning.
>
> …
>
> A sound summing up in a case which depends to a significant degree upon the fact of possession of the recently stolen property will point out to the jury that such possession is capable, in appropriate circumstances, of supporting an inference of guilt of any crime in the course of which the property was stolen or, depending upon the circumstances, of receiving the property knowing it to have been stolen. It will explain that whether such an inference should be drawn beyond reasonable doubt depends upon all the circumstances of the case including the proximity in time of the possession to the theft and anything that is known of the circumstances of the possession, as well as upon the weight which is attached to any explanation which the accused has given as to the circumstances in which he came into possession of the property. It should, generally speaking, relate recent possession to the onus of proof, by directing the jury that if any explanation given by the accused, or the other circumstances of the case, or both, leave the jury in doubt as to whether the accused stole or criminally received the property as the case may be, the case against him has not been proved and the verdict should be not guilty, *R v Aves* (1950) 34 Cr App R 159. It may be necessary, depending on the facts, to direct the jury that although no inference adverse to the accused is to be drawn from his exercising his right to silence either before trial or at trial, they are nevertheless entitled, if they see fit, to draw the inference of guilt from the fact of possession if the exercise of the right to silence leaves the possession unexplained, *R v Bruce* (supra). It may also be necessary to distinguish between such inferences as the jury is prepared to draw from the fact of possession of the property and such inferences as it is prepared to draw from the giving of a false explanation. If the jury is satisfied beyond reasonable doubt that the explanation given by the accused for the possession of the property is false, it may draw an inference of guilt from the possession of the recently stolen property, no truthful explanation having been offered. Quite independently of the possession of the property the jury may treat the false explanation as evidence of guilt if, in the circumstances, it tends to indicate a consciousness of guilt of the crime charged.

346. There are three requirements that must be met before a jury can draw an inference from recent possession:

- the jury must find the accused was in possession of property;
- the jury must find the property was recently stolen; and
- the jury must find that there was no reasonable explanation for the accused's possession of stolen property.

347. While there is authority that these matters must be proved beyond reasonable doubt,[412] that authority predates *Shepherd v The Queen*[413] and so must be taken to be qualified by the principles established in *Shepherd* concerning when intermediate facts needs to be proved beyond reasonable doubt. See 3.7 – Circumstantial evidence for more information.

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[412] *R v Khalil* (1987) 44 SASR 23, 33.

[413] *Shepherd v The Queen* (1990) 170 CLR 573 (Dawson J); [1990] HCA 56. See also *Chamberlain v The Queen* (1984) 153 CLR 521, 535 (Gibbs CJ and Mason J); [1984] HCA 7.

348. Proof that the accused was in exclusive or joint possession of the property most often arises as an issue where the goods are located in a place that others could also access.[414]

349. It will not always be necessary to explain to the jury what the word "recent" means. It is an ordinary word and it is only if the jury requires assistance that the judge must explain that the time involved may expand or contract depending on the nature of the goods and whether they would usually be retained or passed on.[415]

350. For the purpose of assessing whether the property was *recently* stolen, the jury must consider the time between the alleged theft and when the accused was seen exercising possession over the property. Depending on the availability of witnesses, this may be earlier than when police discover the property in the accused's possession.[416]

351. The jury cannot draw an inference from recent possession unless satisfied that the possession is unexplained. This includes being satisfied beyond reasonable doubt that any explanation given by the accused is false.[417]

352. If the accused has given multiple explanations at different times, then the jury will need to consider all of those explanations. It is not appropriate to limit the jury's consideration to an explanation given in the witness box.[418]

353. For the purpose of rejecting the explanation as false, it is not necessary to decide whether the false explanation stems from consciousness of guilt or another reason. However, the judge may need to explain to the jury how the process of assessing an explanation for the purpose of recent possession interacts with directions on lies as consciousness of guilt.[419]

354. It is not appropriate to direct the jury that recent possession allows an inference of "guilty knowledge". Instead, the judge should spell out that the inference is that the accused either stole the property or received it knowing that it had been stolen.[420]

355. Directions on recent possession should also spell out that if the jury is satisfied that the accused either stole the property or knowingly received it, but cannot determine which, then the jury should convict the accused of the less serious offence. This requires the judge to decide which offence, in the circumstances, is the less serious offence. Seriousness is usually determined by the maximum penalty that attaches to each offence, but the circumstances of the case might call for a different approach.[421]

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[414] *R v Khalil* (1987) 44 SASR 23, 33.
[415] *R v Wanganeen* (1988) 50 SASR 433, 435; *R v Khalil* (1987) 44 SASR 23, 25–26, c.f. 35–37 (Johnston J) and *R v Beljajev* [1984] VR 657.
[416] *R v Khalil* (1987) 44 SASR 23, 25.
[417] *R v Weetra* (1996) 187 LSJS 317 (Perry J).
[418] *R v Wanganeen* (1988) 50 SASR 433, 437, 443–448.
[419] *R v Weetra* (1996) 187 LSJS 317 (Perry J); *R v Wanganeen* (1988) 50 SASR 433, 436.
[420] *Ryman v The Queen* [1991] SASC 3061.
[421] *Gilson v The Queen* (1991) 172 CLR 353; *Ryman v The Queen* [1991] SASC 3061.

356. In deciding whether the accused stole or received the property, it is appropriate to consider the nature of the property and the time or distance between the alleged theft and the accused's possession.[422]

357. It is not always necessary to direct the jury about recent possession. The need for directions depends on the circumstances of the case.[423]

[422] *Raptopoulos v Police* [2005] SASC 374, [13].
[423] *R v Weetra* (1996) 187 LSJS 317 (Lander J).

Jury direction #4.18 – Recent possession

I now turn to the evidence that [*describe recent possession evidence*].

The prosecution says that you can use this evidence to show that [*accused*] either stole the goods or received them knowing that they were stolen. In other words, the prosecution says that the time between when the goods were stolen and the accused was found in possession was so short that [he/she] could not have acquired the goods innocently.

There are three matters you must consider before using the evidence in this way.

First, did the accused possess the goods?

[*Identify evidence and arguments relevant to possession.*]

Second, were the goods were recently stolen?

It is a matter for you to determine whether they were recently stolen. In deciding this, you should consider the nature of the goods, and how frequently goods of that nature change hands.

[*Identify evidence and arguments relevant to whether the goods were "recently" stolen.*]

Third, is there a reasonable explanation for the accused's possession of the goods?

That is, you must exclude the possibility that [*identify proposed explanations*]. If you cannot exclude that as a reasonable possibility, then you cannot find the accused guilty of this offence.

[*If the accused has not provided an explanation, add the following section*: In this case, the accused has exercised [his/her] right to stay silent. You have not heard from the accused. As a result, you have not heard the accused [himself/herself] say why [he/she] had the goods. I have warned you that you must not draw any inference against the accused from [his/her] choice to stay silent. It cannot supplement the prosecution's case. But this does not stop you from finding that there was no explanation for the accused possessing recently stolen goods. There is an important difference between using the accused's silence against [him/her], which is prohibited, and assessing all the evidence to find that there is a reasonable explanation available for the accused's possession of the goods, which is permissible.]

[*Identify evidence and arguments relevant to whether there was a reasonable explanation.*]

If you accept these three matters, then you can use that as a basis for inferring that the accused either stole the goods or received them knowing they were stolen.

I must emphasise that it is up to you to decide whether to draw this inference, and you must decide this based on all the evidence in the case.

[*If the jury may be unable to distinguish between a conclusion of theft and a conclusion of knowingly receiving goods, add the following section*: I have told you that the prosecution uses this evidence as a basis for arguing that the accused *either* stole the goods or received them knowing they were stolen. If you accept this argument, then you will need to look for other evidence to decide *which* of those two offences is proved. If you are unable to decide between the two offences, then there is a rule of law to help you choose. It is that you choose the less serious offence. In this case, that is [*identify which offence is less serious*]. You only use this rule if you are satisfied beyond reasonable doubt that the prosecution has proved the accused *either* stole the goods or received them knowing they were stolen but are unable to choose between those two options.]

CHAPTER 5: OTHER MATTERS ARISING IN FINAL DIRECTIONS

5.1 – Alternative verdicts

1. Alternative verdicts relate to both charged and uncharged alternative offences.

2. Charged alternative offences are charges on the Information that are identified by the prosecution as alternative offences relating to the same incident or event.

3. Uncharged alternative offences are offences which, either by statute[1] or common law, are available as alternative findings based on a charge on the Information.

4. At common law, uncharged alternatives are those offences where the definition of the alternative offence is necessarily included within the definition of the charged offence.[2] This requires a comparison of the elements of the two offences, rather than a comparison of the evidence led at the trial.[3]

5. The judge has a discretion whether to leave uncharged alternative offences to the jury.[4]

6. In exercising this discretion, the judge must consider whether it is procedurally fair to put the lesser alternative to the jury in the circumstances of the case.[5] This may require a consideration of the relative gravity of the two offences and whether the accused could be said to be on notice of the lesser charge.

7. Where there are alternative offences available on the Information and evidence, the judge does not need to enter a verdict of acquittal immediately upon finding no case to answer on the charged offences. Instead, the judge may allow the trial to continue on the uncharged alternative offences.[6]

8. Section 57(3) of the *Juries Act 1927* (SA) facilitates the procedure for the jury determining uncharged alternatives. It provides that where there is a charged offence (the major offence) and an uncharged alternative:

    (a) the jury must consider whether the accused is guilty of the major offence before considering whether he or she is guilty of the alternative offence; and

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[1] See, e.g., *Criminal Law Consolidation Act 1935 (SA)* s 75, which establishes that indecent assault, common assault and attempts to commit either offence are statutory alternatives to rape, compelled sexual manipulation and unlawful sexual intercourse.

[2] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [29]; *R v McLaren* (1996) 189 LSJS 466, 468; [1997] SASC 5986.

[3] *R v Winner* (1989) 39 A Crim R 180, 181.

[4] *R v Carson* (1991) 92 Cr App R 236, 238, quoted with approval in *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [44]. See also *R v Tilley* (2009) 105 SASR 306; [2009] SASC 277, [47]–[48]; *Benbolt v The Queen* (1993) 60 SASR 7.

[5] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [29].

[6] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [31]; c.f. *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [70]–[72] (Kourakis CJ), [257]–[258] (Vanstone J).

(b) if the jury reaches a verdict (either unanimously or by majority) that the accused is not guilty of the major offence but then, having been in deliberation for at least 4 hours, is unable to reach a verdict on the question of whether the accused is guilty of the alternative offence—

(i) the accused must be acquitted of the major offence; and

(ii) the jury may be discharged from giving a verdict in respect of the alternative offence; and

(iii) fresh proceedings may be taken against the accused on a charge of the alternative offence.

5.1.1 – Duty to leave uncharged alternatives

9. Different principles apply in determining whether to leave an alternative charge of manslaughter and any other alternative charges.

10. In the case of murder and manslaughter, the judge must direct the jury about the availability of an alternative verdict of manslaughter whenever it is open on the evidence. Failure to leave manslaughter where it is open will likely involve a substantial miscarriage of justice. The forensic decisions of counsel, including an accused's desire to run a case as 'murder or nothing', do not affect the judge's duty to leave manslaughter as an alternative offence.[7]

11. For other offences, the court must take into account the forensic choices of counsel and determine whether the fairness of the trial requires that the uncharged alternative be left.[8]

12. In assessing what fairness requires, the court will take into account that it is for the prosecution to identify what charges it wishes to bring and the defence is entitled to choose the issues which are in contest. The obligation to ensure fairness may also require the judge to direct the jury about an alternative where the defence requests that this be done even if, due to the forensic difficulty of running inconsistent arguments, the defence does not address the jury on that issue.[9]

13. The obligation to leave uncharged alternatives is narrower than the obligation to direct the jury about defences which have not been relied upon. If the evidence raises the issue of a defence, then the duty is on the prosecution to negate that defence. But the mere fact that an alternative charge is open on the evidence is not enough to require the judge to direct the jury about that charge.[10]

14. In deciding whether to leave an alternative verdict, Doyle CJ explained:[11]

> A practical judgment has to be made by the judge, having regard to the issues actually raised, and to the findings or verdicts open as a matter of law and fairly or practically open on the facts.

15. This requires the trial judge to consider the matters in contest between the parties and whether there is a view of those facts which could support the alternative charge. The

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[7] See *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64; *Gilbert v The Queen* (2000) 201 CLR 414; [2000] HCA 15.

[8] *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, [6]. This overrode earlier South Australian authorities which had held that whether the offence was open on the evidence was the primary consideration in deciding whether to leave an alternative, subject to a residual discretion not to leave an alternative if it would cause unfairness to the accused. See, e.g., *R v Perdikoyiannis* (2003) 86 SASR 262; [2003] SASC 310, [47]; *R v Trewartha* (2001) 123 A Crim R 259; [2001] SASC 264, [35]–[36]; *Benbolt v The Queen* (1993) 60 SASR 7.

[9] *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, [26]–[38].

[10] *James v The Queen* (2014) 253 CLR 475; [2014] HCA 6, [33].

[11] *R v Trewartha* (2001) 123 A Crim R 259; [2001] SASC 264, [36].

judge must, however, guard against trifling offences which, while technically available, may distract the jury.[12]

16. The judge must also focus on the evidence led, and consider whether the prospect of the jury convicting the accused of the alternative offence rather than the major offence is fanciful.[13]

[12] *R v King* (2004) 59 NSWLR 515; [2004] NSWCCA 20, [6]–[13].
[13] *R v King* (2004) 59 NSWLR 515; [2004] NSWCCA 20, [111].

5.1.2 – Aggravated offences

17. Section 5AA of the *Criminal Law Consolidation Act 1935* (SA) specifies a series of factors which may make an offence an aggravated offence. Individual offences specify different penalties for the basic offence and the aggravated offence.

18. Section 5AA aggravating factors must be specified on the Information and, if more than one is specified, the jury must state which aggravating factors it finds established.[14] This may be done by asking the jury which factors it finds proved after taking a verdict on the charge.[15]

19. Section 5AA aggravating factors are relevant when determining sentence. A court cannot rely on a factor which is particularised and not accepted by the jury. However, if aggravating factors are not particularised, the sentencing court may take any aggravating factors it finds into account, within the maximum penalty set for the basic offence.[16]

20. As with all uncharged alternatives, the judge has a discretion whether to leave the basic offence to the jury. See 5.1.1 – Duty to leave uncharged alternatives, above, for information on how to exercise that discretion.

21. See the further discussion in 6.3 – Aggravated offences.

[14] *Criminal Law Consolidation Act 1935* (SA) s 5AA(3), (4).
[15] *R v Sumner* (2013) 117 SASR 271; [2013] SASCFC 82, [30]–[38].
[16] *Criminal Law Consolidation Act 1935* (SA) s 5AA(6).

5.2 – Unanimous and majority verdicts

22. Section 57 of the *Juries Act 1927* (SA) sets two conditions for when the court may take a majority verdict:[17]

    - the jury has remained in deliberation for 4 hours; and
    - the jurors have not then reached a unanimous verdict.

23. Section 57(2) prohibits majority verdicts of guilty for murder and treason. This does not prevent a majority verdict of not guilty for these offences.

24. Majority verdicts of both guilty and not guilty are not available in relation to trials for Commonwealth offences.[18]

25. A judge has a discretion whether to allow the jury to return a majority verdict. In deciding whether to exercise that discretion, the judge will consider whether further discussion may assist the jury reach a unanimous verdict, or whether the jury is deadlocked. The judge will not normally accept a majority verdict the moment the jury has been deliberating for four hours.[19]

26. In deciding whether to take a majority verdict, the court is not required to investigate whether the jury may be able to reach a unanimous verdict with more time.[20]

27. A jury informing the court of its difficulty reaching a verdict should not disclose their votes or voting patterns. If this does occur, then the judge should not disclose that information to the parties for the purpose of inviting submissions on whether to allow a minority verdict or to give a perseverance direction. Such information is also irrelevant to the judge's decision on whether to allow a majority verdict or to discharge the jury and the judge should disregard the information.[21]

28. Cases have expressed different views on whether it is appropriate to refer to the possibility of majority verdicts in the summing up. Arguments for and against include:

    - it is undesirable to focus the juror's attention on the possibility of a majority verdict at a time when they should be working towards a unanimous verdict;[22]

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[17] A majority verdict is defined in *Juries Act 1927* (SA) s 57(4) as:
- 10 or 11 jurors, where the jury consists of 12 jurors;
- 10 jurors, where the jury consists of 11 jurors; and
- 9 jurors, where the jury consists of 10 jurors.

[18] *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44; *R v Glynn* (2002) 82 SASR 426; [2002] SASC 117 (Wicks and Gray JJ, Perry J dissenting).

[19] See *R v King* [2007] SASC 358, [46]–[48].

[20] *R v Tropeano* (2015) 122 SASR 298; [2015] SASCFC 29, [102].

[21] *Smith v The Queen* (2015) 255 CLR 161; [2015] HCA 27. See also *Deemal-Hall v Director of Public Prosecutions (Cth)* (1995) 65 SASR 495.

[22] *R v Harrison* (1997) 68 SASR 304, 306 (Cox J).

- the deliberative process involved in working towards a unanimous verdict is different to that involved in a majority verdict;[23]
- it is impractical to conceal knowledge of majority verdicts from a jury;[24]
- as jurors are called for a month, it becomes increasingly likely as the month continues that a juror will have been on a trial where a majority verdict was allowed.[25]

29. The current view is that it is a matter for individual judges to decide whether to refer to the possibility of majority verdicts. If the judge does choose to refer to majority verdicts, the judge should emphasise the desirability of unanimity.[26]

30. The judge should seek submissions from the parties before interrupting the jury's deliberations to inform them of the power to return majority verdicts after four hours.[27]

31. It is not appropriate to bring the jury back to court immediately after four hours to ask if they have a verdict or can return a majority verdict. Such a process puts improper pressure on the jury.[28]

32. A judge should only bring a jury back to court before it has indicated it has reached a verdict to ask if they require more time for deliberating or to ask if they are having difficulty in reaching a verdict. In the latter case, the judge may assist the jury by giving a perseverance direction.[29] See 5.3 – Perseverance direction – *Black* direction.

[23] *Cheatle v The Queen* (1993) 177 CLR 541, 552–553; [1993] HCA 44.
[24] *R v K* (1997) 68 SASR 405, 413–414.
[25] *R v K* (1997) 68 SASR 405, 413–414.
[26] *R v Tropeano* (2015) 122 SASR 298; [2015] SASCFC 29, [110].
[27] *R v Tropeano* (2015) 122 SASR 298; [2015] SASCFC 29, [110]; *Rusovan v The Queen* (1994) 62 SASR 86.
[28] *Rusovan v The Queen* (1994) 62 SASR 86; *R v Hamitov* (1979) 21 SASR 596, 599; *R v Harrison* (1997) 68 SASR 304.
[29] *Rusovan v The Queen* (1994) 62 SASR 86.

5.2.1 – Extended jury unanimity

33. In some cases, the judge may need to direct the jury about the need for 'extended jury unanimity'. This concept refers to the need for the jury to agree not only on the result, but on the basis for the result.

34. Different courts have developed different tests for when extended jury unanimity is required.[30] In South Australia, the test of whether there are "materially different issues or consequences"[31] has been criticised as inherently uncertain.[32]

35. In *R v McCarthy,* Kourakis CJ and Peek J considered that in some cases it is appropriate to ask whether the alternate bases of liability are "mutually destructive". This will occur if some members of the jury find the case proved on a factual basis which would preclude them from agreeing to another factual basis. If so, then the jury must agree on the basis of its decision. In applying this test, the court will need to consider how significant, in the context of the case, is the evidence that would lead to inconsistent conclusions.[33]

36. The court will also need to consider whether acceptance of one factual basis necessarily involves acceptance of the second factual basis, even if the converse is not true. In that situation, there will not likely be a requirement for extended jury unanimity.[34]

37. The need for extended jury unanimity in manslaughter cases which involve both unlawful and dangerous act manslaughter and negligent manslaughter will depend on the facts of the case. Where the same act is relied upon for both forms of liability, and there is no inconsistency in finding the act either negligent or criminal, extended unanimity is not required.[35]

38. Extended unanimity is rarely required where the jury must consider both unlawful and dangerous act manslaughter and provocation manslaughter. In such cases, a finding of provocation will generally be consistent with a finding of an unlawful and dangerous act.[36]

39. Extended jury unanimity will rarely be required in cases where the jury are asked to decide whether the accused was the principal offender or a secondary party, because such cases are usually decided on a common evidentiary foundation which could support either conclusion, but that some jurors may accept additional evidence which allows them to make a more specific finding.[37]

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[30] See *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [230]–[300].
[31] *R v Leivers* [1999] 1 Qd R 649; *R v Pringle* [2017] SASCFC 9, [125]–[136].
[32] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [4], [266].
[33] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [5]–[6], [241]–[245].
[34] *R v Pringle* [2017] SASCFC 9, [131]–[134].
[35] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [8].
[36] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [9].
[37] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [6].

40. Another test has been that where the prosecution relies on a number of discrete acts, any one of which is independently capable of proving guilt, the jury must unanimously agree on at least one of those discrete acts.[38]

41. In *Ribbon v The Queen*, the approach in this latter type of case was summarised as follows:[39]

> In determining whether it is necessary to give an extended unanimity direction in that second type of case, a distinction may be drawn between cases in which the discrete acts are relied upon as independently capable of proving an essential ingredient of the crime charged, and cases in which the discrete acts are relied upon merely as facts that might be found in considering the evidence led in support of an essential ingredient. As the jury must be unanimous as to their conclusion that an essential ingredient of an offence has been established, but need not be unanimous as to the evidentiary route or pathway by which they reach that conclusion, an extended unanimity direction will be required in the former situation, but not in the latter situation.
>
> In drawing this distinction, it will be relevant to have regard to not only the nature of the charge, but also the way the prosecution case is formulated and conducted, and the nature of the acts relied upon and the issues to which they give rise. If the offence charged, and the substance of the prosecution case, is one involving a continuous course of conduct or is reliant upon the cumulative effect of all of the evidence led in respect of the relevant ingredient, then it is unlikely that an extended unanimity direction will be required. However, where the prosecution case relies upon more than one act said to be independently sufficient to establish the relevant ingredient, and those acts are quite separate or different in nature (for example, by reason of their timing, location or circumstance, or by reason of the issues to which they give rise), then such a direction may well be required. The distinction will sometimes be a difficult one to draw, and involve questions of degree.

42. In the case of dishonesty offences with multiple misrepresentations, the jury will need to agree on at least one of those misrepresentations.[40]

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[38] *R v Walsh* (2002) 131 A Crim R 299; [2002] VSCA 98; *R v Klamo* (2008) 18 VR 644; [2008] VSCA 75; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [122]; *Lane v The Queen* (2018) 92 ALJR 689; [2018] HCA 28 at [45]; *Ribbon v The Queen* [2019] SASCFC 130 at [80], [260]–[261].

[39] *Ribbon v The Queen* [2019] SASCFC 130 at [260]–[261].

[40] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [7].

5.2.2 – Majority verdicts and mental incompetence

43. The trial judge has a discretion whether to begin with a trial of the objective elements or with a trial of the accused's mental competence. In the trial of the accused's mental competence, the accused bears the onus of rebutting the presumption of competence on the balance of probabilities. In cases such as murder where a majority verdict is not available, the court may accept a finding that the accused was mentally incompetent by majority, but require a unanimous decision that the presumption of competence has not been rebutted.[41]

[41] *R v W–B* (1999) 73 SASR 45; [1999] SASC 147, [21], [26].

5.3 – Perseverance direction – *Black* direction

44. When the jury are encountering difficulty reaching a verdict, the judge may tell the jury that each juror has a duty to give a verdict according to the evidence, and should listen to the views of fellow jurors, weigh them objectively and a juror may change his or her mind if honestly persuaded that his or her earlier view was not well founded.[42]

45. The High Court has identified the suggested terms of a perseverance direction. This is extracted below under Jury direction #5.3 – Black direction

46. It is a matter of judgment for the judge to decide how to respond when informed that the jury is unable to reach a verdict. The judge will need to consider whether to give the jury more time and, if so, whether a perseverance direction should be given.[43]

47. The judge should not invite extended submissions on whether to give a perseverance direction.[44]

48. Perseverance directions should not tell the jury:[45]

    - that there is public inconvenience and expense if jurors are unable to reach a verdict;
    - that the duty of the jury is to operative collectively; or
    - that there must be a certain amount of give and take and adjustment.

49. While judges can depart from the High Court's formula, or give abbreviated instructions about the desirability of reaching a verdict, it is dangerous to do so.[46]

50. It is not appropriate to give the jury the impression that they are under a time limit, or must decide the case within a certain time.[47]

51. Informing the jury that if they do not reach a verdict on a Friday afternoon, they can resume their deliberations the following Monday (even if that is outside the juror's allotted sitting month) does not put improper pressure on the jury to reach a verdict.[48]

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[42] *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.
[43] *Deemal-Hall v Director of Public Prosecutions (Cth)* (1995) 65 SASR 495.
[44] *Deemal-Hall v Director of Public Prosecutions (Cth)* (1995) 65 SASR 495.
[45] *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.
[46] *R v Harrison* (1997) 68 SASR 304.
[47] *R v Harrison* (1997) 68 SASR 304.
[48] *R v El Rifai* [2012] SASCFC 98, [111] (David J), [145] (Kelly J) (Gray J contra at [58]-[60]); *R v Nguyen* [2018] SASCFC 87, [8], [45].

Jury direction #5.3 – *Black* direction

Members of the jury,

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

Each of you has sworn or affirmed that you will give a true verdict according to the evidence. That is an important responsibility. You must fulfil it to the best of your ability. Each of you takes into the jury room your individual experience and wisdom and you are expected to judge the evidence fairly and impartially in that light. You also have a duty to listen carefully and objectively to the views of every one of your fellow jurors. You should calmly weigh up one another's opinions about the evidence and test them by discussion. Calm and objective discussion of the evidence often leads to a better understanding of the differences of opinion which you may have and may convince you that your original opinion was wrong. That is not, of course, to suggest that you can, consistently with your oath or affirmation as a juror, join in a verdict if you do not honestly and genuinely think that it is the correct one.

Experience has shown that often juries are able to agree in the end, if they are given more time to consider and discuss the evidence. For that reason, judges usually request juries to re-examine the matters on which they are in disagreement and to make a further attempt to reach a verdict before they may be discharged. So, in the light of what I have already said, I ask you to retire again and see whether you can reach a verdict.

5.4 – Use of written directions

52. Written directions are an accepted and commonplace aid to a judge's summing up.[49] These directions often provide summaries of the elements of offences and an explanation of relevant defences.[50]

53. Any statements of elements or questions should be set out in logical order.[51]

54. Written directions are especially useful where the law is complex (such as directions on self-defence), or where there are a number of alternative verdicts the jury must consider.[52]

55. Counsel must have an adequate opportunity to comment on proposed written directions. This means that counsel must receive the proposed written directions "in a timely fashion well before the oral summing up is commenced".[53]

56. The judge should ensure the language of the written direction is consistent with the oral direction.[54]

57. Written directions should be limited to the law and should not discuss the facts or the process the jury might follow in reaching its conclusions.[55]

58. If the judge does include any discussion of the facts or arguments, the direction must be fair and balanced.[56]

59. The judge must introduce and explain the significance of any written directions as part of the oral directions.[57]

60. Written directions cannot be used as a substitute for oral directions,[58] though it is not necessary to explicitly tell the jury this in all cases.[59] While there may be cases in which a judge wishes to rely solely on the words written in an aide-memoire, it is not

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[49] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [36]; *Feutrill v The Queen* (2010) 272 LSJS 507; [2010] SASCFC 48, [51].
[50] *R v Tulisi* (2008) 258 LSJS 428; [2008] SASC 306, [54]; *R v Muir* [2009] SASC 94, [42]; *Feutrill v The Queen* (2010) 272 LSJS 507; [2010] SASCFC 48, [51].
[51] *R v Muir* [2009] SASC 94, [42].
[52] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [36]; *R v Radford* (1986) 133 LSJS 110; *R v Muir* [2009] SASC 94, [38].
[53] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [48].
[54] *R v Muir* [2009] SASC 94, [42].
[55] *R v Muir* [2009] SASC 94, [42].
[56] *R v Tulisi* (2008) 258 LSJS 428; [2008] SASC 306, [55]; *R v Deane-Johns* [2011] SASCFC 55, [32].
[57] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [45].
[58] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [36]–[41]; *R v Petroff* (1980) 2 A Crim R 101, 116; *R v Smart* [2018] SASCFC 123, [91]. See also *R v Thompson* (2008) 21 VR 135; [2008] VSCA 144.
[59] *R v Smart* [2018] SASCFC 123, [92].

permissible to merely hand the document to the jury without reading and possibly repeating the words on that document.[60]

61. While it is not generally the practice of judges to provide juries with a transcript of directions, it may be appropriate to provide an extract from the directions transcript to a jury, as a written direction, in response to a question from the jury about a particular issue.[61]

[60] *R v Dunn* (2006) 94 SASR 177; [2006] SASC 58, [41].

[61] *Feutrill v The Queen* (2010) 272 LSJS 507; [2010] SASCFC 48, [52], [74].

CHAPTER 6: ELEMENTS OF OFFENCES

6.1 – Using offence directions

1. This chapter contains commentary and model directions on major offences heard in the Supreme and District Courts.

2. As model directions, these directions will inevitably need to be adapted to the facts of individual cases. In using these directions, judges should take note of the following areas where adaptations may be required.

3. For most directions, full explanations are provided for all elements. In cases where particular elements are not in issue, the judge should consider whether the full explanation can be omitted and replaced with a statement such as:

> This element is not in issue. You should have no trouble finding this element proved. The parties agree that your focus should be on the [*identify relevant element*].
>
> Or
>
> The parties agree that elements [*identify relevant elements*, e.g. two, three and four] are not in issue. You should have no trouble finding those elements proved. Your focus in this case should be on [*identify relevant element*, e.g. the first element, whether the accused caused the victim's death].

4. The model directions are written with the judge referring to how the parties put their case as part of the explanation of each element. Depending on the issues in the case, and the preferences of the individual judge, this material may need to be omitted as part of the description of each element, and instead given to the jury in another part of the directions.

6.2 – General principles

5. This section considers the following general issues that can arise in relation to any offence:

- Causation
- Voluntariness
- Inferring intention
- Intoxication
- Contemporaneity

6.2.1 – Causation

6. Causation is a question of fact. In directing juries about causation, it is:[1]

> enough if juries [are] told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

7. For the purpose of causation, the accused's conduct must contribute significantly to the occurrence of the offence. The conduct must not be a trivial cause, or merely part of the history of events. At least in the context of homicide, it need not be the sole, direct or immediate cause of the death, but must be a substantial or significant cause of death.[2]

8. A 'but for' test should not be used as the sole basis of causation, as it may indicate that a negligible causal relationship is sufficient.[3]

9. Directions on causation should also identify for the jury any possible intervening causes which the prosecution must exclude.[4]

10. Identification of the relevant causal act may also be important for the purpose of determining whether the prosecution has proved the relevant fault element for the offence. Choice of the relevant causal act is a matter for the jury.[5]

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[1] *Campbell v The Queen* [1981] WAR 286, 290, quoted with approval in *Royall v The Queen* (1991) 172 CLR 378, 387 (Mason CJ), 411–412 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ); [1991] HCA 27.

[2] *Royall v The Queen* (1991) 172 CLR 378, 398 (Brennan J), 411 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ); [1991] HCA 27; *Swan v The Queen* (2020) 94 ALJR 385; [2020] HCA 11, [24]–[25]. See also *R v Hallett* [1969] SASR 141, 150; *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [29]; *R v Munn* (2017) 128 SASR 117; [2017] SASCFC 68, [23]; *R v Heeremans* (2007) 249 LSJS 49; [2007] SASC 187, [44].

[3] *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [35].

[4] See, e.g., *R v Dawood* (2002) 223 LSJS 19; [2002] SASC 346, [30], [75].

[5] See, e.g., *Ryan v The Queen* (1967) 121 CLR 205; [1967] HCA 2; *Royall v The Queen* (1991) 172 CLR 378, 386 (Mason CJ); [1991] HCA 27.

11. Acts by the victim may complicate the question of causation. For example, where the victim suffers injury while attempting to flee the accused, the accused will still be the legal cause of the injuries if the accused's conduct caused a well-founded apprehension of physical harm such that the victim seeking to escape is a natural or reasonable consequence of the accused's acts.[6]

12. The natural consequence test does not require the jury to be directed about the concept of foreseeability, as this is more likely to confuse the jury than to assist.[7]

[6] *Royall v The Queen* (1991) 172 CLR 378, 389-390 (Mason CJ), 412-413 (Deane and Dawson JJ); [1991] HCA 27.
[7] *Royall v The Queen* (1991) 172 CLR 378, 390 (Mason CJ), 412 (Deane and Dawson JJ), 425 (Toohey and Gaudron JJ); [1991] HCA 27.

6.2.2 – Voluntariness

13. For all offences the prosecution must prove that the relevant acts involved an exercise of the accused's will.[8]

14. As part of this, the prosecution must show that the accused was aware of what he or she was doing.[9] However, while awareness may be a necessary precondition to voluntariness, it is not a sufficient condition by itself. As the test is whether the act involved an exercise of the accused's will, a person may act involuntarily even if he or she has some awareness of what is happening.[10]

15. This is sometimes referred to as general or basic intent, and relates to the accused's control and intent to engage in the relevant actions.[11]

16. In the context of intoxication, it has been said that a direction on voluntariness is not necessary if the crime is one of basic or specific intent, because if intent is proved, then voluntariness automatically follows. A judge should not give this kind of direction where voluntariness arises as an issue for other reasons, as it is confusing and unnecessary.[12]

17. Voluntariness is generally not related to the accused's knowledge or intention regarding the consequences of his or her act.[13]

18. Dissociation and sleepwalking are two conditions which will deprive an act of its voluntary character.[14] Similarly, actions that are the product of automatic reflexes are involuntary.[15]

19. Amnesia is a condition that may be associated with dissociation and sleepwalking. A judge should be careful in giving directions about the significance of amnesia. Where, on the evidence, the only suggested causes of amnesia are causes associated with a lack of voluntariness, it is wrong to tell the jury that they may find the accused acted voluntarily even if they find that the accused does not remember the relevant acts.[16]

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[8] *Ryan v The Queen* (1967) 121 CLR 205; [1967] HCA 2; *R v O'Connor* (1979) 146 CLR 64; [1980] HCA 17; *R v Falconer* (1990) 171 CLR 30; [1990] HCA 49; *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14.

[9] *R v Lem (No 2)* [2004] SASC 417, [214]–[216].

[10] *R v Radford* (1985) 42 SASR 266.

[11] *Ryan v R* (1967) 121 CLR 205; [1967] HCA 2; *He Kaw Teh* v *R* (1985) 157 CLR 523; [1985] HCA 43. However, in *R v Martin* (1983) 32 SASR 419, White and Matheson JJ (Mitchell J dissenting) found the trial judge erred by failing to draw a distinction between voluntariness and basic intent, in that the judge needed to distinguish between whether the stabbing was a willed or voluntary act and that the accused intended to do the physical act involved in the stabbing.

[12] See *R v Duncan* [2015] SASCFC 191, [84]–[86] and compare *R v Tucker* (1984) 36 SASR 135, 139.

[13] *R v Falconer* (1990) 171 CLR 30; [1990] HCA 49; *R v Williamson (No 1)* (1996) 67 SASR 428. But compare *Kolian v The Queen* (1968) 119 CLR 47; [1968] HCA 66.

[14] *Kroon v The Queen* (1990) 55 SASR 476, 478; *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14; *R v Falconer* (1990) 171 CLR 30, 76; [1990] HCA 49, [31] (Toohey J).

[15] See *Ryan v The Queen* (1967) 121 CLR 205, 215; [1967] HCA 2, [22] (Barwick CJ); *Bratty v Attorney-General for Northern Ireland* [1963] AC 386, 409.

[16] *R v Duncan* [2015] SASCFC 191, [56]–[66].

20. In most cases, it is not necessary to precisely identify the act which must be voluntary and deliberate. However, there are exceptions to this general rule, such as where the nature of the accused's conduct may significantly change, depending on what the accused thought he or she was doing.[17]

21. In most cases, voluntariness does not arise as an issue, as there is an evidentiary presumption that an act done by an apparently conscious person is done voluntarily. However, if that presumption is displaced, the prosecution carries the onus of proving that the relevant act was voluntary and the judge should not refer to any presumption of voluntariness.[18]

[17] *R v Williamson (No 1)* (1996) 67 SASR 428, 433–434, 447 (where Doyle CJ and Matheson J drew a distinction between striking with a hand and striking with a knife, in a case where there was an argument that the accused did not know he was holding a knife at the relevant time. Doyle CJ noted, however, that there is no single rule that determines the ambit of the action which must be voluntary and the issue must be decided on a case by case basis). Further, in *Ugle v The Queen* (2002) 211 CLR 171; [2002] HCA 25, [30], the High Court identified that a key issue was whether the accused stabbed the deceased, or whether the deceased impaled himself on the accused's knife, and that the second scenario was not a willed act of the accused. See also *Duffy v The Queen* [1981] WAR 72, 80.

[18] *R v Falconer* (1990) 171 CLR 30; [1990] HCA 49; *R v Radford* (1985) 42 SASR 266; *Murray v The Queen* (2002) 211 CLR 193; [2002] HCA 26.

6.2.3 – Inferring specific intent

22. Unless there is an admission by the accused, proof of intention or recklessness usually requires the jury to draw an inference from the circumstances in which the accused performed the relevant act.[19]

23. In directing the jury about the process of drawing inferences about states of mind, it is erroneous to tell the jury that a person intends the natural or reasonable consequences of their actions. The statement "either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation".[20]

24. While it is legitimate for the jury to consider what a reasonable person would have intended or foreseen as part of drawing an inference of the accused's actual state of mind, the jury must not be left thinking that it can treat the reasonable person's state of mind as decisive.[21]

25. The accused's circumstances may be relevant to the assessment of his or her state of mind, including the accused's age, background, education, emotional state or sobriety.[22]

26. The ability to infer intention from the accused's acts may be more difficult where the accused acted while in a state of intoxication. See 6.2.4 – Intoxication, below, for more information on the interaction between intoxication and formation of intention.

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[19] *Pemble v The Queen* (1971) 124 CLR 107, 120; [1971] HCA 20, [25].
[20] *Stapleton v The Queen* (1952) 86 CLR 358, 365; [1952] HCA 56, [11]. See also *Smyth v The Queen* (1957) 98 CLR 163; [1957] HCA 24; *Parker v The Queen* (1963) 111 CLR 610, 632; [1963] HCA 14, [17] (Dixon CJ).
[21] *Pemble v The Queen* (1971) 124 CLR 107, 120; [1971] HCA 20, [25].
[22] *Pemble v The Queen* (1971) 124 CLR 107, 120; [1971] HCA 20, [25].

Jury Direction #6.2.3 – Inferring intention

Note: There is a general direction on the process of drawing inferences at 3.6 – Inferences. Depending on the structure of the judge's directions, the judge may want to remind the jury of those directions, reiterate parts of those directions here, or incorporate those directions when first directing the jury about inferring intention.

This element concerns the accused's state of mind.

To prove the accused's intention, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that the accused intended to [*identify relevant intent*]. In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

6.2.4 – Intoxication

27. At common law, an accused's intoxication can be relevant to various facts in a criminal trial, including voluntariness, the formation of intention or the appreciation of facts relevant to an element or a defence. Intoxication may also be relevant to the reliability of witnesses.

28. At common law, if there was evidence that any of these issues arise, the judge was required to identify that evidence and give appropriate directions on how it was relevant.[23]

29. The operation of the common law on intoxication has been modified by *Criminal Law Consolidation Act 1935* (SA) ss 268, 269. The principal effects of these provisions are:

- The impact of intoxication on the accused's consciousness is not to be left to the jury unless the prosecutor or defendant specifically asks for the issue to be left;[24]
- If the objective elements are proved, but the accused's consciousness was or may have been impaired by intoxication to the point of criminal irresponsibility, the accused must be convicted if he or she formed an intention to commit the offence before becoming intoxicated and became intoxicated to strengthen his or her resolve to commit the offence;[25]
- If the objective elements are proved, but the accused's consciousness was or may have been impaired by intoxication to the point of criminal irresponsibility, the accused is to be convicted if he or she would have been guilty if his or her conduct had been voluntary and intentional. However, this does not extend to an offence that requires proof that the defendant foresaw the consequences of his or her conduct, intended to cause a consequence or, except for a charge of rape, it is necessary to establish that the defendant was aware of the circumstances surrounding his or her conduct.[26]

30. Consciousness is defined as follows:[27]

> Consciousness includes —
>
> (a) volition;
>
> (b) intention;
>
> (c) knowledge;

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[23] *Bedi v The Queen* (1993) 61 SASR 269, 273; *R v O'Connor* (1979) 146 CLR 64, 87–88; [1980] HCA 17, [68]–[69] (Barwick CJ); *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [71]–[73].

[24] *Criminal Law Consolidation Act 1935* (SA) s 269.

[25] *Criminal Law Consolidation Act 1935* (SA) s 268(1).

[26] *Criminal Law Consolidation Act 1935* (SA) s 268(2), (3); *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [136].

[27] *Criminal Law Consolidation Act 1935* (SA) s 267A(1).

(d) any other mental state or function relevant to criminal liability.

31. Under this definition, consciousness includes voluntariness, basic intent and specific intent.[28]

32. The effect of sections 268(2) and (3) is that self-induced intoxication may deem a person to have acted voluntarily even if they would not be found to have acted voluntarily. However, except for rape, self-induced intoxication remains relevant to whether the accused had the required specific intent.[29]

33. For the offence of rape, self-induced intoxication must be ignored when considering whether the accused had the specific intent required for rape. This means that the accused may be found guilty even if, because of self-induced intoxication, the prosecution cannot prove voluntariness, knowledge of lack of consent, or recklessness. The jury should be specifically directed to ignore the effects of intoxication, as otherwise it may assume that it can take intoxication into account.[30]

34. Where a person is charged with murder and manslaughter is an available alternative, the effect of sections 268(2) and (3) is that intoxication is relevant to whether the accused had the state of mind relevant for murder, but it is not relevant to manslaughter, as manslaughter is a crime of basic intent, and may be available if the specific intent required for murder is not proved.[31]

35. Directions on the relevance of intoxication may include an instruction that alcohol-based amnesia does not necessarily indicate that the accused's acts were not voluntary or performed with the required intention at the time of the alleged offending.[32]

36. Directions on intoxication should not focus upon the potential of intoxication to affect the accused's *capacity to form* the relevant intention. The focus should be on whether the prosecution has proved that the accused *did have* the relevant intention. Inability to form the required intention is one hypothesis consistent with innocence which the prosecution might need to exclude, but only as part of its attempt to prove that the accused in fact had the required state of mind.[33]

37. It is also incorrect to tell the jury that it must consider whether the evidence of intoxication negates proof of specific intention, as this is inconsistent with the presumption of innocence.[34]

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[28] *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [80]

[29] *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [80]. See also *R v Vallarent* [2007] SASC 269, [28]; *R v Ford* [2016] SASC 112, [14].

[30] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [3]-[5], [140]-[141].

[31] See *R v Humbles* [2014] SASCFC 91, [21].

[32] *R v O'Connor* (1979) 146 CLR 64, 87-88; [1980] HCA 17, [69] (Barwick CJ).

[33] *R v Wingfield* (1994) 176 LSJS 14; *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [156]-[163]; *R v Coleman* (1990) 19 NSWLR 467, 485-486; *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [94]-[100].

[34] *R v Gardiner* (2013) 117 SASR 143, [2013] SASCFC 53 [157], [176].

38. In cases involving physical violence, intoxication may be relevant to whether the accused intended the required degree of harm. Inferences regarding intention that might readily be drawn from the extent of injuries actually inflicted might not be as readily drawn if the accused was intoxicated.[35]

39. As noted above, issues of intoxication relevant to both voluntariness and specific intention are not to be raised unless the prosecution or defence specifically asks for a direction on that issue.[36]

40. This limits the trial judge's common law discretion or obligation to provide a fair trial. A judge must not give a direction on the relevance of intoxication to the accused's consciousness unless one of the parties requests such a direction.[37] Further, a judge does not need to give a direction on intoxication whenever there is a request. The judge still must decide whether there is evidence fit to go to the jury on this issue.[38]

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[35] *R v Wingfield* (1994) 176 LSJS 14; *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [50], [182]; *R v Shinner* (1993) 173 LSJS 384, 386; *R v Ford* [2016] SASC 112, [19].

[36] *R v B, MA* (2007) 99 SASR 384; [2007] SASC 384, [52].

[37] *R v B, MA* (2007) 99 SASR 384; [2007] SASC 384, [76]; *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [146]–[147].

[38] *R v B, MA* (2007) 99 SASR 384; [2007] SASC 384, [55]; *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [89].

Jury Direction #6.2.4 – Relevance of intoxication to inferring specific intent

Note: This direction is designed to follow on from Jury Direction – Inferring intention. The direction must be modified if it is to be given at a different time.

Note: Due to Criminal Law Consolidation Act 1935 s 269, a direction about the relevance of intoxication to intention must not be given unless the prosecution or defence ask for the direction.

You must also take into account evidence that [*accused*] was intoxicated at the time of the alleged offence. Intoxication can affect whether a person makes calm and rational choices, or thinks through the consequences of their acts. This means that you must consider whether to place less weight on the accused's acts as a guide to what inferences you can draw about [his/her] state of mind. Remember that the onus is on the prosecution to prove that the accused [*identify relevant intention*].

[*If expert evidence is led about the impact of intoxication on capacity to form intention, add the following*: You will remember that [*name of expert*] gave evidence about whether intoxication can affect the capacity or ability of a person to form a particular intention. I give you the following direction about that evidence. For this element, the question is whether [*accused*] intended to [*identify relevant intention*]. Deciding whether [*accused*] was able to form that intention does not answer that question. If you find that, despite being intoxicated, [*accused*] remained able to form an intention, you must go on to decide whether you are satisfied beyond reasonable doubt that [*accused*] actually did intend to [*identify relevant intention*]. On the other hand, if you have a reasonable doubt about whether [he/she] was still able to form an intention due to [his/her] intoxication, then you cannot find this element proved.]

[*Refer to relevant evidence and arguments*]

6.2.5 – Contemporaneity

41. To prove a criminal offence, all elements must exist at the same time.[39] This is known as the requirement of contemporaneity.

42. Contemporaneity is most often an issue in the context of proving that the accused had the relevant state of mind at the time he or she committed the relevant acts.

43. This requirement may be particularly complex where the relevant acts involved an extended course of conduct, such as a prolonged assault,[40] or a course of conduct involving drug trafficking.[41]

44. Where the requirement of contemporaneity raises issues of complexity, the judge should draw the jury's attention to the fact that the relevant state of mind must exist at the time of the relevant physical acts, and alert the jury, by reference to the party's cases, to any erroneous reasoning the jury must avoid.

45. The requirement of contemporaneity may also be an issue where there are multiple possible causal acts. In that situation, the jury will need to assess the accused's state of mind by reference to its findings on which act caused the alleged offence.[42]

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[39] *Meyers v The Queen* (1997) 147 ALR 440, 442; [1997] HCA 43; *Royall v The Queen* (1991) 172 CLR 378; 401 (Brennan J), 414 (Deane and Dawson JJ); [1991] HCA 27; *Ryan v The Queen* (1967) 121 CLR 205, 217–218; [1967] HCA 2, [25]; *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [23].

[40] *R v McDonald* (2015) 123 SASR 313; [2015] SASCFC 99, [28]–[30].

[41] See *Mustica v The Queen* (2011) 31 VR 367; [2011] VSCA 79.

[42] See, e.g., *Ryan v The Queen* (1967) 121 CLR 205; [1967] HCA 2; *Royall v The Queen* (1991) 172 CLR 378, 386 (Mason CJ); [1991] HCA 27.

Jury Direction #6.2.5 – Contemporaneity

Note: This direction is designed for cases where the issue of contemporaneity must be highlighted to the jury. It is designed to be given after the judge has instructed the jury on the relevant elements.

I must now give you a direction of law about the timing of elements. A person only commits an offence if all the elements exist at the same time. In particular, the accused must have had the state of mind required for the offence at the same time [he/she] performed the acts that constitute the offence.

In this case, the defence argued that [*identify how the issue of contemporaneity arises*]. The prosecution says that you should reject this argument and find that all the elements existed at the same time.

[*Refer to relevant evidence and arguments*]

6.3 – Aggravated offences

46. Section 5AA of the *Criminal Law Consolidation Act 1935* (SA) contains a list of aggravating factors.[43]

47. The prosecution may plead these factors in relation to any offence which lists a separate penalty for an aggravated offence.

48. Proof of an aggravating factor must be established beyond reasonable doubt.[44]

49. There are conflicting views on whether basic offences and aggravated offences are separate offences.[45] Prosecutors will need to consider whether to separately charge the basic offence as an alternative on the information, or whether to rely on common law rules which govern when an alternative charge is available.[46]

50. Despite these conflicting views, it is established that the judge must direct the jury about the elements of the offence in terms which treat the circumstance(s) of aggravation as an element.[47]

51. Where the basic offence is available as an uncharged alternative, the judge must decide whether to leave the basic offence to the jury. This will depend on whether a charge without the circumstance of aggravation is reasonably open or is a viable alternative.[48]

52. Where a charge pleads two or more aggravating circumstances, a person may plead guilty and, at sentencing, dispute the existence of one of those factors.[49]

53. Section 5AA lists a number of different aggravating features, including:

- deliberately and systematically inflicting severe pain on the victim in the course of offending;
- offending in company;

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[43] See earlier discussion of verdicts in relation to aggravated offences in 5.1.2 – Aggravated offences.

[44] *Tilley v The Queen* (2009) 105 SASR 306; [2009] SASC 277, [63]; *Royall v The Queen* (1991) 172 CLR 378; [1991] HCA 27.

[45] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [85]–[98] (Kourakis CJ); *Tilley v The Queen* (2009) 105 SASR 306; [2009] SASC 277, [45]; *Sumner & Fitzgerald v The Queen* (2013) 117 SASR 271; [2013] SASCFC 82, [31]–[38] (Gray and Sulan JJ); *Jones v Police* [2019] SASC 36; c.f. *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [167] (Vanstone J); *Sumner & Fitzgerald v The Queen* (2013) 117 SASR 271; [2013] SASCFC 82, [120]–[140] (Blue J); *Glouftsis v Police* (2014) 120 SASR 420; [2014] SASC 136, [50]–[65]. See also *R v W* (2015) 123 SASR 70; [2015] SASCFC 86, [21].

[46] Compare *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [98] (Kourakis CJ); [126] (Gray J), [167], [174] (Vanstone J).

[47] See *Tilley v The Queen* (2009) 105 SASR 306; [2009] SASC 277.

[48] *Tilley v The Queen* (2009) 105 SASR 306; [2009] SASC 277, [60], [70]; *Sumner & Fitzgerald v The Queen* (2013) 117 SASR 271; [2013] SASCFC 82, [45].

[49] *R v W* (2015) 123 SASR 70; [2015] SASCFC 86, [22].

- offending against police, prison or other law enforcement officers;
- offending against a person the offender knows to be under 12 (or, in the case of offences of child marriage or child exploitation material, under 14) or over 60;
- offending on behalf of, or while claiming identity with, a criminal organisation;
- using of an offensive weapon;
- offending against a person who was or had been in a relationship with the offender;
- offending involving an abuse of a position of trust;
- offending against vulnerable people due to physical disability, a cognitive impairment or the nature of employment.[50]

54. The s 5AA aggravating factors only apply where they are capable of being picked up by a basic offence.[51]

55. As part of the aggravating factor in s 5AA(1)(c)(i), offending against a law enforcement officer knowing the victim to be acting in the course of his or her official duty, the prosecution must show that the victim was acting in the course of official duties.[52] There is no defined list of when a police officer will be acting in the course of his or her official duties. One circumstance is where the officer is conducting a lawful arrest of the accused. This will require the court to pay attention to whether the arrest was lawful, or whether any conduct of the officer made the arrest unlawful.[53]

56. It follows that other aggravating factors in s 5AA which contain knowledge elements also require proof of the underlying fact of what is said to be known. This is an issue where the prosecution relies on the age of the victim (though see CHAPTER 10: CHILD EXPLOITATION MATERIAL OFFENCES for a qualification to this principle), whether the victim is or was in a relationship with the accused and whether the victim was particularly vulnerable, whether due to physical disability, cognitive impairment or occupation or employment.

57. Where an aggravating factor involves a knowledge element, a person is taken to know a particular fact if the person knows that it is possibly true and is then reckless as to whether it is true or not.[54]

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[50] *Criminal Law Consolidation Act 1935* (SA) s 5AA(1).
[51] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [127]–[128].
[52] *R v Tipping* [2019] SASCFC 41, [98].
[53] *R v Tipping* [2019] SASCFC 41, [175]–[176].
[54] *Criminal Law Consolidation Act 1935* (SA) s 5AA(2).

58. Separate aggravating factors are specified for the offences of causing death or harm by use of a vehicle,[55] dangerous driving to escape police pursuit,[56] street racing,[57] drug offences[58] and certain firearms offences.[59] These factors are discussed in the later chapters on those specific offences.

59. Section 5AA(1)(h) provides that committing an offence in company is an aggravating factor. For this purpose, 'in company' is not the same as committing the offence as part of a joint criminal enterprise. However, it is not necessary to draw the distinction between the two concepts to the jury's attention unless there is something about the case which makes that necessary.[60]

[55] *Criminal Law Consolidation Act 1935* (SA) ss 5AA(1a), 19A.
[56] *Criminal Law Consolidation Act 1935* (SA) ss 5AA(1b), 19AC.
[57] *Criminal Law Consolidation Act 1935* (SA) ss 5AA(1c), 19AD.
[58] *Controlled Substances Act 1984* (SA) s 43.
[59] *Firearms Act 2015* (SA) ss 9(7), 39(4), 40(4).
[60] *Sumner & Fitzgerald v The Queen* (2013) 117 SASR 271; [2013] SASCFC 82, [49]. See also *R v Button & Griffin* (2002) 54 NSWLR 455; [2002] NSWCCA 159.

CHAPTER 7: HOMICIDE OFFENCES

7.1 – Murder

1. Murder is a common law offence consisting of four elements:[1]

   - The accused's act or acts caused the victim's death;
   - The accused's act or acts were voluntary and deliberate;
   - The accused had the specific intention required for murder;
   - The killing was unlawful.

Causation

2. In assessing whether the accused's act or acts caused the victim's death, the jury must determine whether those acts were a substantial or significant cause.[2]

3. It is not necessary for the jury to isolate a single causal act and the accused's act or acts need not be the sole, direct or immediate cause.[3]

4. The jury may be told that the question is one for them applying their common-sense to the facts they find, while appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.[4]

5. Where there are multiple possible causes of death, it is a matter for the jury to decide what are the relevant causal acts. It will often be necessary as a practical matter for the jury to first reach a conclusion on the relevant causal act(s) before assessing the accused's state of mind. This is because available conclusions about an accused's state of mind may change depending on the time and nature of the relevant causal act.[5]

6. In many cases (such as where the killing involves a shooting or stabbing) it is not necessary to elaborate on the causation element. In other cases, it may be necessary to point to other possible causes which relieve the accused of responsibility.[6]

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[1] *R v Willoughby (No 2)* [2017] SASC 191, [5].
[2] *Royall v The Queen* (1991) 172 CLR 378; [1991] HCA 27; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [336]–[338]. In some cases, the jury will need to unanimously agree on the causal act or acts. See Extended jury unanimity in 5.2 – Unanimous and majority verdicts.
[3] *Royall v The Queen* (1991) 172 CLR 378, 398 (Brennan J), 411 (Deane and Dawson JJ), 441 (McHugh J); [1991] HCA 27; *R v NJA* [2002] SASC 113, [40]–[41].
[4] *Royall v The Queen* (1991) 172 CLR 378, 387 (Mason CJ), 411–412 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ); [1991] HCA 27; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [336]–[338]; *R v Fleming & Maher (No 2)* [2017] SASC 17, [248].
[5] *Royall v The Queen* (1991) 172 CLR 378; [1991] HCA 27; *Ryan v The Queen* (1967) 121 CLR 205; [1967] HCA 2.
[6] *Royall v The Queen* (1991) 172 CLR 378, 412 (Deane and Dawson JJ); [1991] HCA 27.

7. In complex cases, the judge should not leave the jury at large to decide which acts are potentially causal. Instead, the judge should identify for the jury the facts that, if they find them proved, are open to be regarded as causative.[7]

8. The 'but for' test is not the sole test of causation and can wrongly suggest that a negligible contribution is sufficient. The judge should not direct the jury to consider causation using the 'but for' test unless there is no risk of the test being misused by the jury.[8]

Voluntary and deliberate (General intent)

9. The second element the prosecution must prove is that the accused's conduct was voluntary and deliberate.

10. For information on this element, see 6.2.2 – Voluntariness, above.

Specific intent

11. There are four states of mind which are sufficient to prove the third element of murder:[9]

    - The accused intended to kill the deceased;
    - The accused intended to cause the deceased grievous bodily harm;
    - The accused knew that death was a probable result of his or her acts;
    - The accused knew that grievous bodily harm was a probable result of his or her acts.

12. It does not matter if the cause or mechanism of death was different to that expected or intended by the accused, provided the prosecution proves that the accused had the relevant specific intent at the time of committing the relevant causal acts.[10]

13. In most cases, directions on specific intent will concern the accused's intention in relation to the deceased. However, in appropriate circumstances, the directions should be adapted to refer to an intention or recklessness regarding harm to any person.[11]

14. In directing the jury, it is not necessary to refer to an intention to kill, if that intention is not advanced by the prosecution. In such cases, the directions may refer only to an intention to cause grievous bodily harm.[12]

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[7] *R v Hoskin* (1974) 9 SASR 531, 539.
[8] See *Royall v The Queen* (1991) 172 CLR 378; [1991] HCA 27; *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [35].
[9] *R v Crabbe* (1985) 156 CLR 464; [1985] HCA 22; *R v Marshall* (1987) 49 SASR 133; *R v Fry* (1992) 58 SASR 424.
[10] *Royall v The Queen* (1991) 172 CLR 378, 392 (Mason CJ), 400 (Brennan J), 411 (Deane and Dawson JJ), 452 (McHugh J); [1991] HCA 27.
[11] *La Fontaine v The Queen* (1976) 136 CLR 62; 68–69; [1976] HCA 52, [6] (Barwick CJ).
[12] See *R v Bosworth* (2007) 97 SASR 502; [2007] SASC 150, [161]–[168].

15. In explaining the meaning of 'grievous bodily harm', the judge should not suggest that the phrase means 'substantial interference with health or comfort' (as that is too wide) or that the injury must be life threatening (as that is too narrow).[13] Judges should stick with the classic term 'grievous bodily harm', with or without an explanation that 'grievous' means 'really serious'. Judges should not tell the jury that the term means merely 'serious bodily harm'. Apart from this guidance, it is for the jury to decide what 'grievous bodily harm' means and whether the intended injury meets that description.[14]

16. The third and fourth states of mind listed above are forms of recklessness. While recklessness can provide the specific intent required for murder, it should not be left to the jury in all cases. In most cases, foresight that death or grievous bodily harm was probable provides a basis for inferring an intention and it is not necessary to separately direct on it as an element of murder. The judge should not direct on recklessness unless it genuinely arises, such as in the unusual case where a realistic view of the facts is that the accused foresaw death or grievous bodily harm, but did not desire that outcome.[15]

17. Where the judge does leave reckless murder, the state of mind required is that the accused is aware that death or grievous bodily harm will *probably* result. Knowledge that it is *possible* is not sufficient.[16]

18. In most cases, it is not desirable to attempt to translate 'probable' into mathematical percentages, or into a more precise form such as 'more likely than not'. Instead, it is sufficient to direct the jury that the test is whether the accused realised that death or grievous bodily harm was probable, rather than possible.[17] It is also not desirable to refer to this state of mind as recklessness or reckless indifference, as this may blur the line between murder and negligent manslaughter.[18]

19. Reckless murder does not involve concepts of reckless indifference. The culpable state of mind is the offender's awareness of the probability, rather than the offender's indifference to the consequences.[19]

20. Where there is evidence of significant intoxication, the judge will need to direct the jury about the interaction between intoxication and the formation of specific intent.[20] This direction should draw the jury's attention to the possibility that the accused's

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[13] *R v Perks* (1986) 41 SASR 335, 337, 345–348; *R v Blevins* (1988) 48 SASR 65, 68–70; *R v Griffiths* (1999) 202 LSJS 30; [1999] SASC 70, [11]–[15].

[14] *R v Perks* (1986) 41 SASR 335, 337, 345–348. See also *R v Blevins* (1988) 48 SASR 65, 68–70; *R v Griffiths* (1999) 202 LSJS 30; [1999] SASC 70, [11].

[15] *R v Marshall* (1987) 49 SASR 133; *R v Cooke* (1985) 39 SASR 225, 236–237. See also *La Fontaine v The Queen* (1976) 136 CLR 62, 69 (Barwick CJ), 77 (Gibbs J); [1976] HCA 52.

[16] *R v Crabbe* (1985) 156 CLR 464, 469–470; [1985] HCA 22, [9].

[17] *Boughey v The Queen* (1986) 161 CLR 10, 19–20; [1986] HCA 29 [13] (Mason, Wilson and Deane JJ).

[18] *La Fontaine v The Queen* (1976) 136 CLR 62, 76–77; [1976] HCA 52 [5] (Gibbs J).

[19] *R v Crabbe* (1985) 156 CLR 464, 469–470; [1985] HCA 22, [9].

[20] *R v Machin* (1996) 68 SASR 526, 537. See also *R v Shinner* (1993) 173 LSJS 384, 385–386.

intoxication affected whether the accused intended to kill or cause grievous bodily harm and any evidence of the relevance of intoxication in the circumstances of the case.[21] For more information on the relevance of intoxication, see 6.2.4 - Intoxication.

21. Some cases have recognised an additional form of murder called apprehension-murder. This has been applied where the accused was aware that the victim was a police officer and the accused engaged in a violent act in the course of resisting, preventing or escaping from lawful arrest. This form of murder only applied where the victim had a lawful power to arrest the accused. Acts within the arrest, such as use of unnecessary force, did not transform an arrest into an unlawful arrest (though the conclusion may be different in the case of exceptional violence). However, if the arrest was not lawful, then the accused was entitled to a verdict of manslaughter. For this purpose, the lawfulness of the arrest was determined objectively and it was not necessary to examine whether the accused knew the arrest was unlawful.[22] The status of this doctrine is unclear in light of the express recognition of constructive murder under *Criminal Law Consolidation Act 1935* (SA) s 12A.

Unlawfulness

22. The fourth element requires the prosecution to disprove any defences that arise on the evidence, such as:

    - Self-defence;
    - Excessive self-defence;
    - Duress; and
    - Provocation.

23. Defences will be considered in a subsequent chapter of this Bench Book.

[21] *R v Suppiah* [2018] SASCFC 11, [108]-[110].

[22] *R v Fry* (1992) 58 SASR 424.

Jury Direction #7.1A – Murder (without Recklessness)

I will now direct you as to the elements of the offence of murder.

To prove murder, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused's act or acts caused the death of the deceased;

Two – The accused's act or acts were voluntary and deliberate;

Three – The accused acted with the intention to kill or cause grievous bodily harm;

Four – The accused acted unlawfully.

I will now explain these four elements and how they apply in this case.

Causation

The first element is that the accused's act or acts caused the death of the deceased.

This means that the accused's act or acts must have been a substantial or significant cause of [*deceased*]'s death. The accused does not need to be the sole cause of [*deceased*]'s death

In deciding whether an act or acts cause a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

Here, the prosecution says that the accused's act or acts caused [*deceased*]'s death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

Voluntary and deliberate

The second element is that the accused's act or acts were voluntary and deliberate.

There are two parts to this element. Voluntary means [his/her] act or acts must have been a product of [his/her] conscious will. Deliberate means [his/her] act or acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Specific intention

The third element is that the accused acted with the intention to kill or cause grievous bodily harm.

For this element, you are considering the accused's state of mind at the time the accused committed the relevant act or acts.[23]

To prove the accused's intention, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that at the time [he/she] [*identify relevant acts*] the accused intended to kill [*deceased*] or intended to cause [*deceased*] grievous bodily harm. Grievous bodily harm means really serious bodily harm.

In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfulness

The fourth element is that the accused acted unlawfully.

[*Insert relevant directions, based on the issues arising*].

[23] *Note: There is a general direction on the process of drawing inferences at 3.6 – Inferences. Depending on the structure of the judge's directions, the judge may want to remind the jury of those directions, reiterate parts of those directions here, or incorporate those directions when first directing the jury about inferring intention.*

Jury Direction #7.1B – Murder (with Recklessness)

I will now direct you as to the elements of the offence of murder.

The first charge on the information is murder.

To prove murder, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused's act or acts caused the death of the deceased;

Two – The accused's act or acts were voluntary and deliberate;

Three – The accused acted with the state of mind required for murder;

Four – The accused acted unlawfully.

I will now explain these four elements and how they apply in this case.

Causation

The first element is that the accused's act or acts the death of the deceased.

This means that the accused's act or acts must have been a substantial or significant cause of [*deceased*]'s death. The accused does not need to be the sole cause of [*deceased*]'s death.

In deciding whether an act or acts cause a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

Here, the prosecution says that the accused caused [*deceased*]'s death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

Voluntary and deliberate

The second element is that the accused's acts were voluntary and deliberate.

There are two parts to this element. Voluntary means [his/her] act or acts must have been a product of [his/her] conscious will. Deliberate means [his/her] act or acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Specific intention

The third element is that the accused acted with the state of mind required for murder.

For this element, you are considering the accused's state of mind at the time the accused committed the relevant act or acts.[24]

There are two ways the prosecution can prove this element.

First, the prosecution must show that at the time [he/she] [*identify relevant act*], the accused intended to kill or cause grievous bodily harm to [*deceased*]. Grievous bodily harm means really serious bodily harm.

If the prosecution cannot prove this, then this element will also be proved if, at the time [he/she] [*identify relevant act*], the accused was aware that it was probable that [his/her] act or acts would cause death or grievous bodily harm to [*deceased*]. Note that for this alternative, the accused must have known that death or grievous bodily harm was *probable*. It is not enough that the accused knew it was possible.

To prove the accused's state of mind, the prosecution asks you to draw an inference.

When drawing an inference about the accused's state of mind, you must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved one of these two states of mind. You should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfulness

The fourth element is that the accused acted unlawfully.

[*Insert relevant directions, based on the issues arising*].

[24] *Note: There is a general direction on the process of drawing inferences at 3.6 – Inferences. Depending on the structure of the judge's directions, the judge may want to remind the jury of those directions, reiterate parts of those directions here, or incorporate those directions when first directing the jury about inferring intention.*

7.2 – Constructive murder

24. At common law, the felony-murder rule applied where the accused caused "death in the commission of or in furtherance of the commission of a felony involving violence or danger".[25]

25. The felony-murder rule was abolished by the *Criminal Law Consolidation (Felonies and Misdemeanours) Amendment Act 1994* (SA), which abolished the classification of felonies and misdemeanours. Instead, s 12A of the *Criminal Law Consolidation Act 1935* (SA) provides a statutory successor in equivalent form:[26]

> A person who commits an intentional act of violence while acting in the course or furtherance of a major indictable offence punishable by imprisonment for ten years or more (other than abortion), and thus causes the death of another, is guilty of murder.

26. This provides an alternative basis for a conviction of murder which involves three elements:[27]

- The accused intentionally committed an act of violence;
- The act of violence caused the death of another person;
- The act of violence was committed in the course or furtherance of a major indictable offence punishable by 10 years imprisonment or more.

Act of violence

27. Whether an act is an act of violence is a question of fact. The judge should not direct the jury that, if it makes a particular finding of fact, then the act of violence element is proved as a matter of law.[28]

28. In *R v Kageregere* Kourakis CJ held that, for the purpose of this provision, violence means:[29]

> uncontrolled force which carries a real, in the sense of not remote, risk of personal harm. … [A] violent act is not intended unless the accused has an appreciation of surrounding circumstances, which, objectively viewed, make his act violent in the sense of unleashing unrestrained force which carries a risk of personal harm.

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[25] *R v Van Beelen* (1972) 4 SASR 353, 403.

[26] *R v R; R v G* (1995) 63 SASR 417, 420-421. But see Perry J at 424-425 on whether there is complete overlap between the common law felony-murder rule and s 12A.

[27] *R v Fleming & Maher (No 2)* [2017] SASC 17, [22].

[28] *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [23].

[29] *R v Kageregere* [2011] SASC 154, [141].

29. Other judges have held that violence is not limited to acts of physical violence and includes intimidation or threats of physical violence.[30]

30. While it is not necessary to prove that the accused intended that the act be an act of violence, the accused's state of mind in relation to the act may be relevant in assessing whether the act was violent.[31]

Course or furtherance of a major indictable offence punishable by 10 years imprisonment

31. The major indictable offence relied on for this purpose is often called the 'foundational offence'.

32. In assessing whether an offence can be a foundational offence, the court looks at the maximum penalty prescribed for that offence. Considerations personal to the accused, such as the reduced maximum sentence for a child, do not affect whether an offence qualifies as a major indictable offence.[32]

33. The prosecution must prove that the accused had the state of mind required for the foundational offence and intentionally committed the relevant act of violence.[33]

34. The foundational offence cannot be the offence of manslaughter, or an offence committed for the sole purpose of causing personal harm. This construction is necessary to avoid giving s 12A a field of operation which would undermine the common law elements of murder.[34]

Causation

35. Where s 12A is invoked, the act causing death will often be different to the act relied on for a charge of murder at common law. This is because constructive murder can arise where the final causal act is unintentional or involuntary, but an earlier act of violence is voluntary and intentional.[35] The prosecution does not need to prove that the act relied on for the purpose of s 12A is the sole cause of death,[36] but must prove that it was a substantial cause.[37]

36. For more information about causation, see 7.1 – Murder.

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[30] *R v Maurangi* (2000) 80 SASR 295; [2000] SASC 347, [11] (quoting *R v Butcher* [1986] VR 43; [1986] VicRp 4); *R v CMM* (2002) 81 SASR 300; [2002] SASC 21, [61].
[31] See *R v CMM* (2002) 81 SASR 300; [2002] SASC 21, [62].
[32] *R v CMM* (2002) 81 SASR 300; [2002] SASC 21, [57].
[33] *R v Maurangi* (2000) 80 SASR 295; [2000] SASC 347, [23] (quoting Gilles, *Criminal Law* (4th edition, 1997) 637).
[34] *R v Kageregere* [2011] SASC 154, [142]–[143], [147].
[35] See, e.g., *Ryan v The Queen* (1969) 121 CLR 205; [1967] HCA 2; *R v Jarmain* [1946] KB 74.
[36] *R v Butcher* [1986] VR 43, 54–56; [1986] VicRp 4; *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [30].
[37] *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74, [53].

Constructive murder and secondary parties

37. Both the doctrine of extended common purpose in relation to murder and principles of secondary liability in relation to constructive murder can be relied on in the one case.[38] In the case of extended common purpose, the question is whether the accused foresaw that a co-offender committing murder was a possible incident of the joint enterprise.[39] For constructive murder, the question is whether the accused knew that the co-offender might commit an intentional act of violence in the course or furtherance of the jointly agreed foundational offence.[40] This may require examining whether there was an agreement to commit the foundational offence or whether the co-offender's acts went beyond the agreement. Alternatively, it may be necessary to consider whether the commission of the foundational offence had ended, and the co-offender committed a further and separate act of violence.[41]

[38] *R v R & G* (1995) 63 SASR 417.

[39] See 18.6 – Extended common purpose, for more information.

[40] See 18.4 – Aiding, Abetting, Counselling & Procuring and Joint Criminal Enterprise, for more information.

[41] See *R v CMM* (2002) 81 SASR 300; [2002] SASC 21; *Arulthilakan v The Queen* (2003) 203 ALR 259; [2003] HCA 74; *R v R & G* (1995) 63 SASR 417.

Jury Direction #7.2 – Constructive Murder

I will now direct you as to the elements of the offence of (constructive) murder.

To prove this charge, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused intentionally committed an act of violence;

Two – The act of violence was committed in the course or furtherance of [*identify foundational offence*];

Three – The act of violence caused the death of another person.

I will now explain these three elements and how they apply in this case.

Intentional act of violence

The first element is that the accused intentionally committed an act of violence.

This element raises two issues.

First, the prosecution must prove that the accused intentionally [*identify alleged act of violence*].

Second, the prosecution must prove that [*identify alleged act of violence*] is an 'act of violence'.

It is a matter for you to decide whether something is an act of violence. The phrase 'act of violence' is not limited to physical violence, and may include intimidation and threats of violence.

The prosecution says that you will find both of these matters proved. [*Identify relevant evidence and arguments*].

The defence disputes that, and says [*identify relevant evidence and arguments*].

Course or furtherance of foundational offence

The second element is that the act of violence was committed in the course or furtherance of [*identify foundational offence*].

This element requires you to consider the purpose of the accused's acts.

To understand this element, I must first tell about [*identify foundational offence*].

[*Insert and adapt directions on foundational offence*].

Therefore, this element requires the prosecution to prove that the accused committed [*identify alleged act of violence*] as part of, or to help commit [*state elements of foundational offence*].

[*Refer to relevant prosecution and defence arguments and relevant evidence*].

Causation

The third element is that the accused's act of violence caused [*deceased*]'s death.

This means that the [*identify relevant act of violence*] must have been a substantial or significant cause of [*deceased*]'s death.

In deciding whether an act causes a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

Here, the prosecution says that the accused's act of violence caused the victim's death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

7.3 – Manslaughter

7.3.1 – Unlawful and dangerous act manslaughter

38. Manslaughter is a common law offence which can be committed in several different ways. This commentary examines manslaughter by an unlawful and dangerous act. This form of manslaughter consists of four elements:[42]

    - The accused caused the victim's death;
    - The relevant act was voluntary and deliberate;
    - The relevant act was unlawful;
    - The relevant act was dangerous.

39. While it had been common in the past to introduce manslaughter by telling the jury that unlawful killing without a murderous state of mind is manslaughter, the utility of that statement has been doubted as it leaves unanswered the question of what constitutes an unlawful killing.[43]

40. For information on the first two elements (causation and voluntariness), see 6.2 – General principles and 7.1 – Murder. The third element, unlawfulness, raises issues of defences which will be considered in a subsequent chapter of the Bench Book.

41. While the principles in relation to causation and voluntariness are the same for both murder and manslaughter, in a case where manslaughter is left as an alternative to murder, the act(s) relied on may differ. This may also have implications for the availability of any defences.[44]

Unlawful

42. The third element requires the prosecution to prove that the relevant act was a breach of the criminal law, and not merely a matter of civil liability.[45]

43. The breach of the criminal law relied on for this element must not be an offence of negligence. Deaths resulting from offences of negligence must be assessed against the elements of manslaughter by criminal negligence.[46]

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[42] *R v Fleming & Maher (No 2)* [2017] SASC 17, [29]; *R v Ford* [2016] SASC 112, [10].
[43] *R v Cooke* (1985) 39 SASR 225, 230.
[44] *R v Fragomeli* (2008) 254 LSJS 279; [2008] SASC 96, [40]; *R v Bednikov* (1997) 193 LSJS 254.
[45] *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31; *R v Lamb* [1967] 2 QB 981.
[46] *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31.

44. In assessing whether an act is relevantly unlawful, the jury will also need to consider whether there were any operative defences to the alleged act.[47]

Dangerous

45. An act is dangerous for the purpose of this offence if it exposes a person to an appreciable risk of serious injury.[48] An appreciable risk of injury is not sufficient.[49]

46. While an appreciable risk of death or really serious injury is not necessary, such higher states of risk would also meet the definition of dangerous.[50]

47. Dangerousness must be assessed objectively. The jury must decide whether a reasonable person in the position of the accused would have realised that he or she was exposing the other person to an appreciable risk of serious injury.[51]

48. Like the test for causation, whether a person is exposed to an "appreciable" risk of serious injury is qualitative and must be decided in a common sense manner, taking into account that the enquiry concerns criminal responsibility.[52]

49. Whether the supply of a drug to another person can, by itself, constitute a dangerous act "can raise difficult questions of principle and of the application of principle". Judges hearing such a case will need to consider the issue in the context of the evidence and circumstances and decide whether, as a matter of law, supply by itself can be considered dangerous or whether the voluntary acts of the victim break the chain of causation.[53]

50. When directing the jury about assessing the situation from the perspective of a reasonable person in the position of the accused, the judge may need to clearly define the relevant circumstances. As discussed in 6.2 – General principles, under voluntariness, there are different views on how to characterise the accused's act for the purpose of voluntariness. The issue of dangerousness must be assessed by reference to the accused's voluntary and causal act.[54]

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[47] See, e.g., *Edwards v The Queen* (2009) 264 LSJS 315; [2009] SASC 233 (self-defence) or *R v Stein* (2007) 18 VR 376; [2007] VSCA 300 (consent).

[48] *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31; *Burns v The Queen* (2012) 246 CLR 334; [2012] HCA 35, [7].

[49] *R v Suppiah* [2018] SASCFC 11, [37]–[38].

[50] *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31; *R v Fragomeli* (2008) 254 LSJS 279; [2008] SASC 96, [4], [90].

[51] *Wilson v The Queen* (1992) 174 CLR 313; [1992] HCA 31.

[52] *Burns v The Queen* (2012) 246 CLR 334; [2012] HCA 35, [9].

[53] See *Burns v The Queen* (2012) 246 CLR 334; [2012] HCA 35, [11]–[15] and [77]–[87] for a discussion of other cases examining this issue.

[54] *R v Williamson (No 1)* (1996) 67 SASR 428, 435–436, 447, 453.

51. When directing the jury about this element, the judge must tell the jury of the legal meaning of dangerous. The jury cannot be left at large to decide, according to their own views, whether the accused's act was dangerous.[55]

[55] *R v Wilson* (1992) 174 CLR 313; [1992] HCA 31.

Jury Direction #7.3.1 – Unlawful and Dangerous Act Manslaughter

I will now direct you as to the elements of the offence of manslaughter (by unlawful and dangerous act).

To prove manslaughter, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused's act or acts caused a person's death;

Two – The accused's act or acts were voluntary and deliberate;

Three –The accused's act or acts were unlawful;

Four – The accused's unlawful act or acts were dangerous.

I will now explain these four elements and how they apply in this case.

[*If manslaughter is an alternative to a charge of murder, add the following section:* The first two of these elements are the same as for murder – namely that the accused's act or acts caused a person's death, and were voluntary and deliberate. The third and fourth elements are different. Manslaughter does not require the prosecution to prove that the accused intended to kill or cause grievous bodily harm to the victim. Instead, the prosecution must prove the accused's act or acts were unlawful and they were dangerous, in the way I will now explain.]

Causation

The first element is that the accused's act or acts caused a person's death.

This means that the accused's act or acts must have been a substantial or significant cause of [*deceased*]'s death.

In deciding whether an act or acts cause some outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

Here, the prosecution says that the accused caused [*deceased*]'s death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

Voluntary and deliberate

The second element is that the accused's acts were voluntary and deliberate.

There are two parts to this element. Voluntary means that [his/her] act or acts were a product of [his/her] conscious will. Deliberate means that [his/her] act or acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Remember, you can only find this element proved if you are satisfied beyond reasonable doubt that [*name of accused*]'s acts were conscious and voluntary. In other words, if the prosecution can prove that the accused's acts were not [*identify in the circumstances of the case how voluntariness arises as an issue*, e.g. an involuntary act performed while concussed].

Unlawful

The third element is that the accused's acts were unlawful.

This requires the prosecution to show that the acts which caused [*deceased*]'s death breached the criminal law.

In this case, the prosecution say that when [*identify causal act*], [*accused*] was committing [*identify relevant crime*]. To prove this, the prosecution must prove that [*accused*] [*identify elements of relevant offence, including mental elements and any relevant defences*].

[*Identify relevant prosecution and defence arguments and relevant evidence*]

Dangerous

The fourth element is that the accused's acts were dangerous.

For the purpose of this element, dangerous has a special legal meaning which you must apply. An act is dangerous if a reasonable person in the accused's position would have realised that he or she was exposing [*deceased*] to an appreciable risk of serious injury.

This is an objective test. You are not looking at whether [*name of accused*] thought [his/her] conduct was dangerous. You must decide whether a reasonable person in the accused position would have realised that [*identify causal act*] was exposing [*deceased*] to an appreciable risk of serious injury.

[*If relevant, add the following section*: When you are considering this element, you must draw a distinction between an appreciable risk of injury and an appreciable risk of serious injury. An appreciable risk of injury is not enough. The risk must relate to a serious injury.]

[*If relevant, add the following section*: You've now heard three different terms used to describe different levels of injury. In murder, I told you that the accused must have intended to kill or cause grievous bodily harm, which I said meant really serious injury. For manslaughter, a reasonable person must have realised [he/she] was exposing the victim to an appreciable risk of serious injury. And a risk of injury is not sufficient. These three terms, really serious injury, serious injury and injury, are three points on a spectrum. It is up to you to decide what those terms mean in the circumstances of this case, and where an injury sits on the spectrum. The only assistance I can give you is that really serious injury is more serious than serious injury, and serious injury is more serious than injury.]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

7.3.2 – Manslaughter by criminal negligence

52. Manslaughter by criminal negligence involves the following three elements:[56]

- The accused breached a duty of care to a person through criminal negligence;
- The accused's negligence caused the victim's death;
- The accused's act or acts were voluntary and deliberate;

53. For this form of manslaughter, it is not necessary to show that the accused's act or acts were unlawful.[57]

Criminal negligence

54. Conceptually, the first element involves four issues:

- The accused owed the victim a duty of care;
- The accused breached that duty;
- A reasonable person in the situation of the accused would have appreciated that his or her actions would involve a high risk of death, grievous bodily harm or injury;
- The degree of breach constituted criminal negligence.[58]

55. In most trials, the issue for the jury is whether the accused breached an identified duty to the deceased by criminal negligence.[59]

Standard of criminal negligence

56. Criminal negligence involves:[60]

> such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

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[56] *R v Lavender* (2005) 222 CLR 67; [2005] HCA 37, [17]; *Nydam v The Queen* [1977] VR 430 (approved in *R v Johnston* [2007] SASC 300, [49]; *R v Tomac* (1996) 67 SASR 376, 381–382; *Wilson v The Queen* (1992) 174 CLR 313, 333; [1992] HCA 31; *R v Lavender* (2005) 222 CLR 67; [2005] HCA 37, [60]).

[57] *Wilson v The Queen* (1992) 174 CLR 313, 333; [1992] HCA 31.

[58] See *R v Peake* [2017] SASC 10, [37]

[59] If the existence or definition of the duty is in issue, it may be convenient to break the first element up into separate components. This may be particularly appropriate where the accused's duty is the product of specialised expertise. See, e.g., *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29 (duty of a surgeon) and *R v Barrett (No 3)* [2019] SASC 93 (duty of a midwife).

[60] *Nydam v R* [1977] VR 430. See also *R v Colbert* [2016] SASCFC 12, [13]; *R v Wilson* (1992) 174 CLR 313; [1992] HCA 31.

57. When directing the jury about this element, it is common to substitute the phrase 'really serious bodily harm' for 'grievous bodily harm'.[61]

58. As part of explaining the meaning of criminal negligence, it is permissible to draw a distinction with negligence that would support civil litigation as a way of emphasising the high standard required to prove criminal negligence.[62]

59. For the purpose of assessing the magnitude of the breach, the jury will compare the accused's conduct with the conduct of a reasonable person who has the same age, knowledge and skills as the accused.[63]

60. In some cases it will be necessary to warn the jury about the risk of hindsight reasoning.[64]

Relevance of special knowledge

61. In *Patel v The Queen* the majority explained how the accused's special knowledge may and may not be relevant:[65]

> There may be cases where the standard to be applied must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act. But that is not to use a person's knowledge to determine their guilt. A person's special knowledge may mean that the standard of conduct expected of them is higher. It is necessary to add that the appellant's imputed knowledge of his limitations cannot, logically, be applied to exculpate him for the reason that the objective standard to be applied is a minimum standard, applicable to all persons who profess to have the skills and competence of a surgeon by undertaking to perform surgery.
>
> In *Bateman,* Hewart LCJ said that it was conceivable that a person may be held liable for undertaking a case "which he knew, or should have known, to be beyond his powers". His Lordship should not be taken to suggest as appropriate an inquiry into an accused's state of mind. What his Lordship said is not inconsistent with the application of an objective test. It is not necessary to show that an accused in fact knew that a case was beyond his or her powers. Criminal negligence in the context of manslaughter is to be distinguished from other forms of criminal liability which involve intention or recklessness.
>
> …
>
> In assessing the appellant's decision to operate by reference to that which would have been reached by a reasonably competent surgeon, it would be relevant to have regard to the facts and matters which would affect the formation of that judgment. Thus, evidence about the facts known about a patient's condition; whether a diagnosis was possible without further investigation; what the correct diagnosis was; whether a need for surgery was thereby indicated; whether there were less invasive procedures to be considered; the risks to the patient from the surgery; and the ability of the patient to withstand surgery are all matters which would be relevant. The prosecution case contained much evidence of this kind.

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[61] See, e.g., *R v Tomac* (1996) 67 SASR 376, 381–382.

[62] *R v Colbert* [2016] SASCFC 12, [67]. See also *R v Bateman* (1925) 19 Cr App R 8; *R v Tomac* (1996) 67 SASR 376, 381.

[63] *R v Edwards* [2008] SASC 303, [416], citing *R v Adomako* [1995] 1 AC 171.

[64] *Cittadini v R* [2009] NSWCCA 302; *Gordon v Ross* [2006] NSWCA 157.

[65] *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29, [90]–[91], [93].

Existence of duty

62. In most cases, the existence of a duty to the deceased arises from the general common law duty not to cause harm to others.[66]

63. Other sources of duty include:[67]

- statute;
- relationship;
- contract;
- voluntary assumption of care for another (including where a person secludes another so that others cannot provide aid);
- where an accused creates a sequence of events that poses a risk to another

64. Courts should be slow to identify new categories of relationship that give rise to a duty of care.[68]

Causation

65. As the prosecution must prove that the accused's breach caused the victim's death, it will often be important to precisely identify the relevant causal act.[69]

Voluntariness

66. The existence of the third element means that there is a mental element in manslaughter by criminal negligence. The prosecution must prove that the accused intended to perform the act that caused the victim's death.[70]

Accused's state of mind

67. This offence does not contain an element that the accused had no honest and reasonable belief that his or her conduct was safe. Any question of reasonableness is subsumed within the objective element of criminal negligence and is not supported by the law relating to honest and reasonable mistakes of fact, as a belief that the conduct was safe involves an opinion, rather than a fact.[71]

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[66] See *R v Tomac* (1996) 67 SASR 376, 38; *R v Doherty* (1887) 16 Cox CC 306.
[67] *R v Peake* [2017] SASC 10, [29]–[31]; *Burns v The Queen* (2012) 246 CLR 334; [2012] HCA 35, [22]–[23], [46]–[48], [97].
[68] *Burns v The Queen* (2012) 246 CLR 334; [2012] HCA 35, [107].
[69] *Cittadini v The Queen* [2009] NSWCCA 302.
[70] *R v Johnston* [2007] SASC 300, [51]; *Nydam v The Queen* [1977] VR 430, 444.
[71] *R v Lavender* (2005) 222 CLR 67; [2005] HCA 37, [58]–[59].

68. Similarly, as the offence involves an objective assessment of fault, it is not necessary to show that the accused subjectively realised the conduct was negligent,[72] or that the accused knew, or was indifferent to, the risks created by his or her conduct.[73]

[72] *R v Lavender* (2005) 222 CLR 67; [2005] HCA 37, [62]; *R v Edwards* [2008] SASC 303, [415].
[73] *Patel v The Queen* (2012) 247 CLR 531; [2012] HCA 29, [88].

Jury Direction #7.3.2 – Negligent manslaughter

I will now direct as to the elements of the offence of manslaughter (by criminal negligence).

To prove manslaughter, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused breached a duty of care to a person through criminal negligence;

Two – The accused's negligence caused a person's death;

Three – The accused's acts were voluntary and deliberate.

I will now explain these three elements and how they apply in this case.

Criminal negligence[74]

The first element is that the accused breached a duty of care to [*deceased*] through criminal negligence.

The law says that every [*identify basis for duty of care*] must [*identify content of duty*].

For this element, there are two questions.[75]

First, did [*accused*] breach the duty [he/she] owed [*deceased*]? This requires you to consider what a reasonable person would have done in the situation, and whether [*accused*]'s act or acts fell below that standard.

The second question, if you found that [*accused*] breached the duty [he/she] owed, is whether the breach was so serious as to constitute criminal negligence?

A breach will be sufficiently serious for this element if it involved such a great falling short of the standard of care a reasonable person would have exercised and involved such a high risk of death or grievous bodily harm that it merits criminal punishment.

For this question, you are not concerned with mere carelessness or the kind of negligence that often occurs. That might be enough to prove negligence in a civil action between individuals. But this is a criminal case, and the standard of negligence required is higher.

The prosecution must show that there was a high level of negligence and that the circumstances involved a high risk of death or grievous bodily harm. This requires you to

[74] This direction assumes that the existence of a duty involves a pure question of law. If the existence or content of the duty involves the resolution of disputed questions of fact, then directions on this element should be modified to refer the jury to questions involved in assessing the existence of the duty.

[75] Where the case involves issues about the existence or definition of the duty, it may be appropriate to alter this direction to refer to three questions: Did the accused owe a duty of care to the deceased?; Did the accused breach that duty?; and Was the breach so serious as to constitute criminal negligence?

make a value judgment. You must be satisfied that a reasonable person, in the accused's situation, would have realised that there was a high risk of death or grievous bodily harm.

You must then decide whether the accused fell so far short of the standard of care a reasonable person would have exercised, in circumstances of a high risk of death or grievous bodily harm, that [he/she] merits criminal punishment?

If relevant, add: When you are considering this question, you must consider the matter from the perspective of a reasonable person of the same age, knowledge and skills as the accused. This means that you must take into account, for instance [*identify any special knowledge or skills the accused has*].

If relevant, add: When you are considering this question, you must be careful not to rely on the benefit of hindsight. You must consider the issue from the perspective of a reasonable person *before* the accused [*identify relevant act/s*] and ask whether that reasonable person would have foreseen a high risk of death or grievous bodily harm.

The prosecution argue that [*refer to relevant evidence and arguments*]. The defence respond that [*refer to relevant evidence and arguments*].

Causation

The second element is that the accused's negligence caused [*deceased*]'s death.

This means that the accused's negligence must have been a substantial or significant cause of [*deceased*]'s death.

In deciding whether an act causes a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

Here, the prosecution says that the accused's negligence the victim's death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

Voluntary and deliberate

The third element is that the accused's acts were voluntary and deliberate.

There are two parts to this element. Voluntary means that [his/her] act or acts were a product of [his/her] conscious will. Deliberate means that [his/her] act or acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

CHAPTER 8: OFFENCES AGAINST THE PERSON

8.1 – Intentionally or recklessly causing serious harm

1. Section 23 creates two offences involving causing serious harm.

2. The first offence, intentionally causing serious harm, consists of four elements:[1]

   - The accused caused serious harm to another person;
   - The accused's acts were voluntary;
   - The accused intended to cause serious harm;
   - The accused acted unlawfully.

3. The second offence, recklessly causing serious harm, also consists of four elements:[2]

   - The accused caused serious harm to another person;
   - The accused's acts were voluntary;
   - The accused was reckless in causing serious harm;
   - The accused acted unlawfully.

Definitions – Serious harm

4. The term 'serious harm' is defined as:[3]

   (a) harm that endangers a person's life; or

   (b) harm that consists of, or results in, serious and protracted impairment of a physical or mental function; or

   (c) harm that consists of, or results in, serious disfigurement.

5. Harm is defined to mean physical or mental harm, whether temporary or permanent. These terms are then further defined as:[4]

   "mental harm" means psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm;

   "physical harm" includes—

   (a) unconsciousness;

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[1] *Criminal Law Consolidation Act 1935* (SA) s 23(1).
[2] *Criminal Law Consolidation Act 1935* (SA) s 23(3).
[3] *Criminal Law Consolidation Act 1935* (SA) s 21.
[4] *Criminal Law Consolidation Act 1935* (SA) s 21.

(b) pain;

(c) disfigurement;

(d) infection with a disease;

Causation

6. *Criminal Law Consolidation Act 1935* s 21 provides statutory rules regarding causation:

> a person causes harm if the person's conduct is the sole cause of the harm or substantially contributes to the harm;
>
> If a victim suffers serious harm as a result of multiple acts of harm and those acts occur in the course of the same incident, or together constitute a single course of conduct, a person who commits any of the acts causing harm is taken to cause serious harm even though the harm caused by the act might not, if considered in isolation, amount to serious harm.

7. The first paragraph of the s 21 provision on causation operates as a definition of 'causes harm' for the purpose of an offence contrary to ss 23 and 24.[5]

8. The second paragraph has the effect that where multiple acts of harm are performed by different people in a single incident, and the cumulative effect of those acts of harm is 'serious harm', then each person is responsible for that serious harm. As the Court noted in *Staker v The Queen*, there are unresolved questions about how this provision operates in a case where the various people are not acting under a joint enterprise.[6]

Voluntariness

9. As with all offences, the causal act must be voluntary. For information about voluntariness, see 6.2 – General principles.

Intentionally or recklessly causing serious harm

10. For the purpose of the offence in s 23(1), intentionally causing serious harm, the prosecution must prove that the accused intended to cause serious harm. A state of mind such as recklessness, whether within the common law meaning or the s 21 statutory meaning, is not adequate. Instead, recklessness is the fault element for the separate offence of recklessly causing serious harm in s 23(3).[7]

11. Recklessness is defined in s 21 as follows:[8]

> a person is reckless in causing … serious harm to another if the person—
>
> (a) is aware of a substantial risk that his or her conduct could result in … serious harm (as the case requires); and

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[5] *Staker v The Queen* (2011) 110 SASR 274; [2011] SASCFC 87, [42].
[6] *Staker v The Queen* (2011) 110 SASR 274; [2011] SASCFC 87, footnote 27.
[7] See *R v Mavropoulos* [2009] SASC 190, [51].
[8] See also *R v Dransfield* [2016] SASCFC 68, [20], [29]–[30].

(b) engages in the conduct despite the risk and without adequate justification.

12. Recklessness requires more than negligence, carelessness or lack of thought. It requires proof of an active thought process.[9]

Unlawfulness

13. The fourth element is that the accused acted unlawfully. This requires the prosecution to disprove any defences that arise on the evidence.

14. In addition to any generally applicable defences, section 22 excludes certain conduct from the ambit of the offence. This includes where:[10]

- The victim lawfully consents to the act causing the harm; or
- The defendant's conduct is within the limits of what would be generally accepted in the community as normal incidents of social interaction or community life, unless the defendant intended to cause harm.

15. A person may lawfully consent "if the nature of the harm and the purpose for which it is inflicted fall within limits that are generally accepted in the community".[11] Examples given in the section include harm with a religious purpose, therapeutic purposes, to control fertility or as part of a sporting or recreational activity.

16. Section 22 also excludes conduct that results in purely mental harm, unless:[12]

(a) the defendant's conduct gave rise to a situation in which the victim's life or physical safety was endangered and the mental harm arose out of that situation; or

(b) the defendant's primary purpose was to cause such harm.

17. The section gives two examples of where pure mental harm would not be contrary to the Act. Both of these examples involve a situation where the accused is aware that the victim has a psychological condition which is likely to be exacerbated by the accused's act. The examples note that knowledge of susceptibility is not sufficient. Instead, the prosecution would need to show that "the defendant wanted to cause harm and that desire was the sole or a significant motivation for the defendant's conduct".[13]

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[9] *R v Dransfield* [2016] SASCFC 68, [21].

[10] *Criminal Law Consolidation Act 1935* (SA) s 22(1), (4).

[11] *Criminal Law Consolidation Act 1935* (SA) s 22(3).

[12] *Criminal Law Consolidation Act 1935* (SA) s 22(5).

[13] *Criminal Law Consolidation Act 1935* (SA) s 22(5). As stated in *Acts Interpretation Act 1915* (SA) s 19A, examples are not exhaustive and may extend but do not limit the meaning of the Act.

Jury Direction #8.1A – Intentionally causing serious harm

I will now direct you as to the elements of intentionally causing serious harm.

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act was voluntary and deliberate;

Three – A person suffered serious harm;

Four – The accused's voluntary act caused that serious harm;

Five – The accused intended to cause serious harm;

Six – The accused's act was unlawful.

I will now explain these six elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Voluntariness

The second element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Serious harm

The third element is that complainant suffered serious harm.

For the purpose of this case, serious harm is harm that [endangers life / consists of or results in serious and protracted impairment of a physical or mental function / consists of or results in serious disfigurement].

[*Refer to relevant evidence and arguments*]

Causation

The fourth element is that the accused's acts caused the serious harm to [*complainant*].

This requires the prosecution to show that the accused's conduct was either the sole cause of the serious harm, or substantially contributed to the serious harm.

[*Refer to relevant evidence and arguments*]

Intention

The fifth element is that [*accused*] intended to cause serious harm.

This element also concerns the accused's state of mind. This time, you must decide whether s/he intended to cause serious harm. In other words, the prosecution must prove that when he [*identify relevant act*], [*accused*] intended to cause harm that [endangered life / involved serious and protracted impairment / involved serious disfigurement].

[*Refer to relevant evidence and arguments*]

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

Jury Direction #8.1B – Recklessly causing serious harm

I will now direct you as to the elements of recklessly causing serious harm.

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act was voluntary and deliberate;

Three – A person suffered serious harm;

Four – The accused's voluntary act caused that serious harm;

Five – The accused was reckless as to causing serious harm;

Six – The accused's act was unlawful.

I will now explain these six elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Voluntariness

The second element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Serious harm

The third element is that complainant suffered serious harm.

For the purpose of this case, serious harm is harm that [endangers life / consists of or results in serious and protracted impairment of a physical or mental function / consists of or results in serious disfigurement].

[*Refer to relevant evidence and arguments*]

Causation

The fourth element is that the accused's acts caused the serious harm to [*complainant*].

This requires the prosecution to show that the accused's conduct was either the sole cause of the serious harm, or substantially contributed to the serious harm.

[*Refer to relevant evidence and arguments*]

Recklessness

The fifth element is that [*accused*] caused serious harm recklessly.

This element also concerns the accused's state of mind. This time, you must decide whether [*accused*] was reckless in causing serious harm.

Recklessness has two parts. First, the prosecution must show that the accused was aware of a substantial risk that his/her conduct could result in serious harm. Second, the prosecution must show that the accused engaged in the conduct despite the risk and without adequate justification.[14]

As I said, this element concerns the accused's state of mind. It is not enough that you, or a reasonable person, would have realised that the accused's conduct would create a substantial risk of [endangering life / serious and protracted impairment / serious disfigurement]. You can only find this element proved if the prosecution proves that [*accused*] was aware of that risk, and engaged in the conduct without adequate justification.

[*Refer to relevant evidence and arguments*]

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

[14] Note: Judges should consider modifying this direction to omit reference to the requirement of acting despite the risk and without adequate justification unless justification arises as a real issue in the case.

8.2 – Causing harm

18. Section 24 creates two offences involving causing harm.

19. The first offence, intentionally causing harm, consists of four elements:[15]

    - The accused caused harm to another person;
    - The accused's acts were voluntary;
    - The accused intended to cause harm;
    - The accused acted unlawfully.

20. The second offence, recklessly causing harm, also consists of four elements:[16]

    - The accused caused harm to another person;
    - The accused's acts were voluntary;
    - The accused was reckless in causing harm;
    - The accused acted unlawfully.

21. The elements of this offence closely follow the elements of intentionally or recklessly causing serious harm. The difference is the level of harm that must be caused and must be intended or recklessly caused. See 8.1 – Intentionally or recklessly causing serious harm for information on the elements.

22. Harm is defined as "physical or mental harm (whether temporary or permanent)".[17]

[15] *Criminal Law Consolidation Act 1935* (SA) s 24(1).
[16] *Criminal Law Consolidation Act 1935* (SA) s 24(2).
[17] *Criminal Law Consolidation Act 1935* (SA) s 21.

Jury Direction #8.2A – Intentionally causing harm

Note: This direction is designed for cases where the accused caused physical harm. If the prosecution alleges mental harm, then the direction will need to be adapted.

I will now direct you as to the elements of intentionally causing harm.

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act was voluntary and deliberate;

Three – A person suffered harm;

Four – The accused's voluntary act caused that harm;

Five – The accused intended to cause harm;

Six – The accused's act was unlawful.

I will now explain these six elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Voluntariness

The second element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Harm

The third element is that complainant suffered harm.

The first is that [*complainant*] suffered harm.

For the purpose of this element, harm includes unconsciousness, pain, disfigurement or infection with a disease.

[*Refer to relevant evidence and arguments*]

Causation

The fourth element is that the accused's acts caused the harm to [*complainant*].

This requires the prosecution to show that the accused's conduct was either the sole cause of the harm, or substantially contributed to the harm.

[*Refer to relevant evidence and arguments*]

Intention

The fifth element is that [*accused*] intended to cause harm.

This element also concerns the accused's state of mind. This time, you must decide whether s/he intended to cause harm. In other words, the prosecution must prove that when he [*identify relevant act*], [*accused*] intended to cause unconsciousness, pain, disfigurement or infection with a disease.

[*Refer to relevant evidence and arguments*]

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

Jury Direction #8.2B – Recklessly causing harm

Note: This direction is designed for cases where the accused caused physical harm. If the prosecution alleges mental harm, then the direction will need to be adapted.

I will now direct you as to the elements of recklessly causing harm.

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act was voluntary and deliberate;

Three – A person suffered harm;

Four – The accused's voluntary act caused that harm;

Five – The accused caused the harm recklessly;

Six – The accused's act was unlawful.

I will now explain these six elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Voluntariness

The second element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Harm

The third element is that complainant suffered harm.

The first is that [*complainant*] suffered harm.

For the purpose of this element, harm includes unconsciousness, pain, disfigurement or infection with a disease.

[*Refer to relevant evidence and arguments*]

Causation

The fourth element is that the accused's acts caused the harm to [*complainant*].

This requires the prosecution to show that the accused's conduct was either the sole cause of the harm, or substantially contributed to the harm.

[*Refer to relevant evidence and arguments*]

Recklessness

The fifth element is that [*accused*] caused harm recklessly.

This element also concerns the accused's state of mind. This time, you must decide whether [*accused*] was reckless in causing harm.

Recklessness has two parts. First, the prosecution must show that the accused was aware of a substantial risk that his/her conduct could result in harm. Second, the prosecution must show that the accused engaged in the conduct despite the risk and without adequate justification.[18]

As I said, this element concerns the accused's state of mind. It is not enough that you, or a reasonable person, would have realised that the accused's conduct would create a substantial risk of physical or mental harm. You can only find this element proved if the prosecution proves that [*accused*] was aware of that risk, and engaged in the conduct without adequate justification.

[*Refer to relevant evidence and arguments*]

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

[18] Note: Judges should consider modifying this direction to omit reference to the requirement of acting despite the risk and without adequate justification unless justification arises as a real issue in the case.

8.3 – Endangering life or creating risk of serious harm or harm

23. Section 29 creates three offences of endangering another person.

24. The first offence, endangering life, has four elements:[19]

    - The accused performed an act or made an omission that was likely to endanger the life of another;
    - The accused acted unlawfully;
    - The accused knew that the act or omission was likely to endanger the life of another;
    - The accused:
        - Intended to endanger the life of another; or
        - Was recklessly indifferent as to whether the life of another was endangered.

25. The second and third offences, creating a risk of serious harm and creating a risk of harm, differ in that the acts or omissions must be likely to cause serious harm or harm, respectively, rather than to endanger life.[20]

26. As a practical matter, where the accused intends to cause harm or endanger the life of another, it is likely that there will be a sufficient state of mind to charge the accused with an offence of attempt. For this reason, it is likely that most cases involving s 29 will rely on reckless indifference for the purpose of the fourth element.[21]

Action or omission likely to endanger life

27. While the section does not explicitly say so, the requirement that the accused knew the act or omission was likely to endanger life (or cause harm or serious harm) inherently includes the requirement that the act or omission would actually have that result.[22]

28. While the Act uses the term 'likely', it is not useful to speak of whether the risk is probable or more probable than not.[23] While the term 'likely' may be contrasted with a mere possibility, a judge should not suggest synonyms for 'likely'. Juries should be told that the word 'likely' carries its ordinary meaning, no further elaboration is necessary and it

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[19] *Criminal Law Consolidation Act 1935* (SA) s 29(1); *Ducaj v The Queen* [2019] SASCFC 152, [7]–[10].

[20] *Criminal Law Consolidation Act 1935* (SA) ss 29(2), (3). As Kourakis CJ noted in *Ducaj v The Queen* [2019] SASCFC 152 at [4], this may be because a notion of 'endangering safety' would not support a hierarchy which distinguishes between harm and serious harm.

[21] *Ducaj v The Queen* [2019] SASCFC 152, [22].

[22] *Bedi v The Queen* (1993) 61 SASR 269, 274; *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [96]; *Ducaj v The Queen* [2019] SASCFC 152, [7].

[23] *R v Parenzee* (2008) 101 SASR 469; [2008] SASC 245, [73].

is for the jury to decide whether harm is a likely consequence and whether the accused knew it was likely.[24]

29. The first and third elements are not proved by showing that conduct created, and the accused knew that the conduct created, a 'substantial risk' of harm. Use of the term 'substantial risk' with a jury creates a risk that a jury may convict based on a degree of possibility that is little more than a chance or risk.[25]

30. The relevant risk must exist at the time of the relevant act or acts. The offence will not be complete if there is no risk of harm occurring unless the accused takes further voluntary acts. However, the court may take account of the likelihood of the accused making a mistake, or another person performing an act, which would activate the relevant risk, when deciding whether the harm was likely.[26]

31. There is no rigid or definitional line which excludes the court from taking account of the possibility of future events when deciding whether a risk is likely. However, the court can take account of conduct that might have occurred but did not occur.[27]

32. An omission can only be relied on to prove this offence if there was a duty on the accused to act. Such duties include the duty of a parent to care for their child and the duty of a person who assumes responsibility for a sick person to provide them with medical care.[28]

33. These offences may be charged as a course of conduct. It is not necessary to isolate a single act or omission as the physical element of the offence.[29]

Knowledge and intention

34. The structure of the offence creates a requirement that the prosecution must separately prove both that the accused knew the act or omission was likely to endanger the life of another person, and that the accused intended or was recklessly indifferent to that endangerment. Knowledge, combined with deliberately engaging in the relevant conduct, is not enough.[30]

Reckless indifference

35. For the purpose of the offences under s 29, reckless indifference means that the prosecution must show that the accused knew the conduct was likely to endanger life

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[24] *Ducaj v The Queen* [2019] SASCFC 152, [50].
[25] *Ducaj v The Queen* [2019] SASCFC 152, [49].
[26] *Nelson v Police* [2011] SASC 55, [15]–[25]; *R v Adul-Rasool* (2008) 18 VR 586, [41]; *Ducaj v The Queen* [2019] SASCFC 152, [82].
[27] *Nelson v Police* [2011] SASC 55, [22]; *Ducaj v The Queen* [2019] SASCFC 152, [82]–[86].
[28] See *R v Staker* (2011) 110 SASR 274; [2011] SASC 87, [26]–[35].
[29] *R v Staker* (2011) 110 SASR 274; [2011] SASC 87.
[30] *Ducaj v The Queen* [2019] SASCFC 152, [11].

and engaged in the conduct without having any good reason or adequate justification for the conduct.[31]

36. Due to the particular structure of the offences in s 29, there is overlap between the first part of the definition of reckless indifference (knowledge that the conduct was likely to endanger life) and the third element.

37. It is wrong to direct the jury that recklessness requires merely an awareness of the possibility that life will be endangered.[32]

38. The requirement that the accused engaged in the conduct without adequate justification means that some conduct will not be reckless even if the accused is aware of the likelihood that it will endanger life.[33]

39. Examples of good reason or adequate justification include where a person is confronted (through no fault of their own) with choosing between two dangerous options, rushing an injured person to hospital, performing a dangerous manoeuvre in an extreme sport or a dangerous procedure in a workplace or responding to a natural disaster.[34]

Harm and serious harm

40. The offences in ss 29(2) and 29(3) require that the act or omission be likely to cause serious harm or harm.

41. Serious harm is defined as:[35]

    (a) harm that endangers a person's life; or

    (b) harm that consists of, or results in, serious and protracted impairment of a physical or mental function; or

    (c) harm that consists of, or results in, serious disfigurement.

42. Harm is defined as "physical or mental harm (whether temporary or permanent)".[36]

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[31] *Ducaj v The Queen* [2019] SASCFC 152, [22], [50].
[32] *R v Shah* (2018) 131 SASR 491; [2018] SASCFC 90, [47].
[33] *R v Shah* (2018) 131 SASR 491; [2018] SASCFC 90, [46].
[34] *Ducaj v The Queen* [2019] SASCFC 152, [25].
[35] *Criminal Law Consolidation Act 1935* (SA) s 3.
[36] *Criminal Law Consolidation Act 1935* (SA) s 21.

Jury Direction #8.3 – Endangering life

Note: This direction assumes that the prosecution case is based on an act. If it is based on an omission, the direction must be adjusted.

Note: This direction is designed for cases where the charge is laid under s 29(1). It may be adapted if the offence under ss 29(2) or 29(3) is charged.

I will now direct you as to the elements of endangering life.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused committed an act that was likely to endanger the life of another person;

Two – The accused acted unlawfully.

Three – The accused knew the act was likely to endanger the life of another person;

Four – The accused either intended to endanger another person or was recklessly indifferent to whether another person's life was endangered;

I will now explain these four elements and how they apply in this case.

Act likely to endanger life

The first element is that the accused committed an act that was likely to endanger the life of another person.

There are two parts to this element.

The first is whether the accused committed a certain act. For this element, the prosecution alleges that [*accused*] [*identify relevant act or omission*].

The second part of this element is that this act was likely to endanger life.[37] There is no legal definition of the phrase 'likely to endanger life' or further definition I can give you about the meaning of this phrase. It is for you to decide whether the actions were likely to endanger life, using the ordinary meaning of the word 'likely'.

The prosecution says that [*identify relevant act or omission*] endangered [*identify possible victim*]'s life because [*explain how the prosecution says the act was likely to endanger life*].

The defence says that [*refer to evidence and arguments by the defence*].

[37] If this direction is being adapted for a charge under *Criminal Law Consolidation Act 1935* (SA) ss 29(2) or (3), the judge should add in a direction that it is not necessary for the conduct to actually cause harm / serious harm. It is sufficient if the accused's acts were likely to cause harm / serious harm.

Unlawfulness

The second element is that the accused acted unlawfully.

This means the prosecution must prove that the accused was not [*insert directions on relevant lawful excuse*].

Knowledge

The third element is that the accused knew that his/her act was likely to endanger the life of another person.

This element concerns the accused's state of mind. Again, there is no special legal definition of the phrase 'likely to endanger life'. You must look at all the evidence and decide whether the accused knew his/her conduct was likely to endanger life, using the ordinary meaning of the word 'likely'.

[*Refer to relevant evidence and arguments*]

Intention or Recklessness

The fourth element is that the accused either intended to endanger another person or was recklessly indifferent to whether another person's life was endangered.

This element also concerns the accused's state of mind.

There are two ways to prove this element.

The first requires the prosecution to prove that [*accused*] intended to put [*identify possible victim*]'s life in danger.

The second way to prove this element requires the prosecution to prove that [*accused*] knew that his/her act was likely to endanger life and engaged in the conduct without having any adequate justification.

You have already considered whether the accused knew the act was likely to endanger the life of another when considering the third element. The focus of the fourth element is whether, having this knowledge, the accused engaged in the conduct without having any adequate justification for his/her conduct. [*If relevant, elaborate on the sorts of actions that might be an adequate justification*].

[*Refer to relevant evidence and arguments*]

8.4 – Possession of an object intending to kill or cause serious harm

43. Section 31(1) creates the offence of possessing an object with intent to kill or cause harm. The offence consists of two elements:[38]

    - The accused had custody or control of an object;
    - The person intended to use, or cause or permit another to use, the object to:
        - Kill another;
        - Endanger the life of another;
        - Cause serious harm to another;

44. Section 31(2) creates a lesser offence which differs in the second element. Under the s 31(2) offence, the prosecution only needs to prove that the accused intended to use, or cause or permit another to use, the object to cause harm to another.

45. See 8.1 – Intentionally or recklessly causing serious harm for information on the meaning of 'serious harm' and see 8.2 – Causing harm on the meaning of 'harm'.

46. Section 31 provides that the accused must perform these acts "without lawful excuse". Under s 5B, the onus of proof of a "lawful excuse" lies on the defendant.

[38] *Criminal Law Consolidation Act 1935* (SA) s 31.

Jury Direction #8.4 – Possession of an object intending to kill or cause serious harm

Note: This direction is designed for where the accused is charged with possessing an object intending to use it to kill. It can be adapted if the charge alleges an intent to cause serious harm, or if the accused is charged with the offence in s 31(2), involving an intent to cause harm.

I will now direct you as to the elements of possessing an object intending to kill or cause serious harm.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused had possession of an object;

Two – The accused intended to use the object to kill another person;

I will now explain these two elements and how they apply in this case.

Possession of an object

The first element is that [*accused*] had possession of [*identify object*].

A person has possession of something if [s/he] has the power and intention to exercise control over the item, to the exclusion of others.

[*If joint possession is in issue, add the following* – Two or more people may have possession of something at the same time. This is called joint possession. It means that each of them have the power and intention to exercise control over the item, to the exclusion of anyone apart from another person in joint possession.]

Possession is different to ownership. Ownership lets you use, sell or destroy something. Possession is merely a right to exercise control. For this element, you are looking at whether [*accused*] had possession of the [*identify object*], not whether s/he owned the [*identify object*].

A person continues to have possession even when they don't physically control the item. To give a simple example, suppose you borrowed a library book to read during breaks in the trial. You have possession of the book but you do not own the book. You continue to have possession of the book when you leave it in your bag in the jury room, or at home when you leave the house. You decide where to take the book and where to put it, rather than leaving it for anyone else to take.

Possession requires that you know you have the item. For example, if someone slipped a book into your bag during a break without your knowledge, you would not have possession of that book, even after you picked up your bag and go home for the day.

The prosecution argues that [*accused*] had possession of the [*identify object*] because [*refer to relevant evidence and arguments*]. To establish this, they have to exclude other possible explanations. In particular, they must prove that [*identify competing hypothesis that must be excluded, such as lack of knowledge or mere acquiescence*]. [*Refer to relevant evidence and arguments on proof or disproof of hypotheses consistent with innocence*].

Intention to kill

The second element is that the accused intended to use the [*identify object*] to kill a person.

This element concerns the accused's state of mind.

To prove the accused's intention, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that the accused intended to use the [*identify object*] to kill a person. In making this assessment, you should take into account any evidence of words spoken by the accused at the time s/he possessed the [*identify object*]. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

[*Identify relevant evidence and arguments*]

[If the defence raises the issue of lawful excuse, add the following direction:

Lawful excuse

If the prosecution has proved these two elements, you must then turn to look at a legal defence. The law provides that an accused must not be convicted of this offence unless s/he acted without lawful excuse.

Unlike the elements of the offence, the accused must prove the elements of a lawful excuse. This is one of the rare situations where the accused must prove an issue. To establish a lawful excuse, the accused must prove that [*insert directions on relevant lawful excuse*].

The standard of proof for this defence is the balance of probabilities. That is, the accused must show that each element of the defence is more likely than not. This is a lower standard than beyond reasonable doubt, which is the standard that applies to the prosecution.]

8.5 – Assault

47. Section 20 creates two offences involving assault.

48. The first offence, assault, consists of three elements:[39]

- The accused assaulted another person;
- The assault was voluntary;
- The assault was unlawful.

49. The second offence, assault causing harm, consists of four elements:[40]

- The accused assaulted another person;
- The assault was voluntary;
- The assault was unlawful;
- The assault caused harm.

50. Charges of assault have the potential to raise issues of duplicity. The judge will need to consider the allegations made and the evidence led to determine whether, for example, multiple blows are part of a single transaction or must be treated as separate events.[41]

Assault

51. An assault occurs when the accused:[42]

(a) intentionally applies force (directly or indirectly) to the victim; or

(b) intentionally makes physical contact (directly or indirectly) with the victim, knowing that the victim might reasonably object to the contact in the circumstances (whether or not the victim was at the time aware of the contact); or

(c) threatens (by words or conduct) to apply force (directly or indirectly) to the victim and there are reasonable grounds for the victim to believe that—

(i) the person who makes the threat is in a position to carry out the threat and intends to do so; or

(ii) there is a real possibility that the person will carry out the threat; or

(d) does an act of which the intended purpose is to apply force (directly or indirectly) to the victim; or

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[39] *Criminal Law Consolidation Act 1935* (SA) s 20(3).
[40] *Criminal Law Consolidation Act 1935* (SA) s 20(4).
[41] See, e.g., *Wellington v Police* (2009) 105 SASR 215; [2009] SASC 294; *Stratis v Police* [1998] SASC 6886; *R v Traino* (1987) 45 SASR 473.
[42] *Criminal Law Consolidation Act 1935* (SA) s 20(1).

(e) accosts or impedes another in a threatening manner.

52. Despite the breadth of this term, section 20 does not create separate offences for each different type of assault specified in section 20(1).[43]

53. In enacting these provisions, it was Parliament's intention to reflect the existing common law of common assault.[44]

54. The requirement that the accused intentionally applied force, or made physical contact, does not require proof that the accused intended to apply the force to the particular victim. The element may be proved where the accused intended to apply force to (or make physical contact with) any person.[45]

55. No particular degree of force is required to prove this offence. It is sufficient if the accused touched the victim.[46]

56. Where the prosecution relies on paragraph (c), the prosecution must also show the accused either intended to put someone in fear or engaged in the conduct knowing it was possible that the victim may be put in fear. This second state of mind is commonly described as recklessness. Both states of mind involve a subjective rather than objective test.[47]

57. At common law, assessing the impact of the threat took into account characteristics of the victim known to the accused, such as knowledge that the victim was especially timid.[48]

58. Paragraph (c) requires that "there are reasonable grounds for the victim to believe" certain things. It is not clear whether this requires a jury to consider whether the victim actually formed that belief, or whether it is limited to there being reasonable grounds on which the victim could form that belief.[49]

59. Paragraphs (c)(i) and (ii) also specify the content of the accused's intention. The prosecution must prove that the accused intended that the victim would believe on

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[43] *Nasr v Police* [2017] SASC 138, [83]–[84].

[44] South Australia, *Parliamentary Debates*, House of Assembly, 22 October 2003, 585–591; *Police v Harrison* (2017) 127 SASR 315; [2017] SASC 18, [14].

[45] *Police v Wilson* (2012) 269 LSJS 455; [2012] SASC 38, [10]–[21].

[46] *Collins v Wilcock* [1984] 1 WLR 1172.

[47] *Police v Harrison* (2017) 127 SASR 315; [2017] SASC 18, [10]–[15]. *Fisher v Police* [2004] SASC 232, [21]–[22]; *Edwards v Police* (1998) 71 SASR 493, 495. See also *MacPherson v Beath* (1975) 12 SASR 174, 177; *MacPherson v Brown* (1975) 12 SASR 184, 188, 190.

[48] *Macpherson v Beath* (1975) 12 SASR 174, 177; *White v South Australia* (2010) 106 SASR 521; [2010] SASC 95, [364]–[365].

[49] See *Criminal Law Consolidation Act 1935* (SA) s 20(1)(c); *Police v Harrison* (2017) 127 SASR 315; [2017] SASC 18, [10]–[15]; *Edwards v Police* (1998) 71 SASR 493, 495.

reasonable grounds that the accused was in a position to, and intended to, carry out the threat, or that there was a real possibility the defendant would carry out the threat.[50]

60. At common law, a threat would only constitute an assault if it was a threat to apply force "immediately". For this purpose, "immediately" takes into account practical opportunities for the victim to escape. A threat to a captive victim, to apply force at a time of the accused's choosing, could constitute a threat of immediate force, even though the same threat to a person at liberty may not.[51]

61. While paragraph (c) does not refer to this element of immediacy, the model direction includes this requirement as a matter of caution and for consistency with decisions holding that section 20 was not intended to expand the common law.[52]

Unlawful

62. The third element is that the accused acted unlawfully. This requires the prosecution to disprove any defences that arise on the evidence.

63. In addition to any general defences, the Act provides that:[53]

> Conduct that lies within limits of what would be generally accepted in the community as normal incidents of social interaction or community life cannot amount to an assault.

64. Section 20(1) specifies that an assault occurs if the prescribed conduct occurs without the consent of the other person. The model directions assume that directions on the absence of consent will be given as part of the element that the assault was unlawful, rather than as part of the element that the conduct involved an assault.

Assault causing harm

65. The definition of harm in s 21 does not apply to assault under s 20. Instead, the common law meaning of harm applies.

66. At common law, harm is an ordinary word and carries its ordinary meaning. Harm is a synonym for injury. An assault causing harm is one where the assault causes some injury to the victim. In explaining the word harm, the judge should not suggest that the offence is committed if the assault interferes with the health or comfort of the victim, regardless of whether an injury has been caused.[54]

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[50] See *Nasr v Police* [2017] SASC 138, [76].
[51] See *Zanker v Vartzokas* (1988) 144 LSJS 259; *MacPherson v Brown* (1975) 12 SASR 184.
[52] See *Police v Harrison* (2017) 127 SASR 315; [2017] SASC 18, [10]–[15].
[53] *Criminal Law Consolidation Act 1935* (SA) s 20(2).
[54] *R v Chan-Fook* [1994] 1 WLR 689; *DPP v Smith* [1961] AC 290.

67. The offence of assault causing harm does not require proof of an intention to cause harm.[55] The element of intention is part of the more serious offence of intentionally causing harm under s 24.

[55] *Coulter v The Queen* (1988) 164 CLR 350; [1988] HCA 3 and Note to *Criminal Law Consolidation Act 1935* (SA) s 20(4).

Jury Direction #8.5A – Assault – Application of force causing harm

Note: This direction is designed for use where the accused is charged with an offence under s 20(4). Where the accused is charged with applying force without causing harm, the fourth element should be omitted.

I will now direct you as to the elements of assault causing harm.

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act involved the application of force to a person;

Three – The act was voluntary and deliberate;

Four – The accused intended to apply force;

Five – The application of force caused harm;

Six – The act was unlawful.

I will now explain these six elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Application of force

The second element is that [*accused*]'s act applied force to [*complainant*].

For this element, no particular degree of force or contact is required. The slightest touch is enough.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Voluntariness

The third element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it. The prosecution must also show that his/her acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Intention

The fourth element is that the accused intended to apply force.

This element also concerns the accused's state of mind. You must decide whether the prosecution has proved that the accused intended that his/her act would apply force to a person.

Causing Harm

The fifth element is that the application of force caused harm to the complainant.

The prosecution argues that [*identify alleged act of assault*] caused [*identify alleged harm*].

This element involves three questions.

First, did [*complainant*] suffer *[identify alleged harm*]?

Second, are you satisfied that [*identify alleged harm*] is a form of harm? The word harm has no special legal meaning. It is up to you to decide whether [*identify alleged harm*] is a form of harm.

Third, was the [*identify alleged harm*] caused by [*identify alleged act of assault*]?

[*If necessary, add*: In deciding whether an action causes some outcome, the law says you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfully

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

Jury Direction #8.5B – Assault – Threats

I will now direct you as to the elements of assault.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused performed an act;

Two – The act involved intentionally threatening another person;

Three – The act was voluntary and deliberate;

Four – The act was unlawful.

I will now explain these four elements and how they apply in this case.

Act

The first element is that the accused performed an act.

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Assault

The second element is that [*accused*] intentionally threatened [*complainant*].

For the purpose of this case, the prosecution must prove three matters.

First, the accused must have made a threat that s/he would immediately apply force to another person.[56]

Second, the accused must have either intended to put the other person in fear, or knew it was possible that the other person would be in fear due to his/her conduct.[57]

Third, the other person must have reasonably believed that that the accused was in a position to carry out the threat and intended to do so, or there was a real possibility that the accused would carry out the threat.

[56] As noted in the commentary, *Criminal Law Consolidation Act 1935* (SA) s 20 does not in terms refer to the requirement of immediacy. This is included as a matter of caution, as immediacy was a requirement for assault by threats at common law.

[57] As noted in the commentary, *Criminal Law Consolidation Act 1935* (SA) s 20 does not refer to the accused's state of mind. This component has been added as a matter of caution, as the state of mind component was a necessary part of assault by threats at common law.

The first component concerns what the accused did. There must have been a threat. The threat must have been to apply force to another person. And the threat must have been to apply force immediately, rather than at some later time.

The second component concerns the accused's state of mind. The accused must have intended, or knew it was possible, that the other person would fear the threat would be carried out.

The third component concerns the effect of the accused's acts on the other person, and whether the other person's view of the acts was reasonable.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Voluntariness

The third element is that the accused's act was voluntary and deliberate.

This element concerns the accused's state of mind. You must decide whether the accused's act was a product of his or her will. That is, the prosecution must show that the accused knew what s/he was doing and meant to do it. The prosecution must also show that his/her acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfully

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

8.6 – Kidnapping

68. Section 39 creates the offence of kidnapping. The offence has three elements:

    - The accused took or detained a person;
    - The other person did not consent;
    - The accused intended to:
        - Hold the other person to ransom or as a hostage; or
        - Commit an indictable offence against the other person, or a third person.

69. Section 38 provides three relevant definitions:

> ***child*** means a person under the age of 18 years;
>
> ***detain***—detention is not limited to forcible restraint but extends to any means by which a person gets another to remain in a particular place or with a particular person or persons;
>
> ***take***—a person takes another if the person compels, entices or persuades the other to accompany him or her or a third person.

70. The prosecution must prove that the accused had the relevant intention at the time of the taking or detaining. An accused cannot be convicted of kidnapping if there is a reasonable possibility that the accused only formed the intention to ransom, hold as a hostage or commit an indictable offence against the person at a later time.[58]

71. Section 39(2) provides that apparent consent is to be ignored if the person is a child or mentally incapable of understanding the significance of the consent, or if the consent was obtained by duress or deception.

72. The statutory offence of kidnapping may not have abolished the common law offence of kidnapping.[59] The common law offence consisted of four elements:[60]

    - The accused took or carried away a person;
    - The accused did this by force or fraud;
    - The other person did not consent;
    - The accused acted unlawfully.

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[58] See *R v Jackson* [2007] SADC 140. But c.f. *R v Rowe* (1996) 89 A Crim R 467, where it was accepted that it was sufficient that the intention formed during the period of detention.
[59] *R v Blair and Kipa* (2004) 235 LSJS 70; [2004] SADC 112, [10].
[60] *R v D* [1984] AC 778, 800–801; *R v Nguyen* [1998] 4 VR 394.

73. The requirement of taking or carrying away is what distinguished common law kidnapping from the offence of false imprisonment. However, the law did not require extensive travel. It is a question of fact for the jury and, in one case, taking the victim 100 metres was sufficient. This element has been described as a requirement that the accused took the victim from the place where the victim wished to be.[61]

74. It has not been clearly established whether the requirement of force or fraud is legally distinct from the proof that the other person did not consent. It has been noted that in some contexts, treating these issues as separate elements can give rise to difficulties.[62]

75. For the purpose of the offence of abduction,[63] proof of force involves physical force or the threat of physical force. This has also been expressed as a hostile intent likely to cause the complainant apprehension, along with acts that cause the complainant to apprehend immediate unlawful violence.[64] This is the same degree of force required for other offences against the person.[65] It is likely that the same definition of force applies to kidnapping at common law.

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[61] *R v Wellard* [1978] 3 All ER 161.

[62] *R v Nguyen* [1998] 4 VR 394.

[63] Contrary to *Criminal Law Consolidation Act 1935* (SA) s 80.

[64] *R v Pollitt* (2007) 97 SASR 332, 346, 353; [2007] SASC 103; *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [27]–[29].

[65] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [34].

Jury Direction #8.6 – Section 39 Kidnapping

Note: This direction is designed for cases where the accused's purpose was to commit an indictable offence against the complainant. If the accused intended to hold the other person for ransom or as a hostage, the charge must be adapted.

I will now direct you as to the elements of kidnapping.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused took or detained a person;

Two – The other person did not consent;

Three – The accused intended to commit an indictable offence against the other person.

I will now explain these three elements and how they apply in this case.

Taking / Detaining

The first element is that the accused took or detained [*complainant*].

This requires the prosecution to show that the accused caused [*complainant*] to leave a place, or stopped [*complainant*] from leaving a place.

The prosecution say that the accused [*identify relevant evidence and arguments*]. The defence say that this element is not proved. They say [*identify relevant evidence and arguments*].

Consent

The second element is that [*complainant*] did not consent to being taken or detained.

This requires you to consider [*complainant*]'s state of mind. Has the prosecution proved that s/he was not willing to be taken or detained by [*accused*]?

[*Identify relevant evidence and arguments*]

Accused's intention

The third element is that the accused intended to commit an indictable offence against [*complainant*] / [*third party*].

This element concerns what the accused intended to do at the time of the alleged kidnapping.

The prosecution say that the accused intended to [*identify relevant indictable offence*]. [*Identify relevant indictable offence*] consists of the following [*number*] elements. [*Explain elements of relevant indictable offence*].

The prosecution must therefore prove that, at the time s/he took or detained [*complainant*], [*accused*] intended to [*identify relevant offence* and *complainant* or *third party*].

[*Identify relevant evidence and arguments*]

8.7 – Abduction of a child

76. Section 80(1) creates the offence of abduction of a child under 16. The more commonly arising form of the offence has four elements:[66]

- The accused led, took, decoyed, enticed away, or detained, a person;
- The accused used force or fraud achieve the relevant act;
- At the time of the relevant act, the person was under the age of 16;
- The accused intended to:
    - Deprive a person with lawful care of the child of possession of the child; or
    - Steal an article on or about the person of the child.

77. The offence under s 80 can also be proved with the following four elements:

- The accused harboured or received a person;
- The person was under the age of 16;
- The accused knew that the person had been led, taken, decoyed or enticed away, or detained, by force or fraud;
- The accused intended to:
    - Deprive a person with lawful care of the child of possession of the child; or
    - Steal an article on or about the person of the child.

78. The use of force may be against either the child, or the person who has care of the child at the relevant time.[67]

79. The degree of force required for this offence is the same degree of force required for offences against the person. This includes the slightest unwanted physical contact, or a threat of such contact.[68]

80. In the case of a child who is so young as to be unable to resist, the mere physical removal of the child from the lawful custody of the person who has charge of the child is sufficient to establish the use of force.[69]

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[66] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [19].
[67] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [25].
[68] *R v Pollitt* (2007) 97 SASR 332; [2007] SASC 103, [44], [64], [112]; *R v Hussey* (1980) 23 SASR 178; *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [26]–[34]; *R v Webb* (1996) 186 LSJS 184.
[69] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [35] – [36].

81. Section 80(1a) creates a separate offence with seven elements:[70]

- A person, V, is under the age of 16;
- Another person, G, is a parent, guardian or otherwise has possession of V;
- The accused took V or caused V to be taken out of the possession of G;
- G did not consent;
- The taking was unlawful;
- The taking was conscious and voluntary;
- The accused knew that V was in the lawful care of G, and that G did not consent.

82. The absence of consent, or the presence of consent, of the person taken is not an element of the offence or the basis for a defence.[71]

83. Proof that the child was in the possession of the second person requires showing that the second person was both the child's lawful guardian and was exercising care and control at the relevant time.[72]

84. The taking of a child out of the possession of a parent or guardian covers interference with both the legal right to control the child and the practical exercise of that right.[73]

85. A parent or guardian retains possession of a child for the purpose of this offence when the child is acting under the direction of, or with the consent of, the parent or guardian. This includes when the child is travelling unsupervised.[74]

86. A person does not commit this offence if the child had already left the possession of the guardian at the time of the accused's acts. This may occur, for example, where a child absconds from the guardian's care without any inducement, encouragement or persuasion by the accused. This may also be expressed as requiring the prosecution to show that the accused was the effective cause of the child leaving the guardian's possession.[75]

87. For all offences in s 80, a defence is available if the accused acted in the exercise of a bona fide claim to the right to possession of the child and obtained possession of the

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[70] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [10].
[71] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [11].
[72] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [19].
[73] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [17].
[74] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [18].
[75] *Moore v Police* (2008) 100 SASR 277; [2008] SASC 76, [29]–[42].

child or took the child out of the possession of a person having the lawful charge of the child.[76]

88. A mere assertion of right as a parent is not sufficient, by itself, to engage this defence. The accused will also need to demonstrate a bona fide claim to the right to possession of the child, which is something that may be affected by the existence of orders restricting the access of parents to their children.[77]

89. While s 80(2) speaks of a person not being liable to prosecution, the operation of the section is to create a defence which, where it arises, the prosecution must negate beyond reasonable doubt. It does not create a threshold issue which the judge should decide before the trial begins.[78]

90. It has not been resolved whether there is a wider claim of right defence available for persons other than parents.[79]

[76] *Criminal Law Consolidation Act 1935* (SA) s 80(2).
[77] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [48].
[78] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [51]–[52].
[79] *R v Bruer* (2012) 114 SASR 365; [2012] SASCFC 107, [58].

Jury Direction #8.7A – Abduction of a child under 16 – s 80(1)

Note: This direction is designed for cases where the accused is alleged to have abducted a child to deprive a person with lawful care of possession of the child. It must be modified if the purpose was to steal an article on the child's person

I will now direct you as to the elements of abduction of a child.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused took, led away or detained a person;[80]

Two – The accused used force or fraud;

Three – The other person was under the age of 16;

Four – The accused intended to remove the child from the person with lawful care and custody of the child.

I will now explain these four elements and how they apply in this case.

Taking, leading or detaining

The first element is that [*accused*] took, led away or detained [*complainant*].

This requires the prosecution to show that [*accused*] took [*complainant*] from the place where s/he wanted to be, or stopped [*complainant*] from leaving a place s/he didn't want to be.

The prosecution say that this occurred when [*identify relevant evidence and arguments*]. The defence dispute this, and say [*identify relevant evidence and arguments*].

Use of force or fraud

The second element is that [*accused*] took or carried away [*complainant*] using force or fraud.

[*If relevant, add*: This element can be proved if the accused used force against the complainant, or against a different person, such as [*identify relevant third person*]. For this purpose, force includes any unwanted physical touching, or threat of physical touching.]

[*Identify relevant evidence and arguments*]

Age of complainant

The third element is that [*complainant*] was under the age of 16 at the time of the alleged offence.

[*Identify relevant evidence and arguments*].

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[80] This statement of the element omits the words "decoyed" or "enticed away" which are in *Criminal Law Consolidation Act 1935* s 80(1). The element should be restated if the prosecution relies on those actions rather than taking, leading or detaining.

Specific intent

The fourth element concerns the accused's state of mind. The prosecution must show that when s/he took / led away / detained [*complainant*], [*accused*] was doing so to remove [*complainant*] from the person with lawful care and custody of the child.

The prosecution says that the person with lawful care and custody of [*complainant*] was [*identify relevant guardian*]. The prosecution also says that you can infer that [*accused*]'s purpose of taking / detaining [*complainant*] was to keep [*complainant*] from the care of [*identify relevant guardian*].

[*Identify relevant evidence and arguments*].

Jury Direction #8.7B – Taking a child from a parent or guardian – s 80(1a)

I will now direct you as to the elements of abduction of a child.

To prove this offence, the prosecution must prove seven elements beyond reasonable doubt. These are:

One – [*Complainant*] is under the age of 16;

Two – [*Guardian*] is a parent, guardian or otherwise has care and custody of [*complainant*];

Three – [*Accused*] took [*complainant*] out of the care and custody of [*guardian*];

Four – [*Guardian*] did not consent;

Five – The taking was unlawful;

Six – The taking was voluntary;

Seven – [*Accused*] knew that [*complainant*] was in the lawful care of [*guardian*] and that [*guardian*] did not consent.

I will now explain these seven elements and how they apply in this case.

Age of complainant

The first element is that [*complainant*] is under the age of 16.

The defence accepts that the prosecution has proved this element.

Status of guardian

The second element is that [*guardian*] is a parent, guardian or otherwise has care and custody of [*complainant*].

You have heard evidence that [*identify relevant evidence*].

[*Identify relevant evidence and arguments*].

Taking from guardian

The third element is that the accused took [*complainant*] from the care of [*guardian*].

[*If relevant, add*: As part of this element, the prosecution must show that, at the time of his/her acts, [*complainant*] was in the care of [*guardian*]. This element will not be proved if [*complainant*] had already left [*guardian*]'s care by the time of the accused's acts.]

[*Identify relevant evidence and arguments*].

Absence of consent

The fourth element is that [*guardian*] did not consent to [*accused*] taking [*complainant*].

For this element, the prosecution must show that [*guardian*] did not freely agree to [*accused*] taking [*complainant*].

[*Identify relevant evidence and arguments*]

Unlawfully

The fifth element is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

Voluntariness

The sixth element is that the accused's acts were voluntary.

For this element, you are looking at the accused's state of mind. You must decide whether the accused's actions were a product of his or her will.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Knowledge of status of guardian

The seventh element is that the accused knew that [*guardian*] had lawful care of [*complainant*] and that [*guardian*] did not consent to [*accused*] taking [*complainant*] away.

This element also concerns the accused's state of mind.

To prove what the accused knew, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that the accused knew that [*guardian*] had lawful care of [*complainant*] and that [*guardian*] did not consent to him/her taking [*complainant*] away. In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

[*Identify relevant evidence and arguments*]

8.8 – Stalking

91. Section 19AA creates the offence of stalking. The offence consists of three elements:

- On at least two occasions, the accused engaged in a prohibited act against another person;
- The accused engaged in the prohibited acts intentionally;
- The accused intended to cause serious physical or mental harm to the other person, or a third person, or intended to cause serious apprehension of fear.

92. The Act specifies nine types of acts that are prohibited for the purpose of the first element. These are:[81]

- Following the other person;
- Loitering outside the other person's place of residence or another place frequented by that person;
- Entering or interfering with property in the other person's possession;
- Giving or sending offensive material to the other person, or leaving offensive material where it will be found by, given to or brought to the attention of the other person;
- Publishing or transmitting offensive material using the internet or other electronic communication in a way that the material will be found by or brought to the attention of the other person;
- Communicating with the other person by mail, telephone, fax, internet or other form of electronic communication in a manner that could reasonably be expected to arouse apprehension or fear in the other person;
- Communicating to others about the other person by mail, telephone, fax, internet or other form of electronic communication in a manner that could reasonably be expected to arouse apprehension or fear in the other person;
- Keeping the other person under surveillance;
- Acting in a way that could reasonably be expected to arouse apprehension or fear in the other person.

93. A note to section 19AA refers to *Summary Offences Act 1953* (SA) s 7, which provides that offensive includes 'threatening, abusive or insulting'.

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[81] *Criminal Law Consolidation Act 1935* (SA) s 19AA(1)(a).

94. A person who is acquitted or convicted of a charge of stalking cannot be convicted of another offence arising out of the same circumstances and involving a common physical element. Similarly, a person who has been convicted or acquitted of a charge other than stalking cannot be convicted of stalking if the charge of stalking arises out of the same set of circumstances and involves a common physical element.[82]

95. Several of the prohibited acts involve conduct that could reasonably be expected to cause some specified result. According to the second reading speech, the offence is designed to focus on the intended effect of the accused's conduct, rather than the actual effect, to avoid discriminating against strong-minded and capable victims.[83] For this reason, there is no element that requires the jury to consider the actual impact of the accused's conduct. The actual impact may be of evidentiary relevance only.

96. Whether a communication could reasonably be expected to arouse apprehension or fear is an objective question. In assessing this, the court may take into account the surrounding relationship between the accused and the complainant.[84] The jury does not, however, take into account whether the accused's conduct was a reasonable response to any actual or perceived misconduct by the complainant.[85]

97. The term "apprehension or fear" is not limited to apprehension or fear of physical harm. The term extends to "apprehension or fear of any adverse consequence which is accompanied by anxiety or emotional distress which interferes with a person's social, family or working life".[86]

98. Whether a particular level of apprehension or fear is sufficient for the purpose of the Act is an evaluative judgment, influenced by community standards on what is an acceptable social exchange and what is unacceptably harmful to a person's right to participate safely in social exchanges.[87]

99. Although the point has not been decided, it may well be that this offence requires extended jury unanimity, given that it requires proof of proscribed conduct on two separate occasions and that this likely raises a potential for alternate factual bases of verdicts.[88]

100. Judges will also need to consider it is necessary to ask the jury a special question about the acts it found proved. Under the earlier form of the persistent sexual abuse offence,

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[82] *Criminal Law Consolidation Act 1935* (SA) s 19AA(4), (5).

[83] South Australia, *Parliamentary Debates*, Legislative Council, 16 February 1994, 59.

[84] See *Treloar v Police* [2018] SASC 162, [42].

[85] *R v Ali* [2003] 2 Qd R 389; [2002] QCA 64, [15].

[86] *Phillips v Police* (2016) 125 SASR 427; [2016] SASC 135, [1]; *Police v Gabrielsen* [2011] SASC 39, [12].

[87] *Phillips v Police* (2016) 125 SASR 427; [2016] SASC 135, [21].

[88] See *R v Little* (2015) 123 SASR 414; [2015] SASCFC 118, [11], [19]; *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [75]-[81] and c.f. *R v Hoang* (2007) 16 VR 369; [2007] VSCA 117, [107]-[113]; *Worsnop v The Queen* (2010) 28 VR 187; [2010] VSCA 188, [67]-[78].

it was held that for the purpose of sentencing, a judge was required to assume that the jury found the least serious occasions proved, unless the judge asked the jury a special question to ascertain the basis of the verdict.[89] As this offence also requires proof of offences on discrete occasions, it may be that the same requirement applies.

[89] *Chiro v The Queen* (2017) 260 CLR 425; [2017] HCA 37.

Jury Direction #8.8 – Stalking

I will now direct you as to the elements of stalking.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused engaged in prohibited acts against another person

Two – The accused engaged in prohibited acts on at least two occasions;

Three – The accused engaged in the prohibited acts intentionally;

Four – The accused intended to cause serious physical or mental harm, or serious apprehension or fear.

I will now explain these three elements and how they apply in this case.

Prohibited acts

The first element is that [*accused*] engaged in prohibited acts against [*complainant*].

Stalking is an offence that can cover a wide range of conduct. In this case, the prosecution relies on [*number*] different acts which it says are prohibited.

For this element, there are two matters the prosecution must prove. First, they must prove what the accused did. Second, they must prove that what the accused did meets the legal test of being prohibited.

I will first identify the alleged acts, and then explain what kinds of acts are prohibited for the purpose of this offence.[90]

The first act the prosecution relies on to prove this element is [*identify relevant factual allegation*].

The second act is [*identify relevant factual allegation*].

[*Repeat as required*]

For the purpose of this offence, there are [*number*] of ways an act can be prohibited. [*Identify relevant limbs of s 19AA(1)(a)*].

[*If the prosecution relies on s 19AA(1)(ivb) or (vi), add the following*: The term apprehension or fear refers to anxiety or distress that interferes with a person's social, family or working life. To decide whether something could reasonably be expected to arouse apprehension or fear, you must use your common sense and consider what conduct is acceptable or unacceptable to the community.]

[90] If there are a large number of particulars, the judge may prefer to group the alleged acts by reference to the limbs of Criminal Law Consolidation Act 1935 s 19AA(1)(a).

I have given you a checklist which identifies the particular acts alleged, and the relevant prohibition. You will see that the first act, [*refer to factual allegation*] is alleged to involve [*identify relevant limb of s 19AA(1)(a)*]. Similarly, the second act, [*refer to factual allegation*] is alleged to involve [*identify relevant limb of s 19AA(1)(a)*].

[*Repeat as required*]

For this element, you must decide which of those [*number*] acts are proved, and which acts involved prohibited conduct, in the way I've explained.

[*Refer to relevant evidence and arguments*]

Two or more occasions

The second element is that the accused engaged in prohibited acts on at least two occasions.

For this element, you must consider the prohibited acts you found proved for the first element, and decide whether there were prohibited acts on two or more separate occasions.

As I told you at the start of your trial, your verdict must be unanimous. In relation to this element, that means you must all agree on the same two occasions of prohibited conduct. It is not sufficient if some of you are satisfied that the accused [*identify two instances of conduct*] while others are satisfied that the accused [*identify different two instances of conduct*].

[*Refer to relevant evidence and arguments*]

Intentional acts

The third element is that the accused must have committed the relevant acts intentionally.

That means that, for the conduct you find proved, you must be satisfied the accused meant to engage in that conduct. That is, s/he meant to [*identify relevant limbs of s 19AA(1)(a)*].

Fear or harm

The fourth element intended to cause serious physical or mental harm, or serious apprehension or fear.

This element concerns the accused's state of mind.

To prove the accused's intention, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that the accused intended to cause serious physical or mental harm, or serious apprehension or fear. In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

[*Identify relevant evidence and arguments*]

Special question direction

I now need to explain something about how you return your verdict for this offence.

If you find the accused not guilty, then that is the end of the matter.

If you find the accused guilty, then my associate will go on to ask you which acts you found proved to be prohibited acts. This is to help the court give effect to your verdict. For each of the acts listed on the checklist I gave you, my associate will ask you "in relation to the first allegation, [*identify limb of s 19AA(1)(a) and relevant factual event*], did you find that proved or not proved". If you were all satisfied that allegation was proved beyond reasonable doubt, then the foreperson will answer "proved". Otherwise, the foreperson must say "not proved".

8.9 – Threats

101. Section 19 creates two offences of unlawful threats. The first offence, threat to kill, consists of three elements:

- The accused made a threat;
- The threat was a threat to kill;
- The accused intended to arouse fear that the threat would or was likely to be carried out; or was recklessly indifferent to whether such a fear would be aroused.

102. The second offence, threat to cause harm, consists of the same elements, but differs in the content of the threat.[91]

103. A threat may be communicated directly or indirectly and may be made by words or conduct, or partially by words and partially by conduct.[92]

104. Harm is defined as "physical or mental harm (whether temporary or permanent)".[93]

105. The definition of recklessness in s 21 does not apply to this offence.[94] Instead, the meaning of reckless indifference for the purpose of this offence is likely to be that the accused knew of the risk that his or her conduct would cause the relevant fear and engaged in the conduct without having any good reason or adequate justification. [95]

106. The degree of knowledge of risk for the purpose of this offence has not been judicially determined. In relation to other offences, courts have suggested that the accused must know that the relevant outcome was "probable",[96] "a substantial risk"[97] or "likely".[98] Foresight that the outcome was "probable" is likely confined to homicide.[99]

107. As Kourakis CJ observed in *Ducaj*,[100] 'reckless indifference' is a protean expression. In that case, because the offence of endangering life included an element requiring knowledge that the relevant outcome was likely, it was held that reckless indifference was predicated upon that same degree of risk (ie knowledge that the outcome was likely) rather than a substantial risk. However, in the case of the offence of unlawful threat,

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[91] *Criminal Law Consolidation Act 1935* (SA) s 19(1), (2).
[92] *Criminal Law Consolidation Act 1935* (SA) s 19(3).
[93] *Criminal Law Consolidation Act 1935* (SA) ss 19(4), 21.
[94] The section 21 definition only applies to Division 7A of the Act. See also *R v Shah* (2018) 131 SASR 491; [2018] SASCFC 90, [42].
[95] See *Ducaj v The Queen* [2019] SASCFC 152, [50]; *R v Shah* (2018) 131 SASR 491; [2018] SASCFC 90, [45]; *R v O* (Unreported, Supreme Court of South Australia, Bleby J, 19 June 1997).
[96] See, e.g., *R v Crabbe* (1985) 156 CLR 464; [1985] HCA 22.
[97] See, e.g., *R v Shad* [2018] SASCFC 90.
[98] See, e.g., *Ducaj v The Queen* [2019] SASCFC 152.
[99] See *Ducaj v The Queen* [2019] SASCFC 152; *Aubrey v The Queen* (2017) 260 CLR 305; [2017] HCA 18.
[100] *Ducaj v The Queen* [2019] SASCFC 152.

there is no equivalent separate element requiring knowledge that an outcome (ie arousal of fear) was likely, and so it might be argued that knowledge of a substantial risk of this outcome would suffice. However, in light of *Ducaj*, the model direction adopts the more cautious approach to reckless indifference that requires knowledge that the outcome was likely.

108. Section 19 provides that the accused must perform these acts "without lawful excuse". Under s 5B, the onus of proof of a "lawful excuse" lies on the defendant.

Jury Direction #8.9 – Threat to Kill

Note: This direction is designed for cases where the accused is charged with making a threat to kill under Criminal Law Consolidation Act 1935 s 19(1). This direction can be adapted if the accused is charged with making a threat to cause harm.

Note: This direction states that, for the purpose of reckless indifference, the accused must be aware that it is likely the complainant would fear the threat. Judges should consider whether, in light of Ducaj v The Queen [2019] SASCFC 152, this the appropriate standard, or whether the accused must be aware that there was a substantial risk the complainant would fear the threat.

I will now direct you as to the elements of making a threat to kill.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused made a threat to another person;

Two – The threat was a threat to kill;

Three – The accused intended to cause the other person to fear that the threat would or was likely to be carried out, or was recklessly indifferent to whether the other person would fear the threat.

I will now explain these three elements and how they apply in this case.

Making a threat

The first element is that the accused made a threat to [*complainant*].

This requires you to look at the evidence of what [*accused*] said and decide whether it meets the description of a 'threat'.

[*If necessary, add the following direction*: There are two matters to bear in mind when looking at this element. First, the offence can be committed even if the person who heard the threat is not the person threatened. Second, the threat does not need to be a threat to kill immediately.]

[*Identify relevant evidence and arguments*]

Threat to kill

The second element is that the threat was a threat to kill.

A threat to inflict some harm short of death is not enough. This offence only applies to a threat to kill.

[*Identify relevant evidence and arguments*]

Intention or recklessness

The third element concerns the accused's state of mind when s/he made the threat.

There are two ways the prosecution can prove this element. First, this element is proved if you are satisfied that [*accused*] intended that [*complainant*] would fear that the threat would be carried out, or was likely to be carried out. In other words, this element will be met if the accused intended that [*complainant*] believe the threat.

The second way this element can be met is if the accused was recklessly indifferent to whether [*complainant*] would fear the threat. This second way of proving the element requires the prosecution to show that [*accused*] knew it was likely that [*complainant*] would fear that the threat would be carried out, or was likely to be carried out, and s/he proceeded without having an adequate justification to do so.

[*Identify relevant evidence and arguments*]

[If the defence raises the issue of lawful excuse, add the following direction:

Lawful excuse

The law provides that an accused must not be convicted of this offence unless s/he acted without lawful excuse.

Unlike the elements of the offence, the accused must prove the elements of a lawful excuse. This is one of the rare situations where the accused must prove an issue. To establish a lawful excuse, the accused must prove that [*insert directions on relevant lawful excuse*].

The standard of proof for this defence is the balance of probabilities. That is, the accused must show that each element of the defence is more likely than not. This is a lower standard than beyond reasonable doubt, which is the standard that applies to the prosecution.]

8.10 – Blackmail

109. Section 172 creates the offence of blackmail. Blackmail consists of five elements:[101]

- The accused made a demand to a person;
- The accused makes a threat to harm a person;
- The threat is unwarranted;
- Either a reasonable person of normal stability and courage would take the threat seriously, or the victim of the threat took the threat seriously because of a vulnerability known to the accused;
- The accused intends to get the other person to submit to a demand.

Making a demand

110. The prosecution must show that the accused made a demand.[102]

111. The subject-matter of the demand is irrelevant. The Act gives examples of demands, including marriage, access to children, or how a public duty is performed.[103]

112. A demand may be made even if it does not reach its intended recipient. Whether (and when) a demand is made is a question of fact. The jury will need to consider whether the demand is made "in circumstances apt to achieve its communication to the person to whom it is directed".[104]

Threat to harm

113. The second element is that the accused made a threat to harm a person.

114. The person to be harmed may be the recipient of the threat, or may be a third person. The harm may be inflicted either by the accused, or by another person.[105]

115. For this offence, harm is defined as:[106]

(a) physical or mental harm (including humiliation or serious embarrassment); or

(b) harm to a person's property (including economic harm).

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[101] *Criminal Law Consolidation Act 1935* (SA) ss 171, 172.
[102] *R v Landon* (2011) 109 SASR 216; [2011] SASCFC 12, [11].
[103] *Criminal Law Consolidation Act 1935* (SA) s 172(2).
[104] *Austin v The Queen* (1989) 166 CLR 669; [1989] HCA 26.
[105] *Criminal Law Consolidation Act 1935* (SA) s 171.
[106] *Criminal Law Consolidation Act 1935* (SA) s 171.

116. The definition of threat limits the scope of this offence, in political and industrial contexts, to threats of violence:[107]

> ***threat*** includes an implied threat but, unless the threat is a threat of violence, does not include a threat made in the course of, or incidentally to—
>
> (a) collective bargaining; or
>
> (b) negotiations to secure a political or industrial advantage;

Unwarranted threat

117. A threat is unwarranted if:

> (a) the carrying out of the threat would (if it were carried out in the State) constitute a serious offence; or
>
> (b) the making of the threat is, in the circumstances in which it is made—
>
> (i) improper according to the standards of ordinary people; and
>
> (ii) known by the person making the threat to be improper according to the standards of ordinary people.

Impact of threat

118. The fourth element involves two possibilities. Either:[108]

- a reasonable person of normal stability and courage would take the threat seriously; or
- the victim took the threat seriously because of a vulnerability known to the accused.

119. Expert evidence is not admissible about the impact of a threat. The Act requires an assessment of whether a reasonable person of normal stability and courage would take the threat seriously while expert evidence is only admissible to provide evidence of matters not known to the reasonable person. Expert evidence therefore cannot be relevant to whether a reasonable person would take a threat seriously.[109]

120. The focus of this offence is the making of an unlawful demand with a threat of harm if the demand is not fulfilled. Additional conduct, such as the actual infliction of harm at the time of making the threat, may be charged as a separate offence, as well as being relevant to whether a reasonable person would take the threat seriously.[110]

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[107] *Criminal Law Consolidation Act 1935* (SA) s 171.

[108] *Criminal Law Consolidation Act 1935* (SA) s 171.

[109] *R v Landon* (2011) 109 SASR 216; [2011] SASCFC 12, [17], [32].

[110] See *R v Aoukar* (2011) 110 SASR 453; [2011] SASCFC 96, [25].

Jury Direction #8.10 – Blackmail

I will now direct you as to the elements of blackmail.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused made a demand to a person;

Two – The accused made a threat to harm a person;

Three – The threat was unwarranted;

Four – A reasonable person of normal stability and courage would take the threat seriously;[111]

Five – The accused made the threat to get the other person to submit to the demand.

I will now explain these five elements and how they apply in this case.

Making a demand

The first element is that the accused made a demand.

In this case, the prosecution says that [*accused*] demanded that [*complainant*] [*identify content of demand*].

[*Identify relevant evidence and arguments*]

Threat to harm

The second element is that the accused made a threat to harm a person.

The prosecution says that the threat was to [*identify relevant threat*].

[If relevant, add: It does not matter that [*complainant*] and [*threatened victim*] are different people. For this element, you are looking at whether [*accused*] made a threat to harm [*threatened victim*]]

For this offence, harm has a wide meaning. It includes physical and mental harm and harm to property. Humiliation, serious embarrassment and economic harm are all recognised as harm for this element.

[*Identify relevant evidence and arguments*]

Threat is unwarranted

The third element is that the threat was unwarranted.

[111] If the case involves the possibility that the threat exploited a particular vulnerability known to the accused, the element should be modified.

There are two ways the prosecution can show a threat is unwarranted.

First, a threat is unwarranted if carrying out the threat would constitute a serous offence. The prosecution say that the threat was a threat to commit [*identify relevant offence*]. [*Identify relevant offence*] is a serious offence.

[*If necessary, instruct the jury on the elements of the threatened offence*]

The second way a threat is unwarranted has two parts. First, the prosecution must prove that the threat was made in circumstances which make it improper according to the standards of ordinary people. This requires you to use your common sense and values to decide whether the circumstances of the threat made it improper. Second, the accused must have known that making the threat was improper according to those standards. For this second part, you are looking at the accused's state of mind, and whether s/he knew it was improper according to the standards of ordinary people.

[*Identify relevant evidence and arguments*]

Impact of the threat

The fourth element concerns the impact of the threat. The prosecution must show that a reasonable person of normal stability and courage would take the threat seriously.[112]

For this element, you are not looking at whether [*complainant*] took the threat seriously. Instead, you must consider whether a person of normal stability and courage would take the threat seriously.

[*Identify relevant evidence and arguments*]

Purpose of the threat

The final element concerns purpose of the threat. The prosecution must show that [*accused*] made the threat in order to get [*complainant*] to give in to the demand.

[*If relevant, add*: I remind you, it does not matter that the threat was to harm [*threatened victim*] rather than [*complainant*]. To prove this element, the prosecution must show that [*accused*] made the threat to get [*complainant*] to give in to the demand.]

[*If appropriate, add a direction on inferring states of mind. See 6.2 – General principles – Jury Direction – Inferring intention.*]

[*Identify relevant evidence and arguments*]

[112] If the case involves the possibility that the threat exploited a particular vulnerability known to the accused, the element should be modified.

8.11 – False Imprisonment

121. False imprisonment is a common law offence. It consists of three elements:[113]

- The accused deprived a person of his or her liberty, without the person's consent and against the complainant's will;
- The accused deliberately and intentionally deprived the victim of his or her liberty;
- The accused's acts were unlawful.

Deprivation of liberty

122. A deprivation of liberty is different from preventing the complainant from travelling in a particular direction. There must be a total obstruction of the victim's liberty.[114]

123. A person may be compelled to remain in a place by physical infrastructure (such as a locked door), use of physical violence or by threats to the victim or a third person, or property. The fact that the victim submits to demands to stay in a particular place because of threats does not mean there has not a deprivation of liberty.[115]

124. Whether there is a deprivation of liberty may depend on whether the victim has a viable means of escape. Viability may depend on the characteristics of the alleged victim, as well as how dangerous the suggested means of escape is, the distance and time involved and the legality of the suggested means of escape.[116]

125. Deprivation of liberty requires proof that the victim did not consent to the alleged deprivation.[117]

126. Ostensible consent is not actual consent where it is given to avoid a justified belief that the accused would use force if the victim did not submit.[118]

Intention

127. The fault element of false imprisonment is an intention to deprive the victim of liberty. An intention to arouse fear of violence or foresight of fear of violence are not relevant.[119]

128. This element cannot be proved if the accused held the belief that the victim was consenting to the imprisonment.[120]

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[113] *R v Busuttil* [2006] SASC 47, [37].
[114] *Bird v Jones* (1845) 7 QB 742.
[115] See *Macpherson v Brown* (1975) 12 SASR 184, 196, 209; *R v Garrett* (1988) 50 SASR 392, 402, 405.
[116] See and compare *McFadzean v CFMEU* (2007) 20 VR 250; [2007] VSCA 289; *Balmain New Ferry Co v Robertson* (1906) 4 CLR 379; [1906] HCA 83 and *R v Macquarie* (1875) 13 SCR (NSW) 264.
[117] *R v Busuttil* [2006] SASC 47, [37]; *R v Vollmer* [1996] 1 VR 95.
[118] *Pocock v Moore* (1825) Ry. & Mood. 321; *Watson v Marshall* (1971) 124 CLR 621, 626; [1971] HCA 33.
[119] *Macpherson v Brown* (1975) 12 SASR 184, 197.
[120] *R v Vollmer* [1996] 1 VR 95.

Alternative offences

129. False imprisonment is not an included alternative to assault. While assault is often committed in the course of false imprisonment, the offences are distinct and one is not included in the other.[121]

[121] *Macpherson v Brown* (1975) 12 SASR 184, 196–197, 209, 212.

Jury Direction #8.11 – False imprisonment

I will now direct you as to the elements of false imprisonment.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused deprived a person of his or her liberty;

Two – The accused intended to deprive the person of his or her liberty;

Three – The accused's acts were unlawful.

I will now explain these three elements and how they apply in this case.

Deprivation of liberty

The first element is that the accused deprived [*complainant*] of his/her liberty.

There are two parts to this element.[122]

First, the prosecution must show that the accused completely prevented [*complainant*] from being able to leave where s/he was.

Second, the prosecution must show that [*complainant*] did not freely agree to being detained.

[*If relevant, add the following direction*: A person may be detained by a range of means. It does not matter whether a person is detained by a locked door, being physically held, or being threatened with violence if s/he attempts to escape. Each of these can deprive a person of their liberty.]

[*Refer to relevant evidence and arguments*]

Intention

The second element is that the accused intended to deprive [*complainant*] of his/her liberty.

This element concerns the accused's state of mind at the time s/he performed the relevant acts.

The prosecution must prove that at the time [*accused*] [*identify relevant acts*], s/he intended to prevent [*complainant*] from leaving, knowing that [*complainant*] did not consent to being detained.

[122] If the case involves a taking away, the following directions must be modified to refer to forcing the complainant to accompany the accused and the complainant not freely agreeing to do so.

In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

8.12 – Choking

130. Section 20A creates the offence of domestic choking, suffocation or strangulation. The offence consists of four elements:

- The accused chokes, suffocates or strangles the complainant;
- The complainant does not consent;
- The accused is or has been in a relationship with the complainant;
- The accused acted unlawfully.

131. The offence does not require proof that any harm has been caused. When introducing the amending Bill, the Attorney-General explained why this offence was created:[123]

> The creation of a new offence, rather than simply relying on existing offences such as causing harm or serious harm, endangering life or attempted murder, serves a number of purposes: firstly, it increases the penalty for this behaviour where no harm is caused; secondly, it recognises the inherent dangerousness of this conduct in a domestic setting and its indication of escalation to domestic homicide; thirdly, it educates police and the community; and, finally, it assists in the assessment of risk to the victim.

132. This offence was introduced by the *Statutes Amendment (Domestic Violence) Act 2018* and commenced operation on 31 January 2019.

Choking, suffocation and strangulation

133. The Act does not provide any definition of choking, suffocating and strangling. The words therefore are likely to have their ordinary meaning.

Relationship

134. Section 20A(3) provides an exhaustive definition of when two people will be in a relationship:

> (3) Two people will be taken to be ***in a relationship*** for the purposes of this section if—
>
> (a) they are married to each other; or
>
> (b) they are domestic partners; or
>
> (c) they are in some other form of intimate personal relationship in which their lives are interrelated and the actions of 1 affects the other; or
>
> (d) 1 is the child, stepchild or grandchild, or is under the guardianship, of the other (regardless of age); or

[123] South Australia, *Parliamentary Debates*, House of Assembly, 24 October 2018, (V Chapman, Attorney-General).

(e) 1 is a child, stepchild or grandchild, or is under the guardianship, of a person who is or was formerly in a relationship with the other under paragraph (a), (b) or (c) (regardless of age); or

(f) 1 is a child and the other is a person who acts in *loco parentis* in relation to the child; or

(g) 1 is a child who normally or regularly resides or stays with the other; or

(h) they are brothers or sisters or brother and sister; or

(i) they are otherwise related to each other by or through blood, marriage, a domestic partnership or adoption; or

(j) they are related according to Aboriginal or Torres Strait Islander kinship rules or are both members of some other culturally recognised family group; or

(k) 1 is the carer (within the meaning of the Carers Recognition Act 2005) of the other.

Conduct that is justified or excused by law

135. Section 20A(2) provides that:

> However, conduct that is justified or excused by law cannot amount to an offence against this section.

136. This provision appears to be an 'avoidance of doubt' provision which engages the operation of any general defences such as self-defence. It is assumed that the onus of proving or disproving any justifications, excuses or defences falls on the party that traditionally bears that onus and that s 20A(2) does not shift the onus of proof.[124]

Alternative offences

137. Assault is a statutory alternative offence to this offence that may be left to the jury where it is open on the evidence.[125]

[124] Compare *Criminal Law Consolidation Act 1935* (SA) s 5B.

[125] *Criminal Law Consolidation Act 1935* (SA) s 20A(4).

Jury Direction #8.12 – Choking in a domestic setting

I will now direct you as to the elements of choking in a domestic setting.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused choked, suffocated or strangled a person;

Two – The other person did not consent to the choking;

Three – The accused was or had been in a relationship with the other person;

Four – The accused's act was unlawful.

I will now explain these four elements and how they apply in this case.

Choking

The first element is that the accused choked, suffocated or strangled [*complainant*].

To prove this element, the prosecution relies on [*refer to relevant evidence and arguments*].

The defence say you should not accept that evidence because [*refer to relevant evidence and arguments*].

Absence of consent

The second element is that [*complainant*] did not consent to being choked, suffocated or strangled.

This offence is not committed if the other person freely agrees to being choked, suffocated or strangled. You therefore need to find that [*complainant*] did not freely agree to [*accused*] [choking/ suffocating / strangling] [him/her].

[*Refer to relevant evidence and arguments*]

Relationship

The third element is that [*accused*] and [*complainant*] [were / had been] in a relationship.

To prove this element, the prosecution must show that the accused and the complainant were / had been [*Identified relevant form of relationship, as specified in s 20A(3)*].

[*Refer to relevant evidence and arguments*]

Unlawfulness

The final element of this offence is that the accused acted unlawfully.

Insert relevant direction from Chapter 17 – Defences.

CHAPTER 9: SEXUAL OFFENCES

9.1 – Rape

1. Section 48 creates two offences of rape. The first offence, in s 48(1), consists of three elements:

    - The accused engaged, or continued to engage, in sexual intercourse with the complainant;
    - The complainant:
        - did not consent to engaging in the sexual intercourse; or
        - had withdrawn consent to the sexual intercourse; and
    - The accused:
        - knew the complainant did not consent or had withdrawn consent; or
        - was recklessly indifferent to the fact that the complainant did not consent or had withdrawn consent.

2. The second offence, in s 48(2), is described in 9.2 – Compelled rape, below.

First element – Sexual intercourse

3. The first element requires proof that the accused engaged or continued to engage in sexual intercourse with the complainant.

4. Sexual intercourse is defined in s 5 as:

> ***sexual intercourse*** includes any activity (whether of a heterosexual or homosexual nature) consisting of or involving—
>
> (a) penetration of a person's vagina, labia majora or anus by any part of the body of another person or by any object; or
>
> (b) fellatio; or
>
> (c) cunnilingus,
>
> and includes a continuation of such activity;

5. This definition reflects the fact that the relevant act of sexual intercourse does not have to commence at the time of penetration.[1]

[1] *R v Murphy* (1988) 52 SASR 186, 200 (quoted with approval in *R v Turvey* (2017) 127 SASR 425; [2017] SASCFC 28, [29]).

6. The definition refers to an act "consisting of or involving" one of the three sub-paragraphs. The terms "consisting of" and "involving" have separate meanings and must be given separate effect. A person may commit an act "involving" penetration for the purpose of paragraph (a) without the need to prove that person initially penetrated the complainant.[2]

Second element – Absence of consent

7. The second element requires proof that the complainant either did not consent to the sexual intercourse or withdrew consent to the sexual intercourse.

8. Consent involves free and voluntary agreement.[3] This requires a positive decision by the complainant to consent.[4]

9. A person is taken not to freely and voluntary agree to sexual intercourse if:[5]

    (a) the person agrees because of—

        (i) the application of force or an express or implied threat of the application of force or a fear of the application of force to the person or to some other person; or

        (ii) an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person; or

    (b) the person is unlawfully detained at the time of the activity; or

    (c) the activity occurs while the person is asleep or unconscious; or

    (d) the activity occurs while the person is intoxicated (whether by alcohol or any other substance or combination of substances) to the point of being incapable of freely and voluntarily agreeing to the activity; or

    (e) the activity occurs while the person is affected by a physical, mental or intellectual condition or impairment such that the person is incapable of freely and voluntarily agreeing; or

    (f) the person is unable to understand the nature of the activity; or

    (g) the person agrees to engage in the activity with a person under a mistaken belief as to the identity of that person; or

    (h) the person is mistaken about the nature of the activity.

10. Where absence of consent is in issue, the judge must direct the jury that a person is not to be regarded as having consented merely because:[6]

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[2] *R v Turvey* (2017) 127 SASR 425; [2017] SASCFC 28, [34]–[37].

[3] *Criminal Law Consolidation Act 1935* (SA) s 46(2).

[4] *R v Rahmanian* [2010] SASC 137, [32].

[5] *Criminal Law Consolidation Act 1935* (SA) s 46(3).

[6] *Evidence Act 1929* (SA) s 34N(1). A judge only needs to give those parts of the direction that are applicable in the circumstances of the case: *Evidence Act 1929* (SA) s 34N(2).

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.

11. Some directions are generally necessary to explain how the issue of consent arises, the evidence relevant to the issue and how each party puts its case. The jury should focus on the complainant's state of mind immediately before the relevant sexual act, the events leading up to that act and the complainant's reaction to the sexual act.[7]

12. As Gray J explained in *R v Blayney*:[8]

> There are a number of factors which may be relevant to determining the question of consent. They will vary according to the particular circumstances of each case. A person who does not offer actual physical resistance to sexual intercourse is not by reason of that fact alone to be regarded as consenting to sexual intercourse.
>
> Mere submission of itself is not consent although it is an item of evidence that may be relevant when considering the question of whether the complainant consented. It may be relevant to whether the Crown has proved a lack of consent beyond reasonable doubt. It may also be relevant to the question whether an accused knew that the complainant did not consent or was recklessly indifferent as to whether the complainant was consenting. It may also be relevant to a suggestion that an accused had a reasonable although mistaken belief that a complainant was consenting.

13. It is necessary to distinguish between the situation where the complainant is so intoxicated as to be unable to consent and the situation where the complainant consents due to lowered inhibitions or otherwise.[9]

14. In a case where the prosecution relies on the complainant being incapable of consenting due to intoxication, questions about the complainant's recollection or earlier intention to consent are permissible, but asking the complainant whether he or she did consent may be logically inconsistent with the premise that the complainant's state of mind was so compromised as to be unable to freely agree. Despite this, the question may be

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[7] *R v Blayney* (2003) 87 SASR 354; [2003] SASC 405, [21], [25].
[8] *R v Blayney* (2003) 87 SASR 354; [2003] SASC 405, [75]–[76].
[9] *R v Blayney* (2003) 87 SASR 354; [2003] SASC 405, [17], [23].

permissible if it is sufficiently clear that the question is about the period in which the complainant was conscious.[10]

15. If a complainant with an intellectual disability understands the nature and character of sexual intercourse, that does not necessarily establish his/her capacity to consent to the act. The complainant's capacity to make a decision may be relevant.[11]

16. Paragraph (g), which concerns a mistaken belief about the identity of the other person, is likely limited to mistakes about identity of the individual. As at common law, a complainant's mistake about the characteristics of the accused do not vitiate consent.[12]

17. While the issue of consent relates to the complainant's state of mind, the words or actions of the complainant which are relied on as evidence of consent or lack of consent may also be relevant to the accused's belief about the complainant's consent. Judges must be careful that directions about evidence of lack of consent do not exclude the relevance of that evidence to the accused's belief about consent.[13]

Third element – Knowledge or reckless indifference to absence of consent

18. The third element is that the accused knew or was recklessly indifferent to the complainant's absence of consent.

19. An accused is recklessly indifferent to the fact that another person does not consent to an act of sexual intercourse if the accused:[14]

    (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or

    (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or

    (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

20. While it has not been authoritatively determined, the difference between paragraph (a) and (b) appears to be that paragraph (a) applies where the person has not taken any steps to investigate whether the other person consents while paragraph (b) applies where the person has taken some steps, but those steps were not objectively reasonable.[15]

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[10] *R v Blayney* (2003) 87 SASR 354; [2003] SASC 405, [27], [67]–[69].

[11] *R v Mobilio* [1991] 1 VR 339, 351. Quoted with approval in *M, B v Police* (2019) 134 SASR 575; [2019] SASC 58, [130]–[132]. See also *R v Beattie* (1981) 26 SASR 481.

[12] *Papadimitropoulos v R* (1957) 98 CLR 249; [1957] HCA 74.

[13] *R v Blayney* (2003) 87 SASR 354; [2003] SASC 405, [24]–[25], [28]–[33].

[14] *Criminal Law Consolidation Act 1935* (SA) s 47.

[15] *Higgs v The Queen* (2011) 111 SASR 42; [2011] SASCFC 108, [36] (David J).

21. In applying the test of reckless indifference, the jury must take into account the circumstances of the event and the accused's knowledge of those circumstances. This may include the accused's knowledge of characteristics of the complainant, such as the complainant's age or intellectual disability.[16]

22. Directions on reckless indifference are not required in all cases. No elaboration is required where the expression is used only because the judge is giving a complete statement of the elements. However, where reckless indifference is a live issue, an explanation will be necessary.[17]

23. *Criminal Law Consolidation Act 1935* ss 268(2) and (3) state:

> (2) If the objective elements of an alleged offence are established against a defendant but the defendant's consciousness was (or may have been) impaired by self-induced intoxication to the point of criminal irresponsibility at the time of the alleged offence, the defendant is nevertheless to be convicted of the offence if the defendant would, if his or her conduct had been voluntary and intended, have been guilty of the offence.
>
> (3) However, subsection (2) does not extend to—
>
> (a) a case in which it is necessary to establish that the defendant foresaw the consequences of his or her conduct; or
>
> (b) except where the alleged offence is an offence against section 48 (rape)—a case in which it is necessary to establish that the defendant was aware of the circumstances surrounding his or her conduct.

24. These provisions operate whenever a defendant would, at common law, have been entitled to an acquittal because of a lack of voluntariness or the lack of a required mental element,[18] such as intention or, in the case of rape, knowledge that the complainant was not consenting or might not have been consenting.[19] This means that self-induced intoxication cannot provide a basis for a jury having a doubt about whether the prosecution has proved that the accused's actions were intentional, voluntary and committed with knowledge that the complainant did not consent to the sexual intercourse.

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[16] *R v Bland* [2001] SASC 57, [16]–[17].

[17] *R v Ball* (1991) 56 SASR 126, 127.

[18] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [140].

[19] See also 6.2.4 – Intoxication.

Jury Direction #9.1 – Rape

Note: This direction is designed for cases where the accused is alleged to have commenced sexual intercourse while the complainant was not consenting. The directions must be modified if the charge relates to a complainant who withdraws consent.

I will now direct you as to the elements of rape.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused engaged in sexual intercourse with the complainant;

Two – The complainant did not consent;

Three – The accused knew or was recklessly indifferent to the fact that the complainant did not consent.

I will now explain these three elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] engaged in sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Absence of consent

The second element is that [*complainant*] did not consent to the sexual intercourse.

This element requires you to consider the complainant's state of mind.

Consent means "free and voluntary agreement" to the act of sexual intercourse.

[If one of the forms of non-consent in s 46(3) are relevant, add the following: A person does not freely and voluntarily agree to sexual activity if s/he [*identify relevant limb of s 46(3)*]].

When deciding whether the prosecution has proved that [*complainant*] did not consent to the alleged sexual intercourse, you are entitled to consider the evidence of the complainant as well as all the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act.

In assessing the circumstances of the alleged offence, there are some principles you must consider. The complainant is not to be regarded as having consented merely because [*add all of the following that are applicable in the circumstances of the case:*

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.]

Ultimately, you must look at all the evidence and decide whether the prosecution has proved, beyond reasonable doubt, that the complainant did not freely and voluntarily agree to the sexual intercourse identified in the charge.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Knowledge or reckless indifference

The third element is that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting to sexual intercourse.

This element requires you to consider the accused's state of mind at the time of the act of sexual intercourse.

As with the second element, you must also consider the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act. This time, the focus is on the effect of those circumstances on the accused's state of mind.

There are three ways the prosecution can prove a person is recklessly indifferent.

First, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility.

Second, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails

to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

Third, a person is recklessly indifferent if s/he does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Remember, the onus is on the prosecution to prove that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

9.2 – Compelled rape

25. Section 48(2) creates an offence of rape. The second and third elements of this offence are the same as the offence of rape described in 9.1 – Rape. The difference lies in the first element.

26. The first element of the s 48(2) offence is:

    - The accused compels a person to engage, or continue to engage in:
        - Sexual intercourse with a person other than the accused;
        - An act of sexual self-penetration; or
        - An act of bestiality.

27. The Act contains several definitions specifically relevant to this offence:[20]

> ***bestiality*** means sexual activity between a person and an animal
>
> ***compels***—a person compels another person if he or she controls or influences the other person's conduct by means that effectively prevent the other person from exercising freedom of choice;
>
> ***sexual self-penetration*** means the penetration by a person of the person's vagina, labia majora or anus by any part of the body of the person or by any object.

28. In comparison with the offence in s 48(1), this offence relates to an accused who compels the complainant to engage in certain sexual acts with a person or creature other than the accused.

29. For information about the second and third elements of this offence, see 9.1 – Rape.

[20] *Criminal Law Consolidation Act 1935* (SA) ss 5 (bestiality), 48(3) (compels, sexual self-penetration).

Jury Direction #9.2 – Compelled Rape

Note: This direction is designed for cases where the accused is alleged to have compelled the complainant to commence the prescribed sexual activity. The directions must be modified if the charge relates to a complainant who withdraws consent and is compelled to continue the prescribed sexual activity.

Note: This direction is designed for cases where the accused is alleged to have compelled the complainant to engage in sexual intercourse with a person other than the accused. The directions must be modified if the charge relates to an accused who compels a complainant to engage in an act of sexual self-penetration or an act of bestiality.

I will now direct you as to the elements of rape.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused compelled the complainant to engage in sexual intercourse with a third person;

Two – The complainant did not consent to the sexual intercourse;

Three – The accused knew or was recklessly indifferent to the fact that the complainant did not consent.

I will now explain these three elements and how they apply in this case.

Compulsion to engage in sexual act

The first element is that [*accused*] compelled [*complainant*] to engage in sexual intercourse with [*third party*].

A person compels another person if s/he controls or influences the other person in a way that effectively prevents the other person from exercising freedom of choice. You must therefore decide whether [*accused*] controlled or influenced [*complainant*] so that [*complainant*] did not have a free choice whether to engage in sexual intercourse with [*third party*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Absence of consent

The second element is that [*complainant*] did not consent to the sexual intercourse.

This element requires you to consider the complainant's state of mind. It does not require you to consider [*third party*]'s state of mind.[21]

Consent means "free and voluntary agreement".

[*If one of the forms of non-consent in s 46(3) are relevant, add the following*: A person does not freely and voluntarily agree to sexual activity if s/he [*identify relevant limb of s 46(3)*]].

When deciding whether the prosecution has proved that [*complainant*] did not consent to the alleged sexual intercourse, you are entitled to consider all the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act.

In assessing the circumstances of the alleged offence, there are some principles you must consider.

The complainant is not to be regarded as having consented merely because [*add all of the following that are applicable in the circumstances of the case:*

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.

Ultimately, you must look at all the evidence and decide whether the prosecution has proved, beyond reasonable doubt, that the complainant did not freely and voluntarily agree to the sexual intercourse identified in the charge.

While it is a matter for you, this element overlaps to some degree with the first element. For the first element, you must consider whether the accused **compelled** the complainant to

[21] If the information includes a further charge that alleges that the accused compelled the third party, then the judge should refer to that charge here, while noting that each charge relates to compulsion of a single complainant.

[*identify relevant act*]. If the complainant was compelled, that is, deprived of exercising freedom of choice, then you may think it follows that [*complainant*] acted without consent.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Knowledge or reckless indifference

The third element is that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting to the sexual intercourse.

This element requires you to consider the accused's state of mind.

As with the second element, you must also consider the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act. This time, the focus is on the effect of those circumstances on the accused's state of mind.

There are three ways the prosecution can prove a person is recklessly indifferent.

First, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility.

Second, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

Third, a person is recklessly indifferent if s/he does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Remember, the onus is on the prosecution to prove that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

9.3 – Compelled sexual manipulation

30. Section 48A creates the offence of compelled sexual manipulation.

31. This offence has 4 elements:

    - The accused compelled a person to engage in, or continue to engage in:
        - An act of sexual manipulation of the accused;
        - An act of sexual manipulation of a person other than the accused;
        - An act of sexual self-manipulation;
    - The accused did this for a prurient purpose;
    - The other person did not consent to engaging in the act or had withdrawn consent to the act;
    - The accused knew or was recklessly indifferent to the fact that the other person did not consent or had withdrawn consent.

32. The third and fourth elements (consent and knowledge or reckless indifference) are the same as the second and third elements of rape. For information on those elements, see 9.1 – Rape.

Compelled sexual manipulation

33. The first element is that the accused compelled a person to engage in certain acts of sexual manipulation.

34. Section 48A provides the following relevant definitions:

> ***compels***—a person compels another person if he or she controls or influences the other person's conduct by means that effectively prevent the other person from exercising freedom of choice;
>
> ***sexual manipulation*** means the manipulation by a person of another person's genitals or anus (whether or not including sexual intercourse);
>
> ***sexual self-manipulation*** means the manipulation by a person of his or her genitals or anus (whether or not including sexual self-penetration, within the meaning of section 48).

Prurient purpose

35. The second element is that the accused acted for a prurient purpose. This is defined in s 48A(2) as follows:

> "prurient purpose"—a person acts for a prurient purpose if the person acts with the intention of satisfying his or her own desire for sexual arousal or gratification or of providing sexual arousal or gratification for someone else;

Jury Direction #9.3 – Compelled sexual manipulation

Note: This direction is designed for cases where the accused is alleged to have compelled the complainant to commence the prescribed sexual activity. The directions must be modified if the charge relates to a complainant who withdraws consent and is compelled to continue the prescribed sexual activity.

Note: This direction is designed for cases where the accused is alleged to have compelled the complainant to engage in sexual manipulation of the accused. The directions must be modified if the charge relates to an accused who compels a complainant to engage in an act of sexual manipulation of a third party, or sexual self-manipulation.

I will now direct you as to the elements of compelled sexual manipulation.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused compelled the complainant to engage in sexual manipulation of the accused;

Two – The accused acted for a prurient purpose;

Three – The complainant person did not consent to the sexual manipulation;

Four – The accused knew or was recklessly indifferent to the fact that the complainant did not consent.

I will now explain these four elements and how they apply in this case.

Compulsion to engage in sexual manipulation

The first element is that [*accused*] compelled [*complainant*] to engage in sexual manipulation of the accused.

Sexual manipulation means manipulation of another person's genitals or anus. If you find that [*complainant*] [*identify relevant act*], then that meets the definition of sexual manipulation.

The other part of this element is that the accused must have **compelled** the complainant to engage in the sexual manipulation. The law says that a person compels another person if s/he controls or influences the other person in a way that effectively prevents the other person from exercising freedom of choice. You must therefore decide whether [*accused*] controlled or influenced [*complainant*] so that [*complainant*] did not have a free choice whether to [*identify relevant act*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Prurient purpose

The second element is that the accused acted with a prurient purpose.

A person acts with a prurient purpose if s/he acts with the intention of satisfying his/her own desire for sexual arousal or gratification, or of providing sexual arousal or gratification for someone else.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Absence of consent

The third element is that [*complainant*] did not consent to sexually manipulating the accused.

This element requires you to consider the complainant's state of mind.

Consent means "free and voluntary agreement".

[*If one of the forms of non-consent in s 46(3) are relevant, add the following*: A person does not freely and voluntarily agree to sexual activity if s/he [*identify relevant limb of s 46(3)*]].

When deciding whether the prosecution has proved that [*complainant*] did not consent to the alleged sexual manipulation, you are entitled to consider all the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act.

In assessing the circumstances of the alleged offence, there are some principles you must consider.

The complainant is not to be regarded as having consented merely because [*add all of the following that are applicable in the circumstances of the case:*

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.

While it is a matter for you, this element overlaps to some degree with the first element. For the first element, you must consider whether the accused **compelled** the complainant to [*identify relevant act*]. If the complainant was compelled, that is, deprived of exercising freedom of choice, then you may think it follows that [*complainant*] acted without consent.

Ultimately, you must look at all the evidence and decide whether the prosecution has proved, beyond reasonable doubt, that the complainant did not freely and voluntarily agree to engage in the sexual manipulation identified in the charge.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Knowledge or reckless indifference

The fourth element is that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting to engaging in the sexual manipulation.

This element requires you to consider the accused's state of mind.

As with the third element, you must also consider the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act. This time, the focus is on the effect of those circumstances on the accused's state of mind.

There are three ways the prosecution can prove a person is recklessly indifferent.

First, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility.

Second, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

Third, a person is recklessly indifferent if s/he does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Remember, the onus is on the prosecution to prove that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

9.4 – Unlawful sexual intercourse

36. Section 49 creates four offences of unlawful sexual intercourse. For the purpose of this commentary, these offences are described as:

    - Sexual intercourse with a person under 14;[22]
    - Sexual intercourse with a person under 17;[23]
    - Sexual intercourse by a person in authority;[24]
    - Sexual intercourse with a person with an intellectual disability.[25]

37. Sexual intercourse with a person under 14 consists of two elements:

    - The accused had sexual intercourse with the complainant;
    - The complainant was under the age of 14.

38. Sexual intercourse with a person under 17 consists of two elements:

    - The accused had sexual intercourse with the complainant;
    - The complainant was under the age of 17.

39. Sexual intercourse by a person in authority consists of three elements:

    - The accused had sexual intercourse with the complainant;
    - The complainant was under the age of 18;
    - The accused was in a position of authority in relation to the complainant.

40. Sexual intercourse with a person with an intellectual disability consists of three elements:[26]

    - The accused had sexual intercourse with the complainant;
    - The complainant was unable, due to an intellectual disability, to understand the nature or consequences of sexual intercourse;
    - The accused knew that the complainant was unable, due to an intellectual disability, to understand the nature or consequences of sexual intercourse.

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[22] *Criminal Law Consolidation Act 1935* (SA) s 49(1).
[23] *Criminal Law Consolidation Act 1935* (SA) s 49(3).
[24] *Criminal Law Consolidation Act 1935* (SA) s 49(5).
[25] *Criminal Law Consolidation Act 1935* (SA) s 49(6).
[26] *R v P, LB* [2008] SADC 6, [17].

41. The first element of each offence is the same as the first element of rape. See 9.1 – Rape for information on the meaning of sexual intercourse.

42. Consent is not a defence to any of these four offences.[27]

43. The mental element for the sexual intercourse element is general intent – the accused must have intended to have sexual intercourse with a person. There is no mental element that attaches to the complainant's age. It is no defence that the accused did not know the complainant's age or, except in relation to sexual intercourse with a person under 17, that the accused had a mistaken belief about the complainant's age.[28]

44. These four offences do not apply if the complainant and accused were married to one another.[29] This has not been stated as an element but, where it is in issue, the directions should be modified to include an element that the prosecution must prove the accused and complainant were not married to one another.

Sexual penetration of a child under 17

45. The offence in s 49(3) of sexual penetration of a child under 17 has been amended on several occasions.

46. From 9 December 1976 to 15 May 2006, the offence concerned sexual intercourse with a person of or above the age of 12 years and under the age of 17 years.[30]

47. From 15 May 2006 to 17 January 2007, the lower age limit was raised, so that the offence involved sexual intercourse with a person of or above the age of 14 years and under the age of 17 years.[31]

48. From 18 January 2007, the offence was amended to its current form, with no lower age limit.[32]

49. These amendments do not operate with retrospective effect. As a result, when a charge involves offending during an earlier time period, the element will need to include the lower age limit and require proof beyond reasonable doubt that the complainant was above the minimum age for the offence.[33]

50. This means that for offences alleged to have been committed before 18 January 2007, there is a possibility that the case will "fall between two stools". That is because s 49(1) offence requires proof beyond reasonable doubt that the complainant was under a

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[27] *Criminal Law Consolidation Act 1935* (SA) s 49(7).
[28] *R v Turvey* (2017) 127 SASR 425; [2017] SASCFC 28, [25].
[29] *Criminal Law Consolidation Act 1935* (SA) s 49(8).
[30] *Criminal Law Consolidation Act Amendment Act 1976* (SA) s 4.
[31] *Statutes Amendment (Sentencing of Sex Offenders) Act 2005* (SA) s 11.
[32] *Statutes Amendment (Justice Portfolio) Act 2006* (SA) s 15.
[33] *R v D, WD* (2013) 116 SASR 99; [2013] SASCFC 32, [29]–[36]; *R v Wilson (No 2)* [2007] SASC 129, [28]–[34].

certain age, while s 49(3) requires proof beyond reasonable doubt that the complainant was over that age, and uncertainty about the date of the alleged offending may make it impossible to be satisfied beyond reasonable doubt of either proposition.[34]

51. Section 49(4) states:

> (4) It shall be a defence to a charge under subsection (3) to prove that—
>
> (a) the person with whom the accused is alleged to have had sexual intercourse was, on the date on which the offence is alleged to have been committed, of or above the age of sixteen years; and
>
> (b) the accused—
>
> (i) was, on the date on which the offence is alleged to have been committed, under the age of seventeen years; or
>
> (ii) believed on reasonable grounds that the person with whom he is alleged to have had sexual intercourse was of or above the age of seventeen years.

52. This defence puts the onus on the accused to prove, on the balance of probabilities, the two matters necessary to engage the defence.[35]

53. In a case where there is uncertainty about the date of the alleged offending, the accused bears the onus, for the purpose of engaging this defence, to establish on the balance of probabilities that the incident took place on a date when the complainant was in the relevant age range.[36]

Position of authority

54. For the purpose of the offence of sexual intercourse by a person in authority, a person is in a position of authority if:[37]

> (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
>
> (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
>
> (c) the person provides religious, sporting, musical or other instruction to the child; or
>
> (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
>
> (e) the person is a health professional or social worker providing professional services to the child; or
>
> (f) the person is responsible for the care of the child and the child has a cognitive impairment; or

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[34] See *R v D, WD* (2013) 116 SASR 99; [2013] SASCFC 32, [35].
[35] *R v Wilson (No 2)* [2007] SASC 129, [63]–[70].
[36] *R v Wilson (No 2)* [2007] SASC 129, [66].
[37] *Criminal Law Consolidation Act 1935* (SA) s 49(9).

(g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(ga) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972* , or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

55. The question of whether the accused is in a position of authority in relation to the child must be determined at the time of the alleged acts.[38]

56. Paragraph (h) of the definition is concerned with authority. Past or future exercises of authority are not necessary, and it is not necessary that the accused had a supervisory relationship with the complainant. Instead, the focus is on whether the accused had the authority to determine significant aspects of the child's terms and conditions of employment.[39] This part of the definition is concerned with the fact that if a person has authority to determine terms and conditions or employment, then a child may agree to act in a manner that the child would not otherwise do.[40]

Intellectual disability

57. Section 49(6), which applies where the complainant is "unable to understand the nature or consequences of sexual intercourse" operates differently to s 46(3)(e) of the definition of consent, which concerns a person who is "incapable of freely and voluntarily agreeing". Where expert evidence is led about the effects of the complainant's intellectual disability, the witness should ensure that the evidence is directed toward the correct test.[41]

58. The impact of the intellectual disability was explained by King CJ as follows:[42]

> An understanding of the nature of an act of sexual intercourse is, I apprehend, an understanding of the physical actions constituting the act together with an appreciation that the act is of a sexual character and not of a character of a different kind such as a medical or hygienic procedure. The understanding of consequences which is contemplated is not an exhaustive understanding of all the possible physical and psychological consequences of sexual intercourse, but the sort of understanding of consequences possessed by ordinary persons who are not mentally deficient.

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[38] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [126].
[39] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [124]–[125].
[40] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [127].
[41] *M, B v Police* (2019) 134 SASR 575; [2019] SASC 58, [127], [133].
[42] *R v Richardson* (Unreported, Supreme Court of South Australia, 20 June 1990), quoted in *R v P, LB* [2008] SADC 6, [56].

59. The intellectual disability must be causally related to the lack of understanding, but need not be the sole cause. Other causes, such as lack of instruction, may also be present.[43]

[43] *R v Beattie* (1981) 26 SASR 481, 495.

Jury Direction #9.4A – Sexual intercourse with a person under 14

I will now direct you as to the elements of unlawful sexual intercourse.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused had sexual intercourse with another person;

Two – The other person was under the age of 14;

I will now explain these two elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] had sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Age of complainant

The second element is that [*complainant*] was under the age of 14.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Jury Direction #9.4B – Sexual intercourse with a person under 17

Note: This direction is designed for a case where the prosecution must disprove the defence in s 49(4). If this defence is not relevant, then Jury Direction – Sexual intercourse with a person under 14 should be adapted.

I will now direct you as to the elements of unlawful sexual intercourse.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused had sexual intercourse with another person;

Two – The other person was under the age of 17;

I will now explain these two elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] had sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Age of complainant

The second element is that [*complainant*] was under the age of 17.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Defence

Note: This direction is designed for cases where the accused reasonably believes that complainant was over the age of 17. If the accused relies on the defence that the accused was under the age of 17, the direction must be modified.

If you are satisfied that the prosecution has proved these two elements, you must then go on to consider a defence that may apply.

The accused has a defence to this charge if s/he proves that at the time of the relevant acts, the complainant was of or over the age of 16 and s/he believed on reasonable grounds that the complainant was of or over the age of 17.

I told you at the start of the trial that when something must be proved, it means proved beyond reasonable doubt. This defence is an exception to that rule. Because this is a matter that the **accused** must prove, the standard required is lower. The accused must prove it on the balance of probabilities. That is, the accused must show that these matters are more probable than not. The accused does not need to establish these matters beyond reasonable doubt.

I will now explain how the two parts of this defence apply in this case.

First, the accused must prove that at the time of the act of sexual intercourse, it is more probable than not that [*complainant*] was of or over the age of 16. In this case, that means the accused must prove that it is more probable than not that the act of sexual intercourse occurred [*identify relevant date range*].

Second, the accused must prove that it is more probable than not that s/he believed on reasonable grounds that [*complainant*] was of or over the age of 17. This requires you to consider two questions. Did [*accused*] believe that [*complainant*] was at least 17? And was it reasonable for [*accused*] to believe that [*complainant*] was at least 17?

If the accused can prove, on the balance of probabilities, these two parts of this defence, then you must find him/her not guilty of the offence.

The accused says that you will find this defence proved because [*identify relevant evidence and arguments*].

The prosecution argues that you will not find this defence proved because [*identify relevant evidence and arguments*].

Jury Direction #9.4C – Sexual intercourse by a person in authority

I will now direct you as to the elements of unlawful sexual intercourse.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused had sexual intercourse with another person;

Two – The other person was under the age of 18;

Three – The accused was in a position of authority in relation to the other person.

I will now explain these three elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] had sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Age of complainant

The second element is that [*complainant*] was under the age of 18.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Position of authority

The third element is that, at the time of the alleged offence, [*accused*] was in a position of authority over [*complainant*].

For the purpose of this offence, the law is only concerned with certain kinds of positions of authority. This element will only be established if the prosecution proves that, at the time of the alleged offence, the accused [*identify relevant limb of s 49(9), e.g.,* was a teacher and the complainant was either a pupil of the accused or a pupil at a school where the accused worked as a teacher].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Jury Direction #9.4D – Sexual intercourse with a person with an intellectual disability

I will now direct you as to the elements of unlawful sexual intercourse.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused had sexual intercourse with another person;

Two – The other person was unable, because of an intellectual disability, to understand the nature or consequences of sexual intercourse;

Three – The accused knew the other person was unable, because of an intellectual disability, to understand the nature or consequences of sexual intercourse.

I will now explain these three elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] had sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Intellectual disability

The second element is that [*complainant*] was unable, because of an intellectual disability, to understand the nature or consequences of sexual intercourse.

You have heard evidence that [*identify evidence about intellectual disability and effect of that disability*].

For this element, the prosecution must prove that because of an intellectual disability, the complainant either did not understand the nature of sexual intercourse or did not understand the consequences of sexual intercourse. This will require you to consider a number of matters.

Did the complainant understand what is physically involved in sexual intercourse?

Did the complainant understand the nature of the act as a sexual act, rather than some other kind of act?

What did the complainant understand about the possible consequences of sexual intercourse?

Considering these three questions will help you decide whether the prosecution has proved the complainant either did not understand the nature of sexual intercourse or s/he did not understand the consequences of sexual intercourse.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Accused's knowledge

The third element is that [*accused*] knew that, because of his/her intellectual disability, [*complainant*] was not able to understand the nature or consequences of sexual intercourse.

The second element looked at the effect of intellectual disability on the complainant. This element concerns what the accused knew about the complainant's intellectual disability, and its effects on his/her understanding of the nature or consequences of sexual intercourse.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

9.5 – Persistent sexual abuse of a child

60. Section 50 creates the offence of persistent sexual abuse of a child.

61. The offence consists of the following elements:

- The accused knowingly maintained a relationship with the complainant;
- In the course of that relationship, the accused engaged in two or more unlawful sexual acts with the complainant;
- The complainant was a child during the period of the relationship;
- The accused was an adult during the period of the relationship.

62. Section 50 in its current form was introduced by the *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* on 24 October 2017. Section 50(6) extends the operation of the current provision to relationships that existed wholly or partly before the commencement of the section, including acts that occurred before the section commenced. This gives the offence retrospective operation, as conduct that pre-dates the amendment can be charged under the current offence provision, provided the qualifying acts were unlawful sexual acts at the time.

63. The current form of the offence was introduced to reverse the effect of the High Court decision in *Chiro v The Queen*[44] and implement recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The offence operates as a true course of conduct offence.[45]

64. In contrast to the earlier form of the provision, the current offence:

- does not require proof that the acts occurred over a period of at least 3 days;
- does not require extended jury unanimity in relation to the individual sexual acts;[46]
- appears to allow convictions for constituent offences in addition to the maintaining unlawful sexual relationship offence,[47] rather than requiring charges for constituent offences to be brought as alternatives;
- allows the judge to determine the factual basis for sentencing, rather than requiring the judge to either ask the jury or sentence on the basis most favourable to the accused.[48]

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[44] *Chiro v The Queen* (2017) 260 CLR 425; [2017] HCA 37.

[45] Parliament of South Australia, Legislative Council Debates, 19 October 2017, p 8023 (The Hon K J Maher).

[46] *Criminal Law Consolidation Act 1935* (SA) s 50(4)(c); c.f. *Chiro v The Queen* (2017) 260 CLR 425; [2017] HCA 37.

[47] *Criminal Law Consolidation Act 1935* (SA) s 50(7).

[48] *Criminal Law Consolidation Act 1935* (SA) s 50(11); c.f. *Chiro v The Queen* (2017) 260 CLR 425; [2017] HCA 37. However, as *KMC v DPP (SA)* [2020] HCA 6 demonstrated, a judge still needed to make findings of fact beyond

65. The prosecution must specify the period of time in which the offence is alleged to have been committed.[49]

Knowingly maintaining a relationship

66. The prosecution must prove that the accused maintained a relationship with the complainant.[50]

67. While there must be more to the relationship than the alleged sexual acts, evidence of the unlawful sexual acts can be considered when deciding whether a relationship has been proved. This is because there can only be a single relationship between two people, even if it has multiple aspects.[51]

68. The legislation does not define or identify the kinds of relationships that may be relied on to prove this offence. The existence of a relationship is a question of fact and there should be no judicial gloss on the statutory language.[52] However, past cases have held the following relationships can constitute relationships for the purpose of this offence:[53]

- familial, legal and de-facto, relationships;
- residential relationships;
- working relationships;
- sporting and recreational relationships; and
- professional relationships.

69. The jury must also take into account the duration, frequency, nature and continuity of the interactions between the people when deciding whether there is a relationship. As Kourakis CJ explained in *R v Mann*:[54]

> Relationships are generally characterised by repeated interactions which generate patterns of interpersonal behaviour. The frequency and length of interpersonal interactions may change and may even be completely interrupted by absence for a period of time, but nonetheless the relationship may subsist and interactions resume, albeit perhaps not in the same form, when contact is made again.
>
> Importantly, what might colloquially be referred to as a 'bad relationship' may nonetheless still be a relationship. Relationships may be sympathetic or antagonistic, collaborative or competitive. They may be hierarchial or homogenous. The relative power and control exercised by one person over the other, and the relative independence or interdependence of the parties to a relationship, may also vary.

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reasonable doubt about which sexual acts occurred to engage the protection offered by *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) s 9(1).

[49] *Criminal Law Consolidation Act 1935* (SA) s 50(5).

[50] *R v M, DV* (2019) 133 SASR 470; [2019] SASCFC 59, [9]-[10], [174]-[184].

[51] *R v Mann* [2020] SASCFC 69, [15].

[52] *R v Mann* [2020] SASCFC 69, [21].

[53] *R v Mann* [2020] SASCFC 69, [26].

[54] *R v Mann* [2020] SASCFC 69, [28]-[29].

70. A relationship can also exist even if there are few previous interactions between the parties, where there is an external social, hierarchical or legal relationship, such as may arise between a teacher and students at a school who are not taught by that teacher, or between a religious leader and members of a religious group.[55]

71. Unlike the component offences, the fact of the relationship must be unanimously agreed by the jury.[56]

72. It has been suggested that the existence of the relationship must pre-date the unlawful sexual acts.[57]

73. It is not yet clear what content will be given to the requirement that the accused "maintained" the relationship, and whether this involves something more than the continued existence of the relationship.

74. While the legislation does not expressly identify a fault element for this element, it has been held that knowledge is the necessary fault element. The prosecution must prove that the accused knew of his or her acts, and the contextual circumstances, which have the effect of maintaining a relationship. It is not necessary to prove the accused or the complainant desired, or subjectively thought he or she had a relationship with the other party.[58]

Unlawful sexual acts

75. An unlawful sexual act is an act that constitutes[59] a sexual offence. For this purpose, sexual offence is defined as:[60]

    (a) an offence against Division 11 (other than sections 59 and 61) or sections 63B, 66, 69 or 72; or

    (b) an attempt to commit, or assault with intent to commit, any of those offences; or

    (c) a substantially similar offence against a previous enactment;

76. Section 50(4) limits the need for particulars in relation to the component offences:

    (a) the prosecution is not required to allege the particulars of any unlawful sexual act that would be necessary if the act were charged as a separate offence; and

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[55] *R v Mann* [2020] SASCFC 69, [32].

[56] *R v M, DV* (2019) 133 SASR 470; [2019] SASCFC 59, [14]-[16].

[57] See *R v M, DV* (2019) 133 SASR 470; [2019] SASCFC 59, [10] ("The unlawful sexual acts are not in themselves the relationship, they are acts which occur within it", per Kourakis CJ), [11] ("… the relationship will not be *constituted* an unlawful sexual one unless the jury is satisfied that the adult, in the otherwise innocent relationship, engaged in those acts") and [179] ("… the prosecution would have to prove a pre-existing relationship between the offender and the victim, and that the 2 or more unlawful sexual acts occur within that relationship" per Lovell J).

[58] *R v Mann* [2020] SASCFC 69, [20], [35].

[59] Or would constitute, if adequate particulars were provided.

[60] *Criminal Law Consolidation Act 1935* (SA) s 50(12).

(b) the trier of fact is not required to be satisfied of the particulars of any unlawful sexual act that it would have to be satisfied of if the act were charged as a separate offence, but must be satisfied as to the general nature or character of those acts.

77. It is likely that s 50 does not require particulars that allow distinct occasions of sexual activity to be identified at all, or in a way that distinguishes one occasion from another. A complainant may give evidence that certain sexual acts occurred, for example, every day for two weeks, and no further information identifying particular occasions in that two week period is required.[61]

78. A person may be charged and convicted in a single information of both the persistent sexual abuse offence and a component offence. However, once a person has been convicted or acquitted of either a component offence or a persistent sexual abuse offence, a later charge cannot be brought involving the same acts on a different information.[62]

79. Section 50(4)(c) provides that the jury is not required to agree on which unlawful sexual acts constitute the unlawful sexual relationship. This reverses the common law position that relationship offences, such as this offence, require the jury to agree on which component offences were established.[63]

Child complainant

80. The third element is that the complainant was a child during the relevant period.

81. For this purpose, a child is a person under the age of 17 or, if the accused was a person in a position of authority in relation to the complainant during the alleged relationship, a person under the age of 18.[64]

82. The relationships which give rise to a position of authority are listed in s 50(13). These are the same relationships that are listed in s 49(9). See the discussion of those relationships in 9.4 – Unlawful sexual intercourse.

Adult accused

83. The fourth element is that the accused must have been an adult at the time of the relevant acts.[65]

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[61] See *Hamra v The Queen* (2017) 260 CLR 479; [2017] HCA 38, [27]–[28].

[62] *Criminal Law Consolidation Act 1935* (SA) ss 50(7), (8).

[63] *Criminal Law Consolidation Act 1935* (SA) s 50(4)(c); c.f. *Chiro v The Queen* (2017) 260 CLR 425; [2017] HCA 37; *R v M, BJ* (2011) 110 SASR 1; [2011] SASCFC 50; *R v Little* (2015) 123 SASR 414; [2015] SASCFC 118.

[64] *Criminal Law Consolidation Act 1935* (SA) ss 50(12), (13).

[65] *Criminal Law Consolidation Act 1935* (SA) s 50(1).

Jury Direction #9.5 – Persistent sexual abuse of a child

I will now direct you as to the elements of persistent sexual abuse of a child.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused knowingly maintained a relationship with the complainant in the relevant period;

Two – The accused engaged in two or more unlawful sexual acts with the complainant in the course of the relationship;

Three – The complainant was a child under the age of 17 during the relationship.

Four – The accused was an adult during the relationship.

I will now explain these three elements and how they apply in this case.

Knowingly maintaining a relationship

The first element is that [*accused*] knowingly maintained a relationship with [*complainant*] between [*identify relevant period*].

The prosecution says that the nature of the relationship between the complainant and accused was [*identify relevant relationship*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Two or more unlawful sexual acts

The second element is that [*accused*] engaged in two or more unlawful sexual acts with [*complainant*] in the course of the relationship.

To prove this element, the prosecution has identified [*number*] different sexual offences they say the accused committed against the complainant [*identify relevant period*].

The first offence the prosecution say was committed was [*identify relevant offence and give directions on that offence, linking the evidence of particular acts to the alleged offence*].

The second offence the prosecution says was committed was [*identify relevant offence and give directions on that offence, linking the evidence of particular acts to the alleged offence*].[66]

[66] If the prosecution relies on three or more different offences for the purpose of this element, the judge will need to explain those other offences here as well.

As you have heard, the prosecution says that between [*identify relevant period*], [*accused*] engaged in [*number*] unlawful sexual acts with [*complainant*]. You can only find this element proved if you are satisfied that at least two of those unlawful sexual acts have been proved beyond reasonable doubt. For this purpose, each of you may accept different parts of the evidence, and there is no requirement that you all agree on the same two acts.

Child

Note: If the complainant turned 18 during the relevant period, this direction must be modified to refer to the accused being in a position of authority over the complainant during that period.

The third element is that [*complainant*] was under the age of 17 during the relationship.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Adult

The fourth element is that [*accused*] was an adult during the relationship.

As you have heard, the prosecution says, as part of the first element, there was a relationship between the accused and [*complainant*] between [*identify relevant period*]. For this element, you must be satisfied that at the start of the relationship, the accused was at least 18 years of age.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

9.6 – Sexual exploitation of person with a cognitive impairment

84. Section 51 creates two offences of sexual exploitation of a person with a cognitive impairment.

85. The first offence has six elements:[67]

- The accused provides a service to a person;
- That person has a cognitive impairment;
- The accused is aware that the other person has a cognitive impairment;
- The accused intentionally obtains or procures sexual intercourse or indecent contact with that person;
- The accused intentionally used undue influence to obtain or procure the sexual intercourse or indecent contact;
- The accused is not married to, or the domestic partner of, the other person.

86. The second offence has seven elements:[68]

- The accused provides a service to a person;
- The person has a cognitive impairment;
- The accused is aware that the other person has a cognitive impairment;
- The accused intentionally behaves in an indecent manner in the presence of the person;
- The other person did not consent, or their consent was obtained by undue influence;
- The accused knows the other person does not consent, or that their consent was obtained by undue influence;
- The accused is not married to, or the domestic partner of, the other person.

87. For the purpose of the first element, it does not matter whether the accused receives remuneration for the service.[69]

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[67] *Criminal Law Consolidation Act 1935* (SA) s 51(1).
[68] *Criminal Law Consolidation Act 1935* (SA) s 51(2).
[69] *Criminal Law Consolidation Act 1935* (SA) s 51(1), (2).

88. The service provision requirement is not limited to formal carers. During the second reading speech, the Attorney-General gave examples of a regular transport provider, a taxi or a bus driver as people who provide a service for the purpose of this offence.[70]

89. Cognitive impairment is defined to include:[71]

    (a) an intellectual disability;

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

    (c) a neurological disorder;

    (d) dementia;

    (e) mental impairment;

    (f) a brain injury;

90. The Act does not define indecent contact or indecent manner. It is likely that these terms have their ordinary meaning as informed by caselaw on indecent assault. See 9.7 – Indecent assault.

91. Sexual intercourse is defined as including:[72]

    any activity (whether of a heterosexual or homosexual nature) consisting of or involving—

    (a) penetration of a person's vagina, labia majora or anus by any part of the body of another person or by any object; or

    (b) fellatio; or

    (c) cunnilingus,

    and includes a continuation of such activity;

92. Undue influence is defined as including "the abuse of a position of trust, power or authority". While this exact term has not been interpreted in South Australia, other courts have held that a similar phrase, "care, supervision or authority", must be read disjunctively and is designed to cover people who, because of an established relationship, are in a position to exploit or take advantage of the influence that grows out of the relationship.[73] The lists in ss 49 and 50 of when a person is in 'a position of authority' only apply to those sections and do not apply to this offence.

93. For the purpose of the second offence, the Act contains a reverse onus provision in relation to absence of consent. If the prosecution proves that at the time of the alleged offence the accused was in a position of power, trust or authority in relation to the victim,

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[70] Parliamentary Debates, House of Assembly, 29 October 2014, 2487 (Mr Rau, Attorney-General).

[71] *Criminal Law Consolidation Act 1935* (SA) s 51(5).

[72] *Criminal Law Consolidation Act 1935* (SA) s 5(1).

[73] See *R v Howes* (2000) 2 VR 141; [2000] VSCA 159, [58]; *R v Little* (2015) 45 VR 816; [2015] VSCA 62, [81]-[84].

then consent is presumed to have been obtained by undue influence unless the accused proves the contrary on the balance of probabilities.[74]

94. The Act provides two related definitions for the purpose of determining whether someone is the domestic partner of another person:

> ***domestic partner***—a person is the domestic partner of another if he or she lives with the other in a close personal relationship;
>
> ***close personal relationship*** means the relationship between 2 adult persons (whether or not related by family and irrespective of their gender) who live together as a couple on a genuine domestic basis, but does not include a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind;

[74] *Criminal Law Consolidation Act 1935* (SA) s 51(4).

Jury Direction #9.6 – Sexual exploitation of person with a cognitive impairment

Note: This direction is defined for an offence under s 51(1) where the alleged act was sexual intercourse. If the charge involves indecent contact, the direction must be modified.

I will now direct you as to the elements of sexual exploitation of a person with a cognitive impairment

To prove this offence, the prosecution must prove six elements beyond reasonable doubt. These are:

One – The accused provided a service to a person;

Two – The person had a cognitive impairment;

Three – The accused knew that the person had a cognitive impairment;

Four – The accused obtained sexual intercourse with the person;

Five – The accused used undue influence to obtain the sexual intercourse;

Six – The accused was not married to the other person and was not the domestic partner of the other person.

I will now explain these five elements and how they apply in this case.

Service

The first element is that [*accused*] provided a service to [*complainant*].

The prosecution says that [*accused*] provided [*identify relevant service(s)*] to [*complainant*].

It does not matter whether the accused was paid for providing services. You only need to decide whether the accused provided a service to [*complainant*].

[*Identify relevant evidence and arguments*]

Cognitive impairment

The second element is that [*complainant*] had a cognitive impairment.

To prove this element, the prosecution must show that [*complainant*] had [*identify relevant form of cognitive impairment*].

[*Identify relevant evidence and arguments*]

Knowledge of cognitive impairment

The third element is that the accused knew [*complainant*] had a cognitive impairment.

In other words, the prosecution must show that [*accused*] knew that [*complainant*] had [*identify relevant form of cognitive impairment*].

[*Identify relevant evidence and arguments*]

Sexual intercourse

The fourth element is [*accused*] obtained sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Undue influence

The fifth element is that the accused obtained sexual intercourse with [*complainant*] using undue influence.

For this element, undue influence means the abuse of a position of trust, power or authority.

This element requires you to consider two questions.

First, was there a position of trust, power or authority?

Second, did the accused abuse that position?

The prosecution says that [*accused*] was in a position of trust/power/authority with [*complainant*]. The prosecution also says that [*accused*] abused that position by [*identify relevant abuse of position*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Lack of marriage or domestic partnership

The final element is that the accused was not married to or in a domestic partnership with [*complainant*].

This element is not in dispute and you can find it proved.

9.7 – Indecent assault

95. Section 56 creates the offence of indecent assault. This offence consists of two elements:

- The accused assaulted the complainant;
- The assault occurred in circumstances of indecency.

96. While this commentary analyses the offence by reference to these two elements, the sample jury direction divides the offence into five separate elements. The two element structure may be more useful if the judge needs to direct the jury about the possibility of an alternative verdict of assault. However, cases where there is a dispute about whether the touching involved circumstances of indecency are rare.

Assault

97. To prove the first element, the prosecution must prove four sub-elements:

(1) The accuse applied force to the complainant or put the complainant in fear of force;

(2) The accused intended to apply force to the complainant or intended to put the complainant in fear of force;

(3) The assault was unlawful;

(4) The accused knew the complainant did not consent or was reckless about the absence of consent.

Application of force or fear of force

98. The first sub-element can involve both touching the complainant, or placing the complainant in fear of the use of force.[75]

Unlawful assault

99. The prosecution must prove that the assault occurred without a lawful defence. The most common defence which the prosecution must disprove is that the complainant consented to the assault.

100. In assessing whether the complainant did not consent, the jury must use the definition of consent in s 46.[76] See 9.1 – Rape for information on the meaning of consent.

101. Consent is not a defence to indecent assault if:[77]

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[75] *Fitzgerald v Kennard* (1995) 38 NSWLR 184; *R v Court* [1989] AC 28, 47-48; *Boughey v The Queen* (1986) 161 CLR 10, 26; [1986] HCA 29.

[76] *M, B v Police* (2019) 134 SASR 575; [2019] SASC 58, [124].

[77] *Criminal Law Consolidation Act 1935* (SA) s 57(1)-(3).

- The complainant was under 18 and the accused was in a position of authority in relation to the complainant;
- The complainant was under 17, unless:
    - At the time of the alleged offence, the complainant was between the age of 16 and 17, and:
        - The accused was under the age of 17; or
        - The accused believed on reasonable grounds that the complainant was of or above the age of 17.

102. A person is defined as being in a position of authority over a child if:[78]

(a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or

(b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or

(c) the person provides religious, sporting, musical or other instruction to the child; or

(d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or

(e) the person is a health professional or social worker providing professional services to the child; or

(f) the person is responsible for the care of the child and the child has a cognitive impairment; or

(g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(ga) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972*, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

Knowledge of absence of consent

103. The prosecution must prove, as a fault element, that the accused knew the complainant did not consent or was reckless about the absence of consent.[79]

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[78] *Criminal Law Consolidation Act 1935* (SA) s 57(4).

[79] *Fitzgerald v Kennard* (1995) 38 NSWLR 184; *DPP v Morgan* [1975] 2 All ER 347; *R v Kimber* [1983] 3 All ER 316.

Circumstances of indecency

104. An indecent assault requires proof of both an assault and indecency. However, there is no need to prove a separate assault over and above the act of indecency. This is because the assault and the indecency may involve the same act, such as a touching to a particular part of the complainant's body.

105. Indecency requires "sexual lewdness" or a "sexual connotation".[80]

106. In assessing whether there is a sexual connotation, the jury must apply community values.[81]

107. While there is no prescriptive list of factors used to determine whether there is a sexual connotation, in most cases it will arise from where on the body the complainant is touched, or the part of the body the accused used to do the touching.[82]

108. The judge has a role in directing the jury on the aspects of the assault which are capable, as a matter of law, of being indecent. It is then for the jury to decide whether the relevant acts are proved and, if so, whether those acts are indecent.[83]

109. The element of indecency does not depend on the accused's state of mind. An assault may be indecent because it involves a violation of the complainant's sexual modesty or privacy, even if the accused did not act with a sexual intention, interest or motive.[84]

110. It is not necessary to prove that the accused intend that the assault be indecent.[85] The fault element for the offence is contained within the second and fourth sub-elements, described above.

Indecent assault as an alternative

111. Section 75 provides that indecent assault, or attempted indecent assault, is a statutory alternative to any charge for rape, compelled sexual manipulation or unlawful sexual intercourse, or an attempt to commit any of those three offences.

112. This provision only applies when the jury is deliberating. The section does not, by itself, allow a trial to continue where there is no evidence of a penetrative offence on the basis that there is evidence which the jury could accept to establish indecent assault. Instead, the prosecution must apply to amend the information to add a charge of indecent assault, so that there is a still a case to the jury in relation to the relevant conduct, provided the

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[80] *M, B v Police* (2019) 134 SASR 575; [2019] SASC 58, [120]–[123]; *R v C, M* (2014) 246 A Crim R 21; [2014] SASCFC 116, [17]–[19], [29].

[81] *R v C, M* (2014) 246 A Crim R 21; [2014] SASCFC 116, [27].

[82] *R v Harkin* (1989) 38 A Crim R 296, quoted with approval in *R v C, M* (2014) 246 A Crim R 21; [2014] SASCFC 116, [24].

[83] *R v C, M* (2014) 246 A Crim R 21; [2014] SASCFC 116, [29]–[35].

[84] *R v Thompson* [2018] SASCFC 104, [83].

[85] See, e.g., *R v C, M* (2014) 246 A Crim R 21; [2014] SASCFC 116.

penetrative and non-penetrative alternative relates to the same alleged conduct.[86] In most cases, it would be appropriate to allow the amendment, though there may be cases where doing so would be unfair to the accused.[87]

[86] For example, preparatory conduct that occurred leading up to an alleged penetrative act could not be relied on for the alternative indecent assault, as such conduct could not have been part of the penetrative charge, as the charge would have been bad for duplicity: *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [73], [258].
[87] *R v MJJ; R v CJN* (2013) 117 SASR 81; [2013] SASCFC 51, [67] – [72], [257].

Jury Direction #9.7A – Indecent assault – Adult complainant

Note: This direction must be modified if:

- *the complainant is under 16, or*
- *the complainant is under 18 and the accused is in a position of authority in relation to the complainant.*

If the complainant is aged between 16 and 17, and the case raises the defence in s 57(3), use Indecent assault – Complainant aged 16.

I will now direct you as to the elements of indecent assault.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused touched the complainant;[88]

Two – The accused intended to touch the complainant;

Three – The complainant did not consent to the touching.

Four – The accused knew the complainant did not consent to the touching or was reckless about whether the complainant consented.

Five – The touching occurred in circumstances of indecency.

I will now explain these five elements and how they apply in this case.

Assault

The first element is that [*accused*] touched [*complainant*].

No particular degree of force or contact is required. The slightest touch is enough for this element.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Intention to assault

The second element the prosecution must prove is that the accused intended to touch the complainant.

[88] This direction must be modified where the assault involves only putting the complainant in fear of being touched.

[*Identify relevant evidence and arguments*]

Absence of consent

The third element is that the complainant did not consent to the touching.

Consent means "free and voluntary agreement" to the alleged indecent assault.

[*If one of the forms of non-consent in s 46(3) are relevant, add the following*: A person does not freely and voluntarily agree to be touched if s/he [*identify relevant limb of s 46(3)*]].

When deciding whether the prosecution has proved that [*complainant*] did not consent to the touching, you are entitled to consider the evidence of the complainant as well as all the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act.

In assessing the circumstances of the alleged offence, there are some principles you must consider. The complainant is not to be regarded as having consented merely because [*add all of the following that are applicable in the circumstances of the case:*

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.]

Ultimately, you must look at all the evidence and decide whether the prosecution has proved, beyond reasonable doubt, that the complainant did not freely and voluntarily agree to be touched by the accused in the way alleged.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Knowledge or reckless indifference

The fourth element is that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting to the touching.

This element requires you to consider the accused's state of mind at the time of the alleged touching.

As with the third element, you must also consider the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act. This time, the focus is on the effect of those circumstances on the accused's state of mind.

There are three ways the prosecution can prove a person is recklessly indifferent.

First, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility.

Second, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

Third, a person is recklessly indifferent if s/he does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Remember, the onus is on the prosecution to prove that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Indecency

The fifth element is that the touching occurred in circumstances of indecency.

For this purpose, touching is indecent if it involves a sexual connotation. In deciding whether [*accused*]'s conduct was indecent, you must apply community values. You must decide whether you are satisfied, beyond reasonable doubt that, as a matter of community standards, the touching was indecent. You should look at all the circumstances, including the part of the body [*accused*] touched, and the part of the body s/he used to do the touching.

[*Identify relevant evidence and arguments*]

Jury Direction #9.7B – Indecent assault – Complainant aged 16

I will now direct you as to the elements of indecent assault.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused touched the complainant;[89]

Two – The accused intended to touch the complainant;

Three – The complainant did not consent to the touching;

Four – The accused knew the complainant did not consent to the touching or was reckless about whether the complainant consented;

Five – The touching occurred in circumstances of indecency.

I will now explain these five elements and how they apply in this case.

Assault

The first element is that [*accused*] touched [*complainant*].

No particular degree of force or contact is required. The slightest touch is enough.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Intention to assault

The second element the prosecution must prove is that the accused intended to touch the complainant.

[*Identify relevant evidence and arguments*]

Absence of consent

The third element is that the complainant did not consent to the touching.

The law is that where the complainant is aged between 16 and 17, the prosecution does not always need to prove this element. I will now explain how this rule works. To help you understand, you should follow the checklist I have given you while I am speaking.

[89] This direction must be modified where the assault involves only putting the complainant in fear of being touched.

First, if you are satisfied beyond reasonable doubt that the alleged touching occurred before [*identify relevant date*], then the prosecution does not need to prove this element. This is because a person under the age of 16 cannot consent to an indecent assault.

Second, if you find that it is a reasonable possibility that the alleged touching occurred after [*identify relevant date after complainant turned 17*], then the prosecution must prove the complainant did not consent to the touching.

Third, if you are satisfied beyond reasonable doubt that the alleged touching occurred between [*identify relevant dates when complainant aged between 16 and 17*], then you must decide whether the accused has proved that consent is a defence.

If a person is between the ages of 16 and 17, consent is only a defence if the accused proves that, at the time of the alleged touching, s/he believed on reasonable grounds that the complainant was at least 17 years of age.[90]

There are three parts to what I just said I need to explain.

First, this is one of the rare situations where the accused must prove an issue. This third situation, where consent might be a defence, is only relevant if the accused proves that s/he believed on reasonable grounds that [*complainant*] was at least 17 years old. The standard of proof for this issue is the balance of probabilities. That is, the accused must show that it is more probable than not. This is a lower standard than beyond reasonable doubt, which is the standard that applies to the prosecution.

Second, the question is whether the accused believed on reasonable grounds that [*complainant*] was at least 17 years old at the time of the alleged touching. There are two parts to this. First, the accused must show that s/he personally believed that [*complainant*] was at least 17 years old at the time of the alleged acts. Second, that belief must be based on reasonable grounds. That is, the accused must show that a reasonable person in the accused's position could have also formed that belief.

The third part of this rule I have to explain are the consequences. If the accused proves, on the balance of probabilities, that s/he believed on reasonable grounds that [*complainant*] was at least 17 years old at the time of the alleged acts, then the prosecution must show the complainant did not consent. In other words, the onus then shifts back on the prosecution to prove [*complainant*] did not consent.

I will now explain what the prosecution must prove, if consent is a defence.

Consent means free and voluntary agreement.

[90] If the case involves s 57(3)(a), that the accused was under 17 at the time of the alleged offence, this direction must be modified.

[*If one of the forms of non-consent in s 46(3) are relevant, add the following*: A person does not freely and voluntarily agree to an indecent assault if s/he [*identify relevant limb of s 46(3)*]].

When deciding whether the prosecution has proved that [*complainant*] did not consent to the alleged indecent assault, you are entitled to consider the evidence of the complainant as well as all the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act.

In assessing the circumstances of the alleged offence, there are some principles you must consider. The complainant is not to be regarded as having consented merely because [*add all of the following that are applicable in the circumstances of the case:*

(a) the person did not say or do anything to indicate that he or she did not freely and voluntarily agree to the sexual activity; or

(b) the person did not protest to or physically resist the sexual activity; or

(c) the person was not physically injured in the course of, or in connection with, the sexual activity; or

(d) 1 or more of the following circumstances apply:

(i) the person freely and voluntarily agreed to sexual activity of a different kind with the defendant;

(ii) the person had freely and voluntarily agreed to sexual activity (whether or not of the same kind) with the defendant on an earlier occasion;

(iii) the person had, on that or some other occasion, freely and voluntarily agreed to sexual activity (whether or not of the same kind) with another person.]

Ultimately, you must look at all the evidence and decide whether the prosecution has proved, beyond reasonable doubt, that the complainant did not freely and voluntarily agree to the alleged indecent assault identified in the charge.

To summarise, there are three ways the prosecution can prove this element. First, the prosecution can prove beyond reasonable doubt that [*complainant*] did not consent. Second, the prosecution can prove beyond reasonable doubt that the alleged indecent assault occurred before [*identify date the complainant turned 16*]. Third, if you are satisfied that the alleged indecent assault occurred between [*identify date the complainant turned 16 and the date the complainant turned 17*], this element only needs to be proved if the accused proves, on the balance of probabilities, that the accused believed on reasonable grounds that [*complainant*] was at least 17 years old at the time of the relevant acts.

The prosecution argues that [*identify relevant evidence and arguments*]. The defence says that [*identify relevant evidence and arguments*].]

Knowledge or reckless indifference

The fourth element is that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting to the alleged touching.

This element requires you to consider the accused's state of mind at the time of the act of alleged touching.

This element is only relevant if you found that consent is a defence. That is, you found that the prosecution needed to prove the third element.

As with the third element, you must also consider the circumstances of the alleged offence, including what [*accused*] and [*complainant*] did before, during and after the alleged act. This time, the focus is on the effect of those circumstances on the accused's state of mind.

There are three ways the prosecution can prove a person is recklessly indifferent.

First, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility.

Second, a person is recklessly indifferent if s/he is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed.

Third, a person is recklessly indifferent if s/he does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.

Remember, the onus is on the prosecution to prove that the accused knew or was recklessly indifferent to the fact that the complainant was not consenting.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Indecency

The fifth element is that the touching occurred in circumstances of indecency.

For this purpose, touching is indecent if it involves a sexual connotation. In deciding whether [*accused*]'s conduct was indecent, you must apply community values. You must decide whether you are satisfied, beyond reasonable doubt that, as a matter of community standards, the touching was indecent. You should look at all the circumstances, including the part of the body [*accused*] touched, and the part of the body s/he used to do the touching.

[*Identify relevant evidence and arguments*]

9.8 – Incest

113. Section 72 creates the offence of incest. This offence consists of two elements:

- The accused had sexual intercourse with a person;
- The person is a close family member of the accused.

114. Sexual intercourse is defined in s 5. For information on the definition and its operation, see 9.1 – Rape.

115. Close family member is defined as:

> (a) a parent; or
>
> (b) a child; or
>
> (c) a sibling (including a half-brother or half-sister); or
>
> (d) a grandparent; or
>
> (e) a grandchild,
>
> of the person, but does not include such a family member related to the person by marriage or adoption alone.

116. Section 72 also provides that:

> It is a defence to a charge of an offence against this section for the accused to prove that he or she did not know, and could not reasonably have been expected to know, that the person was a close family member.

Jury Direction #9.8 – Incest

I will now direct you as to the elements of incest.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused had sexual intercourse with a person;

Two – That person was a close family member of the accused.

I will now explain these two elements and how they apply in this case.

Sexual intercourse

The first element is that [*accused*] had sexual intercourse with [*complainant*].

Sexual intercourse includes [*identify relevant limb of definition*].

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Close family member

The second element is that [*complainant*] is a close family member of [*accused*].

For the purpose of this element, the prosecution must prove that [*complainant*] is a [*identify relevant form of relationship*] of [*accused*]. If the prosecution can prove that relationship, then the prosecution has proved this element.

[If relevant, add: For this element, relationship by marriage or adoption alone is not enough. So when I speak about a [*identify relevant relationship*], that does not include a step-[*identify relevant relationship*] or a [*identify relevant relationship*]-in law.

[*Identify relevant evidence and arguments*]

Lack of knowledge

[If relevant, add the following direction: If the prosecution has proved these two elements, you must then turn to consider a defence of lack of knowledge.

A person is not guilty of this offence if s/he can prove that s/he did not know and could not reasonably have been expected to know that the other person was a close family member.

There are three parts to this defence I have to explain.

First, this is one of the rare situations where the accused must prove an issue. This defence requires the accused to prove that s/he did not know and could not reasonably have been

expected to know that the other person was a close family member. The standard of proof for this issue is the balance of probabilities. That is, the accused must show that they are more probable than not. This is a lower standard than beyond reasonable doubt, which is the standard that applies to the prosecution.

Second, there are two matters the accused has to prove. The accused must first prove that s/he personally did not know [*complainant*] was his/her [*identify relevant relationship*]. The accused must also prove that s/he could not reasonably have been expected to know that [*complainant*] was his [*identify relevant relationship*]. This defence only applies if the accused can prove both of these matters.

Third, if the accused proves these two matters, then you must find the accused not guilty.

[*Identify relevant evidence and arguments*]]

9.9 – Sexual servitude

117. Section 66 creates two offences of sexual servitude. The first offence consists of three elements:

- The accused engaged in the relevant conduct;
- The conduct had the effect of compelling a person to provide or continue providing commercial sexual services;
- The accused intended to or was reckless as to compelling the person to provide or continue providing commercial sexual services.

118. The second offence consists of four elements:

- The accused engaged in the relevant conduct;
- The conduct involved the exercise of undue influence;
- The effect of the conduct was to get a person to provide or continue providing commercial sexual services;
- The accused intended to or was reckless as to exerting undue influence on the person to provide or continue providing commercial sexual services.

Compulsion and undue influence

119. The Act defines compulsion and undue influence as follows:[91]

> ***compulsion***—a person compels another (the ***victim***) if the person controls or influences the victim's conduct by means that effectively prevent the victim from exercising freedom of choice;
>
> ***undue influence***—a person exerts undue influence on another (the ***victim***) if the person uses unfair or improper means to influence the victim's conduct.

120. Whether conduct amounts to compulsion or undue influence must be determined according to the circumstances of the case.[92]

121. Evidence of the following may be relevant to whether the conduct amounts to compulsion or undue influence:[93]

> (a) fraud, misrepresentation or suppression of information;
>
> (b) force or a threat of force;
>
> (c) any other threat (including a threat to take action that may result in the victim's deportation or a threat to take other lawful action);

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[91] *Criminal Law Consolidation Act 1935* (SA) s 65A.
[92] *Criminal Law Consolidation Act 1935* (SA) s 66(4).
[93] *Criminal Law Consolidation Act 1929* (SA) s 66(5).

(d) restrictions on freedom of movement;

(e) supply, or withdrawal of supply, of an illicit drug;

(f) abuse of a position of guardianship or trust;

(g) any other form of unreasonable or unfair pressure.

Commercial sexual services

122. Commercial sexual services is defined as:[94]

> services provided for payment involving the use or display of the body of the person who provides the services for the sexual gratification of another or others.

Recklessness

123. Section 65A(2) states:

> For the purposes of this Division, a person whose conduct causes a particular result is taken to have intended that result if the person is reckless about whether that result ensues.

[94] *Criminal Law Consolidation Act 1929* (SA) s 65A(1).

Jury Direction #9.9 – Sexual servitude

I will now direct you as to the elements of sexual servitude.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt:

One – The accused performed the alleged act(s);

Two – The accused's act(s) had the effect of compelling a person to provide commercial sexual services;

Three – The accused intended to compel the person to provide commercial sexual services or was reckless as to compelling the person to provide commercial sexual services.

Acts

The first element is that the accused performed the alleged act(s).

The prosecution says that the accused [*identify relevant act*]. The first question you must answer is whether you are satisfied beyond reasonable doubt that the accused did [*identify relevant act*].

[*Refer to relevant evidence and arguments*]

Compelling to provide commercial sexual services

The second element concerns the effect of the accused's act(s). The prosecution must show that the act(s) had the effect of compelling a person to provide commercial sexual services.

Commercial sexual services means the person is paid to use or display his/her body for the sexual gratification of others.

For the purpose of this element, compelled means the accused controlled or influenced [*complainant*]'s conduct in a way that effectively prevented [*complainant*] from making a free choice. In deciding whether [*complainant*] was compelled, you should take into account [*identify relevant evidence, especially by reference to s 66(5)*].

[*Refer to relevant evidence and arguments*]

Intention or recklessness

The third element concerns the accused's state of mind.

There are two ways the prosecution can prove this element.

The first is to show that the accused intended to compel the complainant to provide commercial sexual services. That is, s/he meant to compel the complainant to provide commercial sexual services.

The second way the prosecution can prove this element is to show that the accused was reckless about compelling the complainant to provide commercial sexual services. For this

purpose, being reckless means the accused knew his actions would probably cause the complainant to be compelled to provide commercial sexual services. In applying this test, I emphasise that you are looking at the accused's state of mind. The accused must have known that his/her actions would probably compel the complainant to provide commercial sexual services.

[*Refer to relevant evidence and arguments*]

9.10 – Bestiality

124. Section 69 creates the offence of bestiality. The offence consists of two elements:[95]

- The accused engaged in sexual activity with an animal;
- The accused intended to engage in sexual activity with an animal.

125. The term 'sexual activity' is not defined. Whether an activity is sexual is a question of fact to be decided by the life experience of the tribunal of fact. It must be determined by reference to the context of the activity, as perceptible to at least one of the parties. For this purpose, the context includes the absence of circumstances that may provide a valid reason, such as a medical reason, and the presence of circumstances indicating that the accused had a prurient purpose. The court must also take into account the body parts involved, or the presence of partial or complete exposure.[96]

[95] *Criminal Law Consolidation Act 1929* (SA) s 5.

[96] See *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [23]–[25].

Jury Direction #9.10 – Bestiality

Note: This charge is designed for the case where there is no dispute that the relevant acts, if committed, are a form of sexual activity, and were intentional. If either of those matters are in issue, then the charge should be modified.

I will now direct you as to the elements of bestiality.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt:

One – The accused engaged in sexual activity with an animal;

Two – The accused intended to engage in sexual activity with an animal.

Sexual activity with an animal

This charge involves a simple question of fact. Has the prosecution proved, beyond reasonable doubt, that [*accused*] [*identify relevant sexual activity*] [*identify animal*]? If that is proved, then you can readily find that the accused engaged in sexual activity with an animal and intended to do so.

[*Identify relevant evidence and arguments*]

CHAPTER 10: CHILD EXPLOITATION MATERIAL OFFENCES

10.1 – Production of child exploitation material

1. Section 63 creates two offences.[1] The first, producing child exploitation material,[2] consists of three elements:

   - The accused produces, or takes a step in the production of, material;
   - The material is child exploitation material;
   - The accused knows of its pornographic nature.

2. The second offence, disseminating child exploitation material, also consists of three elements:

   - The accused disseminates, or takes a step in the dissemination of, material;
   - The material is child exploitation material;
   - The accused knows of its pornographic nature.

3. The Act contains the following relevant definitions:[3]

> ***disseminate***—a person disseminates child exploitation material if the person—
>
> (a) sends, supplies, sells, exhibits, distributes, transmits or communicates it to another, or enters into an agreement or arrangement to do so; or
>
> (b) makes it available for access by another (including access by means of a computer) or enters into an agreement or arrangement to do so;
>
> ***material*** includes—
>
> (a) any written or printed material; or
>
> (b) any picture, painting or drawing; or
>
> (c) any carving, sculpture, doll, statue or figure; or
>
> (d) any photographic, electronic or other information or data from which an image or representation may be produced or reproduced; or
>
> (e) any film, tape, disc, or other object or system containing any such information or data;
>
> ***child exploitation material*** means material—
>
> (a) –

[1] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [24].

[2] Before 1 April 2015, this offence used the language of "child pornography" rather than "child exploitation material".

[3] *Criminal Law Consolidation Act 1935* (SA) s 62. Prior to 17 November 2011, the offence applied to children under the age of 16. From that date, the maximum age was raised to 17.

(i) that—

(A) describes or depicts a child under, or apparently under, the age of 17 years engaging in sexual activity; or

(B) consists of, or contains, the image or representation of (or what appears to be the image or representation of) a child under, or apparently under, the age of 17 years, or the bodily parts of such a child, or in the production of which such a child has been or appears to have been involved; or

(C) (without limiting subsubparagraph (B)) consists of, or contains, the image or representation of (or what appears to be the image or representation of) a child-like sex doll, or part of a child-like sex doll; and

(ii) that is of a pornographic nature; or

(b) that is a child-like sex doll;

pornographic nature—material is of a pornographic nature for the purposes of this Division if the material is intended or apparently intended—

(a) to excite or gratify sexual interest; or

(b) to excite or gratify a sadistic or other perverted interest in violence or cruelty;

4. Despite the inclusion of 'child-like sex doll' in the definition of child exploitation material, that limb of the definition does not apply to offences under s 63.[4] Instead, the production and dissemination of child-like sex dolls is dealt with by the offence in s 63AA.

5. When deciding whether material is 'of a pornographic nature', a tribunal of fact can take into account the circumstances in which material is produced, used or intended to be used. These considerations cannot, however, deprive material that is inherently pornographic of that character.[5]

6. In *R v Morcom*, Peek and Blue JJ described the two limbs required to constitute child exploitation material as follows:[6]

> the physical characteristic of depicting a child engaging in sexual activity (or the image is, or appears to be, that of a child or bodily parts of a child) and
>
> the functional or purposive characteristic of the material being intended or apparently intended to excite or gratify a sexual (or perverted violence or cruelty) interest.

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[4] *Criminal Law Consolidation Act 1935* (SA) s 63.

[5] *Criminal Law Consolidation Act 1935* (SA) s 63C(1).

[6] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [17]. At the time, the Act used the language of "child pornography" rather than "child exploitation material", but the applicable definitions were relevantly identical (subject to the references to child-like sex doll), so their description likely remains apt under the current legislation.

7. The first limb, depending on the physical characteristics of what is depicted, must be assessed objectively by the tribunal of fact and does not depend on anyone's state of mind.[7]

8. The second limb must also be assessed wholly objectively, and a subjective intention to use the material to excite sexual interest is not relevant.[8] Thus, while a tribunal of fact may take the objective context and circumstances into account under s 63C, this does not mean the accused's idiosyncratic subjective intentions can transform innocuous material into child exploitation material.[9]

9. The offence does not contain an element that the accused knew or believed that the child was under the age of 17. Similarly, an honest and reasonable belief that child is at least 17 years of age is not a defence. This is true regardless of whether the prosecution asserts that the other person was under 17 or appeared to be under 17.[10]

10. Whether a person is "apparently under the age of 17" is a question of fact to be decided objectively by the tribunal of fact by making its own assessment of the evidence using its ordinary everyday experience.[11] This exercise of assessing apparent age may be performed even where expert evidence establishes the difficulty of accurately judging a person's chronological age from their image or appearance.[12]

Defences

11. Section 63C provides a series of defences to the offences in Division 11A, other than the offence of providing information for the purpose of avoiding or reducing the likelihood of apprehension for an offence against the Division.

12. The first group of defences state that no offence is committed where the accused produces, disseminates, possesses or deals with material in good faith:[13]

    - for the advancement or dissemination of legal, medical or scientific knowledge;
    - as a police or other law enforcement officer acting in the course of his or her duties;
    - in the course of his or her duties in the administration of the criminal justice system;
    - acting reasonably for the purpose of providing genuine child protection or legal advice.

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[7] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [18].
[8] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [22].
[9] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [64]–[70].
[10] *R v Clarke* (2008) 100 SASR 363; [2008] SASC 100, [59], [89].
[11] *Police v Kennedy* (1998) 71 SASR 175, 186; *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [77].
[12] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [77].
[13] *Criminal Law Consolidation Act 1935* (SA) ss 63C(2), (2a), (2b).

13. In addition, no offence is committed where the accused produces, disseminates, possesses or deals with material that constitutes or forms part of a work of artistic merit if:[14]

> having regard to the artistic nature and purposes of the work as a whole, there is no undue emphasis on aspects of the work that might otherwise be considered to be of a pornographic nature.

14. Finally, the Act provides defences that apply where a publication, film or computer game has been classified under the *Classification (Publications, Films and Computer Games) Act 1995* other than refused classification, or where the possession is for the purpose of obtaining a classification under that Act.[15]

[14] *Criminal Law Consolidation Act 1935* (SA) s 63C(3).

[15] *Criminal Law Consolidation Act 1935* (SA) s 63C(4).

Jury Direction #10.1 – Production of child exploitation material

I will now direct you as to the elements of producing child exploitation material.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused produces or disseminates material;

Two – The material is child exploitation material;

Three – The accused knew of the pornographic nature of the material.

I will now explain these three elements and how they apply in this case.

Producing or disseminating material

The first element relates to what the accused did. The accused must have produced or disseminated material.

The prosecution says that this element is proved because [*identify the acts alleged which, if proved, constitute production or dissemination of material*].

The defence dispute this, and say [*identify relevant evidence and arguments*].

Child exploitation material

The second element looks at the nature of the material. The prosecution must show that it is child exploitation material.

The prosecution must prove two things to establish that the material is child exploitation material. First, the prosecution must prove that it is of a pornographic nature. This requires the prosecution to prove that the material is intended or apparently intended to excite or gratify a sexual interest or a sadistic or other prevented interest in violence or cruelty.

Second, the prosecution must prove that the material [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*If the prosecution relies on the other person's apparent age, add the following direction*: To decide whether the person was apparently under the age of 17, you must look at the material and use your common sense to decide how old the person appears to be. Judging how old someone appears to be does not require any special skill. Instead, you must ask yourself "Am I satisfied beyond reasonable doubt that this person appears to be under 17?"]

[*Refer to relevant evidence and arguments*].

Knowledge

The third element looks at the accused's state of mind. The prosecution must show that the accused knew of the pornographic nature of the material.

This means the prosecution must prove that the accused knew the material was intended or apparently intended to excite or gratify a sexual interest or a sadistic or other perverted interest in violence or cruelty.

[*Refer to relevant evidence and arguments*].

10.2 – Possession of or accessing child exploitation material

15. Section 63A creates three offences.[16] The first offence,[17] possessing child exploitation material, has three elements:

    - The accused has possession of material;
    - The material is child exploitation material, other than a child-like sex doll;
    - The accused knows the material has a pornographic nature.

16. The second offence, obtaining access to child exploitation material, also consists of three elements:

    - The accused obtains access to material;
    - The material is child exploitation material, other than a child-like sex doll;
    - The accused intended to obtain access to child exploitation material.

17. The third offence, taking a step toward obtaining access to child exploitation material, also consists of three elements:

    - The accused takes a step to obtain access to material;
    - The material is child exploitation material, other than a child-like sex doll;
    - The accused intended to obtain access to child exploitation material.

18. For information on the meaning of material, child exploitation material and pornographic nature, see 10.1 – Production of child exploitation material. This topic will examine the requirement of possession and the concepts of obtaining access and taking a step to obtain access.

Possession of child exploitation material

19. Possession requires proof that the accused knew of the existence of the material and intended to exercise custody or control over the material.[18]

20. Where child exploitation material is found on a computer under the accused's control, the prosecution may be able to prove possession by showing that the accused downloaded and viewed the material.[19]

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[16] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [122] (Gray J), [165] (Vanstone J).
[17] *Criminal Law Consolidation Act 1935* (SA) s 63A(1)(a).
[18] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [80], [145]. See also *He Kaw Teh* (1985) 157 CLR 523; [1985] HCA 43; *Tabe v The Queen* (2005) 225 CLR 418; [2005] HCA 59.
[19] *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [146]; *Sabourne v Western Australia* [2010] WASCA 242, [29].

21. As with the offence of production of child exploitation material, it is not necessary to show that the accused knew or believed that the child was under the age of 17. Similarly, an honest and reasonable belief that child is at least 17 years of age is not a defence.[20]

Accessing child exploitation material

22. The offence of accessing child exploitation material does not require the degree of control over the images which the offence of possessing child exploitation material requires. It is sufficient for the person to view the material without having control over the medium on which the material is displayed.[21]

23. For this offence, the prosecution must prove that the accused intended to obtain access. Recklessness is not sufficient.[22]

Taking a step to obtain access

24. The third offence of taking a step to obtain access requires proof that 'the step must advance, in a sufficiently material way, the offender along the path of obtaining access to [child exploitation material]'.[23]

25. In *F, BV v Magistrates' Court* (2013) 115 SASR 232, Kourakis CJ and Vanstone J differed on whether it was accurate to say that this offence involved taking a step that is **apt** to lead to access to child pornography. While Vanstone J thought this was sufficient, Kourakis CJ thought that something more was required, as taking a step towards obtaining access implies that the step is part of a series of steps that will yield access to child exploitation material.[24] This distinction may be important where the accused is engaged in steps which will not yield access, even though, to the accused's perspective, the steps are apt or likely to yield access.

26. Where the prosecution charges a person with taking a step towards obtaining access, it seems likely that the prosecution must identify the item of child exploitation material that the step is directed to obtaining. This limitation is necessary for the aggravating circumstance in s 5AA(1)(e)(i) to be given practical operation – the victim of the offence for the purpose of the aggravating factor is the person depicted in the child exploitation material which accused is seeking to access.[25]

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[20] *R v Clarke* (2008) 100 SASR 363; [2008] SASC 100, [59], [89]; *R v Morcom* (2015) 122 SASR 154; [2015] SASCFC 30, [85]; *R v Godfrey* [2018] SADC 35, [25].

[21] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [47].

[22] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [48].

[23] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [49]. See also *R v Randylle* (2006) 95 SASR 574; [2006] SASC 318, [41].

[24] Compare *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [49]–[50] (Kourakis CJ) and [178] (Vanstone J).

[25] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [50], [63]–[65], [80]; but c.f. [180] (Vanstone J).

27. While the offence of taking a step to obtain access may be considered a form of inchoate offence,[26] it does not displace the availability of a charge under s 270A of attempting to obtain access or attempting to take a step to obtain access.[27]

28. For the purpose of the offences of accessing or taking a step to access, the prosecution must show that the accused "intend[ed] to obtain access to child exploitation material". It has not yet been authoritatively determined whether this requires proof of not only an intention to access the subject material, but also an intention to access material that is child exploitation material. Courts have held that the offences in ss 63 and 63A(1)(a) do not require proof that the accused knew the age of the child depicted. However, the fault element for those offences is stated as the accused "[knew] of its pornographic nature". As a matter of caution, the jury direction below assumes that the prosecution must prove that the accused intended that the material display a child.

Aggravated offences

29. Under s 5AA(1)(e)(i), an offence under Part 3, Division 8A may be committed as an aggravated offence where, at the time of committing the offence, the accused knew that the victim was under the age of 14 years.

30. As applied to this offence, this aggravating circumstance requires the court to consider the age of the child depicted in the child exploitation material at the time the material was originally produced. The court and the jury do not take into account any change in the child's age between the production of the child exploitation material and the accused's acts in accessing or possessing the material.[28]

31. While the definition of child exploitation material contemplates the situation where an adult appears to be under 17, the aggravating circumstance of a child being under the age of 14 depends solely on the actual age of the child and the higher penalty is not engaged where the victim merely appears to be under 14.[29]

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[26] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [122].

[27] *R v Finnigan (No 2)* [2015] SADC 55.

[28] *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [41], [60] (Kourakis CJ), [138] (Gray J).

[29] See *F, BV v Magistrates' Court* (2013) 115 SASR 232; [2013] SASCFC 1, [135].

Jury Direction #10.2A – Possession of child exploitation material

Note: This direction is designed for cases where the child exploitation material consists of files on a computer controlled by the accused. The direction will need to be modified for other forms of possession, including possession of hard-copy material.

I will now direct you as to the elements of possessing child exploitation material.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused had possession of material;

Two – The material was child exploitation material;

Three – The accused knew of the pornographic nature of the material.

I will now explain these three elements and how they apply in this case.

Possession

The first element looks at what the accused did. The prosecution must show the accused had possession of material.

A person has possession of something if s/he has the power and intention to exercise control over the item, to the exclusion of others.

The accused has been charged with possessing the files found on [*identify relevant computer or external hard drive*]. The law recognises that computer files are a form of material, and so the only issue for this element is whether the accused possessed those files.

The prosecution alleges that [*accused*] possessed the files because s/he intentionally downloaded the files onto the computer.[30]

[*Refer to relevant evidence and arguments*].

Child exploitation material

The second element looks at the nature of the material. The prosecution must show that it is child exploitation material.

The prosecution must prove two things to establish that the material is child exploitation material. First, the prosecution must prove that it is of a pornographic nature. This requires the prosecution to prove that the material is intended or apparently intended to excite or gratify a sexual interest or a sadistic or other prevented interest in violence or cruelty.

[30] If the prosecution argues that possession was obtained by other means (e.g. receiving a hard-drive or USB stick), then this part of the direction must be modified.

Second, the prosecution must prove that the material [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*If the prosecution relies on the other person's apparent age, add the following direction*: To decide whether the person was apparently under the age of 17, you must look at the material and use your common sense to decide how old the person appears to be. Judging how old someone appears to be does not require any special skill. Instead, you must ask yourself "Am I satisfied beyond reasonable doubt that this person looks under 17?"]

[*Refer to relevant evidence and arguments*].

Knowledge

The third element looks at the accused's state of mind. The prosecution must show that the accused knew of the pornographic nature of the material.

This means the prosecution must prove that the accused knew the material was intended or apparently intended to excite or gratify a sexual interest or a sadistic or other prevented interest in violence or cruelty.

[*Refer to relevant evidence and arguments*].

Jury Direction #10.2B – Obtaining access of child exploitation material

I will now direct you as to the elements of obtaining access to child exploitation material.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused obtained access to material;

Two – The material was child exploitation material;

Three – The accused intended to obtain access to child exploitation material.

I will now explain these three elements and how they apply in this case.

Obtaining access

The first element looks at what the accused did. The prosecution must show the accused obtained access to material.

The prosecution argues that the accused did this by [*identify alleged step, e.g.* accessing the [*name of website*] website].

The law recognises that computer files are a form of material, and so the only issue for this element is whether the accused obtained access to [*identify relevant source of material, e.g.,* the [*name of website*] website].

[*Refer to relevant evidence and arguments*].

Child exploitation material

The second element looks at the nature of the material the accused accessed. The prosecution must show that it was child exploitation material.

The prosecution must prove two things to establish that the material is child exploitation material. First, the prosecution must prove that it is of a pornographic nature. This requires the prosecution to prove that the material is intended or apparently intended to excite or gratify a sexual interest or a sadistic or other prevented interest in violence or cruelty.

Second, the prosecution must prove that the material [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*If the prosecution relies on the other person's apparent age, add the following direction*: To decide whether the person was apparently under the age of 17, you must look at the material and use your common sense to decide how old the person appears to be. Judging how old someone appears to be does not require any special skill. Instead, you must ask yourself "Am I satisfied beyond reasonable doubt that this person looks under 17?"]

[*Refer to relevant evidence and arguments*].

Intention

The third element looks at the accused's state of mind. The prosecution must show that the accused intended to obtain access to child exploitation material.

As part of the second element, I told you how the law defines child exploitation material. For this third element, you use the same definition.

That means that this element will only be proved if the accused intended that the material s/he accessed would be of a pornographic nature and [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*Refer to relevant evidence and arguments*].

Jury Direction #10.2C – Taking a step to obtain access of child exploitation material

I will now direct you as to the elements of taking a step to obtain access to child exploitation material.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused took a step to obtain access to material;

Two – The material was child exploitation material;

Three – The accused intended to obtain access to child exploitation material.

I will now explain these three elements and how they apply in this case.

Taking a step

The first element looks at what the accused did. The prosecution must show the accused took a step to obtain access to material.

The prosecution argues that the accused did this by [*identify alleged step, e.g.* accessing the [*name of website*] website].

The law recognises that computer files are a form of material, and so the only issue for this element is whether the accused took a step to obtain access to [*identify relevant source of material, e.g.,* the [*name of website*] website].

For the purpose of this element, a step must be one that moves the accused along the path to obtaining access to the material in a real way. It must also be part of a series of steps that will ultimately lead the accused to obtaining the material in question.

[*Refer to relevant evidence and arguments*].

Child exploitation material

The second element looks at the nature of the material the accused was trying to access. The prosecution must show that it was child exploitation material.

The prosecution must prove two things to establish that the material is child exploitation material. First, the prosecution must prove that it is of a pornographic nature. This requires the prosecution to prove that the material is intended or apparently intended to excite or gratify a sexual interest or a sadistic or other prevented interest in violence or cruelty.

Second, the prosecution must prove that the material [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*If the prosecution relies on the other person's apparent age, add the following direction*: To decide whether the person was apparently under the age of 17, you must look at the material

and use your common sense to decide how old the person appears to be. Judging how old someone appears to be does not require any special skill. Instead, you must ask yourself "Am I satisfied beyond reasonable doubt that this person appears to be under 17?"]

[*If relevant, add:* As I said, this element looks at the nature of the material the accused was trying to access. If you find that the accused's steps would never have led him/her to accessing child exploitation material, then this element cannot be proved and you must find the accused not guilty.]

[*Refer to relevant evidence and arguments*].

Intention

The third element looks at the accused's state of mind. The prosecution must show that the accused intended to obtain access to child exploitation material.

As part of the second element, I told you how the law defines child exploitation material. For this third element, you use the same definition.

That means that this element will only be proved if the accused intended that the material s/he was accessing would be of a pornographic nature and [*identify limb of the definition of child exploitation material that is relevant to the case as particularised, e.g.* shows a person who appears to be under 17 engaging in sexual activity].

[*Refer to relevant evidence and arguments*].

10.3 – Procuring a child to commit indecent act

32. Section 63B(1) creates six distinct offences.[31]

33. The first offence is found in s 63B(1)(a) and has two elements:

- The accused incites or procures the commission of an indecent act by a person;
- The person is a child under the prescribed age in relation to the accused.

34. The second offence is found in s 63B(1)(b)(i), and has three elements:

- The accused causes or induces a person to expose any part of that person's body;
- The person is a child under the prescribed age in relation to the accused;
- The accused acted for a prurient purpose.

35. The third offence is found in s 63B(1)(b)(ii), and also have three elements:

- The accused makes a photographic, electronic or other record from which images of a person under 17 may be reproduced;
- The person was engaged in a private act;
- The accused acted for a prurient purpose.

36. The fourth offence is found in s 63B(3)(a) and has three elements:

- The accused procured a person to engage in or submit to a sexual activity;
- The other person is a child under the prescribed age in relation to the accused;
- The accused intended to procure a person to engage in or submit to a sexual activity.

37. The fifth offence is also found in s 63B(3)(a) and has two elements:[32]

- The accused made a communication;
- The accused did so with the intention of procuring a person under the prescribed age in relation to the accused to engage in or submit to sexual activity while still under the prescribed age.

38. The final offence, in s 63B(3)(b), has three elements:[33]

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[31] *R v Barrie* (2012) 218 A Crim R 448; [2012] SASCFC 124, [34].
[32] *R v Barrie* (2012) 218 A Crim R 448; [2012] SASCFC 124, [40]; *SAN v The Queen* [2020] SASCFC 35, [41].
[33] *R v Barrie* (2012) 218 A Crim R 448; [2012] SASCFC 124, [40]; *SAN v The Queen* [2020] SASCFC 35, [41].

- The accused made a communication;
- The accused did so for a prurient purpose;
- The accused did so with the intention of making a person under the prescribed age in relation to the accused amenable to sexual activity while still under the prescribed age.

Common elements

39. These six offences all depend on several common concepts.

40. The offences are not committed if the accused and the child are legally married to each other.[34]

41. The prescribed age is set as:[35]

    - 18 years, if the accused is in a position of authority in relation to the child;
    - 17 years in any other case.

42. The Act specifies that a person is in a position of authority in relation to a child if:[36]

    (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or

    (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or

    (c) the person provides religious, sporting, musical or other instruction to the child; or

    (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or

    (e) the person is a health professional or social worker providing professional services to the child; or

    (f) the person is responsible for the care of the child and the child has a cognitive impairment; or

    (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

    (ga) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972*, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

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[34] *Criminal Law Consolidation Act 1935* (SA) s 63B(5).
[35] *Criminal Law Consolidation Act 1935* (SA) s 63B(7).
[36] *Criminal Law Consolidation Act 1935* (SA) s 63B(6).

(h) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

43. Paragraph (h) of the definition is concerned with authority. Past or future exercises of authority are not necessary, and it is not necessary that the accused had a supervisory relationship with the complainant. Instead, the focus is on whether the accused had the authority to determine significant aspects of the child's terms and conditions of employment.[37] This part of the definition is concerned with the fact that if a person has authority to determine terms and conditions of employment, then a child may agree to act in a manner that the child would not otherwise do.[38]

44. A person is defined as acting with a prurient purpose if:[39]

> the person acts with the intention of satisfying his or her own desire for sexual arousal or gratification or of providing sexual arousal or gratification for someone else;

Second offence – Causing exposure

45. With the prevalence of audio-visual communications, it is not necessary that the exposure and the accused's viewing occur simultaneously. In particular, it is not necessary for the accused to be present when the child exposes themselves. Inducing a child to undress, take pictures of themselves and send those pictures to the accused or another is capable of meeting the terms of the offence, even if there is delay between the accused's acts and the victim's act of sending the pictures.[40]

Third offence – Recording a private act

46. For the purpose of the third offence, a private act is defined as:[41]

(a) a sexual act; or

(b) an act involving an intimate bodily function such as using a toilet; or

(c) an act or activity involving undressing to a point where the body is clothed only in undergarments; or

(d) an activity involving nudity or exposure or partial exposure of sexual organs, pubic area, buttocks or female breasts;

Sexual activity

47. The offences under s 63B(3) all use the term "sexual activity".

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[37] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [124]–[125].
[38] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [127].
[39] *Criminal Law Consolidation Act 1935* (SA) s 62.
[40] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [11], [113].
[41] *Criminal Law Consolidation Act 1935* (SA) s 62.

48. Whether an activity is a sexual activity, for the purpose of these offences, is a question for the tribunal of fact to determine, taking into account the context of the relevant activity. The context includes the presence or absence of a valid reason for the communication, such as a medical or parenting reason. The context also includes the prurient purpose of the accused, but that purpose is not determinative. It is not correct to say that if the accused has a prurient purpose, then whatever is sought must be a form of sexual activity.[42]

49. Where the alleged offence involved inviting the child to touch or reveal parts of his or her body, the part of the body to be touched or revealed is a relevant consideration, along with whether there is a purpose other than prurient interest in the requested conduct.[43]

50. The term "sexual activity" must be read in a way that gives effect to the purpose of the provision, which is to protect children from sexualisation. It includes behaviours, physical or verbal, which are capable of being sexually stimulating. It can include sending and receiving photographs or animations and engaging in discussions about them. It can also include discussing sexual touching.[44]

Communication offences

51. The fifth and sixth offences listed above involve making a communication with the relevant intention. For the purpose of these offences, it is not necessary that the recipient of the communication is, in fact, a child. The offence can be committed where the recipient is an adult posing as a child, provided the accused intended that the person he or she was communicating with was a child.[45]

52. However, the accused must make the communication with the intention that the complainant engage in, or be amenable to, sexual activity while still a child under the prescribed age. Where the communication does not itself involve sexual activity, the offence is not committed if the communication concerns activity that would only take place after the complainant is no longer a child under the prescribed age.[46]

53. Further, the aggravating factor under s 5AA(1)(e)(i), that the accused knew that the victim was under the age of 14 years, will not be available where the victim is an adult posing as a child under the age of 14.[47]

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[42] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [22]–[26].
[43] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [25]–[26].
[44] *R v Symons* (2018) 130 SASR 503; [2018] SASCFC 48, [3]–[6]; *SAN v The Queen* [2020] SASCFC 35, [37].
[45] *R v Barrie* (2012) 218 A Crim R 448; [2012] SASCFC 124, [1], [36], [40] (but c.f. [96] (White J)).
[46] *SAN v The Queen* [2020] SASCFC 35, [37]–[41]. As explained at [37], "it is well accepted that engaging in sexualised conversation is a sexual activity. For that reason, it will not often be necessary to prove that the defendant also intended to make the victim amenable to engaging in fact in the sexual activities discussed".
[47] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79.

54. The sixth offence involves intending to make a child amenable to a sexual activity. Making a child amenable means influencing the child to yield, submit or cooperate.[48]

55. When charging a person with the sixth offence, the prosecution does not need to bring separate charges for each different sexual activity which the accused intended to make the complainant amenable to. Therefore, no issue of duplicity arises where a charge relates to a single communication sent with an intention to make a child amenable to multiple sexual activities.[49]

Defences

56. Except for the third offence, recording a private act, it is a defence if the defendant proves that at the time of the alleged offence:[50]

- the child was at least 16 years of age; and
- the accused:
  - was under the age of 17; or
  - believed on reasonable on reasonable grounds that the child was at least 17 years of age.

57. This defence is not available if the accused was in a position of authority in relation to the child.[51]

[48] *R v Richards* (2016) 125 SASR 341; [2016] SASCFC 79, [21].
[49] *SAN v The Queen* [2020] SASCFC 35, [31]–[32].
[50] *Criminal Law Consolidation Act 1935* (SA) s 63B(4).
[51] *Criminal Law Consolidation Act 1935* (SA) s 63B(4).

Jury Direction #10.3A – Causing a person to expose themselves – s 63B(1)(b)(i)

Note: This direction is designed for cases where the accused is in a position of authority in relation to the child. If that is not the case, the element of authority should be omitted, and the relevant age is 17, rather than 18.

I will now direct you as to the elements of causing a person to expose themselves.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused caused a person to expose any part of that person's body;

Two – The other person was under 18;

Three – The accused was in a position of authority in relation to the other person

Four – The accused acted for a prurient purpose.

I will now explain these four elements and how they apply in this case.

Exposure

The first element looks at what the accused did. The prosecution must show the accused caused [*complainant*] to expose part of their body.

The prosecution argues that the accused did this by [*identify act, e.g.,* asking [complainant] to send a nude image of himself].

In deciding whether the accused **caused** [*complainant*] to expose part of their body, you must apply your common sense to the relationship between [*accused*] and [*complainant*]. You must decide whether the accused's acts were a real cause of [*complainant*]'s later act of [*identify relevant act*].

[*Refer to relevant evidence and arguments*].

Age of complainant

The second element looks at the age of [*complainant*]. The prosecution must prove that at the time of the relevant act, [*complainant*] was under the age of 18.

There is little dispute about this element. If you are satisfied that [*complainant*] did [*identify act*] on [*identify date*], then you can find that [*complainant*] was under the age of 18 at that time.

Position of authority

The third element looks at the nature of the relationship between [*complainant*] and [*accused*]. The prosecution must prove that the accused was in a position of authority over the complainant.

A person is in a position of authority in relation to another person if they are [*identify relevant relationship by reference to s 63B(6)*]

[*Refer to relevant evidence and arguments*].

Prurient purpose

The fourth element looks at the accused's state of mind. The prosecution must prove that the accused had a prurient purpose in causing [*complainant*] to expose part of his/her body.

This requires the prosecution to prove that the purpose of the accused's acts was to satisfy his/her desire for sexual arousal or sexual gratification, or to provide sexual arousal or sexual gratification for someone else.

[*Refer to relevant evidence and arguments*].

Jury Direction #10.3B – Communication for a prurient purpose – s 63B(3)(b)

Note: This direction has been designed for the case where the recipient of the communication is believed to be under 17. If the recipient is believed to be under 18 and under the accused's authority, the third element must be modified to raise the age and add a requirement of belief that the accused was in a position of authority in relation to the other person.

I will now direct you as to the elements of making a communication for a prurient purpose.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused communicated with a person;

Two– The accused acted for a prurient purpose;

Three – The accused acted with the intention of making a person under 17 amenable to sexual activity, while still under 17.

I will now explain these three elements and how they apply in this case.

Communication

The first element looks at what the accused did. The prosecution must show the accused communicated with a person.

To prove this element, the prosecution relies on the evidence that the accused [*identify relevant conduct, e.g.,* sent messages to [*complainant*] using Facebook].

[*Refer to relevant evidence and arguments*].

Prurient purpose

The second element looks at the accused's state of mind. The prosecution must prove that the accused had a prurient purpose in communicating with [*complainant*].

This requires the prosecution to prove that the purpose of the accused's acts was to satisfy his/her desire for sexual arousal or sexual gratification, or to provide sexual arousal or sexual gratification for someone else.

[*Refer to relevant evidence and arguments*].

Amenable to sexual activity

The third element also looks at the accused's state of mind. The prosecution must prove that the accused's purpose was to make a child under 17 amenable to sexual activity, while the person would still be under 17.

There are two parts to this element.

The first relates to what [*accused*] believed about [*complainant*]'s age. The prosecution must prove that [*accused*] believed s/he was speaking to a person under 17.

[*If relevant add*: You have heard that [*complainant*] was a fake identity created by [*police officer*]. That does not matter for this element. The element is all about what [*accused*] believed about [*complainant*], rather than how old [*police officer*] was.]

The second part of this element is the purpose of the accused's communication. The prosecution must show that it was to make [*complainant*] amenable, or willing to engage in, sexual activity, while s/he was under 17.

For the purpose of this offence there is no legal definition of "sexual activity". You must use your own common sense and decide whether [*accused*] was intending to make [*complainant*] willing to engage in sexual activity.

[*If appropriate, add*: You have heard the arguments from the parties on whether the accused was trying to make the complainant amenable to sexual activity, or whether s/he had some other intention. It is up to you to decide whether getting [*complainant*] to talk about sexual activity is enough to prove this element. You should consider whether the accused was sexually aroused or gratified by getting [*complainant*] to talk about sexual activity. You should also consider whether the accused was having this discussion in the hope of making [*complainant*] more willing to engage in physical sexual acts. The law is that merely talking about sexual acts may be enough in some cases, but it is up to you to decide, on all the evidence, whether it is enough to establish this element in this particular case.]

[*Refer to relevant evidence and arguments*].

CHAPTER 11: SERIOUS DRIVING OFFENCES

11.1 – Causing death or harm by dangerous driving

1. Section 19A creates two offences involving dangerous driving. The first offence is causing death by use of a vehicle or vessel. It consists of three elements:[1]

    - The accused drove a vehicle or operated a vessel;
    - The accused drove the vehicle in a dangerous manner;
    - By driving in that manner, the accused caused the death of another.

2. The second offence is causing harm by the use of a vehicle or vessel. It also consists of three elements:[2]

    - The accused drove a vehicle or operated a vessel;
    - The accused drove the vehicle in a dangerous manner;
    - By driving in that manner, the accused caused harm to another.

Driving

3. The Act provides that driving includes riding, and that vehicle includes an animal.[3] A lower maximum penalty applies to driving vehicles or operating vessels that are not propelled by a motor.[4]

4. While the Act applies to both driving a vehicle and operating a vessel, this commentary will refer only to driving for the sake of simplicity.

Driving in a manner dangerous

5. The second element is that the accused drove in a manner dangerous to any person.[5] This:[6]

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[1] *Criminal Law Consolidation Act 1935* (SA) s 19A(1).
[2] *Criminal Law Consolidation Act 1935* (SA) s 19A(3).
[3] *Criminal Law Consolidation Act 1935* (SA) s 5.
[4] *Criminal Law Consolidation Act 1935* (SA) ss 5, 19A(1), (3).
[5] Before the commencement of *Statutes Amendment (Dangerous Driving) Act 2013* (SA), the offence required proof that the driving was dangerous to the public. This could, on occasion, raise disputes on whether the danger was to the public, as distinct from another group. See, e.g. *R v Pannett* (2015) 122 SASR 461; [2015] SASCFC 52, [30]–[40]. This amendment was made to overcome the effect of *R v S* (1991) 22 NSWLR 548 in relation to driving on private land.
[6] *Kroon v The Queen* (1990) 55 SASR 476, 477 (King CJ), citing *R v Coventry* (1938) 59 CLR 633; [1938] HCA 31, 637–638, 639; *McBride v The Queen* (1966) 115 CLR 44, 49–50, 55; [1966] HCA 22; *Giorgianni v The Queen* (1985) 156 CLR 473, 479, 490, 499; [1985] HCA 29; *Cornish v The Queen* (1988) 48 SASR 520.

must be answered by reference to an objective standard and irrespective of whether the accused intended to drive dangerously or appreciated that he was doing so.

6. As an objective test,[7] the jury must decide whether the accused 'ought to have appreciated the danger'. This requires the jury to consider whether a reasonable person in the accused's situation would have appreciated that the driving was a real danger to others.[8]

7. It is not necessary to show that the accused intended to drive dangerously, or that the accused realised they were driving dangerously.[9]

8. While the test is objective, the accused's awareness of the issues which give rise to danger may be relevant to a defence of honest and reasonable mistake of fact. For example, where a vehicle is defective, the prosecution will need to prove that the accused knew or ought to have known of the defect.[10] Similarly, where fatigue is an issue, and the accused's awareness of fatigue is raised, the prosecution must rebut an honest and reasonable belief that it was safe to drive.[11]

9. Proof that the accused intended to drive dangerously will also be sufficient to prove this element.[12]

10. The test of dangerousness has also been expressed as driving that "would give rise to a serious risk of injury to members of the public going beyond the ordinary risks of the road" and which can be regarded as a serious crime.[13]

11. The directions to the jury must distinguish between mere negligence, which is not sufficient to prove this element, a failure to drive with due care, which is a lesser offence, and driving to the danger of others. It is a question of degree that the jury must decide.[14]

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[7] *Criminal Law Consolidation Act 1935* (SA) s 19A(7) provides that where intoxication is self-induced, the mental elements of the offence are deemed established if the evidence adduced at trial would prove the mental elements if the defendant had been sober. Given that this offence involves an objective fault element which does not take into account physical characteristics of the accused, it is not clear what work s 19A(7) has to do.

[8] *R v Hendriksen* (2007) 98 SASR 571; [2007] SASC 304, [41], [61]; *Kroon v The Queen* (1990) 55 SASR 476, 477-478 (King CJ), citing *R v Mayne* (1975) 11 SASR 583, 585 and *R v Duncan* (1953) 11 SASR 592, 594.

[9] *R v Hendriksen* (2007) 98 SASR 571; [2007] SASC 304, [49].

[10] *Jiminez v The Queen* (1992) 173 CLR 572, 583; [1992] HCA 14.

[11] *Jiminez v The Queen* (1992) 173 CLR 572, 584; [1992] HCA 14; *R v Rowlson* (1996) 67 SASR 96.

[12] *R v Hendriksen* (2007) 98 SASR 571; [2007] SASC 304, [61].

[13] *R v Kamleh* (1990) 51 A Crim R 435, 437; *R v Coventry* [1938] SASR 79, 86; *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14.

[14] *Jiminez v The Queen* (1992) 173 CLR 572, 579; [1992] HCA 14; *R v Mayne* (1975) 11 SASR 583, 588; *R v Hendriksen* (2007) 98 SASR 571; [2007] SASC 304, [61]; *R v Michels* [2006] SASC 226, [31]; *R v Kamleh* (1990) 51 A Crim R 435, 437.

12. In applying the reasonable person test, the jury does not take account of personal characteristics of the accused such as age, driving experience, education, mental abilities, poor eyesight and personality defects.[15]

13. The relevant act of driving must be voluntary. Where the case involves an accused who falls asleep, the culpable act cannot be characterised as the driving while asleep, as that conduct is involuntary. Instead, the culpable act is to continue to drive in circumstances that he or she was so tired that he or she was a danger to others. That act of continuing to drive must be sufficiently contemporaneous that it can, in a practical sense, be treated as a cause of the subsequent death or harm.[16]

14. In deciding whether the act of continuing to drive meets the test under the Act, the jury must consider the factors which should have put the accused on notice of the risk of falling asleep, the period in which the accused experienced drowsiness, the length of time spent driving without rest, the heating or ventilation of the vehicle and, if relevant, the responsibility that comes with managing a heavy vehicle.[17]

15. Similarly, when the case involves the accused reacting to an unexpected emergency, the judge will need to draw the jury's attention to the circumstances leading up to that emergency, and whether the accused contributed to the creation of the emergency in a way that can be described as driving in a manner dangerous to others. This may be especially relevant where the accused hits a car coming in the opposite direction while overtaking.[18]

16. The Act identifies four types of driving that constitutes the offence:[19]

    - Culpably negligent driving;
    - Reckless driving;
    - Driving at a speed dangerous to any person;
    - Driving in a manner dangerous to any person.

17. As a matter of practice, the prosecution usually only relies on 'driving in a manner dangerous to any person'.

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[15] *Kroon v The Queen* (1990) 55 SASR 476, 487.

[16] *Jiminez v The Queen* (1992) 173 CLR 572, 578–579; [1992] HCA 14; *Kroon v The Queen* (1990) 55 SASR 476, 479–480 (King CJ), 487 (White J); *McBride v The Queen* (1966) 115 CLR 44, 51; [1966] HCA 22. See also *R v Cain* (2011) 111 SASR 301; [2011] SASCFC 135, [21]. Involuntariness might also arise from external causes, including a stroke, epileptic fit, a blow from a stone or a swarm of bees: *Jiminez v The Queen* (1992) 173 CLR 572, 580; [1992] HCA 14.

[17] *Kroon v The Queen* (1990) 55 SASR 476,480 (King CJ); *Jiminez v The Queen* (1992) 173 CLR 572, 579–580; [1992] HCA 14.

[18] *R v Kamleh* (1990) 51 A Crim R 435, 441–442.

[19] *Criminal Law Consolidation Act 1935* (SA) s 19A(1).

18. The manner of driving covers "all matters connected with the management and control" of the car by the driver.[20]

19. Factors that may be relevant to assessing whether the manner of driving was dangerous may include:[21]

    - weather;
    - lighting;
    - visibility;
    - traffic;
    - speed;
    - heating and ventilation of the car;
    - path of driving;
    - conditions of the car;
    - whether there are unexpected occurrences which affected the accused's ability to control the vehicle;
    - whether the accused is in a condition where the mere fact of driving is dangerous.

20. Where the prosecution relies on 'driving in a manner dangerous to any person', but particularises that manner by reference to speed or recklessness, it is not necessary to instruct the jury to consider whether recklessness or dangerous speed are discretely proved.[22]

21. It is not necessary for a jury to disaggregate multiple contributors to dangerous driving. Instead, the jury may consider whether the driving was dangerous having regard to all matters.[23]

Causation

22. The prosecution must show that the dangerous driving caused the death of the deceased.

23. Even if the driving was not dangerous at the precise moment of impact, the accused may have driven dangerously at a time so contemporaneous with the impact as to satisfy this

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[20] *R v Coventry* (1938) 59 CLR 633, 639; [1938] HCA 31.
[21] See *Jiminez v The Queen* (1992) 173 CLR 572, 579–580; [1992] HCA 14; *R v Hendrisen* (2007) 98 SASR 571; [2007] SASC 304, [61].
[22] See *R v Hendriksen* (2007) 98 SASR 571; [2007] SASC 304, [79].
[23] *R v Clarke* (2003) 87 SASR 203; [2003] SASC 380, [67].

element. Whether the dangerous driving is sufficiently contemporaneous is a question for the jury.[24]

Harm

24. For the purpose of the offence of dangerous driving causing harm, harm is defined as "physical or mental harm (whether temporary or permanent)".[25]

Aggravated offence

25. Section 5AA specifies six circumstances which make this offence an aggravated offence:[26]

- The offence was committed in the course of attempting to escape pursuit by a police officer;
- At the time of the offence, the offender was driving a motor vehicle in a street race;
- At the time of the offence, the offender knew that he or she was disqualified from holding or obtaining a driver's licence, or that his or her licence was suspended;
- The offender "committed the offence as part of a prolonged, persistent and deliberate course of very bad driving or vessel operation";
- The offender had a blood alcohol concentration of 0.08g per 100ml of blood or more;
- The offender was driving in contravention of ss 45A, 47 or 47BA of the Road *Traffic Act 1961* or operating a vessel in contravention of s 70(1) of the *Harbors and Navigation Act 1993*.

26. The judge must direct the jury about any aggravating circumstances which the prosecution relies upon. Those circumstances are then treated as elements which must be proved beyond reasonable doubt.[27]

Defence

27. The Act provides a defence where the accused was carrying out duties as an emergency worker, was acting in accordance with directions of his or her employer and was acting reasonably in the circumstances as the accused believed them to be.[28]

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[24] *Jiminez v The Queen* (1992) 173 CLR 572; [1992] HCA 14, citing *McBride v The Queen* (1966) 115 CLR 44; [1966] HCA 22.
[25] *Criminal Law Consolidation Act 1935* (SA) ss 19AAB, 21.
[26] *Criminal Law Consolidation Act 1935* (SA) s 5AA(1a).
[27] See *Tilley v The Queen* (2009) 105 SASR 306; [2009] SASC 277.
[28] *Criminal Law Consolidation Act 1935* (SA) s 19A(10).

28. For the purpose of this defence, an emergency worker is a police officer or an emergency worker as defined by regulations, and the employer is the Commissioner of Police or the person defined by the regulations for that class of emergency worker.[29]

[29] *Criminal Law Consolidation Act 1935* (SA) s 19A(11).

Jury Direction #11.1 – Causing death by dangerous driving

Note: This direction is designed for cases where a death is caused and the accused is charged under Criminal Law Consolidation Act 1935 s 19A(1). This direction may be modified for use in cases where the accused is charged with causing harm under s 19A(3).

Note: This direction is designed for cases where the prosecution alleges that the driving was in a manner dangerous to any person. It must be modified if the prosecution does not rely on that mode of driving and instead alleges culpable negligence, recklessness or speed as the relevant driving.

Note: Where the prosecution relies on an aggravating factor under Criminal Law Consolidation Act 1935 s 5AA(1a), the judge must direct the jury that it must decide whether the aggravating factor is proved beyond reasonable doubt and should be directed about how to return verdicts for either the basic offence or the aggravated offence.

I will now direct you as to the elements of the offence of causing death by use of a vehicle.

To prove the offence of causing death by use of a vehicle, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused drove a vehicle;

Two – The accused drove in a manner dangerous to others;

Three – The accused's dangerous driving caused the death of a person.

I will now explain these three elements and how they apply in this case.

Driving[30]

The first element is that the accused drove a vehicle.

The defence accepts that [*accused*] was the driver of the [*identify vehicle*] that [*describe relevant event*]. You can therefore find this element proved.

Manner dangerous to a person

The second element is that the accused drove in a manner dangerous to others.

This requires the prosecution to prove that a reasonable person in the situation of [*accused*] would have realised their driving was dangerous. For this purpose, driving is dangerous if it involves a risk of injury to others which is greater than the ordinary risks of the road and amounts to a real danger.

[30] This element is not usually in issue. Where it is contested, the judge will need to direct the jury on the evidence relevant to deciding whether the accused was the driver, or if there is a reasonable possibility that someone else was the driver.

In considering the 'situation of the accused' you must take account of the circumstances of the driving such as the time of day, the nature of the road surface, the weather conditions and the general area in which the vehicle was being driven. However, you do not take into account the personal characteristics of the accused such as age, eyesight or reaction times, or their personal circumstances such as whether they were angry, upset or distressed. You also do not ask whether [*accused*] thought [he/she] was driving dangerously. The question is whether a reasonable person in the situation of [accused] would have realized their driving involved a real danger to others

In determining whether [*accused*] drove in a dangerous manner, it may help you to consider the distinction that the law draws between driving in a manner dangerous to others, and driving without due care. Driving without due care is a lesser offence that is committed whenever a person fails to exercise the level of care a reasonably prudent driver would exercise. In contrast, this offence requires the prosecution to prove beyond reasonable doubt that the accused's driving is in a more serious category. For this offence, you are not concerned with the ordinary risks of the road, including the ordinary risks that other drivers will not drive perfectly. The accused's driving must have been worse than the ordinary risks of the road.

[*If a direction about fatigue is required, add the following:* You have heard evidence that [*refer to relevant evidence that the accused fell asleep while driving*]. The law says that a person is not responsible for their driving while asleep. This means you cannot use the mere fact that [*accused*] fell sleep to say that [his/her] driving was dangerous. Instead, you must look at the accused's driving before falling asleep. The prosecution can prove this element by showing that there were warning signs that should have alerted the accused to the risk of falling asleep. That is, the prosecution must prove beyond reasonable doubt that the accused's choice to continue driving was dangerous, given that risk of falling asleep. Remember that in assessing this issue, the prosecution has the onus of proof. Therefore you can only find this element proved if you can exclude the possibility that a reasonable person in the accused's position would have thought they were safe to continue driving.]

[*Refer to relevant evidence and arguments about whether the driving was dangerous*]

Dangerous driving causing death

The third element is that the dangerous driving caused a person's death.

This means that the accused's acts must have been a substantial or significant cause of the [*deceased*]'s death.

In deciding whether an act causes a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

[*Refer to relevant evidence and arguments about whether the dangerous driving caused the death*]

11.2 – Leaving accident scene after causing death or harm

29. Section 19AB creates two offences involving leaving the scene of an accident after death or harm.

30. The first offence applies where the accused's driving caused a person's death. It consists of four elements:[31]

    - The accused drove a vehicle or operated a vessel;
    - The accused acted without due care or attention;
    - The accused's failure to exercise due care or attention caused the death of a person;
    - The accused failed to fulfil their statutory obligations in relation to that incident.

31. The second offence applies where the accused's driving caused harm. It also consists of four elements:[32]

    - The accused drove a vehicle or operated a vessel;
    - The accused acted without due care or attention;
    - The accused's failure to exercise due care or attention caused harm to a person;
    - The accused failed to fulfil their statutory obligations in relation to that incident.

32. See 11.1 – Causing death or harm by dangerous driving in relation to the first and third elements. This section examines the second and fourth elements.

Driving without due care or attention

33. The second element requires the prosecution to prove that the accused drove without due care or attention.

34. This is the same standard that applies to careless driving.[33]

35. Due care or attention is the standard a reasonably prudent driver would exercise in the same or similar circumstances. It does not depend on the personal characteristics or subjective appreciation of the accused. It requires the driver to look out for both immediate or developing dangers and to look ahead and search for potential dangers.[34]

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[31] *Criminal Law Consolidation Act 1935* (SA) s 19AB(1).

[32] *Criminal Law Consolidation Act 1935* (SA) s 19AB(2).

[33] See *Road Safety Act 1961* (SA) s 45(1).

[34] *Police v Melisi* (2010) 106 SASR 105; [2010] SASC 21, [17], citing *Dunsmore v Dawson* (1981) 94 LSJS 1, 4; *Crispin v Rhodes* (1986) 40 SASR 202, 204; *Ladlow v Hayes* (1938) 8 A Crim R 377, 390; *Stoeckel v Harpas* (1971) 1 SASR 172.

36. This is a standard of reasonable care. It does not require perfection. For example, bumping into another car without causing damage, while attempting to parallel park, may not "involve any substantial departure from the standard of care expected of a *reasonably* competent and skilled driver".[35]

37. If there is no charge of dangerous driving on the information, it is undesirable to compare this element with the standard of dangerous driving, or to inform the jury that there is a scale of offences involving bad driving.[36]

Failure to fulfil statutory obligations

38. *Road Safety Act 1961* (SA) s 43(1) creates three obligations on the driver of a vehicle involved in an accident in which a person is killed or injured. The driver must:[37]

> (a) immediately after the accident—
>
> (i) stop the vehicle; and
>
> (ii) give all possible assistance; and
>
> (b) not more than 90 minutes after the accident, present themself to a police officer at the scene of the accident or at a police station for the purpose of providing particulars of the accident and submitting to any requirement to undergo a test relating to the presence of alcohol or a drug in the driver's blood or oral fluid.

39. The obligation in s 43(1)(a) is a compendious obligation to both stop and give all possible assistance. As a result, the obligation to stop exists to facilitate the obligation to give all possible assistance. A driver must therefore do more than stop the vehicle momentarily to fulfil the obligation in s 43(1)(a). Instead, they must stop the vehicle for a sufficient period to give all possible assistance. This includes assessing the situation and identifying what assistance may be required, and be in a position to provide that assistance.[38]

40. The obligation to stop, assess and provide assistance applies even if, with the benefit of hindsight, it could be seen that no assistance was appropriate. The Act still requires the accused to have stopped and made that assessment, and failure to do so is not excused by the objective fact that no assistance was required.[39]

41. Section 43 contains three defences, which the accused must prove on the balance of probabilities:[40]

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[35] *Lajos v Samuels* (1980) 26 SASR 514, 517 (emphasis in original).
[36] *Bullock v The Queen* [2019] SASCFC 131, [42], [50].
[37] *Road Traffic Act 1961* (SA) s 43(1).
[38] *Bullock v The Queen* [2019] SASCFC 131, [73].
[39] *Bullock v The Queen* [2019] SASCFC 131, [88].
[40] *Road Safety Act 1961* (SA) s 43(3); *McErlean v Fuss* (1989) 9 MVR 441.

- The defendant was unaware of the accident and that lack of awareness was reasonable in the circumstances;
- If the defendant failed to stop and give all possible assistance, the defendant genuinely believed on reasonable grounds that stopping and giving assistance would endanger his or her physical safety, or the physical safety of another person, and he or she notified police, ambulance or another relevant authority at the earliest opportunity;
- If the defendant failed to present themselves to police, the defendant had a reasonable excuse for failing to comply and presented themselves to a police officer as soon as possible after the accident.

42. Under an earlier version of this provision, which required a driver to stop "forthwith", it was held that whether the driver failed to stop required an objective consideration of the distance between the accident and where the driver should have stopped. An honest but erroneous belief that it was appropriate to stop a considerable distance from the accident would not be exculpatory and would be relevant only to penalty.[41]

43. To determine whether a driver is 'involved in an accident', the jury must consider the driver's connection, association or concern in the accident.[42]

44. The duty under the *Road Traffic Act 1961* (SA) is not limited to the individual driver who was directly involved in the accident. Another person can commit this offence by aiding and abetting dangerous driving, and then failing to fulfil their personal obligations as a driver involved in the accident under the *Road Traffic Act 1961* (SA).[43]

[41] *Dolman v Higgins* (1990) 12 MVR 22.
[42] *R v Sully* (2012) 112 SASR 157; [2012] SASCFC 9, [103].
[43] *R v Sully* (2012) 112 SASR 157; [2012] SASCFC 9, [102]–[103].

Jury Direction #11.2 – Leaving accident scene after causing death

Note: This direction is designed for cases where a death is caused and the accused is charged under Criminal Law Consolidation Act 1935 s 19AB(1). This direction may be modified for use in cases where the accused caused harm under s 19AB(2).

Note: This direction is designed for cases involving a vehicle. Where the driving involved a vessel, the obligations of the operator are different and must be modified accordingly.

I will now direct you as to the elements of the offence of leaving an accident scene after a death.

To prove the offence of leaving an accident scene after a death, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused drove a vehicle;

Two – The accused drove without due care or attention;

Three – The accused's failure to drive with due care or attention caused the death of a person;

Four – The accused failed to [stop and give all possible assistance / report to police] after the accident.

I will now explain these four elements and how they apply in this case.

Driving[44]

The first element is that the accused drove a vehicle.

The defence accepts that [*accused*] was the driver of the [*identify vehicle*] that [*describe relevant event*]. You can therefore find this element proved.

Without due care or attention

The second element is that the accused drove without due care or attention.

This law requires everyone to exercise the care that a reasonably prudent driver would exercise. That is, what would a safety-conscious driver do? For this purpose, a prudent driver looks out for immediate dangers, as well as upcoming risks.

This element requires you to consider whether the accused exercised the level of care a reasonably prudent driver would exercise. This does not involve taking into account the

[44] This element is not usually in issue. Where it is contested, the judge will need to direct the jury on the evidence relevant to deciding whether the accused was the driver or if there is a reasonable possibility that someone else was the driver.

accused's personal characteristics, or whether the accused thought [he/she] was driving carefully or paying sufficient attention.

[*Refer to relevant evidence and arguments about whether the driving was without due care or attention*]

Careless driving causing death

The third element is that the accused's careless driving caused a person's death.

This means that the accused's acts must have been a substantial or significant cause of [*deceased*]'s death.

In deciding whether an act causes a particular outcome, you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

[*Refer to relevant evidence and arguments about whether the careless driving caused the death*]

Failure to stop and render assistance / report to police

The fourth element is that the accused failed to [stop and give all possible assistance / report to police] after the accident.

[*If the prosecution case concerns the failure to stop and give assistance, add the following direction*: This element requires the accused to have done two things. [He/She] must have stopped and [he/she] must have given all possible assistance. For the purpose of deciding whether [he/she] stopped, [he/she] must have done more than come to a momentary stop. [He/She] must have stopped for long enough to assess what assistance was required. The assistance required depends on the circumstances of the case. In this case, the prosecution say that the accused was required to [*identify relevant forms of assistance*].]

[*If the prosecution case concerns the failure to report to police, add the following direction*: The driver of a vehicle involved in an accident in which a person is killed or injured must present themselves to a police officer at the accident scene or at a police station within 90 minutes of the accident. This is for the purpose of giving details about the accident and being alcohol or drug tested.]

As with all elements, the onus is on the prosecution to prove this element. So while I have referred to what the law required the accused to do, the real question you must decide is whether the prosecution has proved that the accused has failed to [stop and give all possible assistance / report to police] after the accident.

[*Refer to relevant evidence and arguments about whether the accused failed to stop and give all possible assistance / report to police after the accident*]

11.3 – Dangerous driving to escape police pursuit

45. Section 19AC creates the offence of dangerous driving to escape police pursuit. This offence consists of three elements:[45]

    - The accused drove a vehicle:
    - The accused drove in a manner dangerous to any person;
    - The accused's intention while driving was to:
        - escape pursuit by a police officer; or
        - cause a police officer to engage in pursuit.

46. For information about the first and second element, see 11.1 – Causing death or harm by dangerous driving.

[45] *Arthur v Police (SA)* (2008) 101 SASR 529, [44]; *R v Pannett* (2015) 122 SASR 461; [2015] SASCFC 52, [15]; *R v Bruer* [2011] SADC 184, [151].

Jury Direction #11.3 – Dangerous driving to escape police pursuit

Note: This direction is designed for cases where the accused is charged with driving to escape police pursuit. It will need to be adapted if the prosecution relies on s 19AC(1)(b) – intending to cause a police officer to engage in pursuit.

I will now direct you as to the elements of the offence of dangerous driving to escape police pursuit.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused drove a vehicle;

Two – The accused drove in a manner dangerous to others;

Three – The accused drove intending to escape pursuit by police.

I will now explain these three elements and how they apply in this case.

Driving[46]

The first element is that the accused drove a vehicle.

The defence accepts that [*accused*] was the driver of the [*identify vehicle*] that [*describe relevant event*]. You can therefore find this element proved.

Manner dangerous to a person

The second element is that the accused drove in a manner dangerous to others.

This requires the prosecution to prove that a reasonable person in the situation of [*accused*] would have realised their driving was dangerous. For this purpose, driving is dangerous if it involves a risk of injury to others which is greater than the ordinary risks of the road and amounts to a real danger.

In considering the 'situation of the accused' you must take account of the circumstances of the driving such as the time of day, the nature of the road surface, the weather conditions and the general area in which the vehicle was being driven. However, you do not take into account the personal characteristics of the accused such as age, eyesight or reaction times, or their personal circumstances such as whether they were angry, upset or distressed. You also do not ask whether [*accused*] thought [he/she] was driving dangerously. The question

[46] This element is not usually in issue. Where it is contested, the judge will need to direct the jury on the evidence relevant to deciding whether the accused was the driver, or if there is a reasonable possibility that someone else was the driver.

is whether a reasonable person in the situation of [accused] would have realized their driving involved a real danger to others.

In determining whether [*accused*] drove in a dangerous manner, it may help you to consider the distinction that the law draws between driving in a manner dangerous to others, and driving without due care. Driving without due care is a lesser offence that is committed whenever a person fails to exercise the level of care a reasonably prudent driver would exercise. In contrast, this offence requires the prosecution to prove beyond reasonable doubt that the accused's driving is in a more serious category. For this offence, you are not concerned with the ordinary risks of the road, including the ordinary risks that other drivers will not drive perfectly. The accused's driving must have been worse than the ordinary risks of the road.

[*If a direction about fatigue is required, add the following:* You have heard evidence that [*refer to relevant evidence that the accused fell asleep while driving*]. The law says that a person is not responsible for their driving while asleep. This means you cannot use the mere fact that [*accused*] fell sleep to say that [his/her] driving was dangerous. Instead, you must look at the accused's driving before falling asleep. The prosecution can prove this element by showing that there were warning signs that should have alerted the accused to the risk of falling asleep. That is, the prosecution must prove beyond reasonable doubt that the accused's choice to continue driving was dangerous, given that risk of falling asleep. Remember that in assessing this issue, the prosecution has the onus of proof. Therefore you can only find this element proved if you can exclude the possibility that a reasonable person in the accused's position would have thought they were safe to continue driving.]

[*Refer to relevant evidence and arguments about whether the driving was dangerous*]

Intending to escape police pursuit

The third element is that the accused drove intending to escape police pursuit.

This requires you to draw a conclusion about [*accused*]'s state of mind during the driving. The prosecution must show that his intention or purpose while driving was to escape from police pursuit.

[*Refer to relevant evidence and arguments about whether the accused drove to escape police pursuit*]

11.4 – Street racing

47. Section 19A creates the offence of street racing. This offence consists of one element:

- the accused participated in a street race, or in preparations for a proposed street race.

48. The Act provides the following provisions and definitions:

> (2) For the purposes of this section, a person participates in a street race, or in preparations for a proposed street race, if the person—
>
> (a) drives a motor vehicle in the street race; or
>
> (b) promotes, or assists in the promotion of, the street race or proposed street race in any way; or
>
> (c) engages in any other conduct that assists, or is intended to assist, in the street race or proposed street race taking place.
>
> (3) However, subsection (1) does not apply to a street race that occurs in a place with the consent of the owner or occupier of the place or the person who has the care, control and management of the place.
>
> …
>
> (7) In this section–
>
> ***promote***, in relation to a street race or proposed street race, includes—
>
> (a) organise or conduct the street race; or
>
> (b) offer an inducement to another person to participate in the street race;
>
> **road** and **road-related area** have the same meaning as in the *Road Traffic Act 1961*;
>
> ***street race*** means any or all of the following when conducted on a road or a road-related area:
>
> (a) a race between 2 or more motor vehicles (whether the race is a drag race or otherwise, and whether the race is over a predetermined or indeterminate course);
>
> (b) a trial to determine how quickly a motor vehicle can cover the distance between 2 points;
>
> (c) a competition between, or display involving, 2 or more motor vehicles consisting of or including the production of sustained wheel spin;
>
> (d) a trial of a motor vehicle's speed or performance, or of a driver's skill,
>
> but does not include conduct declared by the regulations not to be included within the ambit of this definition.

Jury Direction #11.4 – Street racing

Note: This direction is designed for cases where the accused is alleged to have participated in a street race. It will need to be adapted if the prosecution alleges that the accused participated in preparations for a proposed street race.

I will now direct you as to the elements of the offence of street racing.

To prove this offence, the prosecution must prove the accused participated in a street race.

The law defines a street race as a race between two or more motor vehicles on a road.[47]

A person participates in a street race by [driving a motor vehicle in the street race / organising or conducting the street race / assisting someone to organise or conduct the street race / offering incentives for someone to participate in the street race / assisting someone to offer incentives for someone to participate in the street race / assisting the street race to take place].

[*Refer to relevant evidence and arguments*]

[47] If the prosecution relies on other limbs of the definition of "street race", this direction must be adapted.

CHAPTER 12: PUBLIC ORDER OFFENCES

12.1 – Riot

1. Section 83B creates the offence of riot. The offence consists of five elements:
    - The accused is part of a group of 12 or more people who are present together;
    - 12 or more members of the group use or threaten unlawful violence for a common purpose;
    - The conduct of the group, taken together, would cause a person of reasonable firmness present at the scene to fear for his or her personal safety;
    - The accused used unlawful violence;
    - The accused intended to use violence or was aware that his or her conduct may be violent.
2. The Act provides a number of rules that apply to this offence:[1]
    - It is immaterial whether the 12 or more people use or threatened unlawful violence simultaneously;
    - The common purpose of the group may be inferred from conduct;
    - A person of reasonable firmness does not need, in fact, be present, or likely present, at the scene;
    - A riot may be committed in private as well as public places;
    - While the accused must be proved to have intended to use or threaten violence, it is not necessary to prove intention in relation to other members of the group.
3. For the purpose of this offence, violence is defined as violent conduct towards both property and persons and is not limited to conduct causing or intending to cause injury or damage.[2]
4. This offence was introduced by the *Statutes Amendment (Public Order Offences) Act 2008* (SA) at the same time as affray[3] and violent disorder.[4] The offences form a hierarchy of seriousness, with riot at the top, affray in the middle and violent disorder at the bottom.

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[1] *Criminal Law Consolidation Act 1935* (SA) ss 83B(2)–(7).
[2] *Criminal Law Consolidation Act 1935* (SA) s 83A.
[3] *Criminal Law Consolidation Act 1935* (SA) s 83C.
[4] *Summary Offences Act 1953* (SA) s 6A.

Jury Direction #12.1 – Riot

I will now direct you as to the elements of riot.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused was part of a group of 12 or more people who were present together;

Two – 12 or more members of the group used or threatened unlawful violence for a common purpose;

Three – The conduct of the group, taken together, would cause a person of reasonable firmness present at the scene to fear for his or her personal safety;

Four – The accused used unlawful violence;

Five – The accused intended to use violence or was aware that his or her conduct may be violent.

I will now explain these five elements and how they apply in this case.

Group

The first element is that the accused was part of a group of 12 or more people.

[*Identify relevant evidence and arguments*]

Unlawful violence

The second element is that 12 or more members of the group used or threatened unlawful violence for a common purpose.

There are two parts to this.

First, the prosecution must prove that 12 or more members of the group used or threatened unlawful violence.

For the purpose of this offence, violence can mean violence against a person or violence against property. You do not need to be satisfied that all 12 people were using violence at the same time. Provided there were at least 12 different people, who were part of the group, who used violence in the course of the one event, then this part of the element has been proved.

The prosecution argues that the group members were using or threatening unlawful violence by [*identify relevant acts*]. If you are satisfied that at least 12 group members were [*identify relevant acts*], then you can find the first part of this element proved.

The second part of this element is that the group members were using or threatening unlawful violence for a common purpose. That is, the prosecution must prove that they were working to a common goal.

[*Identify relevant evidence and arguments*]

Person of reasonable firmness

The third element is that the conduct of the group would have caused a person of reasonable firmness present at the scene to fear for his or fher personal safety.

When you consider this element, you must look at the conduct of the group members as a whole. You look both at the nature of what each person was doing individually, as well as the combined effect of the group.

For this element, you must consider how a person of reasonable firmness present at the scene would have felt. The prosecution does not need to prove that there was, in fact, a person of reasonable firmness present, and that person feared for his or her safety. Instead, you ask yourself "If there was a person of reasonable firmness present at the scene, would that person have feared for their safety?"

[*Identify relevant evidence and arguments*]

Action by accused

The fourth element looks specifically at the actions of the accused. The prosecution must prove that the accused did use unlawful violence as part of the group.

Remember, violence can be against people or against property.

This element will not be proved if the accused was merely hanging on to the group, or was merely making threats. S/he must have been actively using unlawful violence as part of the group.

[*Identify relevant evidence and arguments*]

Intention of accused

The final element is that the accused intended to use violence or was aware that his or conduct was violent.

This element looks at the accused's state of mind. The prosecution must show the accused's use of violence was intentional, or at least that the accused was aware that s/he was using violence against a person or property.

[*Identify relevant evidence and arguments*]

12.2 – Affray

5. Section 83C creates the offence of affray.

6. While the offence of affray can be committed by one person only,[5] it is ordinarily committed in company and hence charged with the aggravating circumstance of offending in company.[6]

7. Where the offence is committed in company, the elements are:[7]

   - the accused together with at least one other person used, or threatened to use, violence towards another;
   - the accused's conduct was voluntary;
   - the accused intended to use or threaten violence or was at least aware that his conduct may be violent or threaten violence;
   - the violence or threat used by the accused and the other or others with him was unlawful;
   - the conduct was such that it would have caused a person of reasonable firmness present at the scene to fear for his or her personal safety.

8. For the purpose of this offence, violence is defined as violence against people. It is not limited to conduct causing or intending to cause injury or damage. However, it does not include violence against property.[8]

9. Section 83C(2) requires that if 2 or more people use or threaten unlawful violence, it is the conduct of them taken together that must be considered for the purpose of the offence.[9]

10. A threat of unlawful violence cannot consist of words alone.[10]

11. For the purpose of the fifth element, a person of reasonable firmness does not need to, in fact, be present. The offence is judged by the response of a hypothetical person of reasonable firmness.[11]

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[5] *Jessen v Police* (2011) 112 SASR 1; [2011] SASC 209, [6].

[6] See *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(h).

[7] *Police v Forbes* [2015] SASC 94, [3], [10]; *Jessen v Police* (2011) 112 SASR 1; [2011] SASC 209, [7]. Where the basic offence of affray is charged, the first element is modified to remove the requirement that the accused acted together with at least one other person

[8] *Criminal Law Consolidation Act 1935* (SA) s 83A.

[9] *Criminal Law Consolidation Act 1935* (SA) s 83C(2).

[10] *Criminal Law Consolidation Act 1935* (SA) s 83C(3).

[11] *Criminal Law Consolidation Act 1935* (SA) s 83C(4).

Jury Direction #12.2 – Affray

I will now direct you as to the elements of affray.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused, together with at least one other person, used or threatened violence towards another person;

Two – The accused's conduct was voluntary;

Three – The accused intended to use or threaten violence or was aware that his or her conduct may be violent or threaten violence.

Four – The violence or threat used was unlawful;

Five – The conduct was such that it would have caused a person of reasonable firmness present at the scene to fear for his or her personal safety;

I will now explain these five elements and how they apply in this case.

Unlawful violence

The first element is that the accused, together with at least one other person, used or threatened violence.

The prosecution say that [*accused*] committed the affray with [*co-offenders*].

For the purpose of this offence, violence means violence against a person.

Also, for this element, a threat cannot involve words alone. The accused, together with at least one other person, must have done something more, such as also using acts or gestures, for you to find that s/he threatened violence.

The prosecution argues that the accused and [*co-offenders*] used or threatened violence by [*identify relevant acts*].

[*Identify relevant evidence and arguments*]

Voluntariness

The second element is that the accused's actions were voluntary.

This means the accused's acts must have been a product of his/her conscious will.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Intention of accused

The third element is that the accused intended to use or threaten violence or was aware that his or conduct was violent or threatened violence.

This element looks at the accused's state of mind. The prosecution must show the accused's use or threat of violence was intentional, or at least that the accused was aware that s/he was using or threatening violence against a person.

[*Identify relevant evidence and arguments*]

Unlawful

The fourth element is that the violence or threats were unlawful.

In the context of this offence, that means the prosecution must show that the violence or threats were not [*identify relevant basis for lawfulness, such as self-defence*].

Person of reasonable firmness

The final element is that the accused's conduct would have caused a person of reasonable firmness present at the scene to fear for his or her personal safety.

You must consider how a person of reasonable firmness would have felt. The prosecution does not need to prove that there was a person of reasonable firmness present, and that person feared for his or her safety. Instead, you ask yourself "If there was a person of reasonable firmness present at the scene, would that person have feared for their safety?"

[If relevant, add: For the purpose of this element, you do not need to separate out the conduct of [*accused*] and [*others who used or threatened unlawful violence*]. Instead, you may look at the combined impact of their conduct to decide how that would affect a person of reasonable firmness.]

[*Identify relevant evidence and arguments*]

CHAPTER 13: PROPERTY OFFENCES

13.1 – Serious criminal trespass – places of residence

1. Section 170 creates the offences of serious criminal trespass to a place of residence. The offence consists of five elements: [1]

    - The accused entered or remained in a place that is not open to the public;
    - That place is a place of residence;
    - The accused entered or remained on those premises as a trespasser;
    - The accused knew he or she was a trespasser;
    - The accused entered the place with the intention of committing a prescribed offence.

Places not open to the public

2. A place is open to the public even if:[2]

    (a) a charge is made for admission; or

    (b) the occupier limits the purposes for which a person may enter or remain in the place by express or implied terms of a public invitation.

3. For this purpose, the occupier is a person entitled to control access to the place.[3]

Place of residence

4. A place of residence is defined as:[4]

    > a building, structure, vehicle or vessel, or part of a building, structure, vehicle or vessel, used as a place of residence.

5. By referring to buildings and structures, this definition has the effect that land on which a house is built is not enough to constitute a trespass of a place of residence.[5]

6. The starting point for whether something is a place of residence is whether it is a place where a person eats, drinks and sleeps.[6]

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[1] *R v Polanski* [2005] SASC 361, [16]–[19]; *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52.
[2] *Criminal Law Consolidation Act 1935* (SA) s 168(2).
[3] *Criminal Law Consolidation Act 1935* (SA) s 168(4).
[4] *Criminal Law Consolidation Act 1935* (SA) s 170(3).
[5] *Lorke v The Queen* [2019] SASCFC 147, [120].
[6] *R v Jackson* (2005) 93 SASR 373; [2005] SASC 472, [15], [68]; *Stoke-on-Trent Borough Council v Cheshire County Council* [1915] 3 KB 699.

7. Whether a place is a place of residence is a question of fact rather than a question of law.[7]

8. The tribunal of fact must consider the nature of the premises and the purpose for which the premises are used to decide whether they are a place of residence. The court does not look solely at whether a person was occupying the premises at the particular moment of the alleged offence. The court examines how the premises have been used and how the premises are intended to be used by both the owner and any occupier in the future.[8]

9. In considering whether a part of a building is a place of residence, the court will look at whether other parts of the building are a place of residence, and whether the relevant part of the building is an integral part which is not intended to be accessed by the public.[9]

10. A detached shed, without any furniture, is unlikely to be a place of residence.[10]

11. In *R v Jackson*, Layton J discussed the need for the offender to know or be reckless about the premises being used as a place of residence. As this was not considered by the other judges, and has not been discussed in other cases, it has not been treated as an element.[11]

Enter or remain as a trespasser

12. A trespasser is a person who deliberately enters a place without authority or permission to do so.[12]

13. Despite any limitations in the civil law on when one person can be responsible for an act of trespass by another, principles of accessorial liability and joint offending apply to this offence in the same way as any other criminal offence. The result is that a person can be guilty of serious criminal trespass as a secondary party even if that person did not personally commit an act of trespass.[13]

14. Consent may be given to enter premises for certain purposes only and a person who enters premises for a purpose outside the scope of his or her authority to enter does so

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[7] *R v Jackson* (2005) 93 SASR 373; [2005] SASC 472, [12].

[8] *R v Jackson* (2005) 93 SASR 373; [2005] SASC 472, [23], [28]–[29]. In this case, the Court held that an apartment, used as respite accommodation by parents of children with cancer, which was unoccupied at the time of offending, was capable of being a place of residence, as it had been used for that purpose and was intended to be used for that purpose again. The case also considered other examples, such as premises are sold for the purpose of being converted into a shop, unfinished dwelling houses, yachts used for racing and a mobile home for sale in a motor vehicle dealer's yard (see [35]–[41]).

[9] *Chatterton v Police* [2011] SASC 137 (offender found to have committed criminal trespass by climbing onto the balcony of an apartment, where the balcony was 'a private elevated area to which there is no other designated means of access except through the main living area').

[10] *Lee v Police* [2015] SASC 70, [23].

[11] *R v Jackson* (2005) 93 SASR 373; [2005] SASC 472, [59]–[61].

[12] *R v Polanski* [2005] SASC 361, [18]; *Barker v The Queen* (1983) 153 CLR 338; [1983] HCA 18.

[13] *R v Khammash* (2004) 89 SASR 488; [2004] SASC 289.

as a trespasser. This requires the tribunal of fact to consider, by reference to the circumstances of the case, whether there were any express or implied limitations on the permission to enter.[14]

15. *Criminal Law Consolidation Act 1935* s 168(3) specifies when the occupier's consent is vitiated:

> (3) A person who enters or remains in a place with the consent of the occupier is not to be regarded as a trespasser unless that consent was obtained by—
>
> (a) force; or
>
> (b) a threat; or
>
> (c) an act of deception.

Intention to trespass

16. The prosecution must prove that the accused knew he or she was a trespasser, or was recklessly indifferent to whether he or she was a trespasser.[15]

17. In other words, the prosecution must prove that the accused knew that he or she was entering without consent, or entered without giving any thought to whether he or she had the lawful occupier's consent to enter.[16]

18. This requires proof that the accused knew the facts that made the accused a trespasser, or he or she was reckless as to the existence of those facts.[17]

19. If the accused has an honest belief that he or she is legally entitled to enter the premises (even if that belief is not well-founded at law), then the accused will not be guilty of this offence. In assessing this issue, the question is only whether the accused had a belief in a right of entry and it is not necessary to consider whether the accused had a belief in a right to take certain steps following entry.[18]

Prescribed offence

20. The following offences are prescribed offences for the purpose of the offence of serious criminal trespass:[19]

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[14] *Barker v The Queen* (1983) 153 CLR 338, 364-365; [1983] HCA 18 per Brennan and Deane JJ.
[15] *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52, [28]; *Barker v The Queen* (1983) 153 CLR 338; [1983] HCA 18.
[16] *R v Pascoe* (2004) 90 SASR 505; [2004] SASC 420, [33].
[17] *Barker v The Queen* (1983) 153 CLR 338, 366; [1983] HCA 18 per Brennan and Deane JJ.
[18] *R v Gapper* [2007] SASC 119, [73]-[83] (accused's belief that he could enter V's premises for the purpose of retrieving the accused's property inconsistent with a finding of intention to trespass), but c.f. *Police v Slobodian* [2008] SASC 69, [35] (a belief in a right to property which is held inside premises may ground a claim of right in relation to theft of that property, but does not necessarily provide a claim of right to enter the premises where the property is held). See also *Walden v Hensler* (1987) 163 CLR 561, 592-594.per Dawson J; *White v South Australia* (2010) 106 SASR 521; [2010] SASC 95, [378].
[19] *Criminal Law Consolidation Act 1935* (SA) s 168.

- Theft;
- An offence of which theft is an element (e.g. robbery);
- An offence against the person;
- An offence involving interference with, damage to, or destruction of property punishable by imprisonment for 3 years or more

Jury Direction #13.1A – Serious criminal trespass – Place of residence – Full

I will now direct you as to the elements of serious criminal trespass in a place of residence.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused entered a private place;

Two – That private place is a place of residence;

Three – The accused entered or remained in the private place as a trespasser;

Four – The accused knew s/he was a trespasser or was reckless as to whether s/he was a trespasser;

Five – The accused entered the private place intending to commit a specified offence.

I will now explain these five elements and how they apply in this case.

Private place

The first element is that the accused entered a private place.

A private place is a place that is not open to the public.[20]

[*Refer to relevant evidence and arguments*].

Place of residence

The second element is that the private place is a place of residence.

A place of residence is a [part of a] [building/structure/vehicle/vessel] used as a place of residence. To decide this element, you must look at how the [*identify relevant place*] has been used and is intended to be used in the future. Is it a place where someone lives, as somewhere to eat, drink and sleep?

[*Refer to relevant evidence and arguments*].

Enter / remain as a trespasser

The third element is that the accused entered / remained in the [*identify relevant place*] as a trespasser.

That is, did the [*accused*] go into / stay in the [*identify relevant place*] without the authority or permission of the person in control of the [building/structure/vehicle/vessel]?[21]

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[20] If the relevant place is a hotel, it may be useful to explain that the offence relates to particular hotel rooms, which may be private places, and not the entire hotel, parts of which are open to the public.

[21] Where there is a dispute about who has authority to permit entry to the premises, this direction may need to be amended or elaborated upon.

[If the case involves remaining, rather than entry, add the following direction: There is no dispute that [*accused*] initially had permission to go into [*identify relevant place*]. The prosecution case on this element is that did not have permission to stay in [*identify relevant place*] after [*identify circumstances in which permission to remain is withdrawn*].]

If the accused is said to have breached a limited licence to enter the premises, add the following direction: In this case, you have heard evidence that [*accused*] had permission to enter [*identify relevant premises*]. The prosecution argues that the accused only had permission to enter [*identify relevant premises*] for the purpose of [*identify relevant purpose*] and did not have permission to enter for the purpose of [*identify alleged prohibited purpose*]. This raises two questions you must consider. First, did [*person with authority to grant permission*] give [*accused*] a general permission to enter, or did s/he only give permission to enter for the purpose of [*identify alleged permitted purpose*]? Second, if [*person with authority to grant permission*] gave the accused permission to enter only for the purpose of [*identify alleged permitted purpose*], did [*person with authority to grant permission*] give permission to enter only if that was the sole purpose, or was there permission to enter as long as the accused was at least entering to [*identify alleged permitted purpose*], even if s/he also had other reasons to enter. This will require you to look at what [*person with authority to grant permission*] said, and what limits s/he set on when or why [*accused*] could go into [*identify private place*].

[*Refer to relevant evidence and arguments*].

Knowledge / recklessness of trespass

The fourth element is that the accused knew that s/he was trespassing, or was reckless about being a trespasser.

This element requires you to look at [*accused*]'s state of mind. The prosecution must prove that [*accused*] knew he did not have permission or authority to go into or stay in [*identify relevant place*].

The other way the prosecution can prove this element is to show that [*accused*] went into or stayed in [*identify relevant place*] even though s/he knew there was a substantial risk that s/he did not have permission to be there, and, despite that, decided to remain.

[*Refer to relevant evidence and arguments*].

Prescribed offence

The fifth element is that the accused entered the place with the intention of committing a particular offence.

This element also looks at the accused's state of mind. The prosecution says that the accused entered the [*identify relevant place*] intending to commit the offence of [*identify relevant offence*]. A person commits [*identify relevant offence*] when s/he [*direct jury on elements of relevant offence*].

[*Refer to relevant evidence and arguments*].

Jury Direction #13.1B – Serious criminal trespass – Place of residence – Short

I will now direct you as to the elements of serious criminal trespass in a place of residence.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused entered a private place;

Two – That private place is a place of residence;

Three – The accused entered or remained in the private place as a trespasser;

Four – The accused knew s/he was a trespasser or was reckless as to whether s/he was a trespasser;

Five – The accused entered the private place intending to commit a specified offence.

In this case, there is no dispute that someone committed a serious criminal trespass against [*complainant*].

The only dispute is whether it was [*accused*] that committed that crime.

[*Refer to relevant evidence and arguments about identity of offender*]

13.2 – Serious criminal trespass – non-residential buildings

21. Section 169 creates the offences of serious criminal trespass to a non-residential building. The offence consists of five elements: [22]

    - The accused entered or remained in a place that is not open to the public;
    - That place is not a place of residence;
    - The accused entered or remained on those premises as a trespasser;
    - The accused knew he or she was a trespasser;
    - The accused entered the place with the intention of committing a prescribed offence.

22. Most of these elements are the same as the offence of serious criminal trespass of a place of residence. See 13.1 – Serious criminal trespass – places of residence. The only difference is the second element – that the place is a non-residential building.

Non-residential building

23. A non-residential building is defined as:[23]

> a building or part of a building that is not a place of residence.

24. For information on when a place is a 'place of residence', see 13.1 – Serious criminal trespass – places of residence.

25. The Act creates an imperfect dichotomy between places of residence and non-residential buildings. The definition of places of residence includes buildings, structures, vehicles and vessels used as places of residence, whereas this offence only relates to buildings. Where the premises involve a structure (other than a building), vehicle or vessel that is not used as a place of residence, neither ss 169 nor 170 will apply.[24]

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[22] *R v Polanski* [2005] SASC 361, [16]–[19]; *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52.

[23] *Criminal Law Consolidation Act 1935* (SA) s 169(3).

[24] *R v Jackson* (2005) 93 SASR 373; [2005] SASC 472, [57].

Jury Direction #13.2A – Serious criminal trespass – Non-residential building – Full

I will now direct you as to the elements of serious criminal trespass in a non-residential building.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused entered a private place;

Two – That private place is a non-residential building;

Three – The accused entered or remained in the private place as a trespasser;

Four – The accused knew s/he was a trespasser or was reckless as to whether s/he was a trespasser;

Five – The accused entered the private place intending to commit a specified offence.

I will now explain these five elements and how they apply in this case.

Private place

The first element is that the accused entered a private place.

A private place is a place that is not open to the public.[25]

[*Refer to relevant evidence and arguments*].

Non-residential building

The second element is that the private place is a building that is a not a place of residence.[26]

To decide this element, you must look at how the [*identify relevant place*] has been used and is intended to be used in the future. Is it a place of residence or not? A place of residence is a place where someone lives, as somewhere to eat, drink and sleep.

[*Refer to relevant evidence and arguments*].

Enter / remain as a trespasser

The third element is that the accused entered / remained in the [*identify relevant place*] as a trespasser.

That is, did the [*accused*] go into / stay in the [*identify relevant place*] without the authority or permission of the person in control of the [building/structure/vehicle/vessel]?[27]

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[25] If the relevant place is a hotel, it may be useful to explain that the offence relates to particular hotel rooms, which may be private places, and not the entire hotel, parts of which are open to the public.

[26] If there is a dispute about whether the private place is a building, the direction on this element must be modified to address that issue.

[27] Where there is a dispute about who has authority to permit entry to the premises, this direction may need to be amended or elaborated upon.

If the case involves remaining, rather than entry, add the following direction: There is no dispute that [*accused*] initially had permission to go into [*identify relevant place*]. The prosecution case on this element is that did not have permission to stay in [*identify relevant place*] after [*identify circumstances in which permission to remain is withdrawn*].

If the accused is said to have breached a limited licence to enter the premises, add the following direction: In this case, you have heard evidence that [*accused*] had permission to enter [*identify relevant premises*]. The prosecution argues that the accused only had permission to enter [*identify relevant premises*] for the purpose of [*identify relevant purpose*] and did not have permission to enter for the purpose of [*identify alleged prohibited purpose*]. This raises two questions you must consider. First, did [*person with authority to grant permission*] give [*accused*] a general permission to enter, or did s/he only give permission to enter for the purpose of [*identify alleged permitted purpose*]? Second, if [*person with authority to grant permission*] gave the accused permission to enter only for the purpose of [*identify alleged permitted purpose*], did [*person with authority to grant permission*] give permission to enter only if that was the sole purpose, or was there permission to enter as long as the accused was at least entering to [*identify alleged permitted purpose*], even if s/he also had other reasons to enter. This will require you to look at what [*person with authority to grant permission*] said, and what limits s/he set on when or why [*accused*] could go into [*identify private place*].

[*Refer to relevant evidence and arguments*].

Knowledge / recklessness of trespass

The fourth element is that the accused knew that s/he was trespassing, or was reckless about being a trespasser.

This element requires you to look at [*accused*]'s state of mind. The prosecution must prove that [*accused*] knew he did not have permission or authority to go into or stay in [*identify relevant place*].

The other way the prosecution can prove this element is to show that [*accused*] went into or stayed in [*identify relevant place*] even though s/he knew there was a substantial risk that s/he did not have permission to be there, and, despite that, decided to remain.

[*Refer to relevant evidence and arguments*].

Prescribed offence

The fifth element is that the accused entered the place with the intention of committing a particular offence.

This element also looks at the accused's state of mind. The prosecution says that the accused entered the [*identify relevant place*] intending to commit the offence of [*identify relevant offence*]. A person commits [*identify relevant offence*] when s/he [*direct jury on elements of relevant offence*].

[*Refer to relevant evidence and arguments*].

Jury Direction #13.2B – Serious criminal trespass – Place of residence – Short

I will now direct you as to the elements of serious criminal trespass in a non-residential building.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused entered a private place;

Two – That private place is a non-residential building;

Three – The accused entered or remained in the private place as a trespasser;

Four – The accused knew s/he was a trespasser or was reckless as to whether s/he was a trespasser;

Five – The accused entered the private place intending to commit a specified offence.

In this case, there is no dispute that someone committed a serious criminal trespass against [*identify relevant place*].

The only dispute is whether it was [*accused*] that committed that crime.

[*Refer to relevant evidence and arguments about identity of offender*]

13.3 – Criminal trespass – place of residence

26. Section 170A creates the offence of criminal trespass in a place of residence. The offence consists of five elements:

    - The accused trespassed in a place;
    - The accused intended to trespass or was recklessly indifferent to the fact that he or she was trespassing
    - The place is a place of residence;
    - Another person was lawfully present in the place;
    - The accused knew of the other person's presence or was reckless about whether anyone is in the place.

Trespass

27. A trespasser is a person who deliberately enters a place without authority or permission to do so.[28] For more information on this element, see 13.1 – Serious criminal trespass – places of residence.

Intention or recklessness

28. The prosecution must prove that the accused knew he or she was a trespasser, or was recklessly indifferent to whether he or she was a trespasser.[29] This includes knowledge or recklessness of the fact that he or she entered the premises without consent.[30] For more information on this element, see 13.1 – Serious criminal trespass – places of residence.

Place of residence

29. For information on this element, see 13.1 – Serious criminal trespass – places of residence.

Another person lawfully present

30. The prosecution must prove that another person was lawfully present in the place of residence at the time of the trespass. This offence is therefore not committed if the accused trespasses into an empty house.[31]

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[28] *R v Polanski* [2005] SASC 361, [18]; *Barker v The Queen* (1983) 153 CLR 338; [1983] HCA 18.
[29] *R v Bennett* (2004) 88 SASR 6; [2004] SASC 52, [28]; *Barker v The Queen* (1983) 153 CLR 338; [1983] HCA 18; *Chatterton v Police* [2011] SASC 137, [19].
[30] *R v Pascoe* (2004) 90 SASR 505; [2004] SASC 420; *R v Nelson* [2005] SADC 154, [81]–[82].
[31] *Criminal Law Consolidation Act 1935* (SA) s 170A; *R v Ellis* [2003] SASC 122.

Knowledge or recklessness

31. The prosecution must also prove that the accused knew or was reckless about the fact that another person was present in the place of residence.

Jury Direction #13.3 – Criminal trespass – Place of residence

I will now direct you as to the elements of criminal trespass in a place of residence.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused trespassed in a place;

Two – The accused knew s/he was a trespasser or was reckless as to whether s/he was a trespasser;

Three – The place is a place of residence;

Four – Another person was lawfully present in the place;

Five – The accused knew another person was present in the place or was reckless about whether anyone was in the place.

I will now explain these five elements and how they apply in this case.

Entry as a trespasser

The first element is that the accused entered the [*identify relevant place*] as a trespasser.

That is, did the [*accused*] go into the [*identify relevant place*] without the authority or permission of the person in control of the premises?

If the accused is said to have breached a limited licence to enter the premises, add the following direction: In this case, you have heard evidence that [*accused*] had permission to enter [*identify relevant premises*]. The prosecution argues that the accused only had permission to enter [*identify relevant premises*] for the purpose of [*identify relevant purpose*] and did not have permission to enter for the purpose of [*identify alleged prohibited purpose*]. This raises two questions you must consider. First, did [*person with authority to grant permission*] give [*accused*] a general permission to enter, or did s/he only give permission to enter for the purpose of [*identify alleged permitted purpose*]? Second, if [*person with authority to grant permission*] gave the accused permission to enter only for the purpose of [*identify alleged permitted purpose*], did [*person with authority to grant permission*] give permission to enter only if that was the sole purpose, or was there permission to enter as long as the accused was at least entering to [*identify alleged permitted purpose*], even if s/he also had other reasons to enter. This will require you to look at what [*person with authority to grant permission*] said, and what limits s/he set on when or why [*accused*] could go into [*identify relevant place*].

[*Refer to relevant evidence and arguments*].

Knowledge / recklessness of trespass

The second element is that the accused knew that s/he was trespassing, or was reckless about being a trespasser.

This element requires you to look at [*accused*]'s state of mind. The prosecution must prove that [*accused*] knew he did not have permission or authority to go into [*identify relevant place*].

The other way the prosecution can prove this element is to show that [*accused*] went into [*identify relevant place*] even though s/he knew there was a substantial risk that s/he did not have permission to be there, and, despite that, decided to remain there.

[*Refer to relevant evidence and arguments*].

Place of residence

The third element is that the place is a place of residence.

A place of residence is a [part of a] [building/structure/vehicle/vessel] used as a place of residence. To decide this element, you must look at how the [*identify relevant place*] has been used and is intended to be used in the future. Is it a place where someone lives, as somewhere to eat, drink and sleep?

Another person lawfully present

The fourth element is that another person was lawfully present in the place.

In this case, there is no dispute that [*complainant*] was lawfully present in the building at the time of the alleged offence. So you should have no difficulty finding this element proved.[32]

Knowledge / recklessness of another person being present

The fifth element is that the accused knew another person was present in the place, or was reckless about another person being present.

This element also requires you to look at [*accused*]'s state of mind. There are two ways the prosecution can prove this element.

First, the prosecution will prove this element if they prove that [*accused*] knew someone was in the building before he entered.

The second way the prosecution can prove this element is to show that [*accused*] went into [*identify relevant place*] even though s/he knew there was a substantial risk that someone was present inside, and, despite that, went in anyway.

The prosecution does not need to show that [*accused*] knew [*complainant*] was inside. The prosecution only needs to show that the accused knew there was someone inside, or knew there was a substantial risk that someone was inside.

[*Refer to relevant evidence and arguments*].

[32] If this element is disputed, then the direction must be modified.

13.4 – Arson

32. Section 85(1) creates the offence of arson. The offence consists of four elements:

- The accused damaged property;
- The property is a building or motor vehicle;
- The accused caused the damage using fire or explosives;
- The accused intended to damage property or was recklessly indifferent as to whether his or her conduct would damage property.

Damaging property

33. Damage is defined as including:[33]

(a) to destroy the property;

(b) to make an alteration to the property that depreciates its value;

(c) to render the property useless or inoperative;

34. At common law, courts have struggled with providing a legal definition of 'damage', as it depends on the circumstances of the case, the nature of the property and the form of alleged damage. However, it was held that proof of damage did not require proof that the property was rendered useless or unable to serve its normal function. Further, damage may be temporary, as the offence may be committed even if the property could be repaired or restored with little difficulty.[34]

35. However, interference with functionality alone does not constitute damage.[35]

36. At least in relation to New South Wales legislation, the words "destroys or damages" do not include conduct that obstructed or rendered property useless without altering the physical integrity of the property.[36] Judges will need to consider whether this test of 'changes to physical integrity' applies under the *Criminal Law Consolidation Act 1935*, given the statutory definition of damage which does not refer to changes to physical integrity.

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[33] *Criminal Law Consolidation Act 1935* (SA) s 84.

[34] *Samuels v Stubbs* (1972) 4 SASR 200, 203–204. See also *A (a juvenile) v The Queen* [1978] Crim LR 689; *Hardman v Chief Constable (Avon & Somerset Constabulary)* [1986] Crim LR 330; *R v Whiteley* (1991) 93 Cr App R 25.

[35] *Grajewski v DPP* (2019) 264 CLR 470; [2019] HCA 8, [46].

[36] *Grajewski v DPP* (2019) 264 CLR 470; [2019] HCA 8, [21]. The Court at [52]–[53] acknowledged that this can mean that property may be rendered inoperative without being damaged. For example, letting the air out of tyre involves damage, whereas applying a wheel clamp does not.

Ownership of property

37. For the purpose of this offence, it does not matter whether the property belongs to the accused or another person.[37]

Building or motor vehicle

38. The property must be a building or a motor vehicle.

39. Building is defined as buildings used for both residential and non-residential purposes and include:[38]

    (a) a part of a building; and

    (b) a structure, vehicle or vessel, or part of a structure, vehicle or vessel, used for residential purposes;

Intention or reckless indifference to causing damage

40. The prosecution must prove that the accused either intended to cause damage or was recklessly indifferent about causing damage.

41. As the Court of Criminal Appeal recognised in *Ducaj v The Queen*, recklessness is a protean concept, with its meaning influenced by statutory definition or other elements of the offence.[39]

42. Section 21 defines recklessness as existing where a person:[40]

    (a) is aware of a substantial risk that his or her conduct could result in harm or serious harm (as the case requires); and

    (b) engages in the conduct despite the risk and without adequate justification;

43. This definition does not apply to arson, as it is limited to offences in Division 7A of the Act.

44. While the jury direction in 8.9 – Threats, adopts the second limb of the statutory meaning of recklessness in s 21 by analogy, there is difficulty in applying that limb in the context of arson. Justification has been said to arise where a person is confronted, through no fault of their own, with choosing between two dangerous options.[41]

45. Given the existence of principles of self-defence and defence of property,[42] it is difficult to imagine what the notion of justification can add to those defences in the context of

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[37] *Criminal Law Consolidation Act 1935* (SA) s 85(1).
[38] *Criminal Law Consolidation Act 1935* (SA) s 84(1).
[39] *Ducaj v The Queen* [2019] SASCFC 152, [13]–[15].
[40] *Criminal Law Consolidation Act 1935* (SA) s 21.
[41] *Ducaj v The Queen* [2019] SASCFC 152, [25].
[42] *Criminal Law Consolidation Act 1935* (SA) ss 15, 15A. See 17.1 – Self-defence and 17.2 – Defence of property and lawful arrest for more information on those defences.

an offence like arson. For that reason, the model direction only adopts by analogy the first limb of the statutory definition of recklessness – the accused is aware of a substantial risk that his or her conduct will cause damage.

Lawful excuse

46. Section 85 provides that the accused must perform these acts "without lawful excuse". Under s 5B, the onus of proof of a "lawful excuse" lies on the defendant.[43]

[43] C.f *R v Taylor* [2017] SASC 167, [11] (albeit without reference to s 5B).

Jury Direction #13.4 – Arson

I will now direct you as to the elements of the arson.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused damaged property;

Two – The property was a building or motor vehicle;

Three – The accused caused the damage using fire or explosives;

Four – The accused intended to damage the property, or was recklessly indifferent

I will now explain these four elements and how they apply in this case.

Damage property

The first element relates to what the accused did.

The prosecution must prove that the accused caused damage to property.

There is no dispute that [*identify relevant property*] was damaged.[44] The issue for this element is whether it was the accused who caused that damage.

[*Refer to relevant evidence and arguments*].

Building or motor vehicle

The second element is that the property was a building or motor vehicle.

There is no dispute that [*identify relevant property*] is a [building / motor vehicle], so you can find this element proved.

[*Refer to relevant evidence and arguments*].

Using fire or explosives

The third element is that the damage was caused by fire or explosives.

There is no dispute that the damage to [*identify relevant property*] was caused by fire or explosives, so you can find this element proved.

Intention or reckless indifference

The final element is that the accused intended to cause the damage, or was recklessly indifferent about causing damage.

[44] If there is a dispute about whether the property was damaged, within the meaning of the Act, this direction must be modified.

This requires you to look at the accused's state of mind.

You must decide whether the prosecution has proved that [*accused*] meant to damage [*identify relevant property*]. As part of this, the prosecution must prove that the damage was not accidental.

The prosecution can also prove this element by showing that the accused was recklessly indifferent to causing damage. This requires the prosecution to show that [*accused*] knew there was a substantial risk his/her actions would cause damage to property, and went ahead anyway.

[*Refer to relevant evidence and arguments*].

13.5 – Property damage

47. Sections 85(2) and (3) create offences of property damage. The offences vary in terms of the nature of the property damaged and the permissible means of damage.

48. The offence in s 85(2) consists of five elements:

- The accused damaged property;
- The damage is not inflicted by fire or explosives;
- The property belongs to another;
- The property is a building or motor vehicle;
- The accused intended to damage property or was recklessly indifferent as to whether his or her conduct would damage property.

49. The offence in s 85(3) consists of four elements:

- The accused damaged property;
- The property belongs to another;
- The property is not a building or motor vehicle;
- The accused intended to damage property or was recklessly indifferent as to whether his or her conduct would damage property.

50. For information about the meaning of 'damage', 'building', intention, reckless indifference and the availability of defences of lawful excuse, see 13.4 – Arson.

Property belonging to another

51. Owner is defined as "a person wholly entitled to the property both at law and in equity".[45]

52. Where a person damages or attempts to damage property which the person is not the 'owner' (in the sense defined above), the property is regarded as belonging to another.[46]

53. The effect of this definition is that where real property is held under a mortgage, the accused may be charged with offences involving damaging the property of another.[47]

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[45] *Criminal Law Consolidation Act 1935* (SA) s 84(1).

[46] See *Criminal Law Consolidation Act 1935* (SA) s 84(2).

[47] See *Holden v The Queen* (1998) 199 LSJS 300. See also *R v Manser* (1999) 72 SASR 588; [1999] SASC 91 (interest in property arose from it being the subject of disputed proceedings in the Family Court).

Jury Direction #13.5 – Property damage

Note: This direction is designed for cases where the accused is charged under s 85(2). It can be modified if the accused is charged under s 85(3).

I will now direct you as to the elements of the property damage.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused damaged property;

Two – The accused did not cause the damage using fire or explosives;

Three – The property belongs to another person;

Four – The property was a building or motor vehicle;

Five – The accused intended to damage the property, or was recklessly indifferent

I will now explain these five elements and how they apply in this case.

Damage property

The first element relates to what the accused did.

The prosecution must prove that the accused caused damage to property.

There is no dispute that [*identify relevant property*] was damaged.[48] The issue for this element is whether it was the accused who caused that damage.

[*Refer to relevant evidence and arguments*].

Using fire or explosives

The second element is that the damage was not caused by fire or explosives.

Using fire or explosives to damage property is a different offence called arson. For this element, the prosecution must prove that the accused **did not** use fire or explosives.

[*Refer to relevant evidence and arguments*].

Property belonging to another

The third element is that the property belonged to another person.

To prove this element, the prosecution must prove that [*accused*] was not the sole owner of the property.

[48] If there is a dispute about whether the property was damaged, within the meaning of the Act, this direction must be modified.

[*Refer to relevant evidence and arguments*].

Building or motor vehicle

The fourth element is that the property was a building or motor vehicle.

There is no dispute that [*identify relevant property*] is a [building / motor vehicle], so you can find this element proved.

[*Refer to relevant evidence and arguments*].

Intention or reckless indifference

The final element is that the accused intended to cause the damage, or was recklessly indifferent about causing damage.

This requires you to look at the accused's state of mind.

You must decide whether the prosecution has proved that [*accused*] meant to damage [*identify relevant property*]. As part of this, the prosecution must prove that the damage was not accidental.

The prosecution can also prove this element by showing that the accused was recklessly indifferent to causing damage. This requires the prosecution to show that [*accused*] knew there was a substantial risk that his actions would cause damage to property, and went ahead anyway.

[*Refer to relevant evidence and arguments*].

13.6 – Threat to damage property

54. Section 85(4) creates the offence of threatening to damage property. It consists of two elements:

    - The accused threatens to damage property belonging to another;
    - The accused intended to arouse fear that the threat will be, or is likely to be, carried out, or the accused was recklessly indifferent as to whether such a fear is aroused.

55. As with offences discussed at 13.5 – Property damage, this offence only applies to property belonging to another. See 13.5 – Property damage for information on when property belongs to another.

56. See 13.4 – Arson on the meaning of reckless indifference.

Jury Direction #13.6 – Threat to damage property

I will now direct you as to the elements of the threatening to damage property.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused threatened to damage property of another;

Two – The accused [intended to arouse fear that the threat will be or is likely to be carried out / was recklessly indifferent on whether the fear will be or is likely to be carried out].

I will now explain these two elements and how they apply in this case.

Threat to damage property

The first element is that the accused made a threat to damage property belonging to another.

There are three parts to this.

First, the accused made a threat.

Second, the threat was to damage property.

Third, the property belonged to a person other than the accused.

[*Refer to relevant evidence and arguments*].

Intention / Reckless indifference

The second element is that the accused intended to arouse fear that the threat will be or is likely to be carried out / was recklessly indifferent on whether the fear will be or is likely to be carried out].

This element looks at the accused's state of mind.

If the prosecution relies on intention, add the following direction: The prosecution must show that the accused [meant to cause [*complainant*] to fear that s/he would damage the property, or was likely to damage the property.

If the prosecution relies on reckless indifference, add the following direction: The prosecution must show that the accused was recklessly indifferent to causing [*complainant*] to fear s/he would or was likely to damage the property. This requires the prosecution to show that [*accused*] knew there was a substantial risk that [*complainant*] would fear that the accused would or was likely to damage the property, but s/he went ahead anyway.

[*Refer to relevant evidence and arguments*].

13.7 – Recklessly endangering property

57. Section 85A creates the offence of recklessly endangering property. This offence consists of three elements:

    - The accused does an act that creates a substantial risk of serious damage to property;
    - The property belongs to another person;
    - The accused knows the act creates a substantial risk of serious damage to property.

58. For information on the meaning of damaging property, and when property belongs to another person, see 13.4 – Arson and 13.5 – Property damage.

Lawful authority and defences

59. Section 85A identifies, as part of the definition of the offence, that the accused:[49]

> does not have lawful authority to do so and knows that no such lawful authority exists,

60. Section 5B provides that the onus of proving a lawful authority lies on the defendant and that in the absence of proof it is presumed that no lawful authority exists.[50]

61. Where the offence under s 85A is charged, judges will need to consider whether:

    - The language of s 85A implicitly excludes (or, at the very least, for practical purposes, overrides) the operation of s 5B, so that the prosecution bears the onus of proving an absence of lawful authority; or
    - Section 5B extends to the issue of whether the accused knows that s/he has no lawful authority.

62. As a matter of prudence, and recognising the practical difficulties associated with directions with a shifting onus, the model direction adopts the former view that s 85A excludes the operation of s 5B. This avoids the absurdity that would exist if the accused bore the onus on proving the existence of a lawful authority, but the prosecution bore the onus of proving the knowledge of the absence of lawful authority.

63. The Act also provides that it is a defence for the accused to prove that he or she had an honest belief that the act was reasonable and necessary for the protection of life or property.[51]

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[49] *Criminal Law Consolidation Act 1935* (SA) s 85A(1)(b).
[50] *Criminal Law Consolidation Act 1935* (SA) s 5B.
[51] *Criminal Law Consolidation Act 1935* (SA) s 85A(2).

Jury Direction #13.7 – Recklessly endangering property

I will now direct you as to the elements of the recklessly endangering property.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused created a substantial risk of serious damage to property;

Two – The property belongs to another person;

Three – The accused knew that s/he created a substantial risk of serious damage to property;

Four – The accused did not have lawful authority to create a substantial risk of serious damage to property;

Five – The accused knew s/he did not have lawful authority to create a substantial risk of serious damage to property.

I will now explain these five elements and how they apply in this case.

Substantial risk of serious damage

The first element is that the accused created a substantial risk of serious damage to property.

There are three parts of this element.

First, the accused must have created a risk. The accused must have done something that created the risk. The prosecution says the accused created the risk by [*identify relevant act*].

Second, the risk must be a substantial risk. This requires you to consider how likely it was that the property would be damaged by the risk. The level of risk must be substantial.

Third, the risk must be of serious damage to property. This requires you to look at how much damage would be caused if the risk came about. The degree of damage must be serious.

[*Refer to relevant evidence and arguments*].

Property belonging to another

The second element is that the property belonged to another person.

To prove this element, the prosecution must prove that [*accused*] was not the sole owner of the property.

[*Refer to relevant evidence and arguments*].

Knowledge

The third element is that he accused knew s/he created a substantial risk of serious damage to property.

This looks at the accused's state of mind.

As with the first element, there are three parts to this element.

First, the accused must have known that s/he was creating a risk.

Second, the accused must have known that the risk was a substantial risk.

Third, the accused must have known the risk was of serious damage to property.

You must decide whether the prosecution has proved that the accused had this knowledge at the time s/he created the risk.

[*Refer to relevant evidence and arguments*].

Lawful authority

The fourth element is that the accused did not have lawful authority to create a substantial risk of serious damage to property.

In this case, the defence argues that the accused had lawful authority to create the risk because [*identify relevant lawful authority*].

The prosecution must prove the accused **did not** have lawful authority to do this.

[*Refer to relevant evidence and arguments*].

Knowledge of absence of lawful authority

The final element is that the accused knew s/he did not have lawful authority to create a substantial risk of serious damage to property.

While the fourth element looked at whether the accused in fact had lawful authority, this element looks at the accused's state of mind. The prosecution must prove the accused **knew** s/he did not have lawful authority to create a substantial risk of serious damage to property. In other words, the prosecution must show there is no reasonable possibility that the accused believed s/he had lawful authority to create a substantial risk of serious damage to property.

[*Refer to relevant evidence and arguments*].

13.8 – Possession of an object with intent to damage property

64. Section 86 creates the offence of possessing an object with intent to damage property. The offence consists of two elements:

    - The accused had custody or control of an object;
    - The accused intended to use the object, or cause or permit a person to use the object, to damage property of another.

65. For information about the meaning of damage and property of another, see 13.4 – Arson and 13.5 – Property damage.

Defences

66. Section 86 identifies, as part of the definition of the offence, that the accused has:[52]

> …no lawful authority for such use of the object and the person knows that no such lawful authority exists,

67. Section 5B provides that the onus of proving a lawful authority lies on the defendant and that in the absence of proof it is presumed that no lawful authority exists.[53]

68. Where the offence under s 86 is charged, judges will need to consider whether:

    - the language of s 86 implicitly excludes (or, at the very least, for practical purposes, overrides) the operation of s 5B, so that the prosecution bears the onus of proving an absence of lawful authority; or
    - section 5B extends to the issue of whether the accused knows that s/he has no lawful authority

69. As a matter of prudence, and recognising the practical difficulties associated with directions with a shifting onus, the model direction adopts the former view s 86 excludes the operation of s 5B. This avoids the absurdity that would exist if the accused bore the onus on proving the existence of a lawful authority, but the prosecution bore the onus of proving the knowledge of the absence of lawful authority.

70. The Act also provides that it is a defence for the accused to prove an honest belief that the intended damage to property was reasonable and necessary for the protection of life or property.[54]

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[52] *Criminal Law Consolidation Act 1935* (SA) s 85A(1)(b).
[53] *Criminal Law Consolidation Act 1935* (SA) s 5B.
[54] *Criminal Law Consolidation Act 1935* (SA) s 86(2).

Jury Direction #13.8 – Possessing object with intent to damage property

Note: This direction is designed for cases where the prosecution alleges that the accused intended to use the object him or herself to cause damage. The direction must be modified if the accused intended to cause or permit another person to use the object to damage property

I will now direct you as to the elements of the possessing an object with intent to damage property.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused had custody or control of an object;

Two – The accused intended to use the object to damage property of another;

Three – The accused did not have lawful authority to use the object to damage the property of another;

Four – The accused knew s/he did not have lawful authority to use the object to damage the property of another.

I will now explain these four elements and how they apply in this case.

Possession

The first element is that the accused had custody or control of an object.

The defence accepts that [*accused*] had custody or control over [*identify relevant object*]. You can therefore find this element proved.[55]

Intention to damage

The second element is that the accused intended to use the object to damage property of another.

This looks at the accused's state of mind.

The prosecution must prove the accused intended to use [*identify relevant object*] to damage [*identify relevant property*].

If relevant, add: As part of this element, the prosecution must prove that the accused's intended actions would involve **damage** to property. Property is damaged if it is destroyed, altered so that its value is decreased, or if it is made useless or inoperative.

If relevant, add: As part of this element, the prosecution must prove that [*accused*] was not the sole owner of [*identify relevant property*].

[*Refer to relevant evidence and arguments*].

[55] If there is a dispute about whether the accused had custody or control of the object, this direction must be modified.

Lawful authority

The third element is that the accused did not have lawful authority to use the object to damage the property of another.

In this case, the defence argues that the accused had lawful authority to use the object to damage property because [*identify relevant lawful authority*].

The prosecution must prove the accused **did not** have lawful authority to do this.

[*Refer to relevant evidence and arguments*].

Knowledge of absence of lawful authority

The final element is that the accused knew s/he did not have lawful authority to use the object to damage the property of another.

While the fourth element looked at whether the accused in fact had lawful authority, this element looks at the accused's state of mind. The prosecution must prove the accused **knew** s/he did not have lawful authority to use the object to damage the property of another. In other words, the prosecution must show there is no reasonable possibility that the accused believed s/he had lawful authority to use the object to damage someone else's property.

[*Refer to relevant evidence and arguments*].

CHAPTER 14: DISHONESTY OFFENCES

1. Part 5 of the *Criminal Law Consolidation Act 1935* creates various offences of dishonesty. Division 1 of Part 5 contains provisions that apply to all offences in Part 5. These general provisions are discussed here, rather than under the specific offences below.

14.1 – General matters

2. Section 130 is a definition provision. Among the terms which are common to several dishonesty offences are:

> ***deal***—a person deals with property if the person—
>
> (a) takes, obtains or receives the property; or
>
> (b) retains the property; or
>
> (c) converts or disposes of the property; or
>
> (d) deals with the property in any other way;
>
> ***deception*** means a misrepresentation by words or conduct and includes—
>
> (a) a misrepresentation about a past, present or future fact or state of affairs; or
>
> (b) a misrepresentation about the intentions of the person making the misrepresentation or another person; or
>
> (c) a misrepresentation of law;
>
> ***owner*** of property means—
>
> (a) a person who has a proprietary interest in the property other than an equitable interest arising under—
>
> (i) an agreement to transfer or grant an interest in the property; or
>
> (ii) a constructive trust; or
>
> (b) in relation to property subject to a trust (other than a trust arising from an agreement to transfer or grant an interest in the property or a constructive trust)—a person who has a right to enforce the trust; or
>
> (c) in relation to property received from or on account of another by a person who is under an obligation to deal with the property or its proceeds in a particular way—the person from whom, or on whose account, the property was received; or
>
> (d) a person who is entitled to possession or control of the property,
>
> (and, if there are 2 or more owners of property, a reference in this Part to the owner is a reference to both or all of them);
>
> ***property*** means real or personal property and includes—
>
> (a) money;
>
> (b) intangible property (including things in action);

(c) electricity;

(d) a wild creature that is tamed or ordinarily kept in captivity or is reduced (or in the course of being reduced) into someone's possession;

3. The term 'deal' replaces the common law concept such as 'take' which had often been used in relation to property offences. The term 'deal' has a wider definition and may include actions taken in both a moment and over a longer period.[1]

Dishonesty

4. Dishonestly is defined as the accused acting dishonestly according to the standards of ordinary people, knowing that he or she is acting dishonesty.[2]

5. Dishonesty must be judged as a question of fact by the tribunal of fact using its own knowledge and experience and not using evidence of the standards of ordinary people.[3]

6. A willingness to pay is not necessarily inconsistent with a finding of dishonesty.[4]

7. Sections 131(5) and (6) provides defences in the nature of a claim of right:

(5) The conduct of a person who acts in a particular way is not dishonest if the person honestly but mistakenly believes that he or she has a legal or equitable right to act in that way.

Example—

A takes an umbrella violently from B honestly but mistakenly believing that B has stolen A's umbrella and that A is entitled to use force to get it back. In fact, it belongs to B. A is charged with robbery. A cannot be properly convicted on this charge because of his honest but mistaken belief (however unreasonable). However, he may still be guilty of an assault.

(6) A person who asserts a legal or equitable right to property that he or she honestly believes to exist does not, by so doing, deal dishonestly with the property.

Example—

A takes an umbrella violently from B honestly believing that the umbrella belongs to A and that A is entitled to possession of the umbrella (but knowing that she is not entitled to use force to get it back). The assertion of that possessory right (whether or not correctly founded in law) is not dishonest (and therefore cannot amount to theft) although the means used to get the umbrella back may well amount to some other offence.

8. These provisions, in substance, are a codification of the common law claim of right defence.[5]

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[1] *R v Kerin* (2013) 116 SASR 316; [2013] SASCFC 56, [267].
[2] *Criminal Law Consolidation Act 1935* (SA) s 131(1).
[3] *Criminal Law Consolidation Act 1935* (SA) s 131(2).
[4] *Criminal Law Consolidation Act 1935* (SA) s 131(3).
[5] *R v Bedford* (2007) 98 SASR 514; [2007] SASC 276; *R v Miller* (2008) 103 SASR 174; [2008] SASC 331, [19].

9. The following principles apply to a claim of right defence:[6]

- As a claim of right negates the element of dishonesty, the onus is on the prosecution to disprove a claim of right;
- The belief in a claim of right must be honestly held, but need not be reasonable;
- The claim does not need to have a foundation in law or fact;
- The belief must be in a legal or equitable right. A belief in a moral right is not sufficient;
- The belief does not need to be in a right to the exact property in question and may extend to property of equivalent value. However, the belief must relate to a right to the whole of the property taken and a belief cannot justify intentionally taking property of greater value;
- The defence does not require a belief in the right to take the actual measures used to obtain the property;
- Measures used to enforce the belief may constitute other offences, even if the belief provides a defence to the property offence.

10. The claim of right principle can apply even to a drug user who, while disguised, threatens his supplier in the belief that he is entitled to a refund for poor quality product.[7]

11. However, the jury can take the circumstances of the asserted belief into account in deciding whether it is a reasonable possibility that the accused held that belief.[8]

12. An accused does not need to give evidence of a belief in a claim of right in the terms of the legislation. Instead, the belief may arise from evidence that supports an inference that the accused believed he or she was entitled to possession of the property.[9]

13. However, there must be some evidence which can raise the possibility that the accused acted due to a belief in a claim of right.[10]

14. A claim of right defence is only relevant if the accused deals with property in a way that is objectively dishonest.[11] However, in some cases, there may be an argument that the accused either acted in accordance with an existing right (which is relevant to objective dishonesty) or believed that he or she was acting in accordance with such a right (in

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[6] *R v Bedford* (2007) 98 SASR 514; [2007] SASC 276, [11]; *R v Langham* (1984) 36 SASR 48; *R v Fuge* (2001) 123 A Crim R 310; [2001] NSWCCA 208; *R v Lopatta* (1983) 35 SASR 101; *R v Kastratovic* (1985) 42 SASR 59.

[7] See *R v Bedford* (2007) 98 SASR 514; [2007] SASC 276.

[8] *R v Bedford* (2007) 98 SASR 514; [2007] SASC 276, [40]; *R v Lopatta* (1983) 35 SASR 101.

[9] *R v Bedford* (2007) 98 SASR 514; [2007] SASC 276, [11] (citing *R v Langham* (1984) 36 SASR 48).

[10] *R v Miller* (2008) 103 SASR 174; [2008] SASC 331, [16]–[29].

[11] *R v Baslis* [2011] SASCFC 160, [11].

which case the claim of right defence arises), and the jury must be directed about both limbs of that argument.[12]

Consent

15. A person acts with the consent of the owner if the person acts with the implied consent of the owner, or with the actual or implied consent of a person who has authority to consent on behalf of the owner.[13]

16. A person has implied consent if the person honestly believes from the other person's words or conduct that the person has the other person's consent.[14]

17. A person does not have consent if the person knows that the other person's consent was obtained by dishonest deception.[15]

18. A person who dishonestly causes a bank ATM to make a withdrawal that is not approved by the terms of the person's agreement with the bank cannot assert that the ATM's programming gives rise to consent by the bank.[16]

[12] *R v Kerin* (2013) 116 SASR 316; [2013] SASCFC 56, [189]–[199].
[13] *Criminal Law Consolidation Act 1935* (SA) s 132(1).
[14] *Criminal Law Consolidation Act 1935* (SA) s 132(2).
[15] *Criminal Law Consolidation Act 1935* (SA) s 132(3).
[16] *Kennison v Daire* (1986) 160 CLR 129; [1986] HCA 4.

14.2 – Theft

19. Section 134 creates the offence of theft. The offence consists of four elements:[17]

- The accused deals with property;
- The dealing was dishonest;
- The dealing was without the owner's consent;
- The accused intended to:
  - Permanently deprive the owner of the property;
  - Make a serious encroachment on the owner's proprietary rights.

Dealing

20. Dealing is defined as:

> ***deal***—a person deals with property if the person—
>
> (a) takes, obtains or receives the property; or
>
> (b) retains the property; or
>
> (c) converts or disposes of the property; or
>
> (d) deals with the property in any other way;

21. The effect of this definition is that that a charge under s 134 can involve either the accused having stolen the property or the accused having received stolen property. Unlike the common law, there is no separate offence of receiving stolen property.[18]

22. Instead, receiving is a species of theft, and may be charged either as theft or receiving. If, on a charge of receiving, the court is satisfied that the accused committed theft other than by receiving, the court may find the accused guilty of theft.[19]

23. While the fourth element requires an intention to permanently deprive or seriously encroach on the owner's proprietary rights, it is not necessary to show permanent deprivation or serious encroachment to prove the first element.[20]

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[17] *R v Kerin* (2013) 116 SASR 316; [2013] SASCFC 56, [140].
[18] South Australia, *Parliamentary Debates*, House of Assembly, 29 May 2002, 361–368.
[19] *Criminal Law Consolidation Act 1935* (SA) s 134(5), (6).
[20] See *Police v W, BC* [2005] SASC 100, [6]–[11].

Dishonesty

24. Dishonesty is defined as the accused acting dishonestly according to the standards of ordinary people, knowing that he or she is acting dishonesty.[21]

25. Where it arises, the prosecution must also prove that the accused did not believe that he or she had a legal or equitable right to the property.[22]

26. For information on the element of dishonesty, see 14.1 – General matters.

Without consent

27. The prosecution must prove that the accused without the actual or implied consent of the owner, or of a person who had the authority to consent on behalf of the owner.[23]

28. For more information on the element of acting without consent, see 14.1 – General matters.

Intention

29. The prosecution must prove that the accused either intended to deprive the owner permanently of the property, or to make a serious encroachment on the owner's proprietary rights.[24]

30. An intention to make a serious encroachment on an owner's proprietary rights is defined as an intention:[25]

> (a) to treat the property as his or her own to dispose of regardless of the owner's rights; or
>
> (b) to deal with the property in a way that creates a substantial risk (of which the person is aware)—
>
> (i) that the owner will not get it back; or
>
> (ii) that, when the owner gets it back, its value will be substantially impaired.

31. This represents an expansion of the reach of the offence compared to the common law of larceny, which had encountered problems with situations of reckless conduct, unauthorised borrowing and temporary use.[26]

32. Proving that the accused treated the property as his or her own to dispose of regardless of the owner's rights will depend on the nature and duration of the accused's intended

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[21] *Criminal Law Consolidation Act 1935* (SA) s 131(1).
[22] *Criminal Law Consolidation Act 1935* (SA) s 131(5), (6).
[23] *Criminal Law Consolidation Act 1935* (SA) s 132(1).
[24] *Criminal Law Consolidation Act 1935* (SA) s 134(1).
[25] *Criminal Law Consolidation Act 1935* (SA) s 134(2).
[26] *McGuiness v Police* (2016) 125 SASR 413; [2016] SASC 133, [28]–[38].

use and the nature of the property. In some cases, a minor and temporary use may be sufficient for this element, while for other types of property more may be required.[27]

33. In some cases, where the accused takes unmarked property for the purpose of temporary use, and abandons that property in another location, there may be a substantial risk that the owners would not get their property back because they would not find it. Where the accused is aware of the facts which give rise to the relevant risk, it may be open to the jury to infer that the accused intended and was aware of that risk.[28]

34. In the case of cars, an intention to use a car and then abandon it without returning it to the owner will usually be enough to constitute a serious encroachment on the owner's proprietary rights for the purpose of s 134(1)(c)(ii).[29]

35. An intention to permanently deprive or seriously encroach on the owner's proprietary rights is a separate element from proof of dishonesty. A court should not assume that proof of dishonesty necessarily involves proof of an intention to seriously encroach on the owner's proprietary rights.[30]

Misuse of powers

36. Section 134(3) specifically provides that a person can commit theft by misuse of powers as an agent or trustee or other capacity that allows the person to deal with the property. The section gives the following example:

> **Example**
>
> Suppose that land is vested in a trustee in a fiduciary capacity. She is empowered under the instrument of trust to mortgage the land for the purposes of the trust. The trustee dishonestly mortgages the land as security for a personal liability that is unrelated to the trust. In this case, the trustee commits theft of the interest created by the mortgage.

37. This provision does not operate to add, delete or replace any elements of the offence. Instead, it confirms that the elements may be satisfied in particular factual situations.[31]

38. Where there is an agent or trustee relationship, the tribunal of fact must consider the absence of consent element by taking into account whether the donor of the power consented to the kinds of actions taken by the accused. This may include considering the scope of the agent or trustee relationship by assessing both the terms of the relevant instrument, the surrounding circumstances and the role of any relevant statutory provisions.[32]

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[27] *McGuiness v Police* (2016) 125 SASR 413; [2016] SASC 133, [39]–[40].
[28] *Lee v Police* [2015] SASC 70, [35].
[29] *McGuiness v Police* (2016) 125 SASR 413; [2016] SASC 133, [43]–[45].
[30] *Police v W, BC* [2006] SASC 105, [27].
[31] *R v Kerin* (2013) 116 SASR 316; [2013] SASCFC 56, [148], [157], [173]–[174].
[32] *R v Kerin* (2013) 116 SASR 316; [2013] SASCFC 56, [148] – [150] and see, e.g. *Powers of Attorney and Agency Act 1984* (SA) s 7.

Theft of lawfully acquired property

39. Section 134(3)(a) provides that it is possible for a person to commit theft of property that has lawfully come into that person's possession.

40. In contrast, s 134(4) states:

> If a person honestly believes that he or she has acquired a good title to property, but it later appears that the title is defective because of a defect in the title of the transferor or for some other reason, the later retention of the property, or any later dealing with the property, by the person cannot amount to theft.

Theft of money

41. Under s 136, a person may be charged with and convicted of theft by reference to a general deficiency in money or other property, and it is not necessary to establish any particular acts of theft.

42. This provision preserves the former s 179 and its precursors which applied to charges of larceny or embezzlement by clerks and servants, and was designed to deal with cases where a servant took small sums continually over a period of time, in circumstances where it was not possible to prove how much was taken on each occasion. The provision allows the total balance taken to be charged on the basis of a general deficiency in the amount credited to the servant's master over a period of time. It also applied where mixed funds were misappropriated and it could not be identified whose contribution to the fund had been appropriated.[33]

Theft of land and fixtures

43. Trespasses and physical interferences with land cannot amount to theft, even where it leads to acquisition of the land by adverse possession.[34]

44. While fixtures are usually considered part of real property, a fixture can be stolen by severing it from the land.[35]

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[33] See *R v Goodall* (1975) 11 SASR 94; *R v Rich & Hynes* (1997) 68 SASR 390; *R v Gould* (1995) 184 LSJS 424.

[34] *Criminal Law Consolidation Act 1935* (SA) s 135(1).

[35] *Criminal Law Consolidation Act 1935* (SA) s 135(2).

Jury Direction #14.2 – Theft

I will now direct you as to the elements of theft.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused dealt with property;

Two – The accused's dealing with the property was dishonest;

Three – The accused's dealing with the property was without the owner's consent;

Four – The accused intended to permanently deprive the owner of the property or to seriously encroach on the owner's rights in the property.

I will now explain these four elements and how they apply in this case.

Dealing with property

The first element is that the accused dealt with property.

A person deals with property if they [*identify relevant limb of definition, e.g.* take / obtain / receive / retain] property.

The prosecution says that the accused dealt with property by [*identify relevant evidence and arguments*].

The defence rejects this, and says [*identify relevant evidence and arguments*].

Dishonesty

The second element is that the accused dealt with the property dishonestly.

There are two parts to showing that the accused was acting dishonestly.

First, his/her actions must have been dishonest according to the standards of ordinary people.

Second, s/he must have known that his/her actions were dishonest according to the standards of ordinary people.

[If a claim of right is raised, add the following direction: One issue you must consider is whether the accused thought s/he had a legal right to the property. A person is not dishonest if they deal with property believing that they have a legal right to that property. There are three directions I must give you about this issue. First, like all elements, the prosecution must prove that the accused did not believe s/he had a legal right to the property. As I have told you, the accused does not have to prove anything. Second, this issue of a belief in legal right looks at the accused's state of mind. The issue is whether there is a reasonable possibility that the accused <u>believed</u> s/he had a legal right to the property. It does not matter whether this belief was well-founded or correct. Third, a belief in a right only needs to be a belief in a

right to the property. It does not need to be a belief in the right to do what the accused did to [take / obtain / receive / retain] the property.]

[*Refer to relevant evidence and arguments*].

Without consent

The third element is that the accused dealt with the property without the owner's consent.

That is, the prosecution must prove that the property owner did not agree to the accused dealing with the property.

[*Refer to relevant evidence and arguments*].

Intention[36]

The fourth element looks at the accused's state of mind.

The prosecution must prove that the accused either intended to permanently deprive the owner of the property or s/he intended to seriously encroach on the owner's rights in the property.

A person intends to permanently deprive someone of property if they intend that the person will not get it back.

The law recognises three ways a person can intend to seriously encroach on the owner's rights in the property. The first is if the accused intends to treat the property as his/her own to dispose of, regardless of the owner's rights.

The second is if the accused intends to deal with the property in a way that creates a substantial risk that the owner will not get it back, and the accused is aware of that substantial risk.

The third is if the accused intends to deal with the property in a way that creates a substantial risk that, when the owner gets the property back, its value will be substantially impaired, and the accused is aware of that substantial risk.

The prosecution has argued that the accused intended to [*identify alleged intended use of the property, e.g.* take the car and keep it as his own] and this meant s/he intended to [*identify form of permanent deprivation or serious encroachment, e.g.,* intended to permanently deprive the owner of the car]. The defence disputes this, and says that the accused only intended to [*identify hypothesis consistent with innocence*].

[*Refer to relevant evidence and arguments*].

[36] Judges should omit parts of this direction that are not relevant in their case.

14.3 – Robbery

45. Section 137 creates the offence of robbery. The offence consists of three elements:

    - The accused commits theft;
    - The accused uses force or threatens to use for against another in order to commit the theft or to escape from the scene of the offence;
    - The force or threat was used at the time of or immediately before or after the theft;

46. If two of more people commit robbery in company, each is guilty of aggravated robbery.[37]

47. The legislation gives the following example regarding aggravated robbery in company:

> Suppose that A and B plan to steal from a service station. A assaults the attendant while B takes money from the till. In this case, each is guilty of robbery on the principle enunciated by the High Court in *McAuliffe v R* ((1995) 183 CLR 108). Robbery committed in these circumstances is to be treated as aggravated robbery. In other words, the principle that, where robbery is committed jointly, each participant in the offence is guilty of aggravated robbery applies irrespective of whether all elements of robbery can be established against a particular person.

48. Strictly speaking, the effect of *McAuliffe v R* is that all elements can be proved against each participant, whether they personally committed the relevant acts or not. It does not, contrary to the last sentence of the example, render a person guilty of an offence where the elements cannot be established against that person.

[37] *Criminal Law Consolidation Act 1935* (SA) s 137(2).

Jury Direction #14.3A – Robbery – Full

I will now direct you as to the elements of robbery.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused committed theft;

Two – The accused used or threatened to use force against a person in order to commit the theft;

Three – The accused used or threatened to use force at the time of or immediately before or after the theft.

I will now explain these three elements and how they apply in this case.

Theft

The first element is that the accused committed theft.

Theft is a criminal offence which has its own four elements. These are:

One – The accused dealt with property;

Two – The accused's dealing with the property was dishonest;

Three – The accused's dealing with the property was without the owner's consent;

Four – The accused intended to permanently deprive the owner of the property or to seriously encroach on the owner's rights in the property.

I therefore have to explain the elements of theft to you, before I can go back to explaining the law of robbery.

Dealing with property

The first element of theft is that the accused dealt with property.

A person deals with property if they [*identify relevant limb of definition, e.g.* take / obtain / receive / retain] property.

The prosecution says that the accused dealt with property by [*identify relevant evidence and arguments*].

The defence rejects this, and says [*identify relevant evidence and arguments*].

Dishonesty

The second element of theft is that the accused dealt with the property dishonestly.

There are two parts to showing that the accused was acting dishonestly.

First, his/her actions must have been dishonest according to the standards of ordinary people.

Second, s/he must have known that his/her actions were dishonest according to the standards of ordinary people.

If a claim of right is raised, add the following direction: One issue you must consider is whether the accused thought s/he had a legal right to the property. A person is not dishonest if they deal with property believing that they have a legal right to that property. There are three directions I must give you about this issue. First, like all elements, the prosecution must prove that the accused did not believe s/he had a legal right to the property. As I have told you, the accused does not have to prove anything. Second, this issue of a belief in legal right looks at the accused's state of mind. The issue is whether there is a reasonable possibility that the accused <u>believed</u> s/he had a legal right to the property. It does not matter whether this belief was well-founded or correct. Third, a belief in a right only needs to be a belief in a right to the property. It does not need to be a belief in the right to do what the accused did to [take / obtain / receive / retain] the property.

[*Refer to relevant evidence and arguments*].

Without consent

The third element of theft is that the accused dealt with the property without the owner's consent.

That is, the prosecution must prove that the property owner did not agree to the accused dealing with the property.

[*Refer to relevant evidence and arguments*].

Intention[38]

The fourth element of theft looks at the accused's state of mind.

The prosecution must prove that the accused either intended to permanently deprive the owner of the property or s/he intended to seriously encroach on the owner's rights in the property.

A person intends to permanently deprive someone of property if they intend that the person will not get it back.

The law recognises three ways a person can intend to seriously encroach on the owner's rights in the property. The first is if the accused intends to treat the property as his/her own to dispose of, regardless of the owner's rights.

[38] Judges should omit parts of this direction that are not relevant in their case.

The second is if the accused intends to deal with the property in a way that creates a substantial risk that the owner will not get it back, and the accused is aware of that substantial risk.

The third is if the accused intends to deal with the property in a way that creates a substantial risk that, when the owner gets the property back, its value will be substantially impaired, and the accused is aware of that substantial risk.

The prosecution has argued that the accused intended to [*identify alleged intended use of the property, e.g.* take the car and keep it as his own] and this meant s/he intended to [*identify form of permanent deprivation or serious encroachment, e.g.,* intended to permanently deprive the owner of the car]. The defence disputes this, and says that the accused only intended to [*identify hypothesis consistent with innocence*].

[*Refer to relevant evidence and arguments*].

Use of force / threat of force

The second element of robbery is that the accused used or threatened to use force against a person in order to commit the theft.

This element looks at two issues.

First, did the accused use or threaten to use force against [*complainant*]?

Second, what was the accused's purpose in using or threatening to use force against [*complainant*]?

[*Refer to relevant evidence and arguments*].

Timing of use of force

The third element of robbery is that the force was used at the time of, or immediately before or after the theft.

You have heard evidence that [*refer to evidence regarding the timing of the use of force*].

It is up to you to decide whether this occurred at the time of, or immediately before or after the theft.

[*Refer to relevant evidence and arguments*].

Jury Direction #14.3B – Robbery – Short

I will now direct you as to the elements of robbery.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused committed theft;

Two – The accused used or threatened to use force against a person in order to commit the theft;

Three – The accused used or threatened to use force at the time of or immediately before or after the theft.

In this case, there is no dispute that someone committed robbery against [*complainant*].

The only dispute is whether it was [*accused*] that committed the robbery.

[*Refer to relevant evidence and arguments about identity of offender*]

14.4 – Dishonest gains and detriment

49. Section 139 creates the offence of deception. The offence consists of three elements:[39]

- The accused deceived a person;
- The deception benefitted the accused or a third person, or caused a detriment to the person subjected to the deception or a third person;
- The accused was dishonest in obtaining that benefit or causing that detriment.

50. Section 130 contains the following relevant definitions:[40]

> ***deceive*** means to engage in deception;
>
> ***deception*** means a misrepresentation by words or conduct and includes—
>
> (a) a misrepresentation about a past, present or future fact or state of affairs; or
>
> (b) a misrepresentation about the intentions of the person making the misrepresentation or another person; or
>
> (c) a misrepresentation of law;
>
> ***detriment*** means—
>
> (a) a detriment of a proprietary nature; or
>
> (b) a financial disadvantage; or
>
> (c) loss of an opportunity to gain a benefit; or
>
> (d) a detriment of a kind that might result from the exercise of a public duty in a particular way;

Deception

51. The first element requires the prosecution to identify the relevant misrepresentation.[41]

52. A misrepresentation about future intended conduct may need to be considered with care. To prove the offence, the jury needs to be satisfied beyond reasonable doubt that the representation was false when it was made. The accused will be entitled to be acquitted of this offence if there is a reasonable possibility that he or she only decided to appropriate the property after having received access to the property.[42]

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[39] *R v Stewart* [2010] SASCFC 72, [24].

[40] *Criminal Law Consolidation Act 1935* (SA) s 130.

[41] *R v Stewart* [2010] SASCFC 72, [24].

[42] Compare *Theophilus v Police* (2011) 110 SASR 420; [2011] SASC 135, [94]–[100] (manager of a business who lawfully ordered property for the business, which he later stole, was not guilty, as the intention to steal needed to exist at the time of ordering, rather than at a later time) and *R v Donjerkovic* (2012) 278 LSJS 457; [2012] SASCFC 2 (partner in a joint venture held to have always intended to appropriate moneys provided for the purpose of joint venture and no reasonable possibility that this intention was formed after the money was provided).

Causing loss or gain

53. The second element includes a requirement of showing that the deception was the cause (or operative inducement[43]) of the other person parting with property. This may require proof that the victim did not part with the property for some other reason, the deception having had no impact on the decision. Proof of the impact of the deception often requires evidence from the victim of the deception about the impact of the deception, though in some cases the impact of the deception may be proved by inference and explicit evidence is not required.[44]

54. The accused's deception does not need to be the sole, or even the main, cause of the detriment. Causation for this purpose uses the general principles of causation, which is determined as a common sense matter while recognising that it is for the purpose of determining legal responsibility in a criminal matter.[45]

55. There may be some delay between the deception and the occurrence of the relevant detriment, provided the deception was still operative at the time of the detriment and could still be treated, as a matter of common sense, as a cause of the detriment.[46]

Dishonesty

56. Dishonesty is defined in s 131. See 14.1 – General matters for a discussion of the meaning of dishonesty, including the availability of a claim of right defence.

57. Use of deception to induce the debtor to abandon a defence or dispute about a debt could constitute an intention to defraud at common law, provided the accused believed that the debt was currently payable, and was not aware that the debtor considered there was a genuine dispute or reasonably available defence regarding the debt.[47] It is likely that, as at common law, use of deception may be evidence of dishonesty, but is not determinative. This is because the legal definition of dishonesty requires proof that the accused acted dishonestly according to the standards of ordinary people, knowing that he or she is acting dishonestly, and without a claim a legal right. An accused is therefore entitled to be acquitted if he or she acted only to enforce what he believed was a presently owing, undisputed, debt, even if the acts involved deception.

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[43] *Low v The Queen* (1978) 23 ALR 616, 625 per Brinsden J.

[44] *Theophilus v Police* (2011) 110 SASR 420, [24]–[30]; *R v Laverty* [1970] 3 All ER 432.

[45] *R v Donjerkovic* (2012) 278 LSJS 457; [2012] SASCFC 2, [22]; *Royall v The Queen* (1990) 172 CLR 378.

[46] *R v Donjerkovic* (2012) 278 LSJS 457; [2012] SASCFC 2, [31]–[34].

[47] See *R v Kastratovic* (1985) 42 SASR 59, 65–66.

Jury Direction #14.4 – Dishonest gains

Note: This direction is designed for a case where the accused dishonestly gains property from the victim. Where the case involves a dishonest causing of detriment, without a corresponding gain, the direction will need to be modified.

I will now direct you as to the elements of the deception.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused deceived a person;

Two – The deception caused the accused to gain a benefit for himself or another person;

Three – The accused was dishonest in obtaining that benefit;

I will now explain these three elements and how they apply in this case.

Deception

The first element is that the accused deceived a person.

The prosecution says that [*accused*] told [*complainant*] that [*identify misrepresentation*]. The prosecution says this is a deception because, at the time s/he said that, [*accused*] did not believe that to be true. Instead, at that time, [*accused*] [*identify claimed belief or intention which causes statement to be a misrepresentation*]. [*Identify relevant evidence and arguments*]

The defence disputes this, and says [*identify relevant evidence and arguments*].

Causing a gain

The second element is that the accused's deception cause him to gain some benefit.

For this element, the prosecution must prove two things.

First, the accused must have gained some benefit. Here, the prosecution says the benefit was [*identify relevant benefit*].

Second, the prosecution must show that the alleged deception caused the benefit.

In deciding whether the alleged deception caused a particular outcome, the law says you must approach this question using your common sense, while recognising that you are deciding whether a person is criminally responsible for that outcome.

[*Refer to relevant evidence and arguments*].

Dishonesty

The third element is that the accused was dishonest in obtaining that benefit.

There are two parts to showing that the accused was acting dishonestly.

First, his/her actions must have been dishonest according to the standards of ordinary people.

Second, s/he must have known that his/her actions were dishonest according to the standards of ordinary people.

If a claim of right is raised, add the following direction: One issue you must consider is whether the accused thought s/he had a legal right to the property. A person is not dishonest if they deceive a person to obtain property, believing that they have a legal right to that property. There are three directions I must give you about this issue. First, like all elements, the prosecution must prove that the accused did not believe s/he had a legal right to the property. As I have told you, the accused does not have to prove anything. Second, this issue of a belief in legal right looks at the accused's state of mind. The issue is whether there is a reasonable possibility that the accused <u>believed</u> s/he had a legal right to the property. It does not matter whether this belief was well-founded or correct. Third, a belief in a right only needs to be a belief in a right to the property. It does not need to be a belief in the right to do what the accused did to obtain the property.

[*Refer to relevant evidence and arguments*].

14.5 – Money laundering

58. Section 138 creates two offences of money laundering. The first offence has three elements:

- The accused engages in a transaction involving property;
- The property is tainted property;
- The accused knows the property is tainted property.

59. The second offence also has three elements:

- The accused engages in a transaction involving property;
- The property is tainted property;
- The accused ought reasonably to know that the property is tainted

Engaging in a transaction

60. A transaction is defined as:[48]

> (a) bringing property into the State;
>
> (b) receiving property;
>
> (c) being in possession of property;
>
> (d) concealing property;
>
> (e) disposing of property.

61. The first element is proved if the accused engaged in the transaction directly or indirectly.[49]

Tainted property

62. Tainted property is defined as:[50]

> stolen property or property obtained from any other unlawful act or activity (within or outside the State), or the proceeds of such property (but property ceases to be tainted when it passes into the hands of a person who acquires it in good faith, without knowledge of the illegality, and for value);

63. Stolen property is defined as:[51]

> property stolen within or outside the State, but property ceases to be stolen property when—

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[48] *Criminal Law Consolidation Act 1935* (SA) s 138.
[49] *Criminal Law Consolidation Act 1935* (SA) s 138.
[50] *Criminal Law Consolidation Act 1935* (SA) s 130.
[51] *Criminal Law Consolidation Act 1935* (SA) s 130.

(a) it is restored to the person from whom it was stolen or other lawful custody; or

(b) the person from whom it was stolen ceases to have a right to restitution;

64. "Property obtained from any other unlawful act or activity" can include the proceeds of drug trafficking.[52]

65. While the common conception of money laundering is to disguise the true origin of money obtained through criminal offending,[53] the width of the definition of tainted property has the effect that the offending also applies to a person who knowingly sells stolen goods.[54]

Fault elements

66. The two offences in s 138 differ in the relevant fault element. For the first offence, under s 138(1), the prosecution must show that the accused knew the property was tainted.

67. In contrast, the second offence, under s 138(2), contains an objective fault element. The prosecution must prove that at the time of the relevant transaction, the accused "ought reasonably to know that the property is tainted".

[52] See, e.g. *R v Tran* [2017] SASCFC 99. But see *Milne v The Queen* (2014) 252 CLR 149; [2014] HCA 4, where the High Court held that the sale of shares with an intention to evade taxation by failing to declare a capital gain did not involve the shares being or becoming an instrument of crime.

[53] *R v Montila* [2004] UKHL 50, [3], quoted in *R v Beary* (2004) 11 VR 151; [2004] VSCA 229, [2].

[54] See also *R v Beary* (2004) 11 VR 151; [2004] VSCA 229, [31]–[32].

Jury Direction #14.5A – Money laundering with knowledge

Note: This direction is designed for cases where the tainted property is derived from unlawful activity. If property is tainted for a different reason, such as if the property is stolen property, the direction must be modified.

I will now direct you as to the elements of money laundering.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused engaged in a transaction involving property;

Two – The property was tainted property;

Three – The accused knew the property was tainted property.

I will now explain these three elements and how they apply in this case.

Engaging in a transaction involving property

The first element is that the accused engaged in a transaction involving property.

For the purpose of this charge, the property in question is [*identify relevant property*].

To prove this element, the prosecution must show that the accused [*identify relevant form of transaction, e.g.,* brought the property into South Australia / received the property / had possession of the property / concealed the property / disposed of the property].

[*Refer to relevant evidence and arguments*].

Tainted property

The second element is that the property was tainted property.

To prove that the [*identify relevant property*] is tainted, the prosecution must show that it was obtained from unlawful activity. In this case, the prosecution says that the property was obtained from [*identify relevant unlawful act*].

[*Refer to relevant evidence and arguments*].

Knowledge of tainted property

The third element is that the accused must have known the property was tainted property.

This element looks at the accused's state of mind.

The prosecution must prove that the accused knew the [*identify relevant property*] had been obtained from [*identify relevant unlawful act*].

[*Refer to relevant evidence and arguments*].

Jury Direction #14.5B – Money laundering with negligence

Note: This direction is designed for cases where the tainted property is derived from unlawful activity. If property is tainted for a different reason, such as if the property is stolen property, the direction must be modified.

I will now direct you as to the elements of money laundering.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused engaged in a transaction involving property;

Two – The property was tainted property;

Three – The accused ought reasonably to have known the property was tainted property.

I will now explain these three elements and how they apply in this case.

Engaging in a transaction involving property

The first element is that the accused engaged in a transaction involving property.

For the purpose of this charge, the property in question is [*identify relevant property*].

To prove this element, the prosecution must show that the accused [*identify relevant form of transaction, e.g.,* brought the property into South Australia / received the property / had possession of the property / concealed the property / disposed of the property].

[*Refer to relevant evidence and arguments*].

Tainted property

The second element is that the property was tainted property.

To prove that the [*identify relevant property*] is tainted, the prosecution must show that it was obtained from unlawful activity. In this case, the prosecution says that the property was obtained from [*identify relevant unlawful act*].

[*Refer to relevant evidence and arguments*].

Ought reasonably to have known

The third element is that the accused ought reasonably to have known the property was tainted property.

This element looks at what the accused should have known.

The prosecution must prove that the accused ought reasonably to have known the [*identify relevant property*] had been obtained from [*identify relevant unlawful act*]. This requires you

to consider whether a reasonable person in the accused's position would have known the property was tainted.

[*Refer to relevant evidence and arguments*].

CHAPTER 15: FIREARMS OFFENCES

15.1 – Possession of a firearm with intent to commit an offence

1. Section 32 creates two offences of possessing a firearm for a prescribed purpose.

2. The first offence has two elements:

   - The accused has custody or control of a firearm or imitation firearm;
   - The accused intends to use the firearm, or cause or permit another person to use the firearm, in the course of committing an offence punishable by 2 years imprisonment or more.

3. The second offence also has two elements:

   - The accused has custody or control of a firearm or imitation firearm;
   - The accused intends to carry, or cause or permit another person to carry, the firearm, when committing an offence punishable by 2 years imprisonment or more.

4. Whether and how extended jury unanimity may apply to the requirement to identify the offence intended will need to be determined in each case.

Jury Direction #15.1 – Possession of a firearm with intent to commit an offence

Note: This direction is designed for cases where the accused is charged with committing the offence described in s 32(a). It must be modified if the prosecution relies on s 32(b).

I will now direct you about the elements of possession of a firearm with intent to commit an offence.

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused had custody or control of a firearm or imitation firearm;

Two – The accused's purpose for having custody or control was to use, or cause or permit another person to use, the firearm in the course of committing an offence punishable by imprisonment for two years or more.

I will now explain these two elements and how they apply in this case.

Custody or control

The first element is that the accused had custody or control of a firearm or imitation firearm.

A person has custody or control over something if they have the power and intention to exercise control over that item, to the exclusion of others.

This is different to ownership. Ownership lets you use, sell or destroy something. For this element, you are looking at whether the accused had a right to exercise control. That does not require that [*accused*] had the firearm on his person. Just like you continue to exercise custody or control over your car when it is parked in your garage, or when you have driven and parked it somewhere, a person can continue to have custody and control over a firearm if they leave it somewhere for storage or safe keeping.

[*Identify relevant evidence and arguments*]

Purpose

The second element the prosecution must prove is that [*accused*] had custody or control of the firearm or imitation firearm for the purpose of using it, or having another person use it, in the course of committing a criminal offence.

This element relates to the accused's state of mind. It requires the prosecution to prove that the accused had custody or control of the firearm or imitation firearm for a particular purpose.

In this case, the prosecution says that the accused had the gun for the purpose of committing [*identify relevant offence(s)*].

I therefore need to explain the meaning of [*identify relevant offence(s)*]. A person commits [*identify relevant offence*] if s/he [*insert directions on secondary offence(s)*].

[*Identify relevant evidence and arguments*]

15.2 – Discharge of a firearm to injure or damage property

5. Section 32AA creates four offences of unlawfully discharging a firearm.

6. The first offence has three elements:[1]

   - The accused intentionally discharged a firearm;
   - The accused intended to injure, annoy or frighten a person;
   - The accused acted without lawful excuse.

7. The second offence has three elements:[2]

   - The accused intentionally discharged a firearm;
   - The accused intended to damage any property;
   - The accused acted without lawful excuse.

8. The third offence has three elements:[3]

   - The accused intentionally discharged a firearm;
   - The accused was reckless as to whether that act injures, annoys or frightens a person, or may injure, annoy or frighten a person;
   - The accused acted without lawful excuse.

9. The fourth offence has three elements:[4]

   - The accused intentionally discharged a firearm;
   - The accused was reckless as to whether that act damages or may damage any property;
   - The accused acted without lawful excuse.

10. For these offences, it is not necessary to prove that a person was actually injured, annoyed or frightened, or that property was damaged.[5]

11. For the purpose of these offences, a person is reckless if he or she:[6]

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[1] *Criminal Law Consolidation Act 1935* s 32AA(1).
[2] *Criminal Law Consolidation Act 1935* s 32AA(2).
[3] *Criminal Law Consolidation Act 1935* s 32AA(3).
[4] *Criminal Law Consolidation Act 1935* s 32AA(4).
[5] *Criminal Law Consolidation Act 1935* s 32AA(5).
[6] *Criminal Law Consolidation Act 1935* s 32AA(6).

- is aware of a substantial risk that the act could injure, annoy or frighten any person, or damage any property (as the case may be); and
- does the act despite the risk and without adequate justification.

12. This is equivalent to the definition of recklessness that applies to offences such as causing serious harm under s 23(3) or causing harm under s 24(2). See 8.1 – Intentionally or recklessly causing serious harm for information about the statutory meaning of recklessness.

Without lawful excuse

13. The third element of each offence in s 32AA is that the accused acted without lawful excuse. The wording of the section suggests that the provision engages *Criminal Law Consolidation Act 1935* s 5B, which puts the onus of proving the existence of a lawful excuse on the accused. The model jury directions therefore contain a sample reverse onus direction, to be modified as required by the particular case.

Jury Direction #15.2 – Discharging a firearm to intentionally injure, annoy or frighten

Note: This direction is designed for cases where the accused is charged with committing the offence described in s 32AA(1). It must be modified if the prosecution relies on other offences in s 32AA.

I will now direct you about the elements of discharging a firearm to intentionally injure, annoy or frighten.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused intentionally discharged a firearm;

Two – The accused intended to injure, annoy or frighten a person;

Three – The accused acted without lawful excuse.

I will now explain these three elements in more detail.

Discharge

The first element is that the accused intentionally discharged a firearm.

To prove this element, the prosecution must show that the accused fired the gun, and that s/he meant to do so.

[*Identify relevant evidence and arguments*].

Intention

The second element is that the accused discharged the firearm intending to injure, annoy or frighten a person.

This element relates to the accused's state of mind. You must consider the accused's purpose in discharging the firearm.

[*Identify relevant evidence and arguments*].

Without lawful excuse

The third element is that the accused acted without lawful excuse.

The defence have argued that the accused [*identify relevant act*] [*identify relevant lawful excuse*].

The law states that, for this element, the defence must prove that s/he [*identify relevant lawful excuse*].

This is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. When the defence has to prove something, a

different standard applies. The prosecution must prove the other elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that it is more likely than not that [*identify relevant lawful excuse*].

[*Insert directions on lawful excuse*]

15.3 – Unlicensed possession of a firearm

14. *Firearms Act 2015* s 9 creates offences involving the unlicensed possession of firearms.

15. Due to the structure of the provision, it is unclear how many different offences the section creates, as separate penalties are specified for different kinds of firearms, and based on whether the offence is aggravated or not. The section also prescribes two different forms of conduct – unauthorised possession and possession or use for a purpose that is not authorised.

16. The basic unauthorised possession offence requires proof of three elements:[7]

- The accused has possession of a firearm;
- The firearm is a prescribed firearm, a category C, D or H firearm, or is in any other category of firearm (depending on the offence charged);
- The accused does not have a firearms licence authorising possession of that firearm.

17. The basic unauthorised purpose offence in relation to a prescribed firearm also requires proof of three elements:[8]

- The accused has possession of, or uses, a firearm;
- The accused's possession or use is for a purpose not authorised by a firearms licence;
- The firearm is a prescribed firearm, a category C, D or H firearm, or is in any other category of firearm (depending on the offence charged).

Unauthorised possession offence

Possession of a firearm

18. Firearm is defined in s 4 of the *Firearms Act 2015* as:[9]

> ***firearm*** means—
>
> (a) a device designed to fire bullets, shot or other projectiles by means of burning propellant or by means of compressed air or other compressed gas; or
>
> (b) a device of a kind declared by the regulations to be a firearm,
>
> and includes a receiver of a firearm and any device or devices which (whether or not rendered temporarily or permanently unusable) would, if in working order, or if assembled and in working order, be a firearm within the meaning of this definition but does not include—

[7] *Firearms Act 2015* s 9(1), (4); *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [18].
[8] *Firearms Act 2015* s 9(2), (4).
[9] *Firearms Act 2015* s 4.

(c) an antique firearm; or

(d) a device of a kind declared by the regulations not to be a firearm;

19. For the purpose of these offences, *Firearms Act 2015* s 6(2) defines a person as having possession if:[10]

(a) the person has physical possession or control of the item or has the item in the physical possession or control of another; or

(b) the person has and exercises access to the item; or

(c) the person controls access to the item; or

(d) the person occupies, or has care, control or management of, premises, or is in charge of a vehicle, vessel or aircraft, where the item is found.

20. This definition of possession extends the concept of possession beyond the common law notion of possession.[11]

21. While the definition under *Firearms Act 2015* s 6(2)(a) is broadly equivalent to common law possession, it includes possession by an agent.[12]

22. Where a person is charged with both drugs and firearms offences, there is a risk of error in starting from the position that possession for the purpose of the *Firearms Act 2015* equates to possession applicable to offences under the *Controlled Substances Act 1984*.[13]

23. While paragraph (b) extends the common law notion of possession by removing the requirement of exclusivity,[14] the possibility that another person is in exclusive possession of the firearm may be relevant in deciding whether the accused did have and exercise access.[15] Further, this provision does not apply to render a person in possession merely by being in a place where they could access a firearm in the exclusive possession of another person, such as where they acquiesce to the presence of a firearm.[16]

24. The *Firearms Act 2015* creates an exception to the definition of possession in paragraph (d). That limb of the definition does not apply if the accused proves that:[17]

(a) he or she did not know, and could not reasonably be expected to have known, that the item was on or in the premises, vehicle, vessel or aircraft; or

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[10] *Firearms Act 2015* s 6(2).
[11] *R v Britten* [2018] SASCFC 36, [17]; *R v Becirovic* [2017] SASCFC 156, [165].
[12] *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8, [23].
[13] *R v Becirovic* [2017] SASCFC 156, [278].
[14] *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8, [23].
[15] See *R v Becirovic* [2017] SASCFC 156, [256], [276]–[280]; *R v Neal* (2017) 128 SASR 20; [2017] SASCFC 44, [43]–[45].
[16] *R v Neal* (2017) 128 SASR 20; [2017] SASCFC 44, [50].
[17] *Firearms Act 2015* s 6(3).

(b) the item was in the lawful possession of another or he or she believed on reasonable grounds that the item was in the lawful possession of another.

25. The effect of ss 6(2)(d) and 6(3) is to create a rebuttable presumption of possession against a person who exercises a degree of control over the premises or vehicle in which the firearm is found. The prosecution must first prove beyond reasonable doubt the basis for possession in s 6(2)(d), and then, to discharge the rebuttable presumption, the accused must establish the matters in either ss 6(3)(a) or (b) on the balance of probabilities.[18]

26. The term "in charge of" in s 6(2)(d) must be given a broad interpretation, as the purpose is to extend the definition of possession and the provision does not, by itself, create criminal responsibility, but merely triggers a rebuttable presumption.[19] The required degree of control is less than ownership and the terms "care" and "management" will generally connote something significantly less than control.[20] Further, "care" may be synonymous with "safe-keeping" and management may mean effective control.[21]

27. The term "in charge of" will most naturally apply to the driver, captain or pilot of a vehicle, vessel or aircraft. However, it may also extend to other people, and there may be more than one person in charge of a vehicle, vessel or aircraft.[22]

28. To be in charge of a vehicle requires a person to have "a degree of practical control over the vehicle that is suggestive of some knowledge of, or connection with, items located in the vehicle".[23] Ownership will often be sufficient, though in some cases, ownership will not be associated with practical control.[24]

29. Proof of possession under s 6(2)(a) requires proof that the accused knew of the existence of the firearm (though, as noted above, the accused need not know that the object is a firearm[25]). In contrast, proof under paragraph s 6(2)(d) does not, as the question of knowledge instead arises under the reverse onus provision in s 6(3).[26]

30. *Firearms Act 2015* section 6(4) creates an extended definition of possession of a firearm which allows a person to be found in possession on the basis of having possession of

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[18] *R v Fuller & Zazzaro* [2012] SASCFC 101, [37], [50]-[51].
[19] *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8, [24]; *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [41].
[20] *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8, [25].
[21] *R v Becirovic* [2017] SASCFC 156, [226]-[227].
[22] *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8, [26]-[31]; *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [46].
[23] *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [43].
[24] *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [44].
[25] *R v Fuller & Zazzaro* [2012] SASCFC 101, [72]-[73].
[26] *R v Gjergji* (2016) 126 SASR 106; [2016] SASCFC 101, [22].

disassembled parts of a firearm in conjunction with other people at the same location. The section states:[27]

> For the purposes of this Act, if 2 or more persons who occupy or are present on or in the same premises, vehicle, vessel or aircraft, or are in each other's company, have different firearm parts in their physical possession or control which would constitute a firearm if assembled and in working order, each of the persons will be taken to possess the firearm.

Possession, knowledge and intention

31. There are conflicting decisions on what state of mind the prosecution must prove to establish possession.[28]

32. As a matter of prudence, this Bench Book takes the view that, as part of proving the accused 'possessed a firearm', the prosecution must generally prove the accused knew the essential facts which make the object a firearm, such as it being a "device designed to fire bullets, shot or other projectiles by means of burning propellant or by means of compressed air or other compressed gas".[29] However, this requirement does not apply when the prosecution relies on s 6(2)(d), as that section deems a person to be in possession of the firearm based on where the firearm is found.

Types of firearms

33. Section 9 sets different maximum penalties according to the type of firearm. The section groups firearms into three categories:

- Prescribed firearms;
- Category C, D or H firearms;
- Any other category of firearm.

34. Each of these terms is defined in s 5, and the definitions are not repeated here.[30]

Firearms licence

35. The prosecution must prove that the accused did not have a firearms licence for the firearm in question. Licences may specify particular firearms, or firearms of a particular category, along with the purpose of possession.[31]

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[27] *Firearms Act 2015* s 6(4).

[28] Note the discussion in *R v Joyce* [2014] SADC 125, [85]–[103] and *R v Bridgland* [2019] SADC 162, [22]–[25], analysing the decisions of *R v Fuller & Zazzaro* [2012] SASCFC 101 and *R v Marafioti* (2014) 118 SASR 511; [2014] SASCFC 8.

[29] See *Firearms Act 2015* s 4, definition of "firearm", paragraph (a).

[30] The definition of prescribed firearm must be read in conjunction with *Firearms Regulations 2017* reg 7, which specifies additional prescribed firearms, including by reference to barrel length.

[31] See *Firearms Act 2015* s 12.

Unauthorised purpose offence

36. The first element of the unauthorised purpose offence is broader than the first element of the unauthorised possession offence, as it also prohibits a person who uses a firearm.

37. The second element of the unauthorised purpose offence is the same as the unauthorised possession offence.

38. Firearms licences specify the purpose of possession which is permitted under the licence. This includes purposes such as use as a member of a shooting club, security guard, dealer, and so on.[32] This offence requires the prosecution to prove that the accused's possession of the firearm was for a purpose outside that permitted by the licence.

39. Proof of the third element is facilitated by a reverse onus provision. Section 9(3) states:

> If, in proceedings for an offence under subsection (2), the evidence gives rise to a reasonable inference that the purpose for which the defendant had possession of or used the firearm was not authorised by the licence, the onus shifts to the defendant to establish that the purpose for which he or she had possession of or used the firearm was authorised by the licence.

Aggravated offences

40. By reason of s 9(7), an offence under s 9 is an aggravated offence if it is proved that:[33]

> (a) the firearm to which the offence relates was—
>
> (i) loaded (irrespective of whether the offender knew that it was loaded); or
>
> (ii) in the immediate vicinity of ammunition suitable for use in the firearm; or
>
> (b) the offender had the firearm concealed about his or her person; or
>
> (c) the offender committed the offence in connection with, or at the same time as, an act or omission that would, if proved, constitute a prescribed offence against the *Controlled Substances Act 1984*.

41. For this purpose, a firearm is loaded if a round is in the breech, barrel or chamber of the firearm, or in a magazine comprising part of or attached to the firearm.[34]

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[32] See *Firearms Regulations 2017* reg 13.

[33] *Firearms Act 2015* s 9(7).

[34] *Firearms Act 2015* s 9(8)(e).

Jury Direction #15.3 – Unauthorised possession of a firearm

Note: This direction is designed for a case where the accused is charged with a basic offence under Firearms Act 2015 s 9(1), and the firearm is a prescribed firearm. It can be modified where the offence under s 9(2) is charged. The direction assumes that the nature of the firearm and the lack of a licence are not in issue.

I will now direct you about the elements of unauthorised possession of a firearm.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused had possession of a firearm;

Two – The firearm was a prescribed firearm;

Three – The accused did not have a firearms licence which authorised him to possess that firearm.

The defence accepts that the second and third elements are proved. The only matter in dispute is whether the accused had possession of a firearm. I will therefore explain the first element and how it applies.

Possession of a firearm

The first element the prosecution must prove is that the accused had possession of a firearm.

There is no dispute in this case that the [*identify relevant firearm*] is a firearm. The focus is on whether the accused possessed the firearm.

The law recognises several ways a person can possess a firearm. In this case, the prosecution seeks to prove this element by proving that the accused [*identify relevant form of possession relied on by the prosecution under s 6(2)*].

[*If the prosecution does not rely on deemed possession under s 6(2)(d), add the following direction*: As part of proving this, the prosecution must show that the accused knew that the object was a firearm. [**If necessary, add**: That is, the prosecution must show the accused knew the object was a device designed to fire bullets, shot or other projectiles by burning propellant, or using compressed air or other compressed gas].]

The prosecution says that this is proved because [*identify factual basis for the asserted form of possession*].

In response, the defence says [*identify relevant defence evidence and arguments*].

If the prosecution relies on deemed possession under s 6(2)(d), replace the previous paragraph with the following:

The law provides an exception to the general rule that a person is in possession of a firearm if it is found in [premises s/he occupies or has the care, control or management of] / [a vehicle s/he was in charge of].

If you are satisfied beyond reasonable doubt that the accused [occupied or had the care, control or management of the house] / [was in charge of the car] where the firearm was found, then you must decide whether the accused has proved one of two defences.[35]

First, the accused will not be guilty if s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house / car].

Second, the accused will not be guilty if the item was in the lawful possession of another person, or s/he believed on reasonable grounds that the firearm was in the lawful possession of another person.

If the accused can prove either of those matters, then you must find him/her not guilty.

[*If relevant add*: To reiterate, the prosecution must first prove beyond reasonable doubt that the accused was in charge of the car, before this exception may be relevant. The person in charge of a car is the person who has a degree of practical control over the car which suggests s/he knows, or is connected with, the items in the car. Such a person is often the driver or the owner of the car. And more than one person can be in charge of a car at the same time.]

[*If relevant, add*: One consequence of this exception is that the prosecution does not need to prove that the accused knew the firearm was in the [house / car]. Instead, if you are satisfied that the accused [occupied, or had the care, control or management of, the house] / [was in charge of the car], then you can find that s/he had possession of the firearm unless s/he proves that s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house / car].]

When I say that the accused must prove something, this is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. Because the defence must prove this exception, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that it is more likely than not that the exception applies.

In other words, your approach to this offence involves two steps. First, the prosecution must prove beyond reasonable doubt that the firearm was found in [premises the accused occupies or has the care, control or management of] / [a vehicle the accused was in charge of]. If the prosecution does prove that, you must go to the second step. You cannot convict the accused of this offence if the accused proves, on the balance of probabilities, that s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house

[35] If the case involves premises that are not a house, a vehicle that is not a car, or a vessel or an aircraft, then the appropriate term should be used instead.

/ car], or s/he proves on the balance of probabilities that the item was in the lawful possession of another person, or s/he believed on reasonable grounds that the firearm was in the lawful possession of another person.

15.4 – Trafficking in firearms

42. *Firearms Act 2015* s 22 creates offences of trafficking in firearms.

43. Like the offence of unlicenced possession,[36] different penalties are specified for different types of firearms, whether the offence involves one firearm or more than one firearm, and whether the offence was a first offence.

44. The basic offence consists of three elements:

- A person acquired a firearm;
- The firearm was in a particular category;
- The person was not authorised to acquire the firearm.

45. Section 22 also creates a defence where the acquisition was under a loan or hire agreement. However, there is a further offence of failing to return the firearm to the owner within 10 days (in the case of an oral agreement) or 28 days (in the case of a written agreement).[37]

46. Acquire is defined in *Firearms Act 2015* s 4 as "acquire means acquire through purchase, gift, loan or hire".

Authorised acquisition

47. Section 22(1) states that, subject to the section, a person who acquires a firearm is guilty of an offence unless:[38]

> (a) the person is authorised to acquire the firearm by a permit under this Part (or under corresponding legislation of another State or Territory of the Commonwealth); and
>
> (b) there is compliance with the prescribed process for acquisition of the firearm.

48. To prove the offence, the prosecution must therefore disprove either (a) or (b).

49. The prescribed process for acquiring a firearm is specified by *Firearms Regulations 2017* reg 51:

> (a) the firearm must be delivered into the person's physical possession by the supplier while they are together in the presence of a prescribed person;
>
> (b) the delivery of the firearm must be witnessed by the prescribed person;
>
> (c) the person and the supplier must produce the licences and permit and provide the prescribed person with the information necessary to enable the prescribed person to comply with the prescribed person's obligations under paragraph (d);

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[36] See 15.3 – Unlicensed possession of a firearm.

[37] *Firearms Act 2015* ss 22(5), (6), (7).

[38] *Firearms Act 2015* s 22(1).

(d) the prescribed person must—

(i) be satisfied, by inspecting the relevant licence and permit that the person acquiring the firearm is entitled to acquire and possess it; and

(ii) at the time of the transaction, record in a form approved by the Registrar—

(A) the name and address of the supplier and the person acquiring the firearm and the licence number of the firearms licence held by each person; and

(B) the category, make, model, type, action, calibre and magazine capacity of the firearm; and

(C) the number or characters constituting the identifying mark of the firearm; and

(D) the date and time of the transaction; and

(iii) provide the Registrar with the original of the record within 7 days after the end of the month in which the transaction occurred, or as requested by the Registrar.

50. This process does not apply when a firearm is acquired from a person outside South Australia. Instead, the person must acquire the firearm through a licensed dealer in South Australia, acting as agent of the vendor.[39]

Extended party liability

51. While the section defines the offence by reference to a person acquiring a firearm, the section also identifies four further classes of people who are also guilty of the offence:[40]

(a) the person who supplied the firearm;

(b) a person who knowingly took, or participated in, a step, or caused a step to be taken, in the process of acquisition or supply of the firearm;

(c) a person who knowingly provided or arranged finance for a step in the process of acquisition or supply of the firearm;

(d) a person who knowingly provided the premises in which a step in the process of acquisition or supply of the firearm was taken, or allowed a step in the process of acquisition or supply of the firearm to be taken in premises of which the person was an owner, lessee or occupier or of which the person had care, control or management.

52. Section 22 also creates a specific offence that may be committed by a licensed dealer. That offence applies where a person acquires a firearm from a licensed dealer in the ordinary course of the dealer's business, and the dealer fails to comply with the prescribed requirements of the regulations.[41] The prescribed requirements are that the dealer must be satisfied that the person acquiring the firearm is entitled to acquire and

[39] *Firearms Regulations 2017* reg 51(2).

[40] *Firearms Act 2015* s 22(2).

[41] *Firearms Act 2015* s 22(9).

possess the firearm by inspecting the relevant firearms licence and, in the case of a supply to a person who is not a licensed dealer, the permit held by the person.[42]

[42] *Firearms Regulations 2017* reg 53(1).

Jury Direction #15.4 – Trafficking in firearms as a supplier

Note: This direction is designed for a case where the accused is charged with trafficking in firearms as a supplier under ss 22(1) and (2)(a). It assumes that the charge relates to a single prescribed firearm, and that the defence of a loan agreement is not engaged. The direction must be modified where the case departs from any of these assumptions.

I will now direct you about the elements of trafficking in firearms.

To prove this offence, the prosecution must prove four elements beyond reasonable doubt. These are:

One – A person acquired a firearm;

Two – The accused supplied the firearm to that person;

Three – The firearm is a prescribed firearm;

Four – The person was not authorised to acquire the firearm.

Acquiring a firearm

The first element the prosecution must prove is that a person acquired a firearm.

A person can acquire something through purchase, gift, loan or hire.

In this case, the prosecution argues that [*purchaser*] acquired a [*identify firearm*] by [*identify act of acquisition,* e.g., purchasing it].

[*Refer to relevant evidence and arguments*].

Accused supplied the firearm[43]

The second element is that the accused was the person who supplied the firearm.

In other words, the prosecution must prove that [*purchaser*] acquired the firearm from [*accused*].

[*Refer to relevant evidence and arguments*].

Prescribed firearm

The third element is that the firearm is a prescribed firearm.A number of firearms are defined as prescribed firearms. For the purpose of this case, a firearm will be a prescribed firearm if it is [*identify relevant characteristic which makes the firearm a prescribed firearm*].

[43] If the charge is brought against the person who acquired the firearm, this element is omitted. If the charge is brought against another person under ss 22(2)(b) – (d), this element must be modified and must include the element that the accused took part in the transaction knowingly.

[*Refer to relevant evidence and arguments*].

Unauthorised acquisition

The fourth element is that the person was not authorised to acquire the firearm.

There are two ways the prosecution can prove this element.

The first way the prosecution can prove this element is to prove that [*purchaser*] did not have a permit which authorised him/her to acquire the firearm.

The second way the prosecution can prove this element is to prove that [*purchaser*] and [*accused*] did not follow the prescribed process for acquiring a firearm.

[*If the prescribed process is in issue*, add the following direction:

To protect the community from the unauthorised sale of firearms, the law specifies a process that people must follow for the sale of firearms.

First, the firearm must be given to the purchaser by the supplier while they are together with a prescribed person.

Second, the prescribed person must witness the giving of the firearm.

Third, the purchaser and the supplier must produce their licenses and permits and provide the prescribed person with the required information.

Fourth, the prescribed person must be satisfied by inspecting the licence and permit that the purchaser is entitled to acquire and possess the firearm.

Fifth, the prescribed person must record at the time of the transaction the names, addresses and licence numbers of the parties, details about the firearm, identifying marks of the firearm and the date and time of the transaction.

Sixth, the prescribed person must provide the Registrar of Firearms the original record within 7 days after the end of the month when the transaction occurred.]

[*Refer to relevant evidence and arguments*].

15.5 – Possession of unregistered firearms

53. *Firearms Act 2015* s 27 creates offences of possession of an unregistered firearm.

54. Like the offences of unlicenced possession,[44] different penalties are specified for different types of firearms. The section also prescribes two different forms of conduct – possession of an unregistered firearm and ownership of a firearm that is not registered in the person's name.

55. The offence of possession of an unregistered firearm consists of three elements:

- The accused had possession of a firearm;
- The firearm was in a particular category;
- The firearm was not registered.

56. For information on the meaning of possession, and the different categories of firearms, see 15.3 – Unlicensed possession of a firearm.

Defences

57. Section 27(2) creates a defence to this offence where it was not reasonably practicable for the accused to register the firearm:[45]

> It is a defence to a charge of an offence under subsection (1) to prove that the firearm came into the defendant's possession lawfully not more than 14 days before the alleged date of the offence and that it was not reasonably practicable in the circumstances for the firearm to be registered by the time of the alleged offence.

58. The general defence in s 75 is available in relation to this offence. Section 75(1) states:

> It is a defence to a charge of an offence against this Act if the defendant proves that the alleged offence was not committed intentionally and did not result from any failure on the part of the defendant to take reasonable care to avoid the commission of the offence.

59. This defence applies where a person can prove they had no intention of doing anything wrong and no knowledge that they were doing so.[46]

60. One situation in which this general defence may apply is if the accused proves that they thought the object was something other than a firearm.[47]

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[44] See 15.3 – Unlicensed possession of a firearm.
[45] *Firearms Act 2015* s 27(2).
[46] *R v Fuller & Zazzaro* [2012] SASCFC 101, [71].
[47] *R v Fuller & Zazzaro* [2012] SASCFC 101, [72]–[74].

Jury Direction #15.5 – Possession of an unregistered firearm

Note: This direction is designed for a case where the accused is charged with possession of an unregistered firearm, and the firearm is a prescribed firearm. It can be modified where the offence under s 27(3) is charged. The direction assumes that the nature of the firearm and the fact that it was not registered are not in issue.

I will now direct you about the elements of possession of an unregistered firearm.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused had possession of a firearm;

Two – The firearm was a prescribed firearm;

Three – The firearm was not registered.

The defence accepts that the second and third elements are proved. The only matter in dispute is whether the accused had possession of a firearm. I will therefore explain the first element and how it applies.

Possession of a firearm

The first element the prosecution must prove is that the accused had possession of a firearm.

There is no dispute in this case that the [*identify relevant firearm*] is a firearm. The focus is on whether the accused possessed the firearm.

The law recognises several ways a person can possess a firearm. In this case, the prosecution seeks to prove this element by proving that the accused [*identify relevant form of possession relied on by the prosecution under s 6(2)*].

The prosecution says that this is proved because [*identify factual basis for the asserted form of possession*].

[*If relevant, add*: To prove this element, the prosecution must show that the firearm was not possessed by someone else.]

The defence says [*identify relevant defence evidence and arguments*].

If the prosecution relies on deemed possession under s 6(2)(d), replace the previous paragraph with the following: The law provides an exception to the general rule that a person is in possession of a firearm if it is found in [premises s/he occupies or has the care, controlor management of] / [a vehicle s/he was in charge of].

If you are satisfied beyond reasonable doubt that the accused [occupied or had the care, control or management of the house] / [was in charge of the car] where the firearm was found, then you must decide whether the accused has proved one of two defences.[48]

First, the accused will not be guilty if s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house / car].

Second, the accused will not be guilty if the item was in the lawful possession of another person, or s/he believed on reasonable grounds that the firearm was in the lawful possession of another person. If the accused can prove either of those matters, then you must find him/her not guilty.

[*If relevant add*: To reiterate, the prosecution must first prove beyond reasonable doubt that the accused was in charge of the car before this exception may be relevant. The person in charge of a car is the person who has a degree of practical control over the car which suggests s/he knows, or is connected with, the items in the car. Such a person is often the driver or the owner of the car. And more than one person can be in charge of a car at the same time.]

[*If relevant, add*: One consequence of this exception is that the prosecution does not need to prove that the accused knew the firearm was in the [house / car]. Instead, if you are satisfied that the accused [occupied, or had the care, control or management of, the house] / [was in charge of the car], then you can find that s/he had possession of the firearm unless s/he proves that s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house / car].]

When I say that the accused must prove something, this is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. Because the defence must prove this exception, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that it is more likely than not that the exception applies.

In other words, your approach to this offence involves two steps. First, the prosecution must prove beyond reasonable doubt that the firearm was found in [premises the accused occupies or has the care, control or management of] / [a vehicle the accused was in charge of]. If the prosecution does prove that, you must go to the second step. You cannot convict the accused of this offence if the accused proves, on the balance of probabilities, that s/he did not know and could not reasonably be expected to have known that the firearm was on or in the [house / car], or s/he proves on the balance of probabilities that the item was in the lawful possession of another person, or s/he believed on reasonable grounds that the firearm was in the lawful possession of another person.

[48] If the case involves premises that are not a house, or a vehicle that is not a car, or a vessel or an aircraft, then the appropriate term should be used instead.

CHAPTER 16: DRUG OFFENCES

16.1 – Trafficking controlled drugs

1. *Controlled Substances Act 1984* s 32 creates four offences relating to trafficking controlled drugs.[1]

2. Section 32(3) creates the basic offence of trafficking a controlled drug. The elements of that offence are:

   - The substance is a controlled drug;
   - The accused knew or was reckless as to the fact that the substance was a controlled drug;
   - The accused trafficked the substance.

3. Section 32(2) creates the offence of trafficking in a commercial quantity. It has five elements:

   - The substance is a controlled drug;
   - The accused knew or was reckless as to the fact that the substance was a controlled drug;
   - The accused trafficked the substance;
   - There is a commercial quantity of the substance;
   - The accused intended to traffic a quantity of the controlled drug that objectively equates to a commercial quantity.

4. Section 32(1) creates the offence of trafficking a large commercial quantity. It has the same five elements as the offence in s 32(2), except the quantity is a large commercial quantity, rather than a commercial quantity.

5. Section 32(2a) creates the offence of trafficking a controlled drug in a prescribed area. The elements of this are the same as the offence of trafficking simpliciter, with an added element that the trafficking took place in a prescribed area.

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[1] The *Controlled Substances Act 1984* specifies different maximum penalties for basic offences committed by serious drug offenders and otherwise. It has not been determined whether the specification of a higher maximum penalty in the case of an offender who is a serious drug offender results in the creation of a separate offence, or whether it is relevant only to sentencing. Given that an offender's status as a serious drug offender involves proof of previous convictions, it appears likely that the serious drug offender status is a sentencing fact, and not an element of a different offence.

6. These offences do not deal with situations where the accused engages in gratuitous supply. That is a different offence covered by the *Controlled Substances Act 1984* s 33I.[2]

Multiple controlled drugs and duplicity

7. The prosecution may bring a single aggregate charge that relates to more than one controlled substance. This statutory exception to the rule against duplicity applies where:[3]

> (a) a person has committed offences against this Part in relation to different batches of controlled substances (whether or not controlled substances of the same kind); and
>
> (b) the offences were committed by the person on the same occasion or within 7 days of each other or in the course of an organised commercial activity relating to controlled substances carried on by the person.

8. Where the prosecution wishes to use this provision:[4]

- it must identify that it is doing so in the charge;
- the charge must contain adequate particulars of the accused's conduct in relation to each batch, or the total quantity in the different batches; and
- the prosecution does not need to specify the exact dates or exact quantity of batches on different occasions.

9. A person cannot be charged with either a single aggregate offence, or with individual offences, if that person has previously been convicted or acquitted of the individual offences or the single aggregate offence, as the case may be.[5]

Controlled drugs

10. Controlled drugs are defined as:[6]

- a drug of dependence;
- a substance declared by the regulations to be a controlled drug; or
- an interim controlled drug.

11. Controlled plants are excluded from the definition of controlled drugs.[7]

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[2] *Gasmier v The Queen* [2020] SASCFC 16, [14].
[3] *Controlled Substances Act 1984* s 33N(1).
[4] *Controlled Substances Act 1984* s 33N(2).
[5] *Controlled Substances Act 1984* s 33N(5), (6).
[6] *Controlled Substances Act 1984* s 4.
[7] *Controlled Substances Act 1984* s 4.

12. *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* reg 5 specifies what substances are controlled drugs. It states that the natural or synthetic form of any substance listed in Schedule 1 of the Regulations, along with any salt, derivative, isomar, analogue, homologue and preparation, admixture or solution of the substances listed in Schedule 1 are controlled drugs.[8]

13. The effect of *Controlled Substances (Controlled Drugs, Precursors and Plants Regulations 2014* reg 5 is that a charge may specify any prescribed drug listed in Schedule 1 of the regulations, without needing to identify whether the charge relates to the natural or synthetic form of that drug, or one of the varieties specified in reg 5.[9]

14. Where the case relates to one of the non-pure forms listed in reg 5, the court will need to determine how to measure the substance for the purpose of determining quantity. The Court of Criminal Appeal has stated that:[10]

> The amount listed in the column headed "Commercial (pure)" in Schedule 1 opposite the entry "methylamphetamine" applies to methylamphetamine in its "pure" or "base" form, and to methylamphetamine in a "preparation, admixture or solution", in which the substances referred to in sub-paras (a)-(e) of reg 5(1) exist, and also to each of the forms of methylamphetamine referred to in sub-paras (a)-(e). To avoid uncertainty, I add that the effect of listing the relevant amount opposite the entry listing methylamphetamine is to provide that if the relevant form of methylamphetamine is found to contain that amount of methylamphetamine in its pure form, then a commercial quantity of methylamphetamine is present.

15. The definition of cannabis in s 4 and in Schedule 1 of the regulations provides that it does not include cannabis resin or cannabis oil. The effect of this definition is that a substance is not cannabis if it meets the definitions for either cannabis oil or cannabis resin. The fact that cannabis resin and cannabis oil are naturally occurring components of a cannabis plant does not remove cannabis plant material from the definition of cannabis. Similarly, in calculating the weight of cannabis, it is not necessary to calculate and deduct the weight of naturally occurring cannabis oil or cannabis resin in the plant material.[11]

Knowledge or recklessness of controlled drug

16. The prosecution must prove that the accused knew or was reckless as to the substance being a controlled drug. However, it is not necessary to prove that the accused knew or was reckless with respect to the particular identity of the controlled substance.[12]

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[8] There is a degree of overlap between these different forms of a prescribed drug: *R v Elrayes* (2012) 112 SASR 260; [2012] SASCFC 28, [8].

[9] *R v Willingham* (2012) 112 SASR 278; [2012] SASCFC 29, [28], [70]-[72]; *R v Elrayes* (2012) 112 SASR 260; [2012] SASCFC 28, [17]-[18], [43].

[10] *R v Elrayes* (2012) 112 SASR 260; [2012] SASCFC 28, [21] (see also [50]).

[11] *R v Parisi* (2014) 119 SASR 277; [2014] SASCFC 57, [21]-[25].

[12] *Controlled Substances Act 1984* s 33P.

Trafficking

17. The prosecution must prove the accused trafficked the controlled drug. Traffic is defined to mean:[13]

    - sell the drug;
    - have possession of the drug intending to sell it; or
    - take part in the process of sale of the drug.

18. Incorporating the implied requirement that the act of trafficking must be intentional,[14] this means the prosecution must prove the accused either:

    - intentionally sold the drug;
    - had possession of the drug intending to sell it; or
    - intentionally took part in the process of sale of the drug.

19. Sell is defined to mean:[15]

> Sell, barter or exchange, offer or agree to sell, barter or exchange or expose for sale, barter or exchange.

20. A person only engages in barter or exchange if there is a commitment to make payment in kind. A gratuitous supply, in the hope or expectation that the person will make a reciprocal supply on a future occasion, is not an act of trafficking.[16]

21. The prosecution is not required to elect between the different limbs of the definition.[17] However, the judge may need to give an extended unanimity direction where the case involves factually distinct scenarios.[18]

22. Two of the terms in the definition of traffic are further defined by the Act.

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[13] *Controlled Substances Act 1984* s 4(1). In relation to s 4(1)(b), see *Questions of Law Reserved on Acquittal (No 1/1996)* (1997) 68 SASR 117 concerning the previous form of the provision, which held that purchasing a drug with an intention to sell it on to others involved taking part in a sale, even if a specific future transaction was not in contemplation.

[14] See *He Kaw Teh v The Queen* (1985) 157 CLR 525; [1985] HCA 43.

[15] *Controlled Substances Act 1984* s 4(1).

[16] *Gasmier v The Queen* [2020] SASCFC 16, [14]–[15].

[17] *R v Tran* [2011] SASCFC 85, [29].

[18] See *R v Malakouti* [2018] SASCFC 115, [35].

23. A person "takes part in the process of sale" if the person "directs, takes or participates in any step, or causes any step to be taken, in the process of sale".[19] Steps in the process of sale are defined as including the following, when done for the purpose of sale:[20]

    (a) storing the drug;

    (b) carrying, transporting, loading or unloading the drug;

    (c) packaging the drug, separating the drug into discrete units or otherwise preparing the drug;

    (d) guarding or concealing the drug;

    (e) providing or arranging finance (including finance for the acquisition of the drug);

    (f) providing or allowing the use of premises or jointly occupying premises.

24. Possession is defined as including:[21]

    (a) having control over the disposition of the substance or thing; and

    (b) having joint possession of the substance or thing;

25. At common law, possession required proof that the accused had the power and intention to exercise control over the substance to the exclusion of all others, subject to the possibility of the accused being in joint possession of the substance with a co-offender. This necessarily includes knowledge of the existence of the substance.[22]

26. Courts have not yet considered whether the inclusive definition of possession in *Controlled Substances Act 1984* s 4 merely restates the common law or if it expands the common law by removing the requirement of showing the accused intended to exercise control.[23]

27. Possession has been described as "a notoriously elusive legal concept" that is "difficult to explain".[24]

28. Directions on possession are judged by reference to the evidence in the case and the directions as a whole. The question is whether the directions made clear to the jury what is required to prove possession in the circumstances of the case. It is generally not necessary to list the matters that are not sufficient to prove possession, as a list of such

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[19] *Controlled Substances Act 1984* s 4(4).

[20] *Controlled Substances Act 1984* s 4(5). See also *DPP Reference No 2 of 1995* (1995) 65 SASR 508 for a discussion of the width of the previous test of 'take part in the sale', which includes preparatory acts by the principal vendor and the vendor's associate for the purpose of an intended sale.

[21] *Controlled Substances Act 1984* s 4(1).

[22] *R v Baftiroski* [2018] SASCFC 83, [30]. See also *He Kaw Teh v The Queen* (1985) 157 CLR 525, 600; [1985] HCA 43; *DPP v Brooks* [1974] AC 862, 866; *R v Frangos* (1979) 21 SASR 331, 339.

[23] *R v Baftiroski* [2018] SASCFC 83, [31]. See also *R v Nguyen* (2010) 108 SASR 66; [2010] SASCFC 23, [95].

[24] *R v GNN* (2000) 78 SASR 293; [2000] SASC 447, [21].

matters can run the risk of confusing the jury. In addition, judges should be wary of using examples to demonstrate possession, as they may be inaccurate or confusing.[25]

29. Where drugs are found in the accused's premises, it may be necessary to direct the jury of the need to exclude the possibility that the drugs were placed in the house without the accused's knowledge by another person with access to the house, or were placed in the accused's house by a third party with the accused's acquiescence, without the accused intending to control the drugs. This requires a direction that the accused must have intended to exercise control over the drugs, either alone or jointly with the person who brought the drugs onto the premises.[26]

30. A person who misplaces a controlled substance in their house continues to have possession of it.[27]

31. In directing the jury about the need to exclude the possibility of mere acquiescence, it is dangerous for the directions to focus on questions of knowledge. It is necessary to explain how the concepts of custody and control operate in the circumstances of that case.[28]

32. When directing on the possibility of joint possession, it is not necessary to direct the jury that they must be satisfied that the relevant people were acting in concert in relation to trafficking the drugs. It is sufficient to confine the directions to focus on the question of shared control, rather than the purpose of that possession or the existence of an agreement or understanding.[29]

33. If it is proved that the accused had possession of a trafficable quantity, there is a rebuttable presumption:[30]

> (a) in a case where it is alleged that the defendant was taking part in the process of sale of the drug, that the defendant—
>
> (i) was acting for the purpose of sale of the drug; and
>
> (ii) had the relevant belief concerning the sale of the drug necessary to constitute the offence; or
>
> (b) in any other case—that the defendant had the relevant intention concerning the sale of the drug necessary to constitute the offence.

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[25] *R v Baftiroski* [2018] SASCFC 83, [35]–[36]; *R v Wood* (2017) 131 SASR 291; [2017] SASCFC 100, [18]; *R v Saleh* [2017] SASCFC 75, [18]–[19].
[26] *R v GNN* (2000) 78 SASR 293; [2000] SASC 447, [25]; *R v Wood* (2017) 131 SASR 291; [2017] SASCFC 100, [13]; *R v Nguyen* (2010) 108 SASR 66; [2010] SASCFC 23, [13]–[30].
[27] *R v Tran* [2011] SASCFC 85, [20]–[23].
[28] *R v GNN* (2000) 78 SASR 293; [2000] SASC 447, [25].
[29] *R v Nguyen* (2010) 108 SASR 66; [2010] SASCFC 23, [13]–[30], [108]–[110].
[30] *Controlled Substances Act 1984* s 32(5).

34. In a case where the prosecution alleges that the accused either possessed the drug intending to sell it or possessed it intending to take part in the process of sale, the prosecution can rely on both limbs of the deeming provision in s 32(5). The fact that the section is drafted as though paragraphs (a) and (b) are alternatives does not prevent the prosecution from invoking both paragraphs where its case on trafficking is framed in the alternative.[31]

35. The presumption in s 32(5) is engaged when it is proved that the accused had possession of a trafficable quantity. It is not necessary to prove any further dealing with the drugs. Rather, the presumption operates to help prove the purpose of the accused's possession.[32]

36. Where the defendant admits possession of a trafficable quantity, the forensic contest shifts to the defence onus to prove the accused was not acting for the purpose of sale. The summing up should be tailored to that forensic contest, rather than focussing on the prosecution proving that the accused intended to traffic.[33]

Commercial and large commercial quantities

37. Schedule 1 of the Regulations lists a range of controlled drugs, along with the associated large commercial, commercial and trafficable quantities for each drug. Some drugs specify separate quantities for large commercial, commercial and trafficable drugs in pure form or in a mixture.

38. Where the substance is in a mixture, a commercial quantity is an amount of that drug in its pure form which equals or exceeds the prescribed quantity for a pure quantity of the drug (if any), or a quantity of the mixture that equals or exceeds the prescribed quantity for a mixture containing that drug. A commercial quantity may also be defined as a number of discrete dose units (DDUs).[34]. A commercial quantity of a drug that is not contained in a mixture is the quantity that equals or exceeds the amount prescribed as a commercial quantity for the drug in its pure form. A similarly worded definition applies for the purpose of both trafficable and large commercial quantities.[35]

39. In assessing whether a mixture is a particular quantity, the court will look at the quantity of the mixture and does not consider the purity of drug in that mixture.[36]

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[31] *R v Tran* [2011] SASCFC 85, [27]–[32]. But c.f. *R v Daka* [2019] SASCFC 80, [86] on whether, in the circumstances of a particular case, possession is relevant to proof of taking part in the process of sale, noting that in that case, the prosecution did not seek to rely on s 32(5).

[32] *R v Tran* [2011] SASCFC 85, [35]–[37].

[33] *R v Jones* (2018) 131 SASR 532; [2018] SASCFC 96, [3].

[34] A DDU is defined as a number of mixtures which are "prepared or apparently prepared for the purpose of being administered as a single dose": *Controlled Substances Act 1984* s 4.

[35] *Controlled Substances Act 1984* s 4(1).

[36] *R v Valesic* (2018) 132 SASR 520; [2018] SASCFC 136, [29]–[41].

40. Where there is a single aggregate charge that involves multiple substances, s 33O specifies how the quantity of the total amount can be determined. Expressed as an equation, s 33O requires the court to calculate the following:

$$\text{Total quantity} = \frac{Quantity\ of\ drug\ 1\ in\ pure\ form}{Trafficable\ quantity\ of\ drug\ 1} + \frac{Quantity\ of\ drug\ 2\ in\ pure\ form}{Trafficable\ quantity\ of\ drug\ 2} + \cdots$$

41. If the total quantity is greater than or equal to 1, then the single charge involves a trafficable quantity. An equivalent process applies for commercial and large commercial quantities, in each case examining the fraction of each drug against the specified quantity for that drug.[37] If no quantity is specified for a particular drug in a pure form, then that drug must be disregarded for the purpose of assessing the total quantity.[38]

42. Where the substance is a mixture, the charge should identify whether the prosecution relies on the pure quantity of the drug within that mixture, or the weight of the mixture. The assessment of a trafficable, commercial or large commercial quantity is then determined by reference to what is asserted in the charge.[39] Where the charge does not refer to a mixture, and there is no evidence in the trial that the substance is a mixture, then the prosecution is assuming the burden of proving the relevant quantity by reference to a pure amount.[40]

Intention to traffic in prescribed quantity

43. To prove an offence under ss 32(1) or 32(2), the prosecution must prove that the accused intended to traffic a quantity that objectively equates to a commercial or large commercial quantity.[41]

44. Proof that the accused intended to traffic a commercial or large commercial quantity does not require proof that the accused was aware of the legal threshold of a commercial or large commercial quantity. It can be proved by showing that the accused intended to traffic an amount that, in fact, weighed at least the prescribed threshold for a commercial or large commercial quantity.[42]

45. Prior to 10 September 2009, the prescribed quantity of cannabis in the Regulations referred to "dried plant material". This had created some difficulties where a person was found with a quantity of "wet" cannabis.[43] On 10 September, the word "dried" was removed. Due to this change, "wet" cannabis can be weighed as a prescribed quantity, without needing to be reduced to take account of the drying process. Where a person is charged with trafficking a large commercial quantity on the basis of his or her possession

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[37] See *Controlled Substances Act 1984* s 33O(1).
[38] *Controlled Substances Act 1984* s 33O(2).
[39] *Controlled Substances Act 1984* s 33OA(1).
[40] *R v Pali & Buckingham* (2018) 132 SASR 201; [2018] SASCFC 134, [41]–[53].
[41] *R v Tassone* [2016] SASCFC 146, [47]–[48]; *R v Pringle* [2017] SASCFC 9, [114]–[116]; *R v Parisi* (2014) 119 SASR 277; [2014] SASCFC 57.
[42] *R v Tassone* [2016] SASCFC 146, [48], [68]; *R v Parisi* (2014) 119 SASR 277; [2014] SASCFC 57, [34]–[38].
[43] *R v Tennant* (2010) 107 SASR 504; [2010] SASCFC 2.

of wet cannabis, the prosecution must prove that the accused intended to sell the dried material of what, at that stage, was at least 2 kg of wet cannabis. This may be expressed as an intention to sell a certain percentage, such as 50% of the total if the evidence showed the accused had 4 kg of wet cannabis.[44]

46. Evidence of the reduction in weight that occurs when cannabis is dried remains relevant to whether the prosecution has proved an intention to sell. Evidence that the accused was in possession of 1kg of wet cannabis, which will reduce by 75% through the drying process to a final amount of 250g, may be relevant to whether the amount grown was for personal use.[45]

47. The offence in s 32(3) does not require proof that the accused intended to traffic any particular quantity. The offence is committed if the accused intended to traffic any quantity of a controlled substance.[46]

Trafficking in a prescribed area

48. The offence under s 33(2a) requires proof that the act of trafficking occurred in a prescribed area.

49. This involves three related definitions:[47]

> ***prescribed area*** means—
>
> (a) prescribed licensed premises or an area being used in connection with prescribed licensed premises; or
>
> (b) premises at which members of the public are gathered for a public entertainment or an area being used in connection with such premises;
>
> **Example**—
>
> Areas ***being used in connection with*** premises would include—
>
> (a) a car parking area specifically provided for the use of patrons of the premises;
>
> (b) an area in which people are queuing to enter the premises.
>
> ***prescribed licensed premises*** means—
>
> (a) premises in respect of which 1 of the following classes of licence is in force under the *Liquor Licensing Act 1997*:
>
> (i) a general and hotel licence;

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[44] *R v Parisi* (2014) 119 SASR 277; [2014] SASCFC 57, [40]–[43].
[45] *R v Parisi* (2014) 119 SASR 277; [2014] SASCFC 57, [44]–[45].
[46] *Gasmier v The Queen* [2020] SASCFC 16, [19]–[20]. As the court noted in this case, the existence of a trafficable quantity in the regulations does not set a minimum quantity that must be trafficked. Instead, the trafficable quantity is relevant to engage the reverse onus provision in s 32(5).
[47] *Controlled Substances Act 1984* s 32(6).

(ii) an on premises licence;

(iii) a club licence;

(iv) a restaurant and catering licence;

(vi) a licence of a class prescribed by regulation;

(b) the premises defined in the casino licence, within the meaning of the Casino Act 1997, as the premises to which the licence relates;

(c) premises subject to a licence prescribed by regulation;

public entertainment means a dance, performance, exhibition or event that is calculated to attract and entertain members of the public, whether admission is open, procured by the payment of money or restricted to members of a club or a class of persons with some other qualification or characteristic.

Jury Direction #16.1A – Trafficking a controlled drug

Note: If the accused is charged with an offence under Controlled Substances Act 1984 s 32(2a), this direction can be adapted to include an element on trafficking in a prescribed area.

I will now direct you about the elements of trafficking a controlled drug.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The substance is a controlled drug;

Two – The accused knew that the substance was a controlled drug;[48]

Three – The accused trafficked the drug.

I will now explain these three elements and how they apply in this case.

Controlled drug

The first element is that the substance is a controlled drug.

I direct you that [*identify relevant controlled drug*] is a controlled drug.

If you are satisfied that [*identify relevant substance*] is [*identify relevant controlled drug*], then this first element is proved.

Knowledge of controlled drug

The second element the prosecution must prove is that [*accused*] knew the substance was a controlled drug. This element relates to [*accused*]'s state of mind.

For this element, the prosecution only has to prove that [*accused*] knew the substance was an illegal drug. The prosecution does not have to prove [*accused*] knew the precise identity of the drug.

[*Refer to relevant evidence and arguments*]

Trafficking

The third element is that the accused trafficked the drug.

A person traffics a drug when they [intentionally sell it / possess it intending to sell it / intentionally take part in the process of selling it].

[48] Where the case involves the accused being reckless as to the substance being a controlled drug, the direction should be modified accordingly.

If the accused is alleged to have possessed a trafficable quantity of the drug, add the following:[49]

The law states that a person who has possession of at least [*identify trafficable quantity*] of [*identify controlled drug*] is presumed to be [intending to sell it / possessing it for the purpose of taking part in the process of selling it].

There are two matters I need to direct you about to explain this rule. First, the concept of possession. Second, the effect of this presumption.

The law says that a person has possession of something if [s/he] has the power and intention to exercise control over the item, to the exclusion of others.

If joint possession is in issue, add the following: The law also recognises that two or more people may have possession of something at the same time. This is called joint possession. It means that each of them have the power and intention to exercise control over the item, to the exclusion of anyone apart from another person in joint possession.

I'll now elaborate on what possession means.

First, possession is different to ownership. Ownership lets you use, sell or destroy something. Possession is merely a right to exercise control. For this element, you are looking at whether [*accused*] had possession of the drugs, not whether s/he owned the drugs.

Second, a person continues to have possession even when they don't physically control the item.

To give a simple example, suppose you borrowed a library book to read during breaks in the trial. You have possession of the book but you do not own the book. You continue to have possession of the book when you leave it in your bag in the jury room, or at home when you leave the house. You decide where to take the book and where to put it, rather than leaving it for anyone else to take.

The prosecution argues that [*accused*] had possession of the drugs because [*refer to relevant evidence and arguments*]. To establish this, they have to exclude other possible explanations. In particular, they must prove that [*identify competing hypothesis that must be excluded, such as lack of knowledge or mere acquiescence*]. [*Refer to relevant evidence and arguments on proof or disproof of hypotheses consistent with innocence*].

The second matter I need to explain is the effect of this presumption. The law says that if the prosecution proves the accused had possession of at least [*identify trafficable quantity*] of [*identify controlled drug*], then s/he is presumed to have [intended to sell it / possessed it for the purpose of taking part in the process of selling it]. This means that the prosecution must

[49] If the accused is alleged to have trafficked less than a trafficable quantity, then this direction should be modified to explain the concept of possession with intention to sell.

prove beyond reasonable doubt that the accused had possession of at least [*identify trafficable quantity*] of [*identify controlled drug*]. If this happens, then the defence must prove that s/he did not [intend to sell it / possess it for the purpose of taking part in the process of selling it].

This is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. When the defence has to prove something, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that something is more likely than not.

In this case, that means that if the prosecution can prove that the accused had possession of at least [*identify trafficable quantity*] of [*identify controlled drug*], then you may find that the accused trafficked the drugs, unless the defence shows that it is more likely than not that s/he did not [intend to sell the drugs / possess the drugs for the purpose of taking part in the process of selling them].

[*Refer to relevant evidence and arguments on rebutting the statutory presumption*]

If the accused is alleged to have taken part in the process of selling without possessing the drug, add the following section. In giving this direction, refer only to the relevant steps that arise on the facts of the case:

The law states that a person takes part in the process of selling a drug by [storing the drug / carrying the drug / transporting the drug / loading the drug / unloading the drug / packaging the drug / separating the drug into discrete units / preparing the drug / guarding the drug / concealing the drug / providing or arranging finance for the drug / providing or allowing the use of premises] for the purpose of selling the drug.[50]

[*Refer to relevant evidence and arguments*]

[50] If the case involves the accused directing or participating in a step, rather than performing the step personally, this direction should be adjusted accordingly.

Jury Direction #16.1B – Trafficking a large commercial quantity of controlled drug

I will now direct you about the elements of trafficking a large commercial quantity of a controlled drug.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The substance is a controlled drug;

Two – The accused knew that the substance was a controlled drug;[51]

Three – The accused trafficked the drug;

Four – There is a large commercial quantity of the drug;

Five – The accused intended to traffic a quantity which is, in fact, a large commercial quantity of the drug.

I will now explain these five elements and how they apply in this case.

Controlled drug

The first element is that the substance is a controlled drug.

I direct you that [*identify relevant controlled drug*] is a controlled drug.

If you are satisfied that [*identify relevant substance*] is [*identify relevant controlled drug*], then this first element is proved.

Knowledge of controlled drug

The second element the prosecution must prove is that [*accused*] knew the substance was a controlled drug. This element relates to [*accused*]'s state of mind.

For this element, the prosecution only has to prove that [*accused*] knew the substance was an illegal drug. The prosecution does not have to prove [*accused*] knew the precise identity of the drug.

[*Refer to relevant prosecution and defence evidence and arguments on this issue*]

Trafficking

The third element is that the accused trafficked the drug.

[51] Where the case involves the accused being reckless as to the substance being a controlled drug, the direction should be modified accordingly.

A person traffics a drug when they [intentionally sell it / possess it intending to sell it / intentionally take part in the process of selling it].

If the accused is alleged to have possessed a trafficable quantity of the drug, add the following:

The law states that a person who has possession of at least [*identify trafficable quantity*] of [*identify controlled drug*] is presumed to be [intending to sell it / possessing it for the purpose of taking part in the process of selling it].

There are two matters I need to direct you about to explain this rule. First, the concept of possession. Second, the effect of this presumption.

The law says that a person has possession of something if [s/he] has the power and intention to exercise control over the item, to the exclusion of others.

[If joint possession is in issue, add the following: The law also recognises that two or more people may have possession of something at the same time. This is called joint possession. It means that each of them have the power and intention to exercise control over the item, to the exclusion of anyone apart from another person in joint possession.]

I'll now elaborate on what possession means.

First, possession is different to ownership. Ownership lets you use, sell or destroy something. Possession is merely a right to exercise control. For this element, you are looking at whether [*accused*] had possession of the drugs, not whether s/he owned the drugs.

Second, a person continues to have possession even when they don't physically control the item.

To give a simple example, suppose you borrowed a library book to read during breaks in the trial. You have possession of the book but you do not own the book. You continue to have possession of the book when you leave it in your bag in the jury room, or at home when you leave the house. You decide where to take the book and where to put it, rather than leaving it for anyone else to take.

The prosecution argues that [*accused*] had possession of the drugs because [*refer to relevant evidence and arguments*]. To establish this, they have to exclude other possible explanations. In particular, they must prove that [*identify competing hypotheses that must be excluded, such as lack of knowledge or mere acquiescence*]. [*Refer to relevant evidence and arguments on proof or disproof of hypotheses consistent with innocence*].

The second matter I need to explain is the effect of this presumption. The law says that if the prosecution proves the accused had possession of the drugs in this case, then s/he is presumed to have [intended to sell it / possessed it for the purpose of taking part in the process of selling it]. This means that the prosecution must prove beyond reasonable doubt that the accused had possession of the drugs. If this happens, then the defence must prove

that s/he did not [intend to sell it / possess it for the purpose of taking part in the process of selling it].

This is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. When the defence has to prove something, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that something is more probable than not.

In this case, that means that if the prosecution can prove that the accused had possession of the drugs, then you may find that the accused trafficked the drugs, unless the defence shows that it is more probable than not that s/he did not [intend to sell the drugs / possess the drugs for the purpose of taking part in the process of selling them].

[*Refer to relevant evidence and arguments on rebutting the statutory presumption*]

If the accused is alleged to have taken part in the process of selling without possessing the drug, add the following. In giving this direction, refer only to the relevant steps that arise on the facts of the case:

The law states that a person takes part in the process of selling a drug by [storing the drug / carrying the drug / transporting the drug / loading the drug / unloading the drug / packaging the drug / separating the drug into discrete units / preparing the drug / guarding the drug / concealing the drug / providing or arranging finance for the drug / providing or allowing the use of premises] for the purpose of selling the drug.[52]

[*Refer to relevant evidence and arguments*]

Large commercial quantity

The fourth element is that there was a large commercial quantity of the controlled drug.

The law states a large commercial quantity of [*identify relevant controlled drug*] is [*identify large commercial quantity threshold*].

[*Refer to relevant prosecution and defence evidence and arguments on this issue*]

Intention to traffic in a large commercial quantity

The fifth element the prosecution must prove is that the accused intended to traffic in a quantity which is, in fact, a large commercial quantity of the controlled drug.

[52] If the case involves the accused directing or participating in a step, rather than performing the step personally, this direction should be adjusted accordingly.

Remember, a large commercial quantity of [*identify controlled drug*] is [*identify relevant quantity*].

For this element, the prosecution must prove that [*accused*]'s [intent to sell / possession with intent to sell / intent to take part in the process of sale] related to the [*identify relevant controlled drug and supposed quantity*, e.g. 200 kg of cannabis].

It is not necessary to show that [*accused*] was aware that [*identify relevant quantity*] of [*identify controlled drug*] is defined in law as a large commercial quantity. This element focuses on the quantity [*accused*] was dealing with, rather than his/her knowledge of the significance of any particular weight or number.

If the case involves wet cannabis, adapt the following:

You have heard evidence that cannabis is usually sold in a dry state, and that the accused was found with cannabis that had not yet been dried.

The accused has been charged with trafficking a large commercial quantity of cannabis plant material. That is, the flowering and fruiting tops, leaves, seeds or stalks of a cannabis plant. For the purpose of this element, a person will intend to traffic a large commercial quantity if s/he [intends to sell / possesses with intent to sell / intends to take part in the process of selling] at least 2 kg of the cannabis which was found.

It does not matter if the actual amount would have been less at the time of sale, because of the drying process. To explain this another way, a large commercial quantity, 2 kg, is [*identify percentage*] of the [*identify wet weight*] of cannabis found. The prosecution will have proved this element if they prove the accused intended to traffic at least [*identify percentage*] of the cannabis in his possession.

[*Refer to relevant evidence and arguments*]

16.2 – Manufacture of controlled drugs

50. *Controlled Substances Act 1984* s 33 creates three offences relating to manufacturing controlled drugs for sale.

51. The first offence, manufacturing a large commercial quantity of a controlled drug, has three elements:

- The accused intentionally manufactured a controlled drug;
- The amount manufactured is or will be a large commercial quantity;
- The accused manufactured the drug for a commercial purpose.

52. The second offence, manufacturing a commercial quantity of a controlled drug, has similar elements, but differs in the relevant quantity.

53. The third offence, manufacturing a controlled drug, does not require proof of the quantity to be produced.

54. *Controlled Substances Act 1984* s 33J creates a further offence of manufacturing controlled drugs simpliciter. This offence has a single element:

- The accused intentionally manufactured a controlled drug.

55. For information on what substances are controlled drugs, see 16.1 – Trafficking controlled drugs.

Manufacture

56. The first element the prosecution must prove is that the accused manufactured a substance.

57. Manufacture is defined as:[53]

> (a) undertake any process by which the drug is extracted, produced or refined; or
>
> (b) take part in the process of manufacture of the substance;

58. A person takes part in the process of manufacture if the person "directs, takes or participates in any step, or causes any step to be taken" in the process of manufacture.[54] Steps in the process of manufacture include the following, when done for the purpose of manufacturing the drug:[55]

> (a) acquiring equipment, substances or materials;

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[53] *Controlled Substances Act 1984* s 4(1).
[54] *Controlled Substances Act 1984* s 4(4).
[55] *Controlled Substances Act 1984* s 4(6).

(b) storing equipment, substances or materials;

(c) carrying, transporting, loading or unloading equipment, substances or materials;

(d) guarding or concealing equipment, substances or material;

(e) providing or arranging finance (including finance for the acquisition of equipment, substances or materials);

(f) providing or allowing the use of premises or jointly occupying premises.

59. This definition is intended to catch a wide range of conduct and should not be read narrowly.[56]

60. This definition extends the meaning of manufacture to include preparatory conduct which, considered alone, might not appear to be a step in the process of manufacture. The question for the jury is whether the relevant act is a step in the process of manufacture and whether the accused intended to ultimately produce the relevant drug, or whether it is merely preparatory to manufacture. This is a distinction which must be decided on a case by case basis.[57]

61. The fact that further steps are required to successfully produce the relevant drug does not prevent a finding that the accused was taking part in the process of manufacture. These further steps might include additional chemical reactions, or the acquisition of additional chemicals or equipment.[58]

62. Similarly, the fact that further steps are required to produce a commercial or large commercial quantity of a controlled drug does not prevent a finding that the accused has manufactured a commercial or large commercial quantity. The question is whether the accused has engaged in a process that, if completed, would result in the extraction, production or refinement of a commercial or large commercial quantity.[59]

63. A charge of manufacture may allege multiple steps, or that the accused will engage in production in multiple batches, without raising issues of duplicity. The issue for the jury will be whether there is a single process, which the accused is participating in continuously, intermittently or by performing a single act. It is a question of fact for the jury to decide whether the batches are part of one or more processes of manufacture.[60]

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[56] See *R v Randylle* (2006) 95 SASR 574; [2006] SASC 318, [5] on the earlier form of the relevant provisions, which were narrower than the current provisions.

[57] See *R v Randylle* (2006) 95 SASR 574; [2006] SASC 318, [34]–[44]; *R v Vaccaro* (2017) 127 SASR 284; [2017] SASCFC 10; *R v Bilac* [2018] SASCFC 75, [38]–[41]; *Question of Law Reserved (No 1 of 2003)* (2003) 87 SASR 392; [2003] SASC 430, [96].

[58] *R v Bilac* [2018] SASCFC 75, [39]–[41]; *R v Randylle* (2006) 95 SASR 574; [2006] SASC 318, [43]–[47].

[59] *R v Vaccaro* (2017) 127 SASR 284; [2017] SASCFC 10, [43].

[60] *R v Vaccaro* (2017) 127 SASR 284; [2017] SASCFC 10, [41]–[42], [46]; *R v Chapman* (2001) 214 LSJS 319, 329; [2001] SASC 200; *R v Maggs* (2008) 100 SASR 303; [2008] SASC 105, [46].

64. Where the evidence is ambiguous on whether two steps were part of a single process of manufacture or multiple processes, it may not be open to convict the accused of separate offences, as the possibility that there is a single process of manufacture cannot be excluded beyond reasonable doubt. Whether this is so will depend on the state of the evidence, but the fact that chemicals are found which represent different stages of a drug manufacturing process does not dictate that there are separate processes.[61]

Quantity

65. The three offences in s 33 differ in terms of the quantity of controlled drug manufactured.

66. There is no fault element associated with the quantity of drugs. It is not necessary to show that the accused intended to manufacture a commercial or large commercial quantity. An intention to manufacture is sufficient.[62]

67. However, where the manufacturing process was incomplete, evidence of an accused's intention may be relevant as a factual matter to whether, objectively, the accused was taking a step in the manufacture of a commercial or large commercial quantity, or if the accused was taking a step in the manufacture of a smaller quantity.[63]

Commercial purpose

68. For all offences in s 33, the prosecution must prove that the accused manufactured the controlled drug with the intention of selling any of it or believing that another person intended to sell any of it.

69. Where it is proved the accused manufactured a trafficable quantity of the controlled drug, there is a rebuttable presumption that the accused intended or believed the drug would be sold.[64]

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[61] *R v Maggs* (2008) 100 SASR 303; [2008] SASC 105, [24]–[29], [85].
[62] *R v Scarpantoni* (2013) 118 SASR 131; [2013] SASCFC 120, [33].
[63] See *R v Vaccaro* (2017) 127 SASR 284; [2017] SASCFC 10, [58]–[59].
[64] *Controlled Substances Act 1984* s 33(4). This presumption also applies to cases of attempted manufacturing or conspiracy to manufacture.

Jury Direction #16.2 – Manufacture of large commercial quantity for sale

Note: This direction can be modified if the accused is charged with manufacturing a commercial quantity of controlled drugs for sale, manufacturing controlled drugs for sale and manufacturing controlled drugs simpliciter.

I will now direct you about the elements of manufacturing a large commercial quantity of a controlled drug for sale.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused intentionally manufactured a controlled drug;

Two – The accused manufactured a large commercial quantity of the controlled drug;[65]

Three – The accused manufactured the drug for a commercial purpose.

I will now explain these three elements and how they apply in this case.

Manufacture a controlled drug

The first element is that the accused intentionally manufactured a controlled drug.

There are two parts to this element.

The first part is that the accused intentionally manufactured something.

The second part is that the thing manufactured was a controlled drug.

The law says that a person manufactures a controlled drug when they [undertake a process by which the drug is extracted / produced / refined] / [take part in the process of manufacturing a controlled drug].

If the prosecution relies on a process of manufacture, add the following direction:

A person takes part in the process of manufacturing a controlled drug by [acquiring equipment / acquiring substances / acquiring materials / storing equipment / storing substances / storing materials / carrying, transporting, loading or unloading equipment / carrying, transporting, loading or unloading substances / carrying, transporting, loading or unloading materials / guarding or concealing equipment / guarding or concealing substances / guarding or concealing materials / providing or arranging finance / providing or allowing premises to be used / providing or allowing premises to be jointly occupied] for the purpose of manufacturing the drug.

[65] If the process of manufacture was interrupted, this element should be modified to read "a large commercial quantity was to be manufactured".

Manufacturing controlled drugs is a process, and the law is designed to prohibit conduct that even forms an early part of that process. In deciding whether the prosecution has proved this element, you must distinguish between whether the accused was engaging in a step in the process of manufacturing a controlled drug, or whether the conduct was merely part of preparation, and that there was no process of manufacture underway.

The second part of this element is that the manufacture was of a controlled drug.

I direct you that [*identify relevant controlled drug*] is a controlled drug.

[*Identify relevant evidence and argument*]

Large commercial quantity

The second element is that the accused was manufacturing a large commercial quantity of a controlled drug.

The law states a large commercial quantity of [*identify relevant controlled drug*] is [*identify large commercial quantity threshold*].

If the process of manufacture was interrupted, add the following direction:

In this case, there is no evidence that [*accused*] succeeded in making [*identify large commercial quantity threshold*] of [*identify relevant controlled drug*]. To prove this element, the prosecution must show that the accused was engaged in a process to produce at least [*identify large commercial quantity threshold*] of [*identify relevant controlled drug*].

To do this, you must look at the facts objectively. You must look at all the evidence to decide what this process would have achieved, if it was not interrupted. You do not need to decide whether [*accused*] personally intended or believed that s/he would produce at least [*identify large commercial quantity threshold*] of [*identify relevant controlled drug*].

[*Identify relevant evidence and argument*]

Commercial purpose

The third element is that the accused was manufacturing the drug with a commercial purpose. That is, the prosecution must prove that s/he intended to sell any of the drug, or believed that another person intended to sell any of the drug.

The law states that a person who manufactures at least [*identify trafficable quantity*] of [*identify controlled drug*] is presumed to intend to sell it, unless the defence proves otherwise.

This is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. When the defence has to prove something, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that something is more probable than not.

This means that the prosecution must first prove that the amount manufactured was at least [*identify trafficable quantity*]. If that happens, then you can find this element proved, unless the defence can prove that it is more probable than not that s/he did not intend to sell the controlled drug.

[*Identify relevant evidence and argument*]

Summary

To summarise, the three elements look at different aspects of what [*accused*] was doing.

The first element required you to be satisfied that [*accused*] was [making / engaged in the process of making] [*identify relevant controlled drug*]. The second element relates to how much [*identify controlled drug*] s/he made. The prosecution must prove that s/he made at least [*identify large commercial quantity threshold*]. The third element looks at why s/he was [making / engaged in the process of making] [*identify relevant controlled drug*]. The prosecution must prove that his/her purpose was to sell the drug, or s/he believed another person intended to sell it.

16.3 – Cultivation of controlled plants for sale

71. *Controlled Substances Act 1984* s 33B creates three offences of cultivating controlled plants for sale.

72. The first offence, cultivating a large commercial quantity of a controlled plant for sale, has three elements:[66]

    - The accused cultivates a controlled plant;
    - The quantity cultivated is a large commercial quantity;
    - The accused intended to sell the controlled plant(s), their products or believed another person intended to sell the controlled plant(s) or their products.

73. The second offence, cultivating a commercial quantity of a controlled plant for sale, has similar elements, but differs in the relevant quantity.[67]

74. The third offence, cultivating a controlled plant for sale, does not require proof of the quantity to be cultivated.[68]

75. The Act requires that where the only controlled plant involved is a cannabis plant, a charge of cultivating a controlled plant for sale must be prosecuted and dealt with in the Magistrates Court as a summary offence.[69] However, this charge may be joined on an information charging other offences, and the whole case heard in the District or Supreme Court.[70]

76. *Controlled Substances Act 1984* s 33K creates a further offence of cultivating a controlled plant simpliciter. That offence has two elements:

    - The accused intentionally cultivated a substance;
    - The substance is:
        - A controlled plant other than a cannabis plant;
        - A cannabis plant cultivated by artificially enhanced cultivation;
        - A prescribed quantity of cannabis plants; or
        - A cannabis plant and the accused intended to supply the plant or to supply or administer any product of the plant to another person.

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[66] *Controlled Substances Act 1984* s 33B(1).
[67] *Controlled Substances Act 1984* s 33B(2)
[68] *Controlled Substances Act 1984* s 33B(3)
[69] *Controlled Substances Act 1984* s 33B(4).
[70] *Tennant (No 2) v The Queen* (2010) 272 LSJS 87; [2010] SASCFC 26.

Cultivation of a controlled plant

77. Cultivating a plant is defined as:[71]

    (a) plant a seed, seedling or cutting of the plant or transplant the plant; or

    (b) nurture, tend or grow the plant; or

    (c) harvest the plant (including pick any part of the plant or separate any resin or other substance from the plant); or

    (d) dry the harvested plant or part of the plant;

    (e) take part in the process of cultivation of the plant;

78. A person takes part in the process of cultivation of a plant if the person directs, takes or participates in any step, or causes any step to be taken, in the process of cultivation.[72]

79. Steps in the process of cultivation of a plant include:[73]

    (a) acquiring the plant or equipment, substances or materials;

    (b) storing the plant or equipment, substances or material;

    (c) carrying, transporting, loading or unloading the plant or equipment, substances or materials;

    (d) guarding or concealing the plant or equipment, substances or materials;

    (e) providing or arranging finance (including finance for the acquisition of the plant or equipment, substances or materials);

    (f) providing or allowing the use of premises or jointly occupying premises.

80. A controlled plant is defined as:

> a growing cannabis plant or a cutting of a cannabis plant (provided that the cutting has been planted or otherwise placed in a growing medium) or any other plant declared by the regulations to be a controlled plant for the purposes of this Act.[74]

81. This definition means that a cutting that has been planted in a 'growing medium' is a controlled plant.[75]

82. In addition to cannabis, other controlled plants are prescribed by Schedule 3 of the *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014*.

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[71] *Controlled Substances Act 1984* s 4.

[72] *Controlled Substances Act 1984* s 4(4).

[73] *Controlled Substances Act 1984* s 4(7). For the purpose of this list, "materials includes seeds, seedlings and cuttings": *Controlled Substances Act 1984* s 4(8).

[74] *Controlled Substances Act 1984* s 4.

[75] *R v Pali & Buckingham* (2018) 132 SASR 201; [2018] SASCFC 134, [20]–[22].

83. Possession is not an element of a charge of cultivation. While the process of cultivation may involve possession, it is not a necessary requirement. A conviction for cultivation will therefore not raise a plea in bar in relation to trafficking the products of a controlled plant.[76]

Commercial and large commercial quantity

84. Schedule 3 of the *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* specifies the prescribed quantities of controlled plants. Depending on the plant, and the weight of individual plants, the quantity is specified either by reference to the number of plants, or the weight of the plants.

Intention to sell

85. *Controlled Substances Act 1984* s 33B(5) contains a reverse onus provision in relation to proof of the intention to sell. The section states:[77]

> If, in any proceedings for an offence against subsection (1), (2) or (3), it is proved that the defendant cultivated a trafficable quantity of a controlled plant, it is presumed, in the absence of proof to the contrary, that the defendant had the relevant intention or belief concerning the sale of the plants or their products necessary to constitute the offence.

86. A trafficable quantity, sufficient to engage the reverse onus provision, is specified for each controlled plant in *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2014* Schedule 3.

[76] *R v Brendel* (2016) 126 SASR 35; [2016] SASCFC 89, [15].

[77] *Controlled Substances Act 1984* s 33B(5).

Jury Direction #16.3 – Cultivation of a large commercial quantity of controlled plants for sale

Note: This direction can be modified if the accused is charged with cultivating a commercial quantity of a controlled drug for sale, or cultivating controlled plants for sale.

I will now direct you about the elements of cultivating a large commercial quantity of controlled plants for sale.

To prove this offence, the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused cultivated a controlled plant;

Two – The accused cultivated a large commercial quantity of the controlled plant;

Three – The accused intended to sell the controlled plants or the products of the controlled plants.[78]

I will now explain these three elements and how they apply in this case.

Cultivating a controlled plant

The first element is that the accused cultivated a controlled plant.

There are two parts to this element.

The first is that the accused cultivated a plant. The second is that the thing cultivated was a controlled plant.

There are many ways a person can cultivate a plant. For the purpose of this case, a person cultivates a plant by [*add the following forms of cultivation relevant to the case*:

(a) planting a seed, seedling or cutting of a plant, or transplanting a plant; or

(b) nurturing, tending or growing a plant; or

c) harvesting a plant, including picking any part of the plant or separating any resin or other substances from the plant; or

(d) drying a harvested plant or part of a plant;

(e) taking part in the process of cultivating a plant.]

If the prosecution relies on the accused taking part in the process of cultivation, add the following: A person takes part in the process of cultivation by directing, taking or participating

[78] If the prosecution alleges the accused engaged in the cultivating believing another person intended to sell the controlled plants or their products, the direction must be modified.

in [*add those parts of the definition of steps in the process of cultivation from Controlled Substances Act 1984 s 4(7) as relevant to the case*].

The prosecution says [*accused*] did this by [*identify relevant evidence and arguments*]. The defence say you should not find this element proved because [*identify relevant evidence and arguments*].

The second part of this element is that the plant was a controlled plant. I direct you as a matter of law that [*identify relevant controlled plant*] is a controlled plant. There is no dispute that the plants were [*identify relevant controlled plant*], and so there is no dispute about this second part of the element.

Large commercial quantity

The second element is that the accused cultivated a large commercial quantity of a controlled plant. A large commercial quantity of [*identify relevant controlled plant*] is [*identify relevant threshold*]. You have heard evidence that police found [*identify relevant quantity*] of [*identify relevant plant*], and so there is no dispute about this element.

Intention to sell

The third element the prosecution must prove is that the accused was cultivating the controlled plants with the intention of selling the plants, or their products.

The law states that a person who cultivates at least [*identify trafficable quantity*] of [*identify controlled drug*] is presumed to intend to sell the plants or their products, unless the defence proves otherwise.

This is an exception to the general rule that the prosecution must prove all elements, and the defence does not have to prove anything. When the defence has to prove something, a different standard applies. The prosecution must prove the elements of the offence beyond reasonable doubt. The standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that something is more probable than not.

This means that the prosecution must first prove that the amount cultivated was at least [*identify trafficable quantity*]. If that happens, then you can find this element proved, unless the defence can prove that it is more probable than not that s/he did not intend to sell the controlled plants or their products.

[*Identify relevant evidence and argument*]

16.4 – Importing and exporting a border controlled drug

87. Subdivision A of Division 307 of the *Criminal Code*[79] creates four offences of importing or exporting border controlled drugs or border controlled plants.[80]

88. The first offence relates to commercial quantities and has the following five elements:[81]

- The accused imports or exports a substance;
- The accused intended to import or export a substance;
- The substance is a border controlled drug or plant;
- The accused was reckless as to the substance being a border controlled drug or plant;
- The quantity imported or exported is a commercial quantity.

89. The second offence relates to marketable quantities. It differs from the commercial quantity offence in that:[82]

- The quantity imported or exported must be a marketable quantity, rather than a commercial quantity;
- It is a defence for the accused to prove that he or she neither intended nor believed another person intended to sell any of the drugs, plants or their products.

90. The third offence relates to any quantity of border controlled drugs or plants. Like the second offence, it is a defence for the accused to prove that he or she neither intended nor believed another person intended to sell any of the drugs, plants or their products.[83]

91. The fourth offence relates to any quantity of border controlled drugs or plants, but does not have a defence of a lack of commercial intent.[84]

Importing and exporting

92. Import is defined to include:[85]

- bring the substance into Australia; and

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[79] *Criminal Code Act 1995* (Cth).
[80] For convenience, the phrase 'border controlled drug or plant' is used below to refer to a 'border controlled drug or a border controlled plant'.
[81] *Criminal Code* s 307.1.
[82] *Criminal Code* s 307.2.
[83] *Criminal Code* s 307.3.
[84] *Criminal Code* s 307.4.
[85] *Criminal Code* s 300.2, definition of "import".

- deal with the substance in connection with its importation.

93. This definition provides both a primary and an extended meaning of "import". The extended meaning in paragraph (b) was added by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No 2) 2010* (Cth) to overcome the narrow interpretation which courts had previously adopted.[86]

94. Under the primary meaning, "import" is complete when the goods are brought into Australia and delivered to a point which would result in the goods remaining in Australia.[87]

95. The expanded meaning of import contains two distinct requirements that must be proved:[88]

- The accused must "deal with the substance"; and
- The dealing must be "in connection with its importation".

96. The *Criminal Code* does not define the phrase "deal with the substance", but it must be interpreted in accordance with the plain meaning of the words.[89] While the ambit of the phrase has not been defined, one limit is that a person cannot deal with a substance which does not, at the time of the relevant acts, exist.[90] Similarly, preparatory acts, such as seeking to source a border controlled substance for importation, will not constitute a dealing where there is no substance in existence or which the accused could deal with at the time of those acts.[91]

97. The requirement that the dealing be "in connection with its importation" places a practical limit on how far the dealing is from the importation itself.[92]

98. This expanded meaning of imports includes conduct which involves taking part in a process of importation. Different people may take part in an importation at different stages, such as physically bringing a package into Australia, obtaining customs clearance in Australia and delivering the package to its ultimate destination. This recognition of different stages may be important where a person is charged with attempting to import,

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[86] Compare *R v Toe* (2010) 106 SASR 203; [2010] SASC 39.

[87] *Wilson v Chambers* (1926) 38 CLR 131, 139; approved in *Campbell v The Queen* (2008) 73 NSWLR 272; [2008] NSWCCA 214, [125]–[130]; *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61; *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [105].

[88] *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [87]–[93].

[89] *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [176].

[90] See *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [145]–[146].

[91] *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [176].

[92] *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [93]; *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [152]–[153].

which may continue to occur even after the substance has been seized by police or customs officials.[93]

99. Export is defined to include taking from Australia.[94] The focus of a charge of exporting is therefore on the accused's acts which involved taking the substance out of Australian territory. When or where it arrived at a foreign destination is not the focus of the element.[95]

The expanded meaning of import, police substitutions and attempts

100. Where police intercept a border controlled substance, and fully replace it with an inert substance, careful attention is required as to whether an accused may have imported the substance. Conduct occurring exclusively before the substitution can be relevant to a charge of importing a border controlled substance, under either the primary or expanded meaning.

101. However, conduct occurring exclusively after the substitution cannot constitute the actus reus of import, as the importing is complete, and the accused will not have dealt with the intended substance, due to the full substitution. However, conduct occurring exclusively after a full substitution can constitute the actus reus of a charge of attempting to import under the expanded definition, as the process of dealing with a substance in connection with its importation is not limited to conduct occurring before the substance is imported.[96]

102. Where the accused is charged with attempting to import a substance, and the police have fully substituted the substance, the expanded definition of import requires the prosecution to prove:[97]

> first, that at the time of his conduct he is intending to deal with the original substance (wrongly believing that he is doing so); and
>
> second, that his conduct is sufficiently proximate to a completed "dealing" with the substituted substance so as to constitute an attempt rather than mere preparation.

Intention to import or export

103. The second element the prosecution must prove is that the accused intended to import or export the substance.[98]

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[93] *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [18]–[26], [87]–[106].
[94] *Criminal Code* s 300.2.
[95] *Campbell v The Queen* (2008) 73 NSWLR 272; [2008] NSWCCA 214, [124].
[96] *R v Toe* (2010) 106 SASR 203; [2010] SASC 39, [71], [233]–[234]; *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [77]–[106], [126]–[129]; *Ribbon v The Queen* (2019) 134 SASR 328; [2019] SASCFC 130, [153].
[97] *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [97].
[98] *Criminal Code* s 5.6.

104. Under the Code, a person intends to engage in conduct if he or she means to engage in the conduct.[99]

105. Where the accused brings in a container which has a substance in it, and it is open to find the accused intended to import the container, it is open to infer the accused meant to import the substance if, at the time of importation, the accused:[100]

- Knew the substance was in the container; or
- Knew or believed there was a real or significant chance that the substance was in the container.

106. In deciding whether to draw an inference of intention from knowledge of a real or significant chance, the court is entitled to look at what the accused did with that knowledge. As the High Court explained in *Smith & Afford*:[101]

> Recklessness may be the right conclusion, for example, in the case of an honest tourist who, although being aware of the risk known to us all that strangers may sometimes slip a foreign substance into a tourist's luggage, does not have any particular reason to be concerned about the chance of the presence of a substance in his or her luggage, and, in that state of mind, brings his or her luggage into Australia without declaring any concerns. But, in cases like those the subject of these appeals, a mental state short of intent is highly unlikely because, if someone is aware of a real or significant chance that there is an extraneous substance in his or her luggage, and the person's state of mind is truly that he or she would not be prepared to take the substance into Australia if it were within the luggage, it is to be expected that the person would inspect the luggage to ensure that there is no substance in it, or at the very least declare his or her concerns to Customs upon arrival. Where, therefore, as in these appeals, a person is aware of a real or significant chance of the presence of an extraneous substance in an object which the person brings into Australia, and does nothing by way of inspection or declaration to avoid the risk of its presence, the circumstances of the case strongly suggest that the person's state of mind is, in truth, that he or she is prepared to proceed with bringing the object into Australia even if the substance is in the object; and thus that the person means and intends to import the substance.

107. Drawing an inference of intention to import from knowledge of the risk of the existence of the substance does not require proof that he accused knew or believed:[102]

- what the substance was;
- what the substance looked like;
- how it was wrapped;
- what the substance otherwise contained;
- where it was located or concealed;

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[99] *Criminal Code* s 5.2.

[100] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [57]–[63], [69(8)].

[101] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [59].

[102] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [63], [69(9)].

- in what fashion the substance existed or was hidden in the container;
- in what form the substance existed or was hidden in the container;

108. However, as the element requires proof of an intention to import or export the substance, careful identification of the substance may be necessary, especially where it is concealed in a container. It is not enough that the accused intended to import or export the container.[103] While this element does not require consideration of whether the accused knew or believed that the substance was a border controlled drug,[104] an intention to import a concealed substance may, as a practical matter, require some knowledge of the nature of the concealed substance, as opposed to the container in which it was imported.

109. This element must be assessed separately from the fourth element, which requires proof that the accused was reckless as to whether the substance was a border controlled drug.[105]

110. An inference of intention may only be drawn if the jury is satisfied beyond reasonable doubt of the facts and circumstances from which the inference is drawn and that the inference of intent is the only reasonable inference to draw from those facts and circumstances.[106]

Substance is a border controlled drug or plant

111. A substance is a border controlled drug or plant if it is:[107]

- Listed by regulation as a border controlled drug or plant;
- Determined by the Minister as a border controlled drug or plant;

112. The list of proscribed border controlled drugs and border controlled plants are contained in *Criminal Code Regulations 2002* regulation 5E, and Schedule 4, column 1.

113. A drug analogue of a listed border controlled drug is itself a border controlled drug.[108] Drug analogue is defined in s 301.9(1), and depends on the similarities in chemical structure. Whether a substance is a drug analogue is a question of fact for the jury, on which they will need expert evidence.[109]

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[103] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [59]–[60].
[104] As that is the fourth element.
[105] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [69(4)].
[106] *Smith & Afford v The Queen* (2017) 259 CLR 291; [2017] HCA 19, [69(7), (10)].
[107] *Criminal Code* ss 301.4, 301.5.
[108] *Criminal Code* s 301.4
[109] See *Daley v Tasmania* (2012) 21 Tas R 247; [2012] TASCCA 4; Clegg v Western Australia (No 2) (2017) 265 A Crim R 201; [2017] WASCA 30.

Recklessness as to the substance being a border controlled drug or plant

114. The fourth element is that the accused was reckless as to the substance being a border controlled drug or a border controlled plant.[110]

115. Recklessness requires proof that:[111]

- The accused was aware of a substantial risk that the substance was a border controlled drug or plant; and
- Having regard to the circumstances known to the accused, it was unjustifiable to take the risk.

116. Whether taking a risk is unjustifiable is a question of fact.[112]

117. In deciding whether it was unjustifiable to take the risk, the jury must "make a moral or value judgment concerning the accused's advertent disregard of the risk".[113] This is an objective, rather than subjective, inquiry.[114] The jury must consider the likelihood of the risk occurring and decide whether the risk is one that should not have been taken.[115]

118. A person is also reckless if that person believes that the substance is a border controlled drug or plant, or knows that the substance is or will be a border controlled drug or plant.[116]

119. It is not necessary to prove that the accused was reckless about the precise identity of the border controlled drug.[117]

120. When an accused is charged with attempting to commit one of the offences against Division 307 of the *Criminal Code*, this fault element remains one of recklessness.[118]

Quantity

121. Where the accused is charged with the offences in ss 307.1 or 307.2, the prosecution must prove that the quantity imported was a commercial or marketable quantity, respectively.

122. The quantity required for a commercial or marketable quantity is prescribed in the relevant regulation or ministerial direction. The prescribed quantity for drug analogues

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[110] *Criminal Code* ss 307.1(2), 307.2(2), 307.3(3), 307.4(2).
[111] See *Criminal Code* s 5.4(1).
[112] *Criminal Code* s 5.4(3).
[113] *R v Saengsai-Or* (2004) 61 NSWLR 135; [2004] NSWCCA 108, [70].
[114] *R v Nozhat (No 2)* [2019] ACTSC 81, [12].
[115] *Lustig v The Queen* (2009) 195 A Crim R 310; [2009] NSWCCA 143, [74].
[116] See *Criminal Code* ss 5.3, 5.4(4).
[117] *Criminal Code* s 300.5.
[118] *Criminal Code* s 300.6. This is different to most attempt offences under the *Criminal Code*, where intention and knowledge are the fault elements in relation to each physical element: c.f. *Criminal Code* s 11.1(3).

is either the prescribed quantity for the drug to which it is an analogue, or the smaller of the prescribed quantities if it is an analogue to more than one prescribed drug.[119]

123. The amounts listed in the regulations are based on the quantity of the drug in pure form, unless otherwise noted.[120]

124. Divisions 311 and 312 contain provisions which allow parcels and mixtures to be aggregated. These provisions also allow quantities to be aggregated in particular circumstances. To determine whether a charge involves an aggregate commercial or marketable quantity, the Code prescribes an equivalent process to that which applies under *Controlled Substances Act 1984* s 33O.[121]

125. There is no fault element associated with proof of quantity.[122] This is different to the offences under the *Controlled Substances Act 1984*, where the offender must intend to deal with a large commercial or commercial quantity of a controlled drug.[123]

Defences

126. There are two specific defences that may apply to offences under Division 307:

- Lack of commercial intent;[124]
- Mistaken belief in state law authorisation.[125]

Lack of commercial intent

127. A person charged with importing or exporting a marketable quantity of border controlled drugs or border controlled plants, or importing or exporting simpliciter under s 307.3, is not guilty if they prove that they neither intended, nor believed that another person intended, to sell any of the drugs or plants or its products.[126]

128. The accused bears the burden of proving this defence on the balance of probabilities.[127]

129. In most cases, a person who establishes this defence may be guilty of the alternative offence in s 307.4.[128] The exception is where the substance is only a border controlled

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[119] *Criminal Code* s 301.10.
[120] *Criminal Code* s 312.1(3). See also *Weng v The Queen* (2013) 279 FLR 119; [2013] VSCA 221.
[121] See 16.1 – Trafficking controlled drugs for information on calculating aggregate quantities under s 33O.
[122] *Criminal Code* ss 307.1(3), 307.2(3).
[123] Compare *R v Tassone* [2016] SASCFC 146, [6], [47]–[48]; *R v Pringle* [2017] SASCFC 9, [114]–[116].
[124] *Criminal Code* ss 307.2(4), 307.3(3).
[125] *Criminal Code* s 313.2.
[126] *Criminal Code* ss 307.2(4), 307.3(3).
[127] See *Criminal Code* ss 13.4, 13.5.
[128] See *Criminal Code* s 313.3, which permits alternative verdicts for any offence under Part 9.1, where the maximum penalty of the second offence is not greater than the maximum penalty of the charged offence, provided the accused has been accorded procedural fairness in relation to that finding.

drug or plant due to a ministerial determination rather than a regulation. Determined drugs and plants are not prohibited for the purpose of the offence in s 307.4.[129]

Mistaken belief in state law authorisation

130. Section 313.2 states:

> A person is not criminally responsible for an offence against this Part if:
>
> (a) at the time of the conduct constituting the offence, the person was under a mistaken but reasonable belief that the conduct was justified or excused by or under a law of the Commonwealth or of a State or Territory; and
>
> (b) had the conduct been so justified or excused—the conduct would not have constituted the offence.
>
> Note: A defendant bears an evidential burden in relation to the matter in paragraph (a) (see subsection 13.3(3)).

[129] See *Criminal Code* s 307.4(1)(b).

Jury Direction #16.4 – Importing a commercial quantity of a border controlled drug

Note: This direction is designed for charges under s 307.1 where the conduct relates to importing a border controlled drug. It can be adapted for the other offences in Subdivision A of Division 307, including where the conduct involved exporting a border controlled drug, or less than a commercial quantity.

I will now direct you about the elements of importing a commercial quantity of a border controlled drug.

To prove this offence, the prosecution must prove five elements beyond reasonable doubt. These are:

One – The accused imported a substance;

Two – The accused intended to import a substance;

Three – The substance was a border controlled drug;

Four – The accused was reckless about the substance being a border controlled drug;

Five – The accused imported a commercial quantity of that border controlled drug.

I will now explain these five elements and how they apply in this case.

Importing a substance

The first element is that the accused imported a substance.

To import something means either to bring it into Australia, or to deal with it in connection with its importation.

Importation is an ongoing process, and includes bringing a substance into Australia, obtaining customs clearance and delivering the substance to its ultimate destination.

[*Refer to relevant evidence and arguments*]

Intention to import a substance

The second element the prosecution must prove is that [*accused*] intended to import a substance. This element relates to [*accused*]'s state of mind.

The prosecution must show that the accused meant to import a substance. As part of that, the prosecution must show that the accused knew the substance existed in [*identify relevant container*, e.g., his/her suitcase, the ceramic pots, the towels].

To prove this element, the prosecution asks you to draw an inference about [*accused*]'s state of mind. The prosecution argues that you can infer that s/he meant to import the substance because you can find that the accused knew or believed there was a substantial risk that there was a prohibited substance in [*identify relevant container*] and s/he didn't do anything to

address that risk, such as inspecting [*identify relevant container*] or informing customs about his/her concerns.

While the prosecution does not need to prove that [*accused*] meant to import [*identify border controlled drug*], the prosecution must show that the accused meant to bring in some kind of prohibited substance. An intention to bring in [*identify relevant container*] is not enough, by itself, to prove this element.

[*Refer to relevant prosecution and defence evidence and arguments on this issue*]

Substance is a border controlled drug

The third element is that the substance is a border controlled drug.

The law states that [*identify relevant drug*] is a border controlled drug.

You have heard expert evidence that [*describe relevant evidence, including analysis of substance*].

The defence accepts that this element has been proved.

Recklessness as to the substance being a border controlled drug

The fourth element is that the accused was reckless about the substance being a border controlled drug.

There are two parts to this element.

First, the prosecution must prove that the accused was aware there was a substantial risk that the substance was a border controlled drug.

This part of the element relates to the state of mind. You must consider this element separately from the second element. The focus this time is on what [*accused*] knew or believed about the substance. In contrast, the second element looked at what the accused intended to do with the substance. That is, the prosecution had to prove the accused meant to import the substance.

For this element, the prosecution does not need to show that [*accused*] was aware of a substantial risk that the substance was [*identify relevant border controlled drug*]. This element is also proved if the accused thought it was a different border controlled drug.

The second part of the element is the prosecution must prove that, having regard to the circumstances known to the accused, it was unjustifiable to take the risk. This requires you to make a value judgment about whether, in the circumstances, it was unjustified for the accused to take the substantial risk that the substance was a border controlled drug.

[*Identify relevant evidence and arguments*]

Commercial quantity

The fifth element is that the accused imported a commercial quantity of a border controlled drug.

The law states that a commercial quantity of [*identify relevant drug*] is [*identify relevant quantity threshold*] or more. This is measured by reference to the drug in pure form.

You have heard evidence that [*describe relevant evidence of quantity, including, where necessary, translating dilute quantities into pure quantities*].

[*Refer to relevant prosecution and defence evidence and arguments on this issue*]

CHAPTER 17: DEFENCES

17.1 – Self-defence

1. The law of self-defence is codified by Part 3, Division 2 of the *Criminal Law Consolidation Act 1935*.

2. Self-defence involves two limbs:[1]

    - The accused genuinely believed that his or her conduct was necessary and reasonable for a defensive purpose;

    - The accused's conduct was, in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat the accused genuinely believed to exist.

3. The first limb is a purely subjective test, while the second limb is an objective test which is assessed in the context of the accused's subjective perspective of the circumstances he or she faced.[2]

4. A judge should leave self-defence if, taking the version of the evidence most favourable to the accused, a jury acting reasonably might find the prosecution has not excluded self-defence.[3]

5. This requires the judge to consider whether there is evidence that is capable of supporting both limbs, as the defence will fail if the prosecution is able to negate either limb.[4]

6. The manner in which the trial is conducted, and the submissions of parties, are relevant to but not determinative of whether the judge should leave self-defence to the jury.[5]

7. This defence is capable of applying to intentional, reckless and negligent acts. There is no reason to exclude its operation when the accused is charged, for example, with negligent manslaughter.[6]

8. Where the accused is charged with several alternative offences, the judge may need to direct the jury that the relevant defensive act may vary depending on the alleged offence.

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[1] *Criminal Law Consolidation Act 1935* s 15(1).
[2] *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [84]
[3] *Warne v The Queen* (2020) 135 SASR 431; [2020] SASCFC 12, [57]; *R v CMM* (2002) 81 SASR 300; [2002] SASC 21, [40].
[4] *Warne v The Queen* (2020) 135 SASR 431; [2020] SASCFC 12, [57]. See also *Flanagan v The Queen* (2013) 236 A Crim R 255; [2013] NSWCCA 320, [78]–[93].
[5] *Warne v The Queen* (2020) 135 SASR 431; [2020] SASCFC 12, [58].
[6] *Edwards v The Queen* (2009) 264 LSJS 315; [2009] SASC 233, [31]–[33], [144]–[145].

For example, this may be required where there is a difference in the relevant causal acts between the different alternative offences.[7]

9. It is not necessary in every case to slavishly follow the words of the statute. Provided the jury is correctly directed about the legal test, it may be acceptable to also use substitute phrases such as "as the defendant genuinely saw it" or "as the defendant saw it", "proportionate" (without prefacing with the word "reasonably" on each occasion) or "reasonably proportionate to the threat which the defendant believed [he faced]". In doing so, the judge should make clear that these are short-hand phrases.[8]

10. When explaining self-defence, it is permissible to first introduce the topic in a way that does not refer to the onus of proof. This can aid proper understanding of the issue, without the complication that arises from the double negatives necessary to explain how the onus of proof works. However, if that is done, the judge must go on to explain how the basic principles of self-defence interact with the onus of proof.[9]

Evidence relevant to self-defence

11. Evidence of the victim's propensity for violence is relevant to self-defence in two ways. First, it increases the likelihood that the victim was the aggressor. Secondly, if the accused knows of the victim's propensity for violence, that knowledge is relevant to the accused's assessment of the danger he or she was facing.[10]

12. The relevance of evidence to self-defence, particularly evidence about the accused's state of mind, may not be intuitive for members of the jury. While it is not necessary to identify every item of evidence in a summing up, it may be necessary for the judge to alert the jury to the relevance of certain evidence which they might otherwise overlook.[11]

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[7] For example, in *R v Bednikov* (1997) 95 A Crim R 200, unlawful and dangerous act manslaughter was left as an alternative to murder. The causal act for murder was the firing of a pistol, whereas for manslaughter it was the production and pointing of the pistol. In the context of manslaughter, the question was whether the production and pointing of the pistol was justified in self-defence, whereas for murder the question was whether the firing was justified. See also *R v Fragomeli* (2008) 254 LSJS 279; [2008] SASC 96, [41]-[42], [112]-[113].

[8] *R v Dunn* (2012) 280 LSJS 137; [2012] SASCFC 40, [49]; *R v Heffernan* (2012) 281 LSJS 21; [2012] SASCFC 70, [40]-[44].

[9] *R v Sekrst* [2016] SASCFC 127, [81].

[10] *R v Hajistassi* (2010) 107 SASR 67; [2010] SASC 111, [15]; *Penhall v The Queen* [2020] SASCFC 58, [89]; *R v Jones* (2017) 129 SASR 522; [2017] SASCFC 163, [11]-[13] (Kourakis CJ) and [125]-[127] (Nicholson J). See also *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75.

[11] Compare *Penhall v The Queen* [2020] SASCFC 58, [91]-[96] and *R v Hajistassi* (2010) 107 SASR 67; [2010] SASC 111, [24]-[35].

Onus of proof

13. Where self-defence is raised, the onus is on the prosecution to disprove the defence beyond reasonable doubt.[12] However, where the accused wishes to rely on s 15C, which removes the need for proportionality in response to a home invasion, the defendant bears the onus of establishing, on the balance of probabilities, the operation of the home invasion exception (see Reasonable proportionality and home invasions, below).[13]

14. Directions on self-defence which take into account the onus of proof are inevitably complex, because they involve an onus of proof on the prosecution to prove negatives.[14]

15. To address the problems caused by expressing the negative propositions in a way consistent with the onus of proof, judges will often inform the jury that the two limbs of self-defence require them to consider:[15]

    - Is it reasonably possible that the accused genuinely believed that his or her conduct was necessary and reasonable for a defensive purpose; and

    - Is it reasonably possible that the accused's conduct was, in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat the accused genuinely believed to exist?

16. A further exception to the general rule that the onus is on the prosecution to disprove self-defence may exist where the provision creating the offence states that the conduct must be without lawful excuse. The use, in the statute, of the term 'without lawful excuse' may engage *Criminal Law Consolidation Act 1935* s 5B, which provides that, where it is material to establish whether an act was done with or without lawful authority, lawful excuse or reasonable excuse, the onus is on the accused to prove authority or excuse. In one case, it was held that s 5B, where it is engaged by a particular offence, prevails over the general provision in s 15(5) which places the onus on the prosecution.[16]

17. In practice, the scope of s 5B is likely to be applied narrowly, and will not apply unless the words of the offence provision match the language of s 5B. For this reason, a provision like *Criminal Law Consolidation Act 1935* s 20(2)(b), which provides that "conduct that is justified or excused by law cannot amount to an assault", is not likely to engage s 5B, as it does not use any of parts of the phrase "without lawful authority, lawful excuse or reasonable excuse".

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[12] *Criminal Law Consolidation Act 1935* s 15(5).

[13] *Criminal Law Consolidation Act 1935* s 15C.

[14] See *Zecevic v The Queen* (1987) 162 CLR 645, 680 (per Deane J); [1987] HCA 26.

[15] See *R v Dunn* (2012) 280 LSJS 137; [2012] SASCFC 40, [27]-[28]. See also *R v Burns* (2009) 103 SASR 514; [2009] SASC 105, [14]-[17].

[16] See *R v O* (Unreported, Supreme Court of South Australia, 19 June 1997, Bleby J).

Subjective limb and defensive purpose

18. The first limb of self-defence requires the jury to consider whether the accused genuinely believed his or her conduct was necessary and reasonable for a defensive purpose.

19. A defensive purpose is defined as:[17]

    - Acting in self-defence or in defence of another; or
    - To prevent or end the unlawful imprisonment of the accused or another.

20. In assessing whether a belief is subjectively held, the jury will take into account anything the accused has said about his or her beliefs, along with whether any stated beliefs were genuinely held.[18]

21. In applying the first limb, it may be necessary to distinguish between the accused's **conduct** and the **consequences**. The defence relates to the accused's belief about the need for and reasonableness of the accused's actions. This may include the degree of force used. However, the defence does not involve asking whether the accused believed that the specific injuries ultimately inflicted were reasonable and necessary.[19]

22. Further, in applying the first limb, the jury will consider the defensive action the accused thought he or she was taking. In a case where the accused is unaware that he or she is wielding a weapon, the accused's belief in the necessity and reasonableness of his or her conduct will not be judged by reference to the use of the weapon.[20]

23. The first limb introduces in a limited way the concept of proportionality, as the accused's belief must extend to the need to use force and the degree of force used. Therefore, where the conduct is disproportionate to the threat, that may (not must) indicate the defendant did not consider the conduct was necessary and reasonable for a defensive purpose.[21]

24. Self-defence is generally not available where the accused was the original aggressor, or voluntarily joined a fight and then, during the fight, needed to act defensively.[22] The exception is where the accused's original aggression has ceased and a new incident has started. This requires a consideration of whether the accused has declined further conflict or sought to retreat.[23]

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[17] *Criminal Law Consolidation Act 1935* s 15(3).
[18] *Police v Lloyd* (1998) 72 SASR 271, 276; [2009] SASC 6941; *R v Gillman* (1994) 62 SASR 460, 465.
[19] See *R v Ormond* [2012] SASCFC 130, [77]-[78].
[20] *R v Bond* [2009] SASC 256, [24]. See also *R v Winter* [2006] VSCA 144 (which considered the use of a weapon in the context of voluntariness).
[21] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [350]; *R v Fragomeli* (2008) 254 LSJS 279; [2008] SASC 96, [28].
[22] *R v Nguyen* (1995) 36 NSWLR 347, 407; *Morgan v Colman* (1981) 27 SASR 334, 336; *R v Bridgland* [2014] SASCFC 80.
[23] *Zecevic v DPP* (1987) 162 CLR 645, 663; [1987] HCA 26; *R v Miller* [2019] SASCFC 91, [162]-[164].

25. Section 15(4) limits the scope of the term defensive purpose in the context of law enforcement action:[24]

> However, if a person—
>
> (a) resists another who is purporting to exercise a power of arrest or some other power of law enforcement; or
>
> (b) resists another who is acting in response to an unlawful act against person or property committed by the person or to which the person is a party,
>
> the person will not be taken to be acting for a defensive purpose unless the person genuinely believes, on reasonable grounds, that the other person is acting unlawfully.

26. Where s 15(4) is relevant, there will be three elements of self-defence:[25]

- the defendant genuinely believed on reasonable grounds that the complainant was acting unlawfully in purporting to arrest him (*the hybrid limb*);
- the defendant genuinely believed his or her conduct to be necessary and reasonable to prevent his or her unlawful arrest (*the subjective limb*); and
- the defendant's conduct was in the perceived circumstances reasonably proportionate to the perceived threat (*the objective limb*).

27. Where the case may involve the accused allegedly being subjected to both violence and unlawful arrest, the judge will need to carefully consider how the two threats should be addressed. One approach is for the jury to consider self-defence against violence and self-defence against unlawful arrest separately, as the prosecution will need to disprove both bases of self-defence.[26] This may be especially relevant where the lawfulness of the arrest can be established, or where the accused's violence was disproportionate to the unlawfulness of the arrest.[27] The other approach is to consider the subjective and objective limbs by reference to the combined threats of violence and unlawful arrest, while recognising that there are different types of threats, and the elements differ because of the hybrid element of self-defence against unlawful arrest.[28]

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[24] *Criminal Law Consolidation Act 1935* s 15(4).
[25] *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [159] (Blue J).
[26] *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [166]–[171] (Blue J).
[27] See *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [103] (Peek J).
[28] *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [160] (Blue J).

Objective limb and reasonable proportionality

28. The objective limb of self-defence requires the jury to consider whether the accused's conduct was reasonably proportionate to the threat the accused faced. This must be assessed in the circumstances, and in response to the threat, that the accused genuinely believed existed.[29]

29. This requires the jury to place themselves in the position of the accused as he or she genuinely believed it to be and then objectively assess whether the accused's conduct was reasonably proportionate.[30] In *Police v Lloyd*, Debelle J explained the second limb of self-defence as follows:[31]

> In short, the test requires an objective assessment to be made of the reasonableness of the response of the accused having regard to the nature of the threat which the accused subjectively and genuinely believed to have existed.

30. In applying this test, the tribunal of fact will first need to make findings about the circumstances which the accused genuinely believed existed and the threats which the accused genuinely believed existed. The tribunal must then objectively consider the reasonable proportionality of the conduct in those circumstances to that threat.[32]

31. In assessing the circumstances and the threat from the accused's perspective, the court may take into account any injuries sustained by the accused, such as shock and concussion. Even if those injuries do not impair the accused's judgment or ability to act rationally, they may be relevant to the circumstances the accused believed existed and the threat the accused believed that he or she faced.[33]

32. The court will also take into account the intoxication of the accused, to the extent that it affected his or her perception of the threat he or she faced.[34]

33. The requirement that the conduct was 'reasonably proportionate' does not mean that the accused cannot use more force than is used against him or her[35] and the jury should be directed about this aspect of proportionality.[36]

34. The chaotic nature of the circumstances which the accused faced may also be relevant to whether continued violence was proportionate.[37]

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[29] *Criminal Law Consolidation Act 1935* s 15(1). See also *R v Sekrst* [2016] SASCFC 127, [85]; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [60].
[30] *R v Dunn* [2012] SASCFC 40, [29].
[31] *Police v Lloyd* (1998) 82 SASR 271, 277; [2002] SASC 160.
[32] *Edwards v The Queen* (2009) 264 LSJS 315; [2009] SASC 233, [137]. See also *R v Dunn* (2012) 280 LSJS 137; [2012] SASCFC 40, [29].
[33] *Edwards v The Queen* (2009) 264 LSJS 315; [2009] SASC 233, [22], [153].
[34] *R v Fleming* [2017] SASC 17, [382].
[35] *Criminal Law Consolidation Act 1935* s 15B.
[36] *R v Dunn* (2012) 280 LSJS 137; [2012] SASCFC 40, [29].
[37] *Edwards v The Queen* (2009) 264 LSJS 315; [2009] SASC 233, [26]

35. The availability of escape is a factor a judge or jury may consider when deciding whether the use of force was reasonably proportionate. However, attempting to escape is not a precondition to invoking self-defence.[38]

36. As with the first limb, it may also be necessary to consider what the accused believed he or she was doing. For example, where the accused is unaware that he or she is striking the victim with a weapon, the assessment of proportionality takes place in the context of defensive action by the accused without a weapon.[39]

Reasonable proportionality and family violence

37. Where the defence asserts that the offence occurred in circumstances of family violence, the court must take into account any evidence of family violence when assessing whether the conduct was reasonably proportionate.[40]

38. This requirement was introduced by *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020* s 7, which commenced operation on 29 March 2021. As an evidentiary provision, it is likely that it applies to any trials commenced after this date.[41]

39. For this purpose, an offence occurs in "circumstances of family violence" if:[42]

> (a) the offence or event consists of, or includes, the commission of family violence; or
>
> (b) the offence is committed, or the event occurs—
>
> (i) during the commission of family violence; or
>
> (ii) as a response to the commission of family violence, or a threat of the commission of family violence in the future (whether implied or express and whether the commission of the family violence is imminent or otherwise); or
>
> (c) the offence is committed, or the event occurs, in any other circumstances resulting from or related to the commission of family violence.

40. "Evidence of family violence" is defined to include the following kinds of evidence:[43]

> (a) evidence of the history of the relationship between the person and a family member, including family violence by the family member towards the person or a family member, or by the family member or the person in relation to any other family member;
>
> (b) evidence of the effect, including the cumulative effect, of family violence on the person or a family member;

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[38] *R v Fricker* (1986) 42 SASR 436; *Zecevic v DPP* (1987) 162 CLR 645, 663; [1987] HCA 26; *R v Howe* (1958) 100 CLR 448.
[39] *R v Bond* [2009] SASC 256, [24].
[40] *Criminal Law Consolidation Act 1935* s 15B(2).
[41] *Rodway v The Queen* (1990) 169 CLR 515, 521; [1990] HCA 19.
[42] *Evidence Act 1929* s 34V.
[43] *Evidence Act 1929* s 34W.

(c) evidence of any social, cultural or economic effects of the family violence on the person or a family member;

(d) evidence of the general nature and dynamics of the person's relationship, including the possible consequences of separation from the person who committed the family violence;

(e) evidence of the psychological effect of family violence on the person or a family member.

41. "Evidence of family violence" is also defined to include expert "social framework evidence", if the defences of self-defence, duress or sudden or extraordinary emergency are raised.[44] Social framework evidence is defined as:[45]

> evidence of the nature and effect of family violence that provides context to the experiences of victims of family violence, including—
>
> (a) evidence relating to the general nature and dynamics of relationships affected by family violence and the cumulative effect on the person or a family member of family violence; and
>
> (b) evidence of the experiences of victims of family violence generally, to the extent that the evidence assists in understanding family violence generally; and
>
> (c) such other evidence as may be necessary or appropriate to ensure a jury has an adequate understanding of family violence.

42. Where the defence asserts that the offence occurred in circumstances of family violence and evidence of family violence is admitted, the judge has a mandatory obligation to identify and explain the purpose for which the evidence may and may not be used.[46]

43. This obligation to explain the permissible and impermissible uses of evidence of family violence is framed in similar terms to the obligation to explain discreditable conduct evidence.[47] However, unlike the discreditable conduct provisions, the Act does not provide guidance on the ways in which evidence of family violence is and is not relevant. That will need to be determined on a case by case basis.[48]

Reasonable proportionality and home invasions

44. Section 15C of the Act provides an exception to the requirement that self-defence must be reasonably proportionate, provided the victim was not a police officer acting in the course of his or her duties.

45. This exception applies where:[49]

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[44] *Evidence Act 1929* s 34X(1), (4). Subsection (2) provides that subsection (1) does not limit the ability of the defendant or any other person to adduce evidence relating to the nature and effect of family violence.

[45] *Evidence Act 1929* s 34X(4).

[46] *Evidence Act 1929* s 34Y.

[47] Compare *Evidence Act 1929* ss 34R and 34Y.

[48] See 4.12.5 - Directions on discreditable conduct evidence at [239] on the operation of the obligation in the context of discreditable conduct evidence.

[49] *Criminal Law Consolidation Act 1935* s 15C(2).

- the accused genuinely believed[50] the victim was committing or had just committed a home invasion;
- the accused was not (at or before the time of the alleged offence) engaged in criminal misconduct that might have given rise to the threat or perceived threat from the victim;
- the accused's mental faculties were not, at the time of the alleged offence, substantially affected by the voluntary and non-therapeutic consumption of a drug.

46. The onus is on the accused to establish the three elements of this exception on the balance of probabilities.[51] The prosecution may establish that the defence does not apply by proving, beyond reasonable doubt, that the victim was a police officer acting in the course of his or her duties.[52]

47. In deciding whether to direct the jury about s 15C, the judge must decide whether there is evidence that, taken at its highest in favour of the accused, could lead a reasonable jury to conclude on the balance of probabilities that the three limbs of s 15C are established.[53] The availability of s 15C is not determined by tactical decisions of trial counsel.[54]

48. For the purpose of the exception:[55]

> ***criminal misconduct*** means conduct constituting an offence for which a penalty of imprisonment is prescribed;
>
> ***drug*** means alcohol or any other substance that is capable (either alone or in combination with other substances) of influencing mental functioning;
>
> ***home invasion*** means a serious criminal trespass committed in a place of residence;
>
> ***non-therapeutic***—consumption of a drug is to be considered non-therapeutic unless—
>
> (a) the drug is prescribed by, and consumed in accordance with the directions of, a medical practitioner; or
>
> (b) the drug is of a kind available, without prescription, from registered pharmacists, and is consumed for a purpose recommended by the manufacturer and in accordance with the manufacturer's instructions;

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[50] As White J noted in *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [91]–[95], a *genuine belief* is a tautology, as a belief is either held, or it is not. However, the need for the belief to be *genuine* suggests that the evidence of the belief should be examined closely, but not necessarily sceptically. It does not imply any objective element of reasonableness. See also *R v Lorke* (2019) 135 SASR 334; [2019] SASCFC 147, [115].

[51] *Criminal Law Consolidation Act 1935* s 15C(2).

[52] *Criminal Law Consolidation Act 1935* s 15C(1); *R v Martin* (2007) 99 SASR 213; [2007] SASC 336, [13].

[53] *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [48], [115]–[119] (applying *Braysich v The Queen* (2011) 243 CLR 434; [2011] HCA 14).

[54] *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [39]–[45], [122]–[128].

[55] *Criminal Law Consolidation Act 1935* s 15C(3).

49. Serious criminal trespass is defined in s 168 as entering or remaining in a place (other than a place open to the public) as a trespasser with the intention of committing an offence to which the section applies. The following offences are offences to which s 168 applies:[56]

    - Theft, or an offence of which theft is an element;
    - An offence against the person;
    - An offence involving interference with, damage to, or destruction of property punishable by imprisonment for 3 years or more.

50. While the definition of 'place of residence' in *Criminal Law Consolidation Act 1935* s 170 is not expressly extended to s 15C, it appears that s 15C picks up that definition. A home invasion therefore requires entry to a building or structure, rather than merely the land on which the building or structure sits.[57]

51. When explaining the requirement that the accused believed the victim had committed or was committing a home invasion, it is appropriate to identify the offence which the victim is said, on the defence case, to have intended to commit. However, this may need to be approached with caution, if there is a risk that identifying a specific offence may improperly narrow the availability of the defence.[58]

52. This exception poses practical difficulties for a judge directing a jury. This is because of the shifting onus of proof. Ultimately, there will be three questions a jury needs to consider:[59]

    1. Has the prosecution proved beyond reasonable doubt that the defendant did not genuinely believe the conduct to which the charge relates was necessary and reasonable for a defensive purpose?
    2. Has the defendant proved on the balance of probabilities each of the circumstances specified in s 15C(2)(a) – (c)?
    3. Has the prosecution proved beyond reasonable doubt that the conduct was not, in the circumstances as the defendant genuinely believed them to be, reasonably proportionate to the threat which the defendant genuinely believed to exist?

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[56] *Criminal Law Consolidation Act 1935* s 168, Note 1.

[57] See *R v Ormond* [2012] SASCFC 130, [55]. See also *Lorke v The Queen* [2019] SASCFC 147, [119]–[120], and note footnote 44, where Peek J refers to a possible question whether entry to a porch near a front door without opening the door qualifies as serious criminal trespass in a place of residence.

[58] See *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [352].

[59] *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [106]–[108] (White J) (see also [35] per Sulan J, but compare Peek J at [136] cautioning against the use of these questions as directions to the jury).

53. While the first of these questions must be considered first, there is no fixed order in which the second and third must be considered.[60]

54. The requirement in the first limb that the accused genuinely believed the victim was committing a home invasion does not require positive evidence from the accused testifying that they turned their mind to the issue and formed the relevant belief. Further, it is not necessary for the defence to prove that the accused's actions were motivated by a response to the home invasion, rather than being motivated by self-defence. It is not realistic to expect an accused, responding to a possible home invasion, to compartmentalise their reasons for acting between self-defence and defending their home.[61]

Murder self-defence – Partial defence

55. An additional form of self-defence is available as a partial defence to murder. This form of self-defence is available if:[62]

- The accused genuinely believed his or her conduct was necessary and reasonable for a defensive purpose; but
- The conduct was not, in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat the accused genuinely believed existed.

56. This partial defence is only relevant if the jury is satisfied of all the elements of murder, including proof of the required intent.[63]

57. In comparison to the general form of self-defence, this partial defence applies where the subjective limb exists, but the objective limb does not. This can also be expressed, in terms that take into account the onus of proof, as being that the partial defence is available where the prosecution disproves the objective limb but is not able to disprove the subjective limb of self-defence.[64]

Self-defence and unanimity

58. In most cases, it is not necessary to direct the jury about the issue of extended unanimity in relation to self-defence. Issues of self-defence are unlikely to be "mutually destructive". However, the issue may arise in an exceptional case.[65]

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[60] *Lorke v The Queen* [2019] SASCFC 147, [113] – [114]. See and compare *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [106]–[108] and *R v Martin* (2007) 99 SASR 213; [2007] SASC 336, [14] for cases in which the order of questions 2 and 3 were treated differently.

[61] *Roberts v The Queen* (2011) 111 SASR 100; [2011] SASCFC 117, [50]–[55], [109]–[113].

[62] *Criminal Law Consolidation Act 1935* s 15(2).

[63] *R v McCarthy (No 2)* [2015] SASCFC 177, [13].

[64] See *Penhall v The Queen* [2020] SASCFC 58, [75].

[65] See *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177; 5.2.1 – Extended jury unanimity.

Interaction with provocation

59. In *Penhall v The Queen*, Kourakis CJ explained the overlap and divergence between excessive self-defence and provocation in a case involving homicide:[66]

> In homicide arising out of a response to an attack, much of the factual matrix on which the defences of provocation and excessive self-defence are respectively based is common to both defences. The point of divergence between provocation and excessive self-defence is in the state of mind of the accused. In the case of excessive self-defence, the accused mistakenly believes that further defensive measures are necessary. On the other hand, in the case of provocation, the accused knows that further defence is unnecessary but is so angered by the attack that he or she loses control and retaliates with murderous intent.
>
> The underlying factual basis, common to both defences, is a serious and dangerous attack. An attack of that kind may prompt a proportionate defensive physical response or a genuine, but disproportionate one. The response may also be knowingly disproportionate. Such an attack is also likely to engender strong emotional responses, including fear or anger, of such intensity that self-control is overwhelmed. Moreover, just as the circumstances of an attack and associated defensive action are often dynamic, so too for the motivating states of mind of the participants. It is for these reasons that close attention should be paid to the remarks of King CJ in *R v Earley* and in their application to the particular circumstances of each case.

60. This issue will, however, only be relevant for offences committed before 1 February 2021, as provocation was abolished as a defence by *Criminal Law Consolidation Act 1935* s 14B.

[66] *Penhall v The Queen* [2020] SASCFC 58, [2]-[3].

Jury Direction #17.1A – Self-defence (non-murder)

This direction is designed for a case where the defensive purpose is self-defence. If the case involves a different defensive purpose (e.g., defence of another, or preventing or terminating unlawful imprisonment), then the direction must be modified.

Note: Where self-defence arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act in lawful self-defence.

Self-defence operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to defend himself/herself; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove self-defence. Rather, the prosecution must exclude self-defence by proving beyond reasonable doubt that the accused's conduct was not done in self-defence.

There are two ways the prosecution can prove that the accused did not act in self-defence.

First, the prosecution can prove this element by establishing beyond reasonable doubt that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself.

Second, the prosecution can prove this element by establishing beyond reasonable doubt that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced.

I will now explain a few general principles before I explain these two parts of the element in more detail.

First, the prosecution can prove this element by proving *either* path. The flip side to that is that if the prosecution does not prove either of these two matters, then self-defence does apply and you must find the accused not guilty of [*offence*].

Second, as I told you at the start of the trial, the prosecution has the onus of proof. That is why the prosecution must show beyond reasonable doubt that the accused **did not** act in self-defence. It is not for the accused to show that s/he did act in self-defence.

I turn now to the two parts of the element.

The first way the prosecution can prove this element relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*] himself/herself did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it

was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

The second way the prosecution can prove this element involves considering the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought s/he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with. But there comes a limit where the force used is so much greater than the threat faced, that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available, including whether s/he could have run away or escaped. The law does not say that self-defence must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

[*Refer to relevant evidence and arguments*]

In summary, this element requires the *prosecution* to prove the accused *was not* acting in self-defence. It does this **either** by proving that the accused **did not** think it was reasonable and necessary to do what s/he did, **or** by proving that, in the circumstances, his/her actions were so excessive that they **were not** reasonably proportionate to the threat s/he thought s/he faced.

[*If the accused is the original aggressor, add at an appropriate point*: When you are considering this issue, remember that the defence is *self-defence*. A person cannot start a fight, and then claim to be acting in self-defence, unless their original aggression had stopped. In a practical sense, that means the prosecution has a third way it can prove this element. That is, the prosecution can prove this element by establishing that the accused's actions were part of a continued act of aggression which the accused began. In other words, the prosecution can prove this element by proving that there was no reasonable possibility that the accused's aggression had stopped.]

Question trail – Self-defence (non-murder)

Has the prosecution proved beyond reasonable doubt the accused did not act in self-defence?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, element proved. Go to next element.
    - If no, not guilty of [*offence*].

Jury Direction #17.1B – Self-defence (murder)

This direction is designed for a case where the defensive purpose is self-defence. If the case involves a different defensive purpose (e.g., defence of another, or preventing or terminating unlawful imprisonment), then the direction must be modified.

Note: Where self-defence arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act in lawful self-defence.

Self-defence operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to defend himself/herself; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove self-defence. Rather, the prosecution must exclude self-defence by proving beyond reasonable doubt that the accused's conduct was not done in self-defence.

There are two parts to this element.

First, the prosecution must prove that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself.

Second, the prosecution must prove that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced.

I now explain these two parts in more detail.

The first way the prosecution can prove this element relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*] himself/herself did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

The second way the prosecution can prove this element requires you to consider the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with.

But there comes a limit where the force used is so much greater than the threat faced that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available, including whether s/he could have run away or escaped. The law does not say that self-defence must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

I will now explain a few general principles you must apply when considering this element.

First, as I told you at the start of the trial, the prosecution has the onus of proof. That is why the prosecution must show the accused **did not** act in self-defence. It is not for the accused to show that s/he did act in self-defence.

Second, there are three possible outcomes, depending on what the prosecution is able to prove.

If the prosecution can prove the first part of the element, that the accused did not believe his/her conduct was reasonable and necessary, then you can find the accused guilty of murder, provided the prosecution has proved the other three elements.

If the prosecution can prove the second part of the element, but not the first, then the law says that you must find the accused not guilty of murder, but guilty of manslaughter. Provided of course the prosecution has proved the other three elements of murder. This is sometimes called "excessive self-defence". It is a different way to find the accused guilty of manslaughter, and does not require you to consider the elements of manslaughter, which I will come to in due course.

If the prosecution cannot prove either the first or second part of this element, then you must find the accused not guilty of murder. You will still need to consider the alternative offence of manslaughter which, as I just said, I will come to in due course.

[*Refer to relevant evidence and arguments*]

In summary, this element requires the *prosecution* to prove the accused *was not* acting in self-defence. If you find the accused **did not** think it was reasonable and necessary to do what s/he did, then this element is proved. If you find that his/her actions were so excessive that they **were not** reasonably proportionate to the threat s/he thought s/he faced then he is not guilty of murder, but is guilty of manslaughter in the form of excessive self-defence. If the prosecution does not prove either of these two matters, then this element is not proved, and the accused is not guilty of murder.

[*If the accused is the original aggressor, add at an appropriate point*: When you are considering this issue, remember that the defence is *self-defence*. A person cannot start a fight, and then claim to be acting in self-defence, unless their original aggression had stopped. In a practical sense, that means the prosecution has a third way it can prove this element. That is, the prosecution can prove this element by establishing that the accused's

actions were part of a continued act of aggression which the accused began. In other words, the prosecution can prove this element by proving that there was no reasonable possibility that the accused's aggression had stopped.]

Question trail – Self-defence (murder)

Has the prosecution proved beyond reasonable doubt the accused did not act in self-defence?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, guilty of manslaughter.
    - If no, not guilty of murder.

Jury Direction #17.1C – Self-defence (home invasion, non-murder)

This direction is designed for a case where the defensive purpose is self-defence. If the case involves a different defensive purpose (e.g., defence of another, or preventing or terminating unlawful imprisonment), then the direction must be modified.

Note: Where self-defence arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act in lawful self-defence.

Self-defence operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to defend himself/herself; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove self-defence. Rather, the prosecution must exclude self-defence by proving beyond reasonable doubt that the accused's conduct was not done in self-defence.

There are three parts to this element.

First, the prosecution can prove this element by establishing that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself.

Second, you will need to decide whether the prosecution has proved that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced. If the prosecution proves that, you will go on to the third part of this element. If the prosecution does not prove either the first or second parts of this element, then it has failed to prove this element, and the accused is not guilty of [*offence*].

For the third part of this element, you must decide whether the defence has proved the following three matters.

A – that the accused genuinely believed [*victim*] was committing, or had just committed, a home invasion.

B – that the accused was not engaged in any criminal misconduct that might have given rise to the threat or perceived threat s/he faced; and

C – that the accused's mental faculties were not substantially affected by voluntary and non-therapeutic consumption of drugs.

If the defence proves these three matters, then this element has not been proved, and you must find the accused not guilty of this offence.

I turn now to the three parts of the element in more detail.

The first step relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*] himself/herself did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

The second step requires you to consider the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with. But there comes a limit where the force used is so much greater than the threat faced, that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available, including whether s/he could have run away or escaped. The law does not say that self-defence must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

[*If the accused may have been the original aggressor, add*: In assessing these first two steps, remember that this element is about *self-defence*. A person cannot start a fight, and then claim to be acting in self-defence, unless their original aggression had stopped. In a practical sense, that means the prosecution can also prove this element by establishing that the accused's actions were part of a continued act of aggression which the accused began. In other words, the prosecution can prove this element by proving that there was no reasonable possibility that the accused's aggression had stopped.]

I will now remind you of how the parties put their case on these first two steps, before turning to the third step. [*Refer to relevant evidence and arguments*].

The third step requires the accused to prove the three matters I mentioned before – home invasion; not criminally responsible for the situation; and not affected by drugs.

Before I explain these three concepts, I must emphasise that it is up to the defence to prove these three matters. This is an exception to the general rule that the prosecution must prove all elements, including either of the first two parts of this element. When the defence has to prove something, a different standard applies. While the prosecution must prove the elements of the offence beyond reasonable doubt, the standard or degree of proof that applies to the defence is the balance of probabilities. That is, the defence only needs to show that these three matters are more probable than not.

A home invasion means [*victim*] had entered a place of residence without permission while intending to commit an offence. The defence say this is proved as being more likely than not

because [*identify relevant evidence and the offence the victim is said to have intended to commit*].

The second matter is that the accused was not engaged in any criminal misconduct that might have given rise to the threat or perceived threat. [*Identify relevant evidence and arguments on this issue*].

Finally, the defence must establish that the accused's mental faculties were not substantially affected by the voluntary and non-therapeutic consumption of a drug. [*Identify relevant evidence and arguments on this issue*].

[*If necessary, refer to relevant evidence and arguments*]

Question trail – Self-defence (home invasion)

Has the prosecution proved beyond reasonable doubt the accused did not act in self-defence?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, proceed to next question.
    - If no, not guilty of [*offence*].
- Has the defence proved that:
    - The accused genuinely believed the victim was committing, or had just committed, a home invasion; and
    - The accused was not engaged in any criminal misconduct that might have given rise to the threat or perceived threat; and
    - The accused's mental faculties were not, at the time of the alleged offence, substantially affected by the voluntary and non-therapeutic consumption of a drug?
        - If yes to all three points, not guilty of [*offence*].
        - If no to any of these three points, element proved. Go to next element.

17.2 – Defence of property and lawful arrest

61. Section 15A of the *Criminal Law Consolidation Act 1935* codifies two discrete defences – defence of property and lawful arrest. Many of the relevant principles overlap with self-defence. This material should therefore be read in conjunction with 17.1 – Self-defence.

62. The defence in s 15A applies where:[67]

- The accused genuinely believed that his or her conduct was necessary and reasonable to:
    - protect property from unlawful appropriation, destruction, damage or interference; or
    - prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
    - make or assist in the lawful arrest of an offender, alleged offender, or a person who is unlawfully at large; and
- The accused's conduct was, in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat the accused genuinely believed to exist.

63. For the purpose of this defence, a criminal trespass to land occurs when a person trespasses on land or premises:[68]

- with the intention of committing an offence against a person or property (or both); or
- in circumstances where the trespass itself constitutes an offence or is an element of the offence.

64. One element of a lawful arrest is that the person must generally be informed of the offence alleged. While this principle, known as the rule in *Christie v Leachinsky*,[69] generally arises in the context of whether a police officer has acted in the course of his or her duty, or whether the arrested person acts in self-defence to an illegal arrest,[70] it applies to both police officers and civilians.[71]

65. The rule in *Christie v Leachinsky* recognises several qualifications and exceptions:[72]

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[67] *Criminal Law Consolidation Act 1935* s 15A(1).
[68] *Criminal Law Consolidation Act 1935* s 15A(3).
[69] [1947] AC 573.
[70] See *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41, [127]–[151].
[71] *Christie v Leachinksy* [1947] AC 573.
[72] *Christie v Leachinksy* [1947] AC 573; *R v Tipping* (2019) 133 SASR 58; [2019] SASCFC 41.

- The person performing the arrest does not need to use technical or precise language. The question is whether the person has been informed, as a matter of substance, of the basis for the arrest;
- The person performing the arrest does not need to identify the alleged offence if the conduct of the other person makes that practically impossible, such as by attacking the arresting person, or by running away;
- The person performing the arrest does not need to identify the alleged offence if the circumstances make the alleged offence obvious.

66. Where defence of property is raised and the accused's conduct caused death, there is an additional element to the defence, which is:[73]

- The accused did not intend to cause death and did not act recklessly realising that the conduct could result in death.

67. Section 15A also creates a partial defence reducing murder to manslaughter which applies where:[74]

- The accused genuinely believed that his or her conduct was necessary and reasonable to:
  - Protect property from unlawful appropriation, destruction, damage or interference; or
  - Prevent criminal trespass to land or premises, or to remove from land or premises a person who is committing a criminal trespass; or
  - Make or assist in the lawful arrest of an offender, alleged offender, or a person who is unlawfully at large; and
- The accused did not intend to cause death; and
- The accused's conduct was not, in the circumstances as the accused genuinely believed them to be, reasonably proportionate to the threat the accused genuinely believed to exist.

68. This partial defence is similar to the partial defence of excessive self-defence in s 15(2). The difference is that it contains an added requirement that the accused must not have intended to cause death, and the defensive purpose for the subjective limb is different.[75]

69. The language of s 15A(1)(b) is "nor did the defendant act recklessly realising that the conduct could result in death". This is not the same wording as the test for reckless

[73] *Criminal Law Consolidation Act 1935* s 15A(1)(b).
[74] *Criminal Law Consolidation Act 1935* s 15A(2).
[75] Compare *Criminal Law Consolidation Act 1935* ss 15(2), 15A(2).

murder, which is whether the accused knew that death was a probable result of his or her actions. Therefore, the prosecution can rebut the full defence by proving that the accused acted recklessly realising that the conduct could result in death. This state of mind is necessarily included in a finding that the accused was reckless about causing death, but is discrete from a finding that the accused intended or was reckless about causing grievous bodily harm.

70. Where a person is charged with murder and raises defence of property, the availability of the full and partial defences therefore depends on the jury's decision about the fault element for murder:

- If the accused intended to kill, neither the full defence nor the partial defence are available;
- If the accused was reckless about causing death, the full defence is not available, but the partial defence is available;
- If the accused intended to cause grievous bodily harm, or was reckless about causing grievous bodily harm, then the partial defence is available, and the full defence may be available.

71. The onus is on the prosecution to disprove defence of property beyond reasonable doubt.[76] This requires the prosecution to disprove one limb of the defence.

72. While s 15A provides a separate defence where the accused acts in defence of property, it may not be necessary to direct the jury on this defence where it adds nothing to a defence properly explained under s 15.[77]

73. The defence in s 15A may be contrasted with self-defence in the context of home invasion, created through the interaction of ss 15 and 15C. While the home invasion defence involves defensive action against a person who has committed or is committing a serious criminal trespass in a place of residence, the defence of property defence allows defensive action to prevent a trespass to land. This includes taking defensive action in response to preparatory steps to commit a trespass. Further, while the home invasion defence in s 15C removes the requirement for objective proportionality, the defence of property defence in s 15A retains the proportionality requirement, with the exception for the partial defence to murder which is analogous to excessive self-defence.[78]

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[76] *Criminal Law Consolidation Act 1935* s 15A(4).

[77] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [74]-[80], [354]. See also *R v Pelly* (2015) 122 SASR 84; [2015] SASCFC 25, [78]-[81], [205].

[78] *R v Ormond* [2012] SASCFC 130, [53]-[61].

Jury direction #17.2A – Defence of property (non-homicide)

Note: Where this defence arises, the following direction should be given as part of the element of unlawfulness. Note: This direction is designed for cases where the defence in s 15A(1)(a)(i) arises. It must be modified if other limbs of s 15A(1)(a) arise.

If the conduct caused death, use Jury direction – Defence of property (homicide) or Jury direction – Defence of property (murder) instead.

For this element, the prosecution must prove the accused did not act in lawful defence of property.

Defence of property operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to protect property from theft, destruction, damage or interference; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove defence of property. Rather, the prosecution must exclude this defence by proving beyond reasonable doubt that the accused's conduct was not done in defence of property.

There are two ways the prosecution can prove that the accused did not act in defence of property.

First, the prosecution can prove this element by establishing that the accused did not genuinely believe his/her conduct was necessary and reasonable to protect property from theft, destruction, damage or interference.

Second, the prosecution can prove this element by establishing that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced.

I will now explain a few general principles before I explain these two parts of the element in more detail.

First, the prosecution can prove this element by proving *either* path. [If appropriate, add: Unlike the [*number*] element, these are *alternative* ways of proving the element. Whereas for the [*number*] element, the prosecution needed to prove all [*number*] matters I identified, for this element, the prosecution can prove either the first part *or* the second part.]

Second, as I told you at the start of the trial, the prosecution has the onus of proof. That is why the prosecution must show the accused **did not** act in defence of property. It is not for the accused to show that s/he did act in defence of property.

I turn now to the two parts of the element.

The first way the prosecution can prove this element relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*]

him/herself did not genuinely believe his/her conduct was necessary and reasonable to defend property. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

The second way the prosecution can prove this element requires you to consider the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with. But there comes a limit where the force used is so much greater than the threat faced, that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available, besides using force. The law does not say that defence of property must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

[*Refer to relevant evidence and arguments*]

In summary, this element requires the *prosecution* to prove the accused *was not* acting in defence of property. It does this **either** by proving that the accused **did not** think it was reasonable and necessary to do what s/he did, **or** by showing that, in the circumstances, his/her actions were so excessive that they **were not** reasonably proportionate to the threat s/he thought s/he faced.

Question trail – Defence of property (non-homicide)

Has the prosecution proved beyond reasonable doubt the accused did not act in lawful defence of property?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend property?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, element proved. Go to next element.
    - If no, not guilty of [*offence*].

Jury direction #17.2B – Defence of property (homicide)

Note: Where this defence arises, the following direction should be given as part of the element of unlawfulness. Note: This direction is designed for cases where the defence in s 15A(1)(a)(i) arises and the conduct caused death.

If the accused is charged with murder, use Jury direction – Defence of property (murder).

For this element, the prosecution must prove the accused did not act in lawful defence of property.

Defence of property operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to protect property from theft, destruction, damage or interference; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove defence of property. Rather, the prosecution must exclude this defence by proving beyond reasonable doubt that the accused's conduct was not done in defence of property.

There are three ways the prosecution can prove that the accused did not act in defence of property.

First, the prosecution can prove this element by establishing that the accused did not genuinely believe his/her conduct was necessary and reasonable to protect property from theft, destruction, damage or interference.

Second, the prosecution can prove that the accused intended to cause death, or realised that his/her conduct would probably cause death.

Third, the prosecution can prove this element by establishing that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced.

I will now explain a few general principles before I explain these three parts of the element in more detail.

First, the prosecution can prove this element by proving *any* of the three paths. [If appropriate, add: Unlike the [*number*] element, these are *alternative* ways of proving the element. Whereas for the [*number*] element, the prosecution needed to prove all [*number*] matters I identified, for this element, the prosecution can prove either the first, second or third path to prove this element.]

Second, as I told you at the start of the trial, the prosecution has the onus of proof. That is why the prosecution must show the accused **did not** act in defence of property. It is not for the accused to show that s/he did act in defence of property.

I turn now to the three parts of the element.

The first way the prosecution can prove this element relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*] himself/herself did not genuinely believe his/her conduct was necessary and reasonable to defend property. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

The second way the prosecution can prove this element also relates only to the accused's state of mind. The law allows a person to act to defend property, but defence of property does not excuse killing someone, unless the accused did not intend to cause death or foresee that his/her actions would probably cause death. This element is different to the [*number*] element which also required you to consider the accused's state of mind. For that element, the prosecution needed to prove that the accused [*identify fault element for substantive offence*]. In contrast, for this element, the prosecution can prove the element by showing that the accused intended to cause death, or acted while realising that his/her conduct would probably result in death.

The third way the prosecution can prove this element requires you to consider the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with. But there comes a limit where the force used is so much greater than the threat faced, that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available, besides using force. The law does not say that defence of property must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

[*Refer to relevant evidence and arguments*]

Question trail – Defence of property (homicide)

Has the prosecution proved beyond reasonable doubt the accused did not act in lawful defence of property?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend property?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused intended to cause death, or realised that his/her conduct would probably result in death?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, element proved. Go to next element.
    - If no, not guilty of [*offence*]

Jury direction #17.2C – Defence of property (murder)

Note: Where this defence arises, the following direction should be given as part of the element of unlawfulness. Note: This direction is designed for cases where the defence in s 15A(1)(a)(i) arises and the accused is charged with murder.

For this element, the prosecution must prove the accused did not act in lawful defence of property.

Defence of property operates where the accused genuinely believes that his/her conduct was necessary and reasonable in order to protect property from theft, destruction, damage or interference; and his/her conduct was, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat that s/he genuinely believed to exist.

The accused does not have to prove defence of property. Rather, the prosecution must exclude this defence by proving beyond reasonable doubt that the accused's conduct was not done in defence of property.

Depending on what the prosecution can prove, there are three possible results for this element. I will explain these different possibilities as I move through the element.

The first issue is whether the prosecution can prove that the accused did not genuinely believe his/her conduct was necessary and reasonable to protect property from theft, destruction, damage or interference.

This issue relates only to the accused's state of mind. In other words, the prosecution can prove this element by showing that [*accused*] him/herself did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself. In determining this issue, you look at all the circumstances, including what the accused said and did. If there is a reasonable possibility that the accused thought it was reasonable and necessary to [*identify relevant conduct*], then the prosecution has not proved the first part of the element.

If the prosecution can prove this first part of the element, then the accused did not act in lawful defence of property. If the prosecution proves all other elements of murder, then you would find the accused guilty of murder. If the prosecution cannot prove this first part of the element, you must go on to consider the next two issues.

The second issue is whether the prosecution can prove the accused intended to cause death.

This also relates only to the accused's state of mind, and is related to the third element. Remember, there are four ways the prosecution can prove the third element.[79] I will use shorthand to describe them as intending to kill, intending to cause grievous bodily harm, knowing that death was probable or knowing that grievous bodily harm was probable.

[79] If the trial did not raise issues of recklessness, then this part of the charge should be modified to refer only to intention to kill or intention to cause grievous bodily harm.

Your approach to this issue must be consistent with your approach to the third element.

If you find that the accused intended to kill, then the accused did not act in lawful defence of property. If you find that the accused intended to cause grievous bodily harm, knew that death was probable or knew that grievous bodily harm was probable, then you must go on to consider the third issue. Exactly which state of mind you found will affect whether the prosecution proves that the accused did not act in lawful defence of property.

The third issue is whether the prosecution can prove that the accused's conduct was not, in the circumstances as s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced.

This requires you to consider the accused's conduct from an objective view. You must decide whether his/her conduct was reasonably proportionate. You must determine this by reference to the threat the accused thought s/he faced. In other words, it requires you to put yourself in the accused's shoes at the time, facing the situation and the threat s/he thought s/he was facing and decide whether his/her actions were reasonably proportionate.

There are a few principles you must take into account when deciding whether his/her conduct was reasonably proportionate. First, a person can use more force than s/he was faced with. But there comes a limit where the force used is so much greater than the threat faced, that it becomes excessive, or disproportionate. Second, a person generally cannot be expected to calmly and carefully judge how much force to use when faced with violence. Third, you should consider what other options the accused had available. The law does not say that defence of property must be a last resort. But the availability of other options might lead you to conclude that the accused's actions were excessive.

If you find that the accused's conduct was not reasonably proportionate, then if you are satisfied the prosecution has proved all other elements of murder, the correct verdict is guilty of manslaughter. This is sometimes called "excessive defence". It is a different way to find the accused guilty of manslaughter, and does not require you to consider the elements of manslaughter, which I will come to in due course.

If the prosecution cannot prove the conduct was disproportionate, then your verdict depends on your approach to the third element. If the prosecution proved that the accused was aware that death was probable, then defence of property does not apply and you would find the accused guilty of murder, provided the prosecution proves all other elements. If, under the third element, the prosecution only proves that the accused intended to cause grievous bodily harm, or that the accused was aware that grievous bodily harm was probable, then the prosecution has not excluded defence of property, and you must find the accused not guilty of murder. You will still need to consider the alternative offence of manslaughter which, as I just said, I will come to in due course.

When you are considering these three issues, remember that I told you at the start of the trial that the prosecution has the onus of proof. That is why the prosecution must show the

accused **did not** act in defence of property. It is not for the accused to show that s/he did act in defence of property. [*Refer to relevant evidence and arguments*].

Question trail – Defence of property (murder)

Has the prosecution proved beyond reasonable doubt the accused did not act in defence of property?

- Has the prosecution proved that the accused did not genuinely believe his/her conduct was necessary and reasonable to defend himself/herself?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused intended to cause death (rather than intending to cause grievous bodily harm, or being aware that death or grievous bodily harm were probable)?
    - If yes, element proved. Go to next element.
    - If no, proceed to next question.
- Has the prosecution proved that the accused's conduct was not, in the circumstances s/he genuinely believed them to be, reasonably proportionate to the threat s/he genuinely believed s/he faced?
    - If yes, guilty of manslaughter.
    - If no, and prosecution proved the accused acted while aware that death was probable, guilty of murder.
    - If no, and prosecution proved only that accused intended to cause grievous bodily harm, or acted while aware that grievous bodily harm was probable, not guilty of murder.

17.3 - Intoxication

74. At common law, intoxication was generally relevant to two issues in a trial:[80]

    - Did the accused form the necessary specific intention required for the offence charged?[81]
    - Was the accused's conduct voluntary?

75. Intoxication can also be relevant to other issues, such as the subjective elements of both self-defence and provocation.[82]

76. For this purpose, intoxication covers the effects of both alcohol and other drugs.

77. While expert evidence about the general effects of drugs is permissible, evidence about the impact of drugs, or likely impact of assumed drug taking, on the accused is more difficult. An expert who is asked to give evidence about how the accused would likely have responded must make clear the factual basis for any opinion, so the jury can compare that basis with their own findings of fact to determine the value of the evidence.[83]

Intoxication and intent

78. Intoxication is often relevant to whether the accused intended the consequences of his or her actions. This is a matter that raises issues with proof of intent or recklessness.[84]

79. It is not appropriate to address this issue by asking whether the accused was so intoxicated that he or she was **incapable** of forming the relevant intention. Such an approach imposes too high a threshold and tends to reverse the onus of proof. Similarly, it is not appropriate to ask whether the evidence of intoxication **negates** intention.[85]

80. The correct approach to evidence of intoxication is to ask whether, on the whole of the evidence (including both the evidence of intoxication and the extrinsic evidence of the accused's acts), the prosecution has proved the accused acted with the relevant intention.[86]

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[80] *R v O'Connor* (1980) 146 CLR 64; *R v Tucker* (1984) 36 SASR 135, 138-140; *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [71]-[76]; *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [125]-[128].

[81] In *R v Bedi* (1993) 61 SASR 269, 273, the Court noted that intoxication could be relevant to a variety of issues, "including the existence of a particular state of mind or the appreciation of facts relevant to some element of an offence or to a defence to the charge."

[82] See *R v Perks* (1986) 41 SASR 335, 338-341.

[83] See *R v Fowler* (1985) 39 SASR 440, 441-443, 454.

[84] See *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [357].

[85] *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [161]-[164], [176]. See also *R v Ball, Bunce & Calliss* (1991) 56 SASR 126.

[86] *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [167].

81. In directing the jury about this process, the judge may need to explain that inferences of intention that might readily be drawn from the relevant acts if the accused was sober may not be so readily drawn if the accused was intoxicated. The critical issue for the jury is whether, because of the accused's intoxication, the accused might have performed the acts without intending the relevant consequences.[87] This has been expressed as requiring caution when inferring intention on the part of a person who is intoxicated.[88]

82. This need for caution before inferring intention is particularly relevant where the offence is attempted murder, as the only available fault element is intent to kill.[89]

83. The effect of intoxication on the mental processes of a person has been compared to the effect of stress or heightened emotion, in terms of reducing long-term thinking or consideration of the likely consequences of one's actions. Where there is both intoxication and heightened emotion, the effect of those considerations potentially cumulates.[90]

84. Directions on intoxication and intent must identify how the evidence is relevant and link it to the elements in issue.[91]

85. The adequacy of such directions is judged against the real issues in the case and how the defence case was conducted.[92]

86. In most cases, the defence will seek to emphasise the evidence of intoxication to cast doubt on the accused's formation of the relevant intention, while the prosecution will seek to downplay the extent of intoxication. However, even where the roles are reversed, and the prosecution seeks to maximise the significance of intoxication (such as to defeat a defence), the jury will often require clear directions about the consequences of accepting the prosecution's position for the purpose of establishing any fault elements.[93]

87. Section 268(1) creates an exception to the usual rule that intention must exist at the time of the wrongful acts.[94] This provision provides that if the accused formed an intention to commit the offence before becoming intoxicated and consumed intoxicants to strengthen his or her resolve to commit the offence, then the offence may be proved by proof of the objective elements of the offence, even if the accused's consciousness was

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[87] *R v Wingfield* (1994) 176 LSJS 14, 18; *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [180]-[192]; *R v Perks* (1986) 41 SASR 335, 337.

[88] *R v Ford* [2016] SASC 112, [171].

[89] See, e.g., *Cutter v The Queen* (1997) 84 A Crim R 152, 157-158.

[90] See *R v Gardiner* (2013) 117 SASR 143; [2013] SASCFC 53, [182].

[91] *R v Machin* (1996) 68 SASR 526, 537; *R v Shinner* (1993) 173 LSJS 384. See also *R v Knowles* [2016] SASCFC 100, [32]-[35]; *R v Curtis* (1991) 55 A Crim R 209; *R v Wilson* (1986) 42 SASR 203.

[92] *R v Suppiah* [2018] SASCFC 11, [104]-[105]. See also *R v Wilson* (1986) 42 SASR 203.

[93] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [357]-[359].

[94] Compare 6.2.5 - Contemporaneity.

or may have been impaired by intoxication to the point of criminal irresponsibility at the time of the alleged offence.[95]

Intoxication and involuntariness

88. Section 268(2) of the *Criminal Law Consolidation Act 1935* provides that if the objective elements are established but the accused's consciousness was or may have been impaired by self-induced intoxication to the point of criminal irresponsibility, the accused is to be convicted if the accused would, if his or her conduct had been voluntary and intended, have been guilty of the offence, unless:[96]

    - it is necessary to prove the accused foresaw the consequences of his or her conduct, or,
    - except in the case of rape, it is necessary to prove the accused was aware of the circumstances surrounding his or her conduct.

89. For this purpose, section 268(6) provides that consciousness is impaired to the point of criminal irresponsibility if the accused's consciousness is impaired to the point that, at common law, the accused would be acquitted only because of the accused's intoxication.[97]

90. The effect of these provisions is that self-induced intoxication is not relevant to voluntariness but is relevant to specific intent (except in the case of rape).[98]

91. Section 267A defines intoxication as self-induced if it is caused by recreational use of a drug. "Drug" is defined as "alcohol or any other substance that is capable (either alone or in combination with other substances) of influencing mental functioning" and "recreational use" is defined negatively as occurring except where:[99]

    - the drug is administered against the will, or without the knowledge, of the person who consumes it; or
    - the consumption occurs accidentally; or
    - the person who consumes the drug does so under duress, or as a result of fraud or reasonable mistake; or
    - the consumption is therapeutic.

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[95] *Criminal Law Consolidation Act 1935* s 268(1).
[96] *Criminal Law Consolidation Act 1935* s 268(2)–(3).
[97] *Criminal Law Consolidation Act 1935* s 268(6).
[98] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [135]–[136]; *R v LPH* [2013] SASC 183, [11]–[12].
[99] *Criminal Law Consolidation Act 1935* s 267A(1)–(2).

Intoxication and jury directions

92. Section 269(1) provides that the question of whether the accused's consciousness was impaired by intoxication to the point of criminal irresponsibility is not to be put to the jury by the judge, prosecutor or accused and, if raised by the jury, must be withdrawn from the jury's consideration, unless the prosecutor or accused specifically asks the judge to address the jury on that question.

93. For this purpose, impairment to the point of criminal irresponsibility means impairment of consciousness which means a subjective element of the alleged offence cannot be established.[100]

94. Section 269 only operates when s 268 (which renders intoxication irrelevant to voluntariness and, in the case of rape, awareness of non-consent) does not apply. This is because, to the extent that s 268 applies, intoxication has no role to play and so it cannot be put to the jury.[101]

95. There have been conflicting decisions on the field of operation of s 269. On one view, it ousts the common law obligation to direct on intoxication where it is raised on the evidence, unless there is a request from the prosecution or defence.[102] On the other, it is subject to the judge's obligation to ensure a fair trial, and particular or unusual circumstances may require a trial judge to direct on intoxication even if counsel do not raise the issue.[103]

96. In cases where the intoxication of the accused arises on the evidence, trial judges should specifically ask the parties whether a direction on intoxication is sought, and draw the parties' attention to s 269.

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[100] *Criminal Law Consolidation Act 1935* s 269(2).

[101] *R v Moores* (2017) 128 SASR 340; [2017] SASCFC 95, [133].

[102] *R v Moores* (2017) 128 SASR 340, [2017] SASCFC 95, [146]-[147] (Blue J, Doyle J concurring at [199], Vanstone J not deciding at [2]-[6]); *R v B, MA* (2007) 99 SASR 384; [2007] SASC 384, [75] (David J).

[103] *R v B, MA* (2007) 99 SASR 384, 401-402 (Gray and Sulan JJ); [2007] SASC 384; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [136] (Gray J).

Jury Direction #17.3 – Intoxication and intention

Note: This direction should be given as part of directions on the relevant fault element

As part of this element, you will need to consider the evidence that [*accused*] had been drinking alcohol / using [*drug*] earlier that day.

[*In the case of drug use, refer to relevant evidence on the effects of that drug*]

[*In the case of alcohol use, either refer to relevant evidence on the effects of alcohol, or give the following direction*: As you know from your own experience of life, alcohol can have a range of effects on people. It can lower inhibitions, and make a person more likely to do something they wouldn't otherwise do. It can also cause people to do things without thinking through the consequences of their actions.]

For the purpose of this element, you will need to be careful when deciding whether the prosecution has proved that the accused [*identify fault element*]. Just because you might infer that a sober person who [*identify relevant acts*] must have [*identify relevant fault element*], the same conclusion does not necessarily follow when you are thinking about a person who has [*refer to evidence of intoxication,* e.g., drunk so much they likely had a blood alcohol reading of between 0.2 and 0.27 at the relevant time]. A person who is intoxicated does not necessarily think the same way as a sober person. You should therefore be cautious before inferring that, when [*accused*] [*identify relevant acts*], s/he [*identify relevant fault element*].

17.4 – Provocation

98. Provocation is a partial defence which may reduce murder to manslaughter.

99. Provocation was abolished as a defence by *Criminal Law Consolidation Act 1935* s 14B. This provision was introduced by *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020* and commenced operation on 1 February 2021. The common law defence of provocation therefore remains available only for offences committed before 1 February 2021.

Role of the judge – Whether to leave provocation

100. The trial judge is responsible for deciding whether provocation arises on the evidence. This requires the trial judge to decide whether:[104]

> on the version of events most favourable to the accused which is suggested by material in the evidence, a jury acting reasonably might fail to be satisfied beyond reasonable doubt that the killing was unprovoked in the relevant sense.

101. This has also been expressed as follows:[105]

> The threshold question of law is whether there is material in the evidence which sufficiently raises the issue to leave the partial defence for the jury's consideration. The determination of the threshold question requires the trial judge (and the appellate court) to consider the sufficiency of the evidence to allow that an ordinary person provoked to the degree the accused was provoked might form the intention to kill or to do grievous bodily harm and act upon that intention, as the accused did, so as to give effect to it.

102. In applying this test, the judge should take account of the onus of proof. The judge must consider whether it is open to have a reasonable doubt about provocation. This state of affairs may exist even if it would be unreasonable to find affirmatively that provocation existed and was sufficient.[106]

103. For the purpose of assessing the evidence in the manner most favourable to the accused on the issue of provocation, the court will take into account a combination of evidence given in the prosecution and defence case, including undisputed evidence, but excluding disputed evidence which does not support provocation.[107]

104. In assessing whether the evidence is capable of raising provocation, the judge may look at factors such as the lack of motive for the offending, evidence of previously friendly

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[104] *Stingel v The Queen* (1990) 171 CLR 312, 334; [1990] HCA 61; *Masciantonio v The Queen* (1995) 183 CLR 58, 67–68; [1995] HCA 67. See also *R v Miller* [2019] SASCFC 91, [126]; *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [16].

[105] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [16].

[106] *Packett v The King* (1937) 58 CLR 190, 213–214; [1937] HCA 53 (endorsed in *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [38]).

[107] *R v Miller* [2019] SASCFC 91, [133].

relations between the accused and the victim, the savagery of accused's violence, words spoken at the time of the attack and whether the accused was intoxicated.[108]

105. The common law once drew a distinction between provocative words and provocative conduct, holding that 'mere words' could never amount to provocation, or could only amount to provocation if they were "violently provocative" or "exceptional". That is not currently part of the common law of Australia.[109]

106. A judge should exercise caution before declining to leave provocation, recognising that the threshold question of whether provocation is open is a question of limited scope. This need for caution has particular force where there is evidence that is capable of establishing the subjective limb of the partial defence.[110]

107. There is particularly a need for caution before concluding that contemporary attitudes to sexual relations are such that conduct is incapable of constituting provocation.[111]

108. In deciding whether to leave provocation, it is not the role of the judge to decide whether the jury should find provocation. Instead, the relevant question is whether a reasonable jury, properly directed, might find provocation.[112]

109. In deciding whether to leave provocation to the jury, the judge should take into account whether self-defence is open. In *R v Earley*, King CJ said that it would be a "rare case" in which self-defence sufficient to justify homicide was open, but provocation was not.[113]

110. The judge's duty to decide whether provocation arises is independent of how the defence conducts the case, and may require the judge to leave provocation even over the express wishes of defence counsel, or where the accused makes statements denying loss of self-control. The fact that provocation may be inconsistent with the primary thrust of the defence case is not relevant to whether provocation arises on the evidence. Courts have recognised that the fact that provocation is inconsistent with a primary argument of self-defence may help explain why an accused would deny a loss of self-control.[114]

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[108] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [194]-[195]; *The Queen v R* (1981) 28 SASR 321, 327; *R v Perks* (1986) 41 SASR 335, 337, 339; *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [35].

[109] *R v Dutton* (1979) 21 SASR 356, 357 (noted without comment in *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [31]); c.f. *Moffa v The Queen* (1977) 138 CLR 601.

[110] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [27], [38]; *R v Miller* [2019] SASCFC 91, [129], [143]; *Stingel v The Queen* (1990) 171 CLR 312, 334; [1990] HCA 61.

[111] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [28].

[112] *R v R* (1981) 28 SASR 321, 322 (while said in the context of appellate courts, it is arguable that the principle is also relevant to trial judges).

[113] *R v Earley* (Unreported, Supreme Court of South Australia, King CJ, Millhouse and Olsson JJ, 6 April 1990), 7; *Penhall v The Queen* [2020] SASCFC 58, [2]-[3].

[114] *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [182]-[186], [200]-[203]; *Pemble v The Queen* (1971) 124 CLR 107; *Varley v The Queen* (1976) 12 ALR 347; *R v Perks* (1986) 41 SASR 335, 341-344; *R v Miller* [2019] SASCFC 91, [132]; *The Queen v R* (1981) 28 SASR 321; *R v Rogers* [2016] SASCFC 38; *Van Den Hoek v The Queen* (1986) 161 CLR 158, 161-162; [1986] HCA 76.

Role of the jury – Assessing provocation

111. There are two elements to provocation:[115]

- The provocation must be such that it is capable of causing an ordinary person to lose self-control, form an intention to kill or cause grievous bodily harm and act in the way the accused did (objective limb); and
- The provocation must actually cause the accused to lose self-control and the killing must take place while the accused is deprived of his or her self-control (subjective limb).

112. As with other defences, when provocation is raised, the onus is on the prosecution to disprove it. To do this, the prosecution must disprove one of the limbs of provocation beyond reasonable doubt.[116]

113. Only the conduct of the deceased is relevant for the purposes of provocation.[117] However, provocation is not limited to the acts of the deceased against the accused. Acts by the deceased against a third person, such as a loved one of the accused, may give rise to provocation.[118]

114. The loss of self-control for the purpose of provocation does not necessarily need to follow immediately from, or as a result of, a specific incident.[119]

Objective limb

115. For the purpose of the objective limb, the gravity of the provocative conduct must be assessed by reference to the relevant characteristics of the accused, and the background of the relationship between the parties.[120] As the High Court explained in *Masciantonio v The Queen*:[121]

> Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done. But having assessed the gravity of the provocation in this way, it is then necessary to ask the question whether provocation of that degree or gravity could

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[115] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [15]; *Masciantonio v The Queen* (1995) 183 CLR 58, 69–71; [1995] HCA 67.

[116] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [15].

[117] *R v Miller* [2019] SASCFC 91, [134].

[118] See, e.g. *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [191]–[192].

[119] *Masciantonio v The Queen* (1995) 183 CLR 58, 71; [1995] HCA 67.

[120] *R v R* (1981) 28 SASR 321, 326. See also *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75; *Green v The Queen* (1997) 191 CLR 334, 369; [1997] HCA 50.

[121] *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ), 71–72 (McHugh J); [1995] HCA 67. See also *Stingel v The Queen* (1990) 171 CLR 312, 324–326; [1990] HCA 61 where mental instability or weakness were also identified as potentially relevant.

> cause an ordinary person to lose self-control and act in a manner which would encompass the accused's actions.

116. Having assessed the gravity of the provocative conduct from the perspective of the accused, it is then necessary to decide whether provocation of that gravity could cause a person with ordinary powers of self-control to lose control and form an intention to kill or cause grievous bodily harm. For this purpose, the ordinary person does not have any characteristics of the accused except, where it may be relevant because of immaturity due to youth, the accused's age.[122] Thus, where there is a trait that may be relevant to both the accused's perception of the gravity of the provocation and their self-control, the objective test requires that the trait is only considered in relation to assessing the gravity of the provocation and not when assessing the powers of self-control of the ordinary person.[123]

117. The provocative conduct must be assessed as a whole. Words or actions may have a cumulative impact even if, standing alone, they could not cause an ordinary person to lose control.[124]

118. The purpose of the ordinary person test is to provide an objective and uniform standard of the minimum powers of self-control required before provocation may reduce murder to manslaughter.[125] As Stanley J explained in *R v Miller*:[126]

> The requirement that the provocative conduct be of such a nature as to be sufficient to deprive the hypothetical ordinary person of the power of self-control imposes an objective threshold test. The rationale underlying the objective limb is to ensure that in the evaluation of the partial defence of provocation there is no fluctuating standard of self-control against which accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve the standard.
>
> The assumption underlying the objective limb is not that to do an act which would otherwise be murder may be an ordinary reasonable reaction to a wrongful act or insult. The assumption is that a wrongful act or insult may be of such a nature as to be sufficient to provoke an ordinary person to lose his or her self-control to an extent that he or she does the unreasonable and extraordinary, namely, an act which were it not for the provocation would constitute the crime of murder.

119. While the objective limb does require both a judge and a jury to have regard to the minimum powers of self-control of an ordinary person, the role of the judge is to

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[123] *Stingel v The Queen* (1990) 171 CLR 312, 332; [1990] HCA 61 (giving examples of traits like obsessive jealousy, excitability or a pugnacious nature).
[124] *Stingel v The Queen* (1990) 171 CLR 312, 325-326; [1990] HCA 61.
[125] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [25]; *Masciantonio v The Queen* (1995) 183 CLR 58, 66-67; [1995] HCA 67.
[126] *R v Miller* [2019] SASCFC 91, [145]-[146].

determine what a reasonable jury might consider to be the minimum powers of self-control. It is not for the judge to decide what that minimum standard should be, or is hoped to be.[127]

120. The objective limb does not require that the accused's conduct be proportional to the provocation. Rather, the question of proportionality is absorbed in the question of whether an ordinary person could have lost control and acted as the accused did. Further, in deciding whether the ordinary person could have reacted as the accused did, the focus is on whether the ordinary person could have formed an intent to kill or cause grievous bodily harm and acted on that intention, rather than the precise form of physical reaction.[128]

121. The ordinary person standard for provocation is not the reasonable person standard of negligence. Attempting to apply the degree of care and circumspection of the reasonable person to provocation would, in effect, abolish the partial defence.[129]

122. In directing the jury about the objective limb, judges should avoid inviting the jury to put themselves in the shoes of the accused for the purpose of assessing the impact of the provocation on the ordinary person. While a jury, collectively, represents ordinary members of the public, inviting individual jurors to stand in the accused's shoes might be to invite individual jurors to substitute their own strengths or weaknesses for the ordinary person, or risk asking jurors to consider whether they themselves would have been provoked to the necessary degree in the circumstances.[130]

Subjective limb

123. As part of the subjective limb, the accused must kill the victim while deprived of self-control and before he or she has regained his or her self-control.[131]

124. While the objective limb of the test must be assessed from the perspective of a sober person, the subjective limb takes into account the accused's intoxication (if any).[132]

125. A loss of control, for the purposes of provocation, can stem from a range of emotional states. It is not limited to anger and resentment, but can also include fear or panic, or a combination of these states.[133]

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[127] *Lindsay v The Queen* (2015) 255 CLR 272; [2015] HCA 16, [82].
[128] *Masciantonio v The Queen* (1995) 183 CLR 58, 67-70; [1995] HCA 67. See also *Green v The Queen* (1997) 191 CLR 334, 340, 373; [1997] HCA 50.
[129] *Stingel v The Queen* (1990) 171 CLR 312, 328; [1990] HCA 61.
[130] *Stingel v The Queen* (1990) 171 CLR 312, 327-328; [1990] HCA 61.
[131] *Masciantonio v The Queen* (1995) 183 CLR 58, 68-69; [1995] HCA 67.
[132] *R v Perks* (1986) 41 SASR 335, 337, 339; *R v McCarthy* (2015) 124 SASR 190; [2015] SASCFC 177, [198]; *R v Webb* (1977) 16 SASR 309; *R v Lindsay* (2014) 119 SASR 320, 376-378; [2014] SASCFC 56.
[133] *Van Den Hoek v The Queen* (1986) 161 CLR 158, 168; [1986] HCA 76; *Penhall v The Queen* [2020] SASCFC 58, [65]; *R v Rogers* [2016] SASCFC 38, [60]-[65]; *Masciantonio v The Queen* (1995) 183 CLR 58, 68; [1995] HCA 67.

Provocation and attempts

126. Section 270AB provides that a person who attempts to kill another who would, if the attempt had been successful, have been guilty of manslaughter rather than murder, is guilty of attempted manslaughter.[134] This has the effect of allowing provocation to reduce attempted murder to the statutory offence of attempted manslaughter.[135]

[134] *Criminal Law Consolidation Act 1935* s 270AB(1).

[135] See *R v Rogers* [2016] SASCFC 38, [4], [36], [97]; *R v PNJ* [2003] SASC 308, [109].

Jury Direction #17.4 – Provocation

Note: Where provocation arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act under provocation.

Provocation is sometimes called a partial defence to murder. It can reduce what would otherwise be murder to manslaughter.

There is no need to consider provocation unless you find that all of the elements of murder, including unlawfulness, have been proved beyond reasonable doubt.

But if you take the view that the prosecution has proved all of the elements of murder, you must not convict the accused of murder if it is reasonably possible that s/he was acting under provocation (as the law defines it) when s/he [*engaged in the relevant conduct*].

It is not for the accused to prove that s/he was acting under provocation. Rather, it is necessary for the prosecution to exclude provocation; that is, to prove beyond reasonable doubt that s/he was not acting under provocation when s/he [insert].

There are two ways the prosecution can prove the accused was not acting under provocation.

First, the prosecution can show that provocation from [*deceased*] did not cause the accused to lose his/her self-control and kill [*deceased*] during that loss of self-control.

Second, the prosecution can show that the provocation from [*deceased*] could not have caused an ordinary person to lose their self-control and form an intention to kill or cause grievous bodily harm, and act as the accused did.

Before I explain these two paths in more detail, there are some general directions I need to give you.

Provocation has been described as a concession to human frailty. It recognises that extraordinary circumstances can arise which can cause a person to react in an extraordinary way, by forming an intention to kill or cause grievous bodily harm, and to act on that intention before they have a chance to cool down.

Provocation does not lead to an acquittal. If the prosecution proves all the elements, including this element, then the correct verdict is to convict [*accused*] of murder. However, if the prosecution does not prove this element then, if they prove all the other elements, the correct verdict is to convict [*accused*] of manslaughter.

This issue of provocation arises because [*identify evidence relevant to provocation*]. I will refer to this conduct as the alleged provocation.

The first way the prosecution can show the accused did not act under provocation is to show that s/he did not lose self-control and kill [*deceased*] during that loss of self-control. This relates to what the accused thought and did at the time of the alleged killing.

[*If there is an interval between the provocation and the violence, add the following:* As part of this, you should consider the evidence that there was a delay between the alleged provocation and the alleged killing. One way the prosecution can prove this part of the element is by showing that the accused had regained his/her self-control before killing [*deceased*].]

[*Refer to relevant evidence and arguments*]

The second way the prosecution can prove this element is to prove that an ordinary person, exposed to the same provocation as the accused, could not have lost their self-control, formed an intention to kill or cause grievous bodily harm, and acted as the accused did.

For the purpose of this part of the element, there are two key principles you must apply.

First, you are not looking at how the accused reacted. You are looking at how an ordinary person might react. That is, a person with ordinary powers of self-control.

Second, to decide how significant the alleged provocation was, you have to look at things from the accused's perspective.

Putting these two principles together means you must decide how a person [*identify traits relevant to assessing gravity of provocation*] might react to [*identify essence of alleged provocation*], assuming that person had ordinary powers of self-control.

Finally, a loss of self-control can be a matter of degree. The question for you is whether, in the circumstances, an ordinary person could have been provoked to the point of forming an intention to kill or cause grievous bodily harm. But you do not need to decide whether an ordinary person would have used the same means to kill [*deceased*] as [*accused*] did.

[*Refer to relevant evidence and arguments*]

17.5 – Duress – Common law

127. Duress at common law was abolished as a defence by *Criminal Law Consolidation Act 1935* s 14B. This provision was introduced by *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020* and commenced operation on 1 February 2021. The common law defence of duress therefore remains available only for offences committed before 1 February 2021.

128. This chapter only relates to duress at common law. For information on duress under the *Criminal Law Consolidation Act 1935* s 15D, see 17.6 – Duress – Statutory.

129. Duress has been described as an "extremely vague and elusive juristic concept".[136] There are few recent cases on it, and so the issue must be approached with caution.

130. There are four limbs to the defence of duress:[137]

- The accused must have committed the alleged offending when his or her will was overborn by threats of harm that would be completed unless the accused performed the required act;
- The accused did not have any reasonable opportunity to escape the effect of the threat;
- The accused did not voluntarily expose himself or herself to the threats;
- The threats were such that a person of ordinary firmness of mind and will might have yielded to the threat in the same way.

131. Duress does not preclude the formation of intention or the voluntariness of the accused's actions. Instead, it is a defence that exists in addition to the elements of the offence.[138]

132. Where duress arises on the evidence, the onus is on the prosecution to negate duress beyond reasonable doubt.[139] This can be expressed in a variety of ways, including proving that there is no reasonable possibility that the accused acted under duress, or eliminating any reasonable possibility that the accused acted under duress. Such formulations are equivalent, and all correctly instruct the jury on the burden of proof.[140]

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[136] *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653, 686. See also *R v Brown* (1986) 43 SASR 33, 53; *R v Palazoff* (1986) 43 SASR 99, 105.

[137] *R v Brown* (1986) 43 SASR 33, 37–39; *R v Warren, Coombes & Tucker* (1996) 185 LSJS 461; *R v Williamson* [1972] 2 NSWLR 281, 300. See also I Leader-Elliot, 'Case and comment: Warren, Coombes and Tucker' (1997) 21 Crim LJ 355, 359.

[138] See *R v Brown* (1986) 43 SASR 33; *R v Palazoff* (1986) 43 SASR 99.

[139] *R v Brown* (1986) 43 SASR 33, 57; *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653.

[140] *R v Lanciana* (1996) 84 A Crim R 268; c.f. *R v Abusafiah* (1991) 24 NSWLR 531.

133. The threats must have been made to coerce the accused to commit the offence in question. This must be approached as a matter of substance, rather than the precise form of the threat.[141]

134. It is wrong to formulate the objective limb as whether a person of ordinary firmness of mind and will **would**, or **would likely**, have succumbed to the threat. Such a formulation puts the test too high, as the question is only whether the person **might** have succumbed to the threat.[142]

135. The threat of harm for the purpose of duress must be a threat of death or serious bodily violence, whether to the accused or another. However, the threat does not need to be of immediate harm – a threat of future harm is sufficient, provided the threat is still overpowering the accused's will at the time of the alleged offence.[143]

136. The person of ordinary firmness of mind and will is a person of the same age, sex, background and personal characteristics (other than strength of mind) as the accused.[144] This includes the impact of any history of violence from the person who issued the threat.[145]

137. Duress is not available as a defence to murder as a principal offender.[146] It is not clear whether it is available if the accused is charged with murder as a principal in the second degree.[147]

138. Duress is not available if the accused failed to take an opportunity that was reasonably open to escape from the threat. Whether an opportunity is reasonable is a question of fact, and requires the jury to consider the accused's age, circumstances and any risks involved in the suggested method of escape.[148]

139. Duress is not available if the accused voluntarily exposed himself or herself to the duress. This most often arises where the accused joins an illegal organisation or associates with violent criminals.[149]

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[141] See *R v Hurley & Murray* [1967] VR 526 (duress not available where accused escaped from prison to avoid threats of harm being inflicted while in prison) and *Nguyen v The Queen* (2008) 181 A Crim R 72; [2008] NSWCCA 22, [33]–[41] (duress available, even though the form of the threat was only to compel the accused remaining at a cannabis cultivation and not explicitly requiring continued participation in the cultivation).

[142] *R v Palazoff* (1986) 43 SASR 99, 108.

[143] *R v Brown* (1986) 43 SASR 33, 37–39; *R v Warren, Coombes & Tucker* (1996) 185 LSJS 461; *R v Smith & Turner* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, 1 June 1995); *Osborne v Goddard* (1978) 18 SASR 481; *R v Palazoff* (1986) 43 SASR 99, 109. See also *R v Abusafiah* (1991) 24 NSWLR 531, 537.

[144] *R v Palazoff* (1986) 43 SASR 99, 109; *R v Lanciana* (1996) 84 A Crim R 268.

[145] See *R v Runjanjic & Kontinnen* (1991) 56 SASR 114, 102

[146] *R v Brown* [1968] SASR 467; *DPP for Northern Ireland v Lynch* [1975] AC 653; *R v Brown* (1986) 43 SASR 33 at 37; *R v Smith & Turner* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, 1 June 1995).

[147] *R v Smith & Turner* (Unreported, Supreme Court of South Australia Court of Criminal Appeal, 1 June 1995). But see *Director of Public Prosecutions for Northern Ireland v Lynch* [1975] AC 653.

[148] *R v Hudson* [1971] 2 QB 202, 207; *R v Brown* (1986) 43 SASR 33, 37; *R v Palazoff* (1986) 43 SASR 99, 110.

[149] *R v Palazoff* (1986) 43 SASR 99, 101.

140. Evidence that the accused was left unaccompanied by the person who issued the threat (and therefore was not in immediate danger, or could have gone to the police) is relevant, but not determinative, to whether there was a reasonable opportunity to escape. Whether that situation gives rise to a reasonable opportunity must be assessed in the whole circumstances.[150]

141. Courts must assume that, under ordinary circumstances, an opportunity to seek protection from police will be a reasonable opportunity to escape the threat. However, there are exceptional cases where this assumption is not reasonable. Duress should only be left to the jury where there is evidentiary material that raises a real issue about whether the opportunity to seek police protection was reasonable.[151]

142. It is not necessary to consider whether the threat was lawfully made. In most situations, duress will arise from unlawful threats.[152]

143. In cases where evidence of duress only comes from the accused, it is preferable if the judge does not direct the jury to consider whether it is reasonably possible that the accused's evidence is true. While the standard of reasonably possible is sometimes used to explain when something has not been proved beyond reasonable doubt, it can be dangerous in this context where it implicitly asks the jury to make an affirmative finding. It is better to ask the jury whether they are satisfied beyond reasonable doubt that the accused's evidence is untrue and, if they are not, then they must consider the elements of duress.[153]

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[150] *R v Brown* (1986) 43 SASR 33, 39. See also *R v Williamson* [1972] 2 NSWLR 281, 300 and *Osborne v Goddard* (1978) 18 SASR 481.

[151] *R v Brown* (1986) 43 SASR 33, 40.

[152] *R v Warren, Coombes & Tucker* (1996) 185 LSJS 461.

[153] *R v Perdikoyiannis* (2003) 86 SASR 262; [2003] SASC 310, [26]–[28].

Jury Direction #17.5 – Duress – Common law

Note: Where duress arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act under duress.

I'll first give you some general directions about duress, and then I will break it down into separate parts.

Duress provides a defence to a person who commits a crime when compelled to do so because of serious threats of harm. It requires the accused to have been compelled, and that an ordinary person in the accused's position might have been so compelled.

Like all other elements, the prosecution must prove the accused did not act under duress. This requires the prosecution to prove that duress does not apply. The accused does not need to prove that duress does apply.

There are four ways the prosecution can prove the accused did not act under duress.

First, the prosecution can prove that the accused did not commit the offence when his/her will was overborn by threats of death, serious injury or false imprisonment.

Second, the prosecution can prove that the accused did not take a reasonable opportunity to escape from the threats.

Third, the prosecution can prove that the accused put himself/herself in the position where s/he was threatened.

Fourth, the prosecution can prove that a person of ordinary firmness of mind and will would not have given in to the threats in this way.

The first way relates to the accused's response to the threat. Can the prosecution prove that the accused was not overwhelmed by the threat? It does not matter whether the threats were to harm the accused, or another person. But for the purpose of this element, there are only three types of threats that are relevant. Threats of death, threats of serious injury and threats of false imprisonment. Other less serious threats cannot lead to duress. You must also consider whether the threat was still operating on the accused at the time of the alleged offence. A person will not be overwhelmed by a threat if the threat has ceased by the time the accused committed the relevant offence.

[*Refer to relevant evidence and arguments on the first limb of duress*]

The second way relates to whether the accused could have escaped from the threats. The principle of duress is designed for extraordinary situations where the accused had no choice. It does not apply if the accused could have reasonably escaped from the threats. For example, could the accused reasonably have sought help from the police?

[*Refer to relevant evidence and arguments on the availability of options to neutralise the threat*]

The third way relates to whether the accused put himself/herself in the position where s/he was threatened. This way of proving there was no duress is most relevant when a person chooses to associate with violent criminals. The law takes the view that a person who voluntarily associates with violent criminals cannot complain if those same criminals insist on a person carrying out the things he or she agreed to do.

[*Refer to relevant evidence and arguments on voluntary association*]

The fourth way relates to whether a person of ordinary firmness and will might also have succumbed to the threats. In assessing this issue, you must consider how an ordinary person of the same age, sex, background and personal characteristics as the accused might have reacted to the threats. The prosecution will only prove this way of establishing the element if an ordinary person would not succumbed to the threat.

[*Refer to relevant evidence and arguments on the objective element*]

When you are assessing the four ways the prosecution can prove the accused did not act under duress, remember that the prosecution must prove at least one of the four separate ways to reach the conclusion that the accused did not act under duress.

17.6 – Duress – Statutory

145. *Criminal Law Consolidation Act 1935* s 15D creates the statutory defence of duress. As explained in 17.5 – Duress – Common law, this only applies to conduct occurring after 1 February 2021.

146. Section 15D is modelled on the *Model Criminal Code* provisions on duress, which have been implemented by the Commonwealth, Victoria, the ACT, the Northern Territory and Western Australia.[154]

147. The defence of duress applies if:[155]

> (a) at the time of carrying out the conduct constituting the offence, the defendant reasonably believed that—
>
> (i) a threat had been made that would be carried out unless the person engaged in the conduct; and
>
> (ii) carrying out the conduct was the only reasonable way that the threat could be avoided; and
>
> (b) the conduct was a reasonable response to the threat.

148. Section 15D(1)(a) creates a mixed objective / subjective requirement. The court must consider the state of mind of the accused (subjective component), and the state of mind must be reasonably held (objective component).[156]

149. In assessing whether the accused's belief is a reasonable belief, the court must assess the situation from the perspective of a reasonable person possessing the personal characteristics of the accused that might have affected the accused's appreciation of the circumstances. The court does not use a purely objective reasonable person standard, or a standard that takes into account only certain pre-defined attributes of the accused.[157]

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[154] *Criminal Code* (Cth) s 10.2; *Crimes Act 1958* (Vic) s 322O; *Criminal Code 2002* (ACT) s 40; *Criminal Code* (NT) s 43BB; *Criminal Code 1913* (WA) s 32. For background on the introduction of the provisions, see South Australian Law Reform Institute, 'The Provoking Operation of Provocation: Stage 2', Report 11, April 2018, Part 14.

[155] *Criminal Law Consolidation Act 1935* s 15D(1). The South Australian provision differs slightly from the approach of the Commonwealth, the ACT and the Northern Territory by making the question of whether the conduct was a reasonable response to the threat purely an objective question. These jurisdictions require the accused to have reasonably believed that the conduct was a reasonable response to the threat.

[156] See *R v Oblach* (2005) 65 NSWLR 75; [2005] NSWCCA 440, [55]; *Marchesano v Western Australia* (2017) 52 WAR 176; [2017] WASCA 177, [116]–[118].

[157] *Parker v The Queen* [2016] VSCA 101, [8], [59] (on the similarly worded Victorian provisions), but c.f. *Oblach v The Queen* (2005) 65 NSWLR 75; [2005] NSWCCA 440 [55]–[60], [88]–[93] (on the similarly worded provisions in the *Criminal Code* (Cth)).

150. In assessing whether the conduct is a reasonable response, the court is not limited to considering whether the response is proportionate. The court may take into account:[158]

    (a) the nature and quality of the threat, including its magnitude;

    (b) the severity of the consequences if the person does the act or makes the omission;

    (c) the existence of any available alternative courses of action, of which the person is subjectively aware, apart from doing the act or making the omission; and

    (d) the character of 'the circumstances' as the person subjectively believes them to be.

151. Proportionality can therefore be relevant to both the second and third limbs of duress.[159]

152. As at common law, an unparticularised concern that police protection may not guarantee safety does not provide a basis for a reasonable belief that the conduct was the only reasonable way the threat could be avoided, or that the conduct was a reasonable response to the threat.[160]

153. The trial judge has a role in assessing whether duress is open on the evidence. In performing that role, the judge may take into account policy considerations which informed the defence of duress at common law, including the need to ensure that duress is not permitted to apply too readily. This consideration informs the assessment of whether a reasonable jury, properly instructed, could find that the accused's actions were a reasonable response, or that the accused could reasonably believe that carrying out the conduct was the only reasonable response to the threat.[161]

154. Where the defence raises the issue of duress, the prosecution has the onus of disproving the defence beyond reasonable doubt.[162]

155. The accused may raise the issue of defence even if the accused denies other elements of the offence. For example, a defence of duress is not inherently inconsistent with an assertion that the accused did not have the relevant form of *mens rea*.[163]

156. Duress is not available:[164]

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[158] *Marchesano v Western Australia* (2017) 52 WAR 176; [2017] WASCA 177, [125]–[127], [246] (on the similarly worded Western Australian provisions). See also *Lau v Western Australia* (2017) 264 A Crim R 478; [2017] WASCA 16 [155]–[166].

[159] See *Marchesano v Western Australia* (2017) 52 WAR 176, [248]; [2017] WASCA 177.

[160] *Taiapa v The Queen* (2009) 240 CLR 95; [2009] HCA 53, [40]; *Lau v Western Australia* (2017) 264 A Crim R 478; [2017] WASCA 177, [160].

[161] See *Marchesano v Western Australia* (2017) 52 WAR 176; [2017] WASCA 177, [253]–[271].

[162] *Criminal Law Consolidation Act 1935* s 15D(3).

[163] See *Lau v Western Australia* (2017) 264 A Crim R 478; [2017] WASCA 16, [139]–[144], where the accused argued that he was not aware that he was in possession of methylamphetamine with the intent to sell or supply and that, in any event, his actions were the product of duress.

[164] *Criminal Law Consolidation Act 1935* s 15D(2), (4).

- If the threat was made by or on behalf of a person the accused was voluntarily associating with for the purpose of carrying out conduct of the kind carried out;
- If the offence is:
    - murder;
    - attempted murder;
    - conspiring or soliciting to commit murder;
    - aiding, abetting, counselling or procuring the commission of murder;
    - any other offence prescribed by the regulations.

157. In contrast to common law duress, statutory duress does not:[165]

- explicitly require consideration of the possibility of escape. The possibility of escape is, however, likely to be a factual consideration in whether the conduct was a reasonable response to the threat;
- require the accused's will to have been overborn by the threats. Instead, the focus is on whether the accused reasonably believed the conduct was the only way to avoid the threat and whether the conduct was a reasonable response to the threat;
- require that the threat be limited to a threat of death or serious bodily violence. The harm threatened for the purpose of statutory duress can cover a wider field of operation, but proportionality between the harm threatened and the crime committed is relevant to the second and third limbs of the defence.

[165] Compare 17.5 – Duress – Common law (above).

Jury Direction #17.6 – Statutory Duress

Note: Where duress arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act under duress.

Duress provides a defence to a person who commits a crime when compelled to do so because of serious threats of harm. It requires the accused to have been threatened and that committing the crime was a reasonable response to the threat.

Like all other elements, the prosecution must prove the accused did not act under duress. This requires the prosecution to prove that duress does not apply. The accused does not need to prove that duress does apply.

There are three ways the prosecution can prove the accused did not act under duress.

First, duress will not apply if the prosecution proves that the accused did not reasonably believe that a threat had been made which would be carried out unless s/he committed the offence.

Second, duress will not apply if the prosecution proves that the accused did not reasonably believe that committing the offence was the only reasonable way to avoid the threat.

Third, duress will not apply if the prosecution proves that committing the offence was not a reasonable response to the threat.

I will now explain these three ways of proving the accused did not act under duress in more detail.

The first way relates to whether the accused reasonably believed that a threat had been made that will be carried out unless the person committed the offence. If the prosecution can prove that the accused did not believe there was a threat which would be carried out unless s/he committed the offence, or that a reasonable person in the accused's position would not have believed there was threat which would be carried out unless s/he committed the threat, then the prosecution has proved that duress does not arise.

The second way relates to whether the accused reasonably believed that committing the offence was the only reasonable way to avoid the threat. The prosecution can prove that duress does not arise if they can prove that the accused did not think that committing the offence was the only option, or if a reasonable person in the accused's position would not have thought it was the only option.

When you are considering whether a reasonable person in the accused's position would have believed there was a threat, or that committing the offence was the only option, you must consider the issue from an objective view, taking into account the situation the accused thought s/he was facing. In other words, the prosecution must prove that a reasonable person, faced with the situation the accused thought s/he was facing, could not have believed there

was a threat, or could not have believed that committing the offence was the only reasonable way to avoid the threat.

The third way relates to whether committing the offence was a reasonable response to the threat. This third issue asks whether the conduct was **a** reasonable response to the threat. You must determine this from an objective view. But you must recognise that there may be several reasonable responses.

When you are considering both the second way and the third way, two matters that may be relevant are alternative options and whether the accused's conduct was proportional. First, consider what alternatives the accused had. Could s/he have reported the threat to police? Or could s/he have ignored the threat? The second matter is whether the conduct was proportional. How much harm was being threatened against the accused compared to the amount of harm the accused was expecting to cause? These two matters may help you decide whether the prosecution has proved that a reasonable person in the accused's position would not have thought that carrying out the offence was the only option, or was a reasonable response to the threat.

[*If the issue of voluntary association arises, add the following direction*: In this case, there is a fourth issue you must also consider. A person cannot rely on the defence of duress if the threat was made by a person who the accused was voluntarily associating with for the purpose of carrying out conduct of the kind carried out. The law recognises that when two people are working together to commit an offence, one may use threats to discourage the other from backing out of the arrangement. The law says that in that situation, the person who sought to back out cannot rely on the defence of duress. So, if the prosecution can prove that the threats were made in the context of an existing voluntary association for the purpose of committing conduct of the kind charged, then the prosecution has proved that duress does not apply.

17.7 – Necessity

158. Necessity was abolished as a defence by *Criminal Law Consolidation Act 1935* s 14B. This provision was introduced by *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020* and commenced operation on 1 February 2021. The common law defence of necessity therefore remains available for offences committed before 1 February 2021.

159. This chapter only relates to necessity at common law. For information on sudden and extraordinary emergency under the *Criminal Law Consolidation Act 1935* s 15E, see 17.8 – Sudden or extraordinary emergency.

160. The defence of necessity involves three limbs:[166]

- The accused believed on reasonable grounds there was a threat of death or serious injury to himself, herself or another;
- The accused believed on reasonable grounds that the commission of the offence was necessary to remove that threat;
- Objectively, there was no reasonable alternative course of action available to the accused.

161. The threat faced must be imminent and operational.[167]

162. Proportionality is a factual consideration. If the conduct is disproportionate, then there will objectively be reasonable alternative courses of action available.[168]

163. Each aspect of the accused's conduct must be assessed. In some situations, part of the accused's conduct may be necessary, but other offences committed at the same time may not be.[169]

164. The defence turns on a requirement of necessity, rather than expediency or strong preference. Accused persons and jurors are not free to choose which laws to obey.[170]

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[166] *Bayley v Police* (2007) 99 SASR 413; [2007] SASC 411, [53] (but c.f. [34]). Compare also *R v B, JA* (2007) 99 SASR 317; [2007] SASC 323, [24]–[26], where the court endorses the statement by Gleeson CJ in *R v Rogers* (1996) 86 A Crim R 542, 546 that the statement of principles in *R v Loughnan* [1981] VR 443 should not be treated as technical legal conditions, but as relevant factual considerations to the reasonableness and proportionality of the accused's actions.

[167] *Bayley v Police* (2007) 99 SASR 413; [2007] SASC 411, [53].

[168] *Bayley v Police* (2007) 99 SASR 413; [2007] SASC 411, [53].

[169] *Bayley v Police* (2007) 99 SASR 413; [2007] SASC 411, [53]. See also *R v Rogers* (1996) 86 A Crim R 542.

[170] *R v Rogers* (1996) 86 A Crim R 542, 546.

Jury Direction #17.7 – Necessity

Note: Where necessity arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act in circumstances of necessity.

The law recognises that sometimes a person is placed in an impossible position, and they must commit one offence to avoid some other risk of harm. In that situation, the law says that a person may have a defence of necessity. However, the law is careful about when this defence applies, as it is not up to each person to decide which laws they will follow, or to only follow the law when it is convenient.

There are three ways the prosecution can prove the accused did not act in circumstances of necessity.

First, the prosecution can prove that the accused did not believe on reasonable grounds that s/he was facing a threat of death or serious injury to himself/herself or another.

Second, the prosecution can prove that the accused did not believe on reasonable grounds that the commission of the offence was necessary to avoid that threat.

Third, the prosecution can prove that there was another reasonable alternative course of action available to the accused which did not involve committing such a serious offence.

For this element, the prosecution must prove at least one of these three pathways.

There are three directions you must follow when considering these three pathways.

First, necessity only arises if there is a situation of imminent danger. If there is not an imminent danger, then committing a crime is not a reasonable course of action and there are other ways to avoid the threat.

Second, you must consider whether the accused's conduct was out of proportion to the danger s/he faced. Whether a person has reasonable grounds to believe the offence was necessary and whether a person has other reasonable alternatives depends on how dangerous the situation was.

Third, the first and second pathways look at whether the accused believed something on reasonable grounds. Your focus for these pathways is on whether the accused held that belief, and whether there were reasonable grounds for him/her to hold that belief. The third pathway does not look at what the accused believed. It requires you to look at the matter from an objective view and decide whether there was another reasonable course of action available which did not involve committing any offence, or only involved committing a less serious offence.

17.8 – Sudden or extraordinary emergency

166. *Criminal Law Consolidation Act 1935* s 15E creates the statutory defence of sudden or extraordinary emergency. As explained in 17.7 – Necessity, this only applies to conduct occurring after 1 February 2021.

167. Section 15E is modelled on the *Model Criminal Code* provisions on sudden or extraordinary emergency, which have been implemented by the Commonwealth, Victoria, the ACT, the Northern Territory and Western Australia.[171] It replaces the common law concept of necessity.

168. The defence of sudden or extraordinary emergency applies if:[172]

> (a) the defendant carried out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency; and
>
> (b) at the time of carrying out the conduct, the defendant reasonably believed that—
>
> (i) circumstances of sudden or extraordinary emergency existed; and
>
> (ii) carrying out the conduct constituting the offence charged was the only reasonable way to deal with the emergency; and
>
> (c) the conduct was a reasonable response to the emergency.

169. The term 'sudden or extraordinary emergency' carries its ordinary meaning, to be decided by the jury. An emergency may be sudden, extraordinary or both sudden and extraordinary. A sudden emergency is one requiring immediate action. While an extraordinary emergency may develop over time, it will eventually involve a degree of immediacy, so that the terms sudden and extraordinary may overlap.[173] However, a judge is not bound to spell this out to the jury.[174]

170. A delay between the emergency developing and the accused taking action in response to it may be relevant but not determinative as to whether the circumstances involve a sudden or extraordinary emergency.[175]

171. Section 15E(1)(a) does not exist in the Commonwealth, ACT, NT or WA versions of sudden or extraordinary emergency. In those jurisdictions, it has been held that the prosecution cannot disprove emergency by showing that no sudden or extraordinary emergency

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[171] *Criminal Code* (Cth) s 10.3; *Crimes Act 1958* (Vic) s 322R; *Criminal Code 2002* (ACT) s 41; *Criminal Code* (NT) s 43BC; *Criminal Code 1913* (WA) s 25. For background on the introduction of the provisions, see South Australian Law Reform Institute, 'The Provoking Operation of Provocation: Stage 2', Report 11, April 2018, Part 14.

[172] *Criminal Law Consolidation Act 1935* s 15E(1).

[173] *Warnakulasuriya v The Queen* (2012) 261 FLR 260; [2012] WASCA 10, [2], [49]–[50]; *Ajayi v The Queen* (2012) 263 FLR 465; [2012] WASCA 126, [33]–[39]; *Nguyen v The Queen* [2005] WASCA 22, [17].

[174] *Smith v Western Australia* (2010) 204 A Crim R 280; [2010] WASCA 205, [41]–[42]; *Warnakulasuriya v The Queen* (2012) 261 FLR 260; [2012] WASCA 10, [56].

[175] *Nguyen v The Queen* [2005] WASCA 22, [17(b)].

actually existed.[176] It appears that s 15E(1)(a) reverses that position and excludes the defence in the circumstance where the accused honestly, reasonably and mistakenly believes that a sudden or extraordinary emergency exists.

172. In assessing whether the accused reasonably believed that circumstances of sudden or extraordinary emergency existed, or that carrying out the conduct was the only reasonable way to deal with the emergency, the court may look at alternative courses of action available to the accused which did not involve offending.[177]

173. Like the statutory defence of duress, the limbs of the defence of sudden or extraordinary emergency involve both subjective and objective parts. The accused must hold the relevant belief and the belief must be reasonable.[178]

174. The accused has an evidentiary onus to raise the defence, and the prosecution has a legal onus to disprove the defence.[179] The prosecution may disprove the defence by disproving any one of the four limbs of the defence.[180]

175. For the purpose of this defence, the emergency need not involve a risk of death or serious harm.[181]

176. Sudden or extraordinary emergency is not available for offences of:[182]

- murder;
- attempted murder;
- conspiring or soliciting to commit murder;
- aiding, abetting, counselling or procuring the commission of murder;
- any other offence prescribed by the regulations.

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[176] *Nguyen v The Queen* [2005] WASCA 22, [17(c)]; *Ajayi v The Queen* (2012) 263 FLR 465, [40(b)]; [2012] WASCA 126.

[177] See *R v Webb* (2017) 326 FLR 413; [2017] NTSC 94, [28]–[30]; *Ajayi v The Queen* (2012) 263 FLR 465; [2012] WASCA 126, [51]–[55].

[178] *Warnakulasuriya v The Queen* (2012) 261 FLR 260; [2012] WASCA 10, [48].

[179] *Criminal Law Consolidation Act 1935* s 15E(3).

[180] *Ajayi v The Queen* (2012) 263 FLR 465; [2012] WASCA 126, [31].

[181] *Criminal Law Consolidation Act 1935* s 15E(2).

[182] *Criminal Law Consolidation Act 1935* s 15E(1), (4).

Jury Direction #17.8 – Sudden or extraordinary emergency

Note: Where sudden or extraordinary emergency arises, the following direction should be given as part of the element of unlawfulness.

For this element, the prosecution must prove the accused did not act in circumstances of sudden or extraordinary emergency.

The law recognises that sometimes a person is placed in an impossible position, and they must commit one offence to avoid some other risk of harm. In that situation, the law says that a person may have a defence of sudden or extraordinary emergency. However, the law is careful about when this defence applies, as it is not up to each person to decide which laws they will follow, or to only follow the law when it is convenient.

There are four ways the prosecution can prove the accused did not act in circumstances of sudden or extraordinary emergency.

First, the prosecution can prove that the accused did not carry out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.

Second, the prosecution can prove that, at the time of carrying out the conduct, the accused did not reasonably believe that circumstances of sudden or extraordinary emergency existed.

Third, the prosecution can prove that, at the time of carrying out the conduct, the accused did not reasonably believe that carrying out the conduct was the only reasonable way to deal with the emergency.

Fourth, the prosecution can prove that the conduct was not a reasonable response to the emergency.

I will now explain these four ways of proving this element in more detail.

The first way relates to whether the accused carried out the conduct in response to circumstances of sudden or extraordinary emergency. This requires you to decide whether a sudden or extraordinary emergency existed. The phrase "sudden or extraordinary emergency" does not have a special legal meaning. Instead, you must apply your own common sense and experience to decide whether the accused's situation merits the term "sudden or extraordinary emergency". In doing that, take note that an emergency which is sudden, or an emergency that is extraordinary, is enough for the accused. To prove the accused did not act in circumstances of emergency, the prosecution must prove that the circumstances were neither a sudden emergency nor an extraordinary emergency.

The second way relates to whether, at the time of the conduct, the accused reasonably believed that circumstances of sudden or extraordinary emergency existed. The prosecution can prove this issue by showing that the accused did not believe that a sudden or extraordinary emergency existed, or by proving that a reasonable person in the accused's position would not have believed a sudden or extraordinary emergency existed.

The first and second issues may seem to overlap. The difference is that the second issue relates to whether the accused believed a sudden or extraordinary emergency existed, and whether a reasonable person in the accused's position could have formed that belief. In contrast, the first issue requires you to consider the situation from a purely objective view. You must examine all the circumstances and decide whether a sudden or extraordinary emergency existed.

The third way relates to whether the accused reasonably believed that committing the offence was the only reasonable way to deal with the emergency. The prosecution can prove that emergency does not arise if they can prove that the accused did not think that committing the offence was the only reasonable option, or a reasonable person in the accused's position would not have thought it was the only reasonable option.

The fourth way relates to whether committing the offence was a reasonable response to the emergency. This issue asks whether the conduct was a reasonable response to the threat. You must determine this from an objective view. But you must recognise that there may be several reasonable responses.

When you are considering both the third way and the fourth way, two matters that may be relevant are alternative options and whether the accused's conduct was proportional. First, consider what alternatives the accused had. Could s/he have sought outside assistance for the emergency? Or could s/he have dealt with the emergency without committing an offence? Second, was the conduct proportional? How much harm was the emergency going to cause compared to the amount of harm the accused was going to cause? These two matters may help you decide whether the prosecution has proved that a reasonable person in the accused's position would not have thought that carrying out the offence was the only option, or was a reasonable response to the emergency.

17.9 – Mental incompetence

177. Part 8A of the *Criminal Law Consolidation Act 1935* creates a detailed scheme for resolving issues of mental incompetence.

178. The operation of this scheme, along with a helpful flowchart, is explained in *Question of Law Reserved (No 1 of 1997)*.[183] However, it is important to note that there have been some amendments to the scheme since 1997, which affect the explanations given. In particular, s 269BA has been introduced to permit consideration of alternative offences[184] and defences have been expressly removed from the trial of the objective elements.[185]

Operation of Part 8A

179. Section 269C(1) defines mental incompetence as follows:

> (1) A person is mentally incompetent to commit an offence if, at the time of the conduct alleged to give rise to the offence, the person is suffering from a mental impairment and, in consequence of the mental impairment—
>
> (a) does not know the nature and quality of the conduct;
>
> (b) does not know that the conduct is wrong; that is, the person could not reason about whether the conduct, as perceived by reasonable people, is wrong; or
>
> **Note–**
>
> Paragraph (b) adopts the test as stated and excludes from consideration whether the defendant could reason with a moderate degree of sense and composure as set out in *R v Porter* (1936) 55 CLR 182.
>
> (c) is totally unable to control the conduct.

180. The effect of this provision is that a defence of mental incompetence has three elements:[186]

- At the time of the conduct alleged to give rise to the offence, the accused was suffering from a mental impairment;
- At the time of the conduct alleged to give rise to the offence, the accused:
  - did not know the nature and quality of the conduct;
  - did not know the conduct was wrong;

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[183] (1997) 70 SASR 251.
[184] C.f. *Question of Law reserved (No 1 of 1997)* (1997) 70 SASR 251, 263–264.
[185] See *Criminal Law Consolidation Act 1935* ss 269F(4), 269G(3); *Question of Law reserved (No 1 of 1997)* (1997) 70 SASR 251, 257–263.
[186] See *R v Cox* [2006] SASC 188, [105].

- was totally unable to control the conduct.

- The mental impairment caused the state of mind described in the second element.

181. Section 269C(1)(c) of the test is a marked departure from the common law. At common law, an inability to control actions was not itself a basis for finding insanity, but it could be evidence that the accused did not know the nature and quality of the act, or that the conduct was wrong.[187]

182. The term 'at the time of the conduct alleged to give rise to the offence' refers to the conduct which constitutes the objective elements of the offence.[188] An inability to control conduct which led up to the offending is not enough, by itself, to show that the accused was unable to control the conduct which constituted the offence itself.[189]

183. The term 'totally unable to control the conduct' refers to a state of mind in which the accused is unable to form and implement a decision whether to engage in the relevant conduct.[190] For the purpose of this test, a person is either able to control his or her conduct or not. A person with some control will not meet this test.[191]

184. Mental impairment, and related terms, are defined in s 269A.

185. The test of mental incompetence is qualified by ss 269C(2) and (3). These provisions provide that, in general, if the mental incompetence was substantially caused by self-induced intoxication (such as by alcohol or recreational drug use), then the Part 8A process does not apply. However, the court may elect to deal with a person under Part 8A even though the intoxication is self-induced after taking into account:[192]

    (a) the time and circumstances of when and how the intoxication caused the mental impairment; and

    (b) the interests of justice; and

    (c) whether the making of such an order would affect public confidence in the administration of justice.

186. The defence or the trial judge may raise the defence of mental incompetence.[193] It will almost invariably be in the interests of justice for the judge to raise the defence of mental

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[187] See *R v Cox* [2006] SASC 188, [23]-[24].

[188] *R v Sekrst* [2016] SASCFC 127, [68]. See also *R v Telford* (2004) 89 SASR 352; [2004] SASC 248, [113].

[189] See *R v Telford* (2004) 89 SASR 352; [2004] SASC 248 (compulsive gambling may have compelled the betting, but not the fraudulent actions to cover his gambling debts); *R v Cox* [2006] SASC 188 (morbid jealousy may have compelled the accused's search for evidence of infidelity, but not the killing of his domestic partner).

[190] *R v Telford* (2004) 89 SASR 352; [2004] SASC 248, [100].

[191] *R v Telford* (2004) 89 SASR 352; [2004] SASC 248, [101]; *R v Milka* [2010] SASC 250, [76]-[77].

[192] *Criminal Law Consolidation Act 1935* s 269C(3).

[193] *Criminal Law Consolidation Act 1935* s 269E(1).

incompetence where the accused relies on evidence of a psychiatric disorder to cast doubt on his or her ability to form the required specific intent.[194]

187. When the defence is raised, the defendant's mental competence must be separated from the remainder of the trial, and the trial judge may choose whether to first proceed with a trial of the objective elements of the offence, or with a trial of the accused's mental competence.[195]

188. The trial judge must conduct separate trials regarding the objective elements and the accused's mental incompetence. It is not open to a judge to decide to merge the issues into one trial, or to change the order in which the issues are to be determined once a trial has started.[196]

189. The objective elements of an offence do not include voluntariness or the mental state elements of the offence.[197]

190. Under s 269B(1), the accused may elect to have an investigation into mental competence or proof of the elements determined by a judge or a jury. An accused may even elect to have a judge determine one part of the investigation (such as mental competence) and a jury determine other parts of the investigation (such as the objective elements or, if competence is established, the whole trial). Further, if mental competence is determined first, and the accused is found to be mentally competent, the subsequent trial is not governed by Part 8A, and so a jury would normally hear the trial, unless the accused makes a fresh application for trial by judge alone under the *Juries Act 1927*.[198]

191. On a trial of the defendant's mental competence, the court must hear evidence and representations about that issue and may require the accused to undergo examination by a psychiatrist or another appropriate expert and have the results of that examination put before the court.[199]

192. The defence has the onus of proving mental incompetence on the balance of probabilities.[200]

193. If the trial of mental competence occurs first, the court will either:[201]

- record a finding that the accused was mentally incompetent; or

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[194] *R v Sekrst* [2016] SASCFC 127, [74] (Kourakis CJ), [119] (Bampton J agreeing).
[195] *Criminal Law Consolidation Act 1935* s 269E; *Question of Law reserved (No 1 of 1997)* (1997) 70 SASR 251.
[196] *R v Angel* (2014) 119 SASR 565; [2014] SASCFC 75, [12], [61]–[66].
[197] *R v Sekrst* [2016] SASCFC 127, [74].
[198] *R v Miller (No 1)* (2000) 76 SASR 560; [2000] SASC 147, [4]–[19]; *R v Ridings* (2006) 96 SASR 202; [2006] SASC 368, [27].
[199] *Criminal Law Consolidation Act 1935* ss 269F, 269G; *Question of Law reserved (No 1 of 1997)* (1997) 70 SASR 251.
[200] *Criminal Law Consolidation Act 1935* ss 269D, 269F, 269G.
[201] *Criminal Law Consolidation Act 1935* s 269F.

- record a finding that the presumption of mental competence has not been displaced, and proceed with the trial in the normal manner;

194. If the earlier trial records a finding of mental incompetence, the court will then conduct a trial of the objective elements. If the objective elements are proved, the court must find the accused not guilty and may declare the accused liable to supervision. Otherwise the court will find the accused not guilty and discharge the accused.[202]

195. If the earlier trial finds that the presumption of mental competence has not been displaced, the subsequent trial will consider both the objective and subjective elements in the same way as any ordinary trial. At that trial, the presumption of competence will apply such that evidence of mental impairment is not relevant to, and cannot give rise to a doubt about, the element of voluntariness. However, evidence of mental impairment is relevant to whether the accused had the specific intent necessary to commit the charged offence, and may lead to an accused being convicted only of a lesser offence if specific intent cannot be proved due to the impact of the mental impairment.[203]

196. If the trial of mental competence occurs second (and the objective elements were proved at the earlier trial), the court will either:[204]

- declare the accused was mentally incompetent to commit the offence, find the accused not guilty of the offence and may declare the accused liable to supervision; or

- record a finding that the presumption of mental competence has not been displaced, and proceed with the trial in the normal manner. That subsequent trial will be limited to the subjective elements and any defences of the charged offence.

Preliminary directions

197. A jury hearing a matter that involves the Part 8A process will need to be informed about the nature of the process, and what it entails.

198. On a trial of the objective elements, the judge will need to explain the difference between the objective and subjective elements, and the possibility that, if the objective elements are proved, there may be one or two further stages of the trial – an enquiry into mental competence and possibly a subsequent trial of the subjective elements.[205]

199. Where a trial of the objective elements is held first, it may not be practical to avoid mentioning the issue of mental competence.[206]

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[202] *Criminal Law Consolidation Act 1935* s 269F.
[203] *R v Sekrst* [2016] SASCFC 127, [75]–[79]; *Hawkins v The Queen* (1994) 179 CLR 500, 517; [1994] HCA 28.
[204] *Criminal Law Consolidation Act 1935* s 269G; *R v Sekrst* [2016] SASCFC 127, [76].
[205] *R v Angel* [2016] SASCFC 2, [17], [32].
[206] *R v Angel* [2016] SASCFC 2, [23].

200. At the end of a trial of the objective elements, the jury is asked whether it finds beyond reasonable doubt that the objective elements of the charge have been established. It is not asked whether it finds the accused guilty or not guilty. The nature of this question reinforces the need to explain to the jury the division between the objective and subjective elements.[207]

[207] *R v Angel* [2016] SASCFC 2, [30]

Jury Direction #17.9A – Mental incompetence – Preliminary directions – Trial of objective elements

Note: This direction is designed to replace Jury Direction #1.4D – Onus and standard of proof. The direction assumes that the trial judge intends for one jury to consider all issues.

As the prosecution brings the charge(s) against the accused, it is for the prosecution to prove that/those charge(s).

To prove the accused's guilt of a charge, the prosecution must prove the essential ingredients, or "elements", of that charge beyond reasonable doubt.

You have probably heard these words before, and they mean exactly what they say – proof beyond reasonable doubt.

This is the highest standard of proof that our law demands.

At the end of the trial, I will tell you what the essential ingredients or elements are for each charge, and what evidence the prosecution relies on to prove each element.

Normally, an offence is made up of what are called objective elements and subjective elements. In general terms, objective elements refer to what the accused did, and subjective elements refer to what the accused knew or thought about what s/he was doing.

In this trial, an issue has arisen about whether the accused was mentally competent to commit an offence. The law recognises that for some people, mental illness, intellectual disability or senility means they should not be held criminally responsible for their actions. When this occurs, a trial is broken into stages to manage the different issues.

The first stage looks only at the objective elements. Did [*accused*] perform the acts required to commit the offence(s) charged?

During the first stage, you will hear evidence from witnesses, and submissions from the prosecution and the defence.

At the end of this stage, you will need to decide whether the prosecution has proved the objective elements beyond reasonable doubt. If the prosecution does prove this, then you will make a finding that the objective elements have been proved. If the prosecution does not prove this, then your verdict will be that the accused is not guilty.

If you find the objective elements proved, we will move to the second stage.

In the second stage, the defence will seek to prove that the accused was not mentally competent to commit the offence(s) charged.

Again, you will hear evidence from witnesses and submissions from the prosecution and defence about that issue.

I will give you more directions about that if we get to the second stage. For now, I will just explain the possible outcomes of that stage.

If you find the defence have proved that the accused was not mentally competent, then I will record a verdict of not guilty, but may order that the accused be kept under supervision so that his/her mental illness, intellectual disability or senility can be treated.

If you find that the accused was mentally competent, then we will move to the third stage of the trial.

The third stage, if we get there, is a trial of the subjective elements. At that stage, you will again hear evidence and submissions.

At that stage, you will decide if the prosecution has proved the subjective elements beyond reasonable doubt. If the prosecution has proved those elements beyond reasonable doubt, you will find the accused guilty. Otherwise you will find the accused not guilty.

If the issue of mental competence had not arisen, there would be one trial where you decide the objective and subjective elements together. But because the issue of mental competence has arisen, we need to approach the trial in stages, and you will have different verdicts available to you at each stage.

Jury Direction #17.9B – Mental incompetence – Preliminary directions – Trial of mental incompetence

Note: This direction is designed to replace Jury Direction #1.4D – Onus and standard of proof. The direction assumes that the trial judge intends for one jury to consider all issues.

The usual rule in a criminal trial is that as the prosecution brings the charge(s) against the accused, it is for the prosecution to prove that/those charge(s).

However, in this trial, an issue has arisen about whether the accused was mentally competent to commit an offence. The law recognises that for some people, mental illness, intellectual disability or senility means they should not be held criminally responsible for their actions. When this occurs, a trial is broken into stages to manage the different issues.

In the first stage, the defence will seek to prove that the accused was not mentally competent to commit the offence(s) charged.

During the first stage, you will hear evidence from witnesses, and submissions from the prosecution and the defence.

At the end of this stage, I will explain how you decide whether a person is mentally competent to commit an offence. For now, I will just explain the possible outcomes of this stage.

If you find that the accused was mentally competent, then we will conduct a trial as if the issue of mental competence had not arisen. In that trial, you will hear all the evidence and decide whether the prosecution has proved the essential ingredients, or "elements" of that charge beyond reasonable doubt.

If you find the defence proves that the accused was not mentally competent, then the next hearing will have a narrower focus. You will only be asked to decide whether the prosecution can prove the objective elements of the offence(s) charged beyond reasonable doubt.

Normally, an offence is made up of what are called objective elements and subjective elements. In general terms, objective elements refer to what the accused did, and subjective elements refer to what the accused thought about what s/he was doing.

To decide this, you will hear evidence from witnesses, and submissions from the prosecution and the defence.

If the prosecution does prove the objective elements, then I will record a verdict of not guilty, but may order that the accused be kept under supervision so that his/her mental illness, intellectual disability or senility can be treated. If the prosecution does not prove the objective elements, then I will record a verdict of not guilty, and the accused will be free to go.

Jury Direction #17.9C – Mental incompetence – Final directions

As I explained at the start of the trial, the issue you must decide at this stage is whether the defence has proved the accused was not mentally competent to commit the offence(s) charged.

To prove that [*accused*] is not mentally competent to commit an offence, the defence must prove three elements.

First, the defence must prove the accused was suffering from a mental impairment at the time of the alleged offence.

Second, the defence must prove that the accused either: did not know the nature and quality of his/her conduct; or did not know his/her conduct was wrong; or was totally unable to control his/her conduct.

Third, the defence must prove that it was the mental impairment that caused him/her to not know, or be unable to control, his/her conduct.

When I say that the accused must prove these three matters, the standard or degree of proof is the balance of probabilities. That is, the defence must show that these three elements are more likely than not.

This is a different standard to the one that generally applies in criminal trials. You have probably heard the phrase 'beyond reasonable doubt'. That is the standard to which the prosecution must prove an offence. But because this hearing is only concerned with whether the accused was mentally competent to commit an offence, the standard you apply is 'the balance of probabilities' and not 'beyond reasonable doubt'.[208]

You heard evidence about these three elements from [*identify relevant witnesses*].

[Summarise relevant evidence and arguments]

When you are ready to return your verdict, for each charge, you will be asked "Has the defence proved, on the balance of probabilities, that [accused] was not mentally competent to commit the offence"? If you answer yes, then [e*xplain consequences of finding of mental incompetence, based on the order in which mental competence and objective elements are determined*]. If you answer no, then [*explain consequences of finding that mental incompetence not established, based on the order in which mental competence and objective elements are determined*].

[208] If the trial of mental competence is held second, and the same jury heard the trial of the objective elements, this paragraph should be modified to take account of the fact that the jury will have previous experience with the standard of beyond reasonable doubt.

17.10 – Honest and reasonable mistake of fact (*Proudman v Dayman* defence)

202. Judges have, at times, divided statutory offences into three classes:

- *Mens rea* offences, where the prosecution must prove the existence of one or more fault elements;
- Strict liability offences, where the prosecution does not need to prove the existence of fault elements, but an honest and reasonable mistake of fact can provide a defence; and
- Absolute liability offences, where there are no fault elements and honest and reasonable mistake of fact is not a defence.[209]

203. It is a question of statutory interpretation whether an offence is one of *mens rea*, strict liability or absolute liability.[210]

204. An honest and reasonable mistake of fact is a belief on reasonable grounds in a set of facts that, if true, would render the doing of the act innocent.[211] For this purpose, 'innocent' means not guilty of a criminal offence, or, in the case of a statutory offence, outside the operation of the statute.[212]

205. A belief in a state of affairs which, if true, would mean the accused had committed a different offence to the one charged does not provide a relevant mistake of fact defence, but it may be relevant to sentencing.[213]

206. The accused carries an evidentiary onus to raise the defence of honest and reasonable mistake of fact. Once this evidentiary onus is met, the legal onus is on the prosecution to disprove the defence beyond reasonable doubt.[214]

207. The prosecution does this by proving that:

- The accused did not hold the belief in question; and
- The belief was not held on reasonable grounds.

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[209] See *Davis v Bates* (1986) 43 SASR 149, 150; *R v Sault Ste. Marie* [1978] 2 SCR 1299 (cited with approval in *He Kaw Teh v The Queen* (1985) 157 CLR 523, 533–534; [1985] HCA 43 per Gibbs CJ); *Watson v Police* (2011) 278 LSJS 163; [2011] SASC 240, [11]–[12].

[210] *He Kaw Teh v The Queen* (1985) 157 CLR 523; [1985] HCA 43.

[211] *Proudman v Dayman* (1941) 67 CLR 536, 540; *Davis v Bates* (1986) 43 SASR 149, 150; *Police v Mariner* [2002] SASC 363, [10].

[212] *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [8].

[213] *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [27].

[214] *Davis v Bates* (1986) 43 SASR 149, 152; *Jiminez v The Queen* (1992) 173 CLR 572, 581–582; [1992] HCA 14; *R v Clarke* (2008) 100 SASR 363; [2008] SASC 100, [61]; *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [6]; *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534–535; [1985] HCA 43.

208. A mistake of fact is different from an absence of concern about the issue.[215] The prosecution can disprove the defence by establishing that the defendant did not hold the belief in question.

209. While the accused only bears an evidentiary onus, it appears that courts are inclined to be slow to find that that onus is discharged where the alleged mistaken belief is not clearly identified, or where it is peculiarly within the accused's knowledge but its existence relies on inferences about the accused's actual state of mind based on out of court statements.[216]

210. The court applies an objective test to decide whether the belief was held on reasonable grounds, and does not assess reasonableness on the basis of the circumstances which the accused believed existed.[217]

211. For the purpose of this defence, the mistake must be a mistake *of fact*. A mistake of law, whether concerning the content of the law (either the existence of an offence, or the elements of an offence), or principles relating to enforcement, does not provide a basis for exculpation.[218]

212. The treatment of mistakes that relate to mixed questions of fact and law closely depends on the facts of each case. Cases have accepted that a mistaken belief in the legal effect of certain facts, or in the legal characterisation of a set of facts, is a mistake of law where all the relevant facts are known.[219] Similarly, a mistaken belief that the accused has been authorised to engage in certain conduct has been treated as a mistake of law where the belief stems from a person who had no lawful authority to grant the purported authorisation.[220] Conversely, a correct belief about the legal effect of certain facts, where the mistake related to whether those facts existed, has been treated as a mistake of fact.[221] Further, a mistaken belief about whether a particular court order existed or did not exist has been treated as a mistake of fact, where the person is charged with breaching that order.[222]

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[215] *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [7].

[216] See, e.g., *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [38]–[39]; *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270, 274.

[217] *Lumsden v Police* (2019) 135 SASR 265; [2019] SASC 178, [49]–[50], [55].

[218] *CTM v The Queen* (2008) 236 CLR 440; [2008] HCA 25, [7]; *Singh v City of Holdfast Bay* [2013] SASC 10, [9]; *Ostrowski v Palmer* (2004) 218 CLR 493; [2004] HCA 30, [1], [13], [41]; *Thomas v The Queen* (1937) 59 CLR 279, 305–306.

[219] See *Von Lieven v Stewart* (1990) 21 NSWLR 52, 67; *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745, 751–752; *Hughes v Police* (2009) 103 SASR 337; [2009] SASC 57, [75]–[77].

[220] See *Ostrowski v Palmer* (2004) 218 CLR 493; [2004] HCA 30, [55]–[59] and cases cited within; but c.f. *Morcom v Police* (2017) 82 MVR 54; [2017] SASC 147, [25] regarding a mistaken belief that the accused had a valid driver's licence, based on enquiries with Service SA.

[221] See *Thomas v The Queen* (1937) 59 CLR 279.

[222] See *Police v Beukes* (2011) 205 A Crim R 406; [2011] SASC 9, [12].

CHAPTER 18: EXTENSIONS TO CRIMINAL RESPONSIBILITY

18.1 – Attempts

1. Section 270A creates the general offence of attempting to commit an offence.[1]

2. The general attempt offence does not apply where an offence creating provision specifically relates to an attempt.[2] There are also specific offences which exclude the availability of attempts as an offence.[3]

3. Attempt consists of two elements:[4]

   - An intent to commit the completed offence;
   - Commission of acts or omissions that are sufficiently proximate to the completed offence and not merely preparatory.

4. There is also the statutory offence of attempted manslaughter, which exists where a person commits attempted murder in circumstances where, if the accused had killed the victim, the accused would be able to rely on the partial defence of provocation.[5]

Intent

5. The fault element for attempt is always an intent to commit the completed offence.[6] This is not an intent that relates to any specific intent which is an element of the offence attempted. Instead, as Brennan J explain in *McGhee v The Queen*: [7]

> The intent of the alleged offender relates to the physical events the occurrence of which would, if not interrupted, constitute the crime attempted.

6. For this reason, it is not necessary to investigate whether the accused had, or intended to have, the fault element required for the completed offence.[8]

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[1] *Criminal Law Consolidation Act 1935* s 270A(1).

[2] *Criminal Law Consolidation Act 1935* s 270A(2). See, e.g., *Criminal Law Consolidation Act 1935* ss 81(2) (attempt to procure an abortion), 256 (attempt to obstruct or pervert the course of justice or due administration of law) and 270AB (attempted manslaughter). See also *R v Palaga* (2001) 80 SASR 19; [2001] SASC 174, [57]–[69].

[3] See *Criminal Law Consolidation Act 1935* ss 144E, 239.

[4] *Britten v Alpogut* [1987] VR 929; *R v Irwin* [2006] SASC 90; *R v Male* [2020] SASC 98.

[5] *Criminal Law Consolidation Act 1935* s 270AB. See 17.4 – Provocation for more information on provocation. Note, however, that provocation was abolished for offences committed on or after 1 February 2021 by the *Statutes Amendment (Abolition of Defence of Provocation and Related Matters) Act 2020*.

[6] *Knight v The Queen* (1992) 175 CLR 495, 501; *DPP v Stonehouse* [1978] AC 55, 68.

[7] *McGhee v The Queen* (1995) 183 CLR 82, 85; [1995] HCA 69.

[8] *McGhee v The Queen* (1995) 183 CLR 82, 86; [1995] HCA 69.

7. In relation to attempted murder, only an intention to kill is sufficient. An intention to cause grievous bodily harm is not sufficient.[9]

8. Recklessness is not a sufficient state of mind to constitute attempt.[10]

Proximity

9. To be sufficiently proximate, the acts must be immediately connected with the completed offence, and not merely preparatory, or remotely leading towards it.[11]

10. While other jurisdictions and textbook writers have at times suggested other tests for the physical element of attempt (such as 'the last act' or 'acts that unequivocally demonstrate the intended offence'), these formulations have not been adopted in South Australia.[12]

Impossible attempts

11. The only kind of impossibility which can excuse an attempt is legal impossibility. This arises where the accused engages in conduct which, if it had been successful, would not have constituted an offence.

12. The principle that factual impossibility is a defence has been overturned,[13] and it would be erroneous to reintroduce discarded notions of factual impossibility under the guise of a theory that impossibility prevents the accused from engaging in conduct that is sufficiently proximate.[14]

13. The judge's duty to direct the jury about impossibility only arises when the nature of the impossibility is such that it could, at law, amount to a defence.[15]

Jury directions on attempts

14. There are two ways to structure directions about the elements of an attempt.

15. The first approach is to treat intention and the proximity requirement as elements, and to give the jury information about the legal and factual matters relevant to proof of the proximity requirement as it relates to the completed offence.

16. The second approach is to modify a standard direction about the completed offence to incorporate the issue of attempt within the relevant element or elements.

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[9] *McGhee v The Queen* (1995) 183 CLR 82, 85–86; [1995] HCA 69.
[10] *Giorgianni v The Queen* (1985) 156 CLR 473, 506; [1985] HCA 29.
[11] *R v Borinelli* [1962] SASR 214, 218.
[12] See *R v Male* [2020] SASC 98, [86].
[13] See *R v Irwin* (2006) 94 SASR 480; [2006] SASC 90, overruling *R v Kristo* (1989) 39 A Crim R 86; *R v Collingridge* (1976) 16 SASR 117.
[14] *R v Tranter* (2013) 116 SASR 452; [2013] SASCFC 61, [135].
[15] *R v Kristo* (1989) 39 A Crim R 86, 104.

17. This bench book provides examples of both approaches. However, readers are advised that both approaches will require extensive adjustments of model directions to the issues in each case.

Jury Direction #18.1A – Attempt – Elements of attempt

I will now direct you about the elements of attempted [*offence*].

To prove this offence, the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused intended to commit [*offence*];

Two – The accused engaged in conduct that was sufficiently proximate to commit [*offence*].

I will now explain these two elements and how they apply in this case.

Intention

The first element is that the accused intended to commit [*offence*]. This means the accused must have intended to [*identify physical elements of completed offence*].

[*If attempt is charged as an alternative to an offence that can be committed recklessly or negligently, add the following*: This is a more onerous standard than the standard that applied to charge [*number*], the completed offence of [*offence*]. I direct you that while [*state of mind*] is enough to prove the [*element*] of charge [*number*], it is not enough to prove the first element of attempted [*offence*]. For this element, the prosecution must prove the accused intended to [*identify physical elements of completed offence*].

[*Identify relevant evidence and arguments on intention*]

Proximity

The second element is that the accused must have engaged in conduct that was sufficiently proximate, or sufficiently close, to commit [*offence*].

This element relates to whether the accused has gone far enough along the path to committing [*offence*] that you can say s/he has attempted to commit [*offence*].

The law requires you to make a judgment of how close the accused's conduct was to completing the offence. There are two tools the law provides for you to judge this. First, did the accused do more than merely prepare to commit the alleged offence? Second, was the conduct immediately connected to the alleged offence? It is not enough if the conduct was only remotely leading towards the intended offence.

[*Identify relevant evidence and arguments on proximity*]

Jury Direction #18.1B – Attempt – Attempted murder

I will now direct you about the elements of attempted murder.

To prove attempted murder, the prosecution must prove four elements beyond reasonable doubt. These are:

One – The accused attempted to cause the death of a person;

Two – The accused's act or acts were voluntary and deliberate;

Three – The accused acted with the intention to kill;

Four – The accused acted unlawfully.

I will now explain these four elements and how they apply in this case.

Causation

The first element is that the accused attempted to cause the death of [*victim*].

The law requires you to make a judgment of how close the accused's conduct was to completing the offence. There are two tools the law provides for you to judge this. First, did the accused do more than merely prepare to cause [*victim*]'s death? Second, was the accused's conduct immediately connected to causing [*victim*] to die. It is not enough if the conduct was only remotely leading towards [*victim*]'s death.

Here, the prosecution says that the accused attempted to cause [*victim*]'s death by [*identify relevant evidence and arguments*].

The defence disputes this, and says [*identify relevant competing evidence and arguments*].

Voluntary and deliberate

The second element is that the accused's act or acts were voluntary and deliberate.

There are two parts to this element. Voluntary means [his/her] act or acts must have been a product of [his/her] conscious will. Deliberate means [his/her] act or acts were not accidental.

[*Identify how the issue of voluntariness arises on the facts of the case*]

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Specific intention

The third element is that the accused intended to kill [*victim*].

For this element, you are considering the accused's state of mind at the time the accused committed the relevant act or acts.

To prove the accused's intention, the prosecution asks you to draw an inference. You must look at the surrounding circumstances and decide whether you are satisfied beyond reasonable doubt that the prosecution has proved that at the time [he/she] [identify relevant acts], the accused intended to kill [*victim*].

In making this assessment, you should take into account any evidence of words spoken by the accused. You can also take account of the accused's acts, and what inferences you can draw about the accused's state of mind from those acts.

[*If attempted murder is charged as an alternative to murder, add the following*: This is a more onerous standard than the standard that applied to charge [number], the completed offence of murder. I direct you that while intention to cause grievous bodily harm is enough to prove the [element] of charge [number], it is not enough to prove the first element of attempted murder. For this element, the prosecution must prove the accused intended to cause [victim]'s death.

The prosecution argues that you can find this element proved because [*identify relevant evidence and arguments*].

The defence says that you will not find this element proved because [*identify relevant evidence and arguments*].

Unlawfulness

The fourth element is that the accused acted unlawfully. [*Insert relevant directions, based on the issues arising*].

18.2 – Incitement

19. Incitement to commit an offence is largely governed by the common law in South Australia.[16]

20. It appears that the elements of incitement are:[17]

    - The accused engaged in conduct that incited a person to commit the intended offence;
    - The accused intended that the incited offence would be committed.

Inciting

21. Incitement is broader than conduct that originates or initiates. A person can commit the crime of incitement even if the person to be incited already planned to commit the intended offence.[18]

22. Incitement appears to be synonymous with soliciting, which covers a wide range of conduct, including asking or trying to obtain something. It is not limited to importuning, entreating or imploring.[19]

23. The offence of incitement is completed even if the person said to have been incited does not commit the intended offence.[20]

24. A person may incite a specific person to commit a crime, or may incite the commission of an offence generally. In either case, the offence is complete once the accused engages in the relevant conduct with the necessary state of mind, and there is no defence of withdrawal.[21]

25. The offence incited must be an offence which, as a matter of law, the person incited could commit.[22]

26. Because aiding, abetting, counselling or procuring are not discrete offences, but are modes of committing a completed offence, it appears that a person cannot be found guilty of inciting another person to procure a third party to commit an offence, unless that third party goes on to commit the intended offence (in which case, the offence

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[16] *R v Symons* [2018] SASCFC 48, [83]. One exception is soliciting murder, which is a statutory offence under *Criminal Law Consolidation Act 1935* s 12(b).
[17] Compare *R v Holliday* (2017) 260 CLR 650, 659; [2017] HCA 35, regarding the *Criminal Code* (ACT).
[18] *R v Crichton* [1915] SALR 1 (quoted in *Haines v The Queen* (2001) 80 SASR 363; [2001] SASC 347, [32]).
[19] *R v Forgione* [1969] SASR 248.
[20] *Haines v The Queen* (2001) 80 SASR 363; [2001] SASC 347, [33] (citing *R v Assistant Recorder of Kingston-upon-Hull; Ex parte Morgan* [1969] 2 QB 58, 62).
[21] *Walsh v Sainsbury* (1925) 36 CLR 464, 476; *R v Holliday* (2017) 260 CLR 650, 659; [2017] HCA 35, [30].
[22] See, e.g., *R v Whitehouse* [1977] QB 868.

incited is the completed offence, and not an offence of procuring the completed offence).[23]

27. It is not clear whether a person can be found guilty of inciting one person to incite a third party to commit an offence.[24]

[23] See *R v Holliday* (2017) 260 CLR 650, 659; [2017] HCA 35, [36], [48], [67], [77]; *Walsh v Sainsbury* (1925) 36 CLR 464; *Review of Commonwealth Criminal Laws, Interim Report: Principles of Criminal Responsibility and Other Matters* (July 1990), 241 [18.40].

[24] See, e.g., *R v Sirat* (1985) 83 Cr App R 41; *R v Evans* [1986] Crim LR 470, but c.f. *R v Holliday* (2017) 260 CLR 650, 659; [2017] HCA 35, [62], on the ACT *Criminal Code*.

Jury Direction #18.2 – Incitement

I will now direct you about the elements of incitement to commit [*offence*].

To prove incitement to commit [*offence*], the prosecution must prove two elements beyond reasonable doubt. These are:

One – The accused incited another person to commit [*offence*].

Two – The accused intended that the other person would commit [*offence*].

I will now explain these two elements and how they apply in this case.

Incitement

The first element the prosecution must prove is that the accused incited another person to commit [*offence*].

To understand this element, there are two matters I must explain to you. First, I will explain what it means to incite someone, and then I will explain what it means to commit [*offence*].

Incitement is an ordinary word with no special legal meaning. It covers a range of conduct including requesting, commanding, encouraging or pleading. In the context of this case, this element requires you to decide whether the prosecution has proved that [*accused*] encouraged [*second party*] to do something.

For this purpose, you do not need to consider whether [*accused*] was successful. A person can be found guilty of inciting an offence even if the person they were speaking to was never going to commit the offence intended.

The second part of this element is what it means to commit [*offence*].

A person commits [*offence*] when s/he [*explain elements of intended offence*].

In summary, to prove this element, the prosecution must prove that the accused encouraged [*second party*] to [*summarise elements of intended offence*].

[*Identify relevant evidence and arguments*]

Intention

The second element is that the accused intended the other person would commit [*offence*].

This element relates to the accused's state of mind. To prove this element, the prosecution must show that when s/he [*identify relevant acts of incitement*], [*accused*] intended that [*second party*] would [*identify elements of intended offence*].

[*Identify relevant evidence and arguments*].

18.3 – Conspiracy to commit crime

28. Conspiracy to commit an offence is a common law offence in South Australia.[25]

29. Conspiracy has been described as the agreement of two or more people to do an unlawful act, or to do a lawful act by unlawful means.[26]

30. This requires proof that:[27]

    - The accused and at least one other person entered into an agreement to pursue a criminal offence;
    - The parties intended to form that agreement;
    - The parties intended to commit the agreed offence.

31. When dealing with a conspiracy, there is an important distinction between the existence of a conspiracy and the participation of any given individual in that conspiracy.28 This distinction is critical to the application of the hearsay exception for statements by co-conspirators.29

32. At common law, the offence is complete at the point of agreement and it is not necessary to prove that the parties to the agreement took steps (or "overt acts") to carry out the agreement.[30] However, evidence of overt acts may be led to prove the existence, purpose and scope of the agreement.[31]

Agreement

Scope of agreement

33. Proof of conspiracy requires proof that the accused agreed to commit the proposed offence. While there can be a verdict of guilty where only some of the alleged improper purposes are proved, there cannot be a verdict of guilty where the evidence proves a substantially different conspiracy from that alleged.[32]

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[25] *R v Symons* (2018) 273 A Crim R 180; [2018] SASCFC 48, [83].
[26] *Ahern v The Queen* (1988) 165 CLR 87, 93; [1988] HCA 39, though McHugh J in *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7, [51] said that an agreement to use unlawful means necessarily involves agreeing to do an unlawful act, and so the second limb of the definition adds nothing.
[27] *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7, [55]–[56].
[28] *Ahern v The Queen* (1988) 165 CLR 87, 93; [1988] HCA 39.
[29] See 4.16.1 – Statements by co-conspirators.
[30] *R v O'Brien* [19545] SCR 666, 670. C.f. *Criminal Code 1995* s 11.5(2)(c).
[31] *R v Lacey & Ors* (1982) 29 SASR 525, 532; *R v Ongley* (1940) 57 WN (NSW) 116, 117; *R v Cox (No 4)* (2006) 165 A Crim R 345, [23]; [2006] VSC 60.
[32] *R v Lacey* (1982) 29 SASR 525, 532; *R v Cox (No 4)* (2006) 165 A Crim R 345; [2006] VSC 60, [14]–[15].

34. Evidence which shows only an agreement to commit offences of a particular class, or evidence which shows a likely agreement to commit some kind of offence, will not be sufficient to prove a conspiracy to commit a particular offence.[33]

35. Further, in assessing whether the evidence establishes an agreement to commit a particular offence (and excludes the possibility of an agreement to commit a different offence), the court will look at the acts of the accused and the context of those acts. In some situations, the acts and circumstances may show that the possibility the accused intended to commit some other crime is no more than speculation.[34]

36. An agreement and a joint intention to commit the agreed offence must be distinguished from an expectation that one party would commit the offence with the knowledge and acquiescence of the other. Conspiracy requires a common design or shared intention that the parties commit the offence.[35]

Identity of participants

37. A conspiracy requires a single agreement between the parties. A charge of conspiracy will fail where the prosecution alleges a single conspiracy between multiple parties which, in reality, is a network of separate conspiracies between different groups of parties.36

38. A conspiracy must involve a common agreement. As Brennan J explained in *Gerakiteys v The Queen*:[37]

> If two conspirators agree to effect several unlawful objects and a third person agrees with them to effect some only of those objects, there are two conspiracies not one: the original conspirators are parties to both conspiracies, the third person is a party only to the conspiracy with the more limited objects.

39. While proof of conspiracy requires proof of agreement with at least one other person, the prosecution does not need to establish the identity of that other person beyond reasonable doubt. A prosecution can therefore succeed even where it is alleged that the accused conspired "with a person or persons unknown".[38] However, the evidence and particulars in a case may mean that the identity of one or more conspirators may become a material fact that needs to be proved, as part of proving the conspiracy alleged.[39]

40. Where two people are charged with conspiring with one another and no one else, the potential for the jury to return different verdicts on the two accused depends on the circumstances of the case. Where there is no meaningful difference in the evidence

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[33] *Gebert & Ors v The Queen* (1992) 60 SASR 110, 113–116.
[34] *Gebert & Ors v The Queen* (1992) 60 SASR 110, 117; *R v Yu* [2001] VSCA 179.
[35] *R v Moran & Mokbel* [1999] 2 VR 87; [1998] VSCA 64, [8], [24]–[25]; *R v Trudgeon* (1988) 39 A Crim R 252, 254, 256, 263.
[36] See *Gerakiteys v The Queen* (1984) 153 CLR 317; [1984] HCA 8. See also *R v Lacey & Ors* (1982) 29 SASR 525, 534.
[37] *Gerakiteys v The Queen* (1984) 153 CLR 317, 327; [1984] HCA 8.
[38] *Gerakiteys v The Queen* (1984) 153 CLR 317, 334; [1984] HCA 8; *R v Howes* (1971) 2 SASR 293.
[39] See *R v Masters* (1992) 26 NSWLR 450, 458–459.

between the two accused, the judge should tell the jury that, while it must consider the case of each accused separately, it cannot find one accused guilty and one accused not guilty of the single conspiracy.[40]

41. A conspiracy may continue to exist even if the members of the conspiracy change. People may join or leave a conspiracy, without there being a new conspiracy, provided there are always at least two people acting in combination to achieve the objectives of the conspiracy.[41]

42. A common law rule used to exist that a conspiracy cannot be committed where the only participants are husband and wife. The continued existence of this common law rule has, however, been doubted.[42]

43. A conspiracy to commit an offence such as robbery does not require proof or agreement of the property to be stolen, or the identity of the proposed victim. Those matters may be treated as mere particulars.[43] However, where the proposed victim is identified as a particular of the charge, the jury cannot convict on the basis that the conspiracy related only to proposed victims not identified in the charge.[44]

44. Further, in some cases, a conspiracy which does not relate to certain named victims may be a substantially different conspiracy to that alleged. It is a matter for the judge to determine whether, on the particulars and the way the prosecution opens its case, proof that the conspiracy related to a certain person is essential to proof of the conspiracy alleged.[45]

Agreements and impossibility

45. Historically, it was thought that factual impossibility was a defence to a charge of conspiracy. Under this theory, a conspiracy charge cannot succeed in circumstances where, if the intended acts of the conspiracy were committed, the intended offence would not be committed.[46]

46. While it has not been authoritatively determined in South Australia, it is likely that factual impossibility is no longer a defence. This is because the principle was based on an

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[40] *R v Tulisi* (2008) 258 LSJS 428; [2008] SASC 306, [77]–[95]; *R v Darby* (1982) 148 CLR 668; [1982] HCA 32.
[41] *R v Masters* (1992) 26 NSWLR 450, 458; *Saffron v The Queen* (1988) 17 NSWLR 395, 421–422.
[42] Compare *Namoa v The Queen* [2020] NSWCCA 62, [56]–[86] and *R v Won & Singh* [2012] SADC 117, [43]–[44].
[43] *R v McCaul & Palmer* [1983] 2 VR 419, 423–424, quoting *R v Thomas* (Supreme Court of Victoria Full Court, 29 September 1980).
[44] See *R v Lacey & Ors* (1982) 29 SASR 525, 533.
[45] See and compare *R v Cox (No 4)* (2006) 165 A Crim R 345; [2006] VSC 60 and *R v Saffron (No 1)* (1988) 17 NSWLR 395.
[46] See *DPP v Nock* [1978] AC 979; *R v Barbouttis* (1995) 37 NSWLR 256 (Smart J).

approach to factual impossibility in relation to attempts which has since been discarded.[47]

47. Even if factual impossibility remains a defence, the application of that principle depends on how the conspiracy is characterised and whether the proposed means are an essential feature of the conspiracy, or whether the means are merely incidental and the conspiracy is characterised by reference to the intended criminal outcome.[48]

Intention to commit offence

48. As conspiracy requires a joint intention to commit the agreed offence, a conspiracy will not exist where there are only two parties and one of those parties had no intention of committing the proposed offence. For this purpose, while a person's acts (such as acts demonstrating agreement to the intended offence) can be used as evidence of his or her state of mind (the intention to commit the offence), such evidence is rebuttable. The offence requires a subjective intention, rather than being established merely by acts which objectively appear to demonstrate the required intention.[49]

49. A conspiracy is also not established merely where the accused realised that the probable consequences of his or her conduct might result in another person committing a criminal offence. This is because there must be an agreement and intention that the unlawful act occur. Recklessness is not sufficient, even if it would be sufficient for the completed offence. However, a sufficient intention may exist where the accused is aware that the proposed offence is almost certainly to occur, as intention may exist even if the person does not wish to bring that result about.[50]

50. The intention to commit the intended offence requires knowledge of the facts which render the conduct illegal.[51]

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[47] See *R v Irwin* (2006) 94 SASR 480; [2006] SASC 90. See also *R v Sew Hoy* [1994] 1 NZLR 257; *R v Barbouttis* (1995) 37 NSWLR 256 per Gleeson CJ; *Onourah v The Queen* (2009) 76 NSWLR 1; [2009] NSWCCA 238, [10]–[32].

[48] See *R v El-Azzi* [2004] NSWCCA 455, [14]–[42]; *R v Turner (No 8)* (2001) 10 Tas R 225; [2001] TASSC 86.

[49] See *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7, [56]–[62] and cases cited within; *R v Trudgeon* (1988) 39 A Crim R 252, 261–262.

[50] *Peters v The Queen* (1998) 192 CLR 493; [1998] HCA 7, [66]–[69]; *Giorgianni v The Queen* (1985) 156 CLR 473, 506; [1985] HCA 29; *R v Trudgeon* (1988) 39 A Crim R 252, 256.

[51] See *Giorgianni v The Queen* (1985) 156 CLR 473, 487–488, 494, 500, 505–507; [1985] HCA 29; *O'Donovan v Vereker* (1987) 18 FCR 101, 113.

Jury Direction #18.3 – Conspiracy to commit crime

I will now direct you about the elements of conspiracy to commit [*offence*].

To prove conspiracy to commit [*offence*], the prosecution must prove three elements beyond reasonable doubt. These are:

One – The accused and at least one other person entered into an agreement to commit [*offence*].

Two – The parties to the agreement intended to form that agreement.

Three – The parties to the agreement intended to commit [*offence*].

I will now explain these three elements and how they apply in this case.

Agreement

The first element the prosecution must prove is the agreement to commit [*offence*].

There are two matters I must explain for this element.

First, what does it mean to commit [*offence*].

Second, what does it mean to make an agreement to commit an offence.

Turning to the first issue.

A person commits [*offence*] when he or she [*insert directions on substantive offence*]

I will now turn to the second part of this element. What does it mean to make an agreement to commit an offence?

There are seven principles you must follow here.[52]

First, an agreement is often described as a meeting of the minds. The prosecution must prove that the participants jointly agree that, between them, they will commit the intended offence.

Second, an agreement is different from an expectation. There is no agreement between two people when one assumes the other person will do something. There is also no agreement if one person says they intend to do something, and the other person does not object. An agreement requires that they join together in some way.

Third, there does not need to be any formality to an agreement. The law does not expect those who conspire to commit crimes to put their plans in writing, or to execute a contract.

[52] This section should be modified to reflect the issues in the trial. Principles that are not relevant to the case should be omitted.

Fourth, it is not necessary to prove that all the other parties named in the charge were part of the agreement. To prove this charge against [*accused*], it is enough that the prosecution proves that s/he reached an agreement to commit [*offence*] with at least one of [*identify relevant alleged co-conspirators*].

Fifth, the accused does not need to know all the details of the intended offence, such as the identity of the other parties, or the identity of the proposed victim.

Sixth, a conspiracy is formed the moment when the parties agree to commit the proposed offence. The prosecution does not need to prove that [*accused*] took steps to carry out the agreement. However, you can use evidence of anything the accused said or did after allegedly making the agreement when you are deciding whether they were part of an agreement, and whether it was an agreement to commit [*offence*].

Seventh, while a conspiracy can be formed at the moment two people agree to commit a crime, other people can join that agreement later. In that situation, the prosecution must prove that the person **joined** an existing agreement, rather than made a **new agreement** with one or more parties to the existing agreement.

Intention to agree

The second element is that [at least two of] the parties to the agreement intended to make an agreement.

This element relates to the state of mind of the accused and the other parties to the alleged agreement. The prosecution must prove that they did not merely appear to make an agreement, but that they meant to make that agreement.

[*Identify relevant evidence and arguments*]

Intention to commit agreed offence

The third element is that [at least two of] the parties to the agreement intended to commit [*offence*].

This element also relates to the state of mind of the accused and the other parties to the alleged agreement. The prosecution must prove that [*accused*] and [at least one of] the other parties to the agreement meant to go through with the agreed offence.

If elaboration is needed, add the following direction: This element will not be proved if [*identify relevant conspirators*] always intended to report [*accused*] to the police before anyone had committed [*the intended offence*].

[*Identify relevant evidence and arguments*]

18.4 – Aiding, abetting, counselling or procuring (Accessories)

51. Section 267 provides that:[53]

> A person who aids, abets, counsels or procures the commission of an offence is liable to be prosecuted and punished as a principal offender.

52. The effect of this provision was to abolish strict common law distinctions which previously existed between principals, accessories before the fact and principals in the second degree. Instead, all can be prosecuted and punished as principals without needing to focus on whether the accused was present at the place of the offence.[54] This also means the information may allege that the accused committed the substantive offence, with particulars specifying the accused's involvement as an aider, abetter, counsellor or procurer.[55]

53. Accessorial liability may be excluded as a matter of statutory interpretation.[56] One situation where this will arise is where the statute creating the offence exists for the protection of persons against their own willing participation in the offending.[57]

Elements

54. To prove guilt by way of accessorial liability, the prosecution must prove:

- A person (the principal) committed the offence charged;
- The accused knew the essential facts which make up the offence charged;
- The accused intentionally aided, abetted, counselled or procured the offence charged.

Principal committed offence charged

55. Liability under the principles of accessorial liability is derivative. An accused cannot be convicted of an offence as an accessory unless the jury is satisfied that the principal offender committed the offence. This does not, however, involve or require proof that the principal offender has been convicted. Instead, the question is whether, on the evidence admissible against the accessory, the prosecution has proved that the principal committed the completed offence.[58]

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[53] *Criminal Law Consolidation Act 1935* s 267.
[54] *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [13].
[55] *McDermott v The Queen* (1987) 45 SASR 335, 336–337. See also *Giorgianni v The Queen* (1985) 156 CLR 473, 497; [1985] HCA 29.
[56] *Mallan v Lee* (1949) 80 CLR 198.
[57] *Keane v Police* (1997) 69 SASR 481, 483–484.
[58] *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37; *Giorgianni v The Queen* (1985) 156 CLR 473, 491; [1985] HCA 29.

56. Prosecution acceptance of a guilty plea from the principal to a lesser offence does not prevent the later prosecution of an accessory for a greater offence. The plea only establishes the guilt of the principal in proceedings involving the principal. The prosecution may still call evidence in the case of the accessory which shows that the principal committed the greater offence.[59]

Knowledge of essential facts

57. The prosecution must prove the accused had knowledge of the essential facts which make the conduct criminal, even if the accused did not realise that those facts gave rise to a criminal offence.[60]

58. This includes knowledge of, or belief in, the principal offender's intention to do the acts involved in the offence and, in a crime of specific intent, that the principal offender would have that specific intent.[61]

59. Wilful blindness can provide a basis for inferring knowledge, but actual knowledge is always required and not any form of imputed or presumed knowledge.[62]

60. Recklessness and negligence are not sufficient, even if they would be sufficient for a principal offender, or if the offence is one of strict liability. [63]

61. However, the required intention and knowledge does not extend to the consequences of the principal offender's acts. Therefore, in the case of culpable driving or manslaughter, the accused does not need to know that death would result.[64] Instead, the prosecution must prove that, on the facts known to the accused, the principal was acting unlawfully, in the sense that the accused was acting without lawful excuse. Evidence that the accused believed in a state of facts which, if true, would give rise to a defence, is inconsistent with the requirement that the accused knew that the principal offender was committing the offence.[65]

Intentional aiding, abetting, counselling or procuring

62. The prosecution must prove the accused intended to aid, abet, counsel or procure the offence.[66]

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[59] *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [35]–[36].
[60] *Giorgianni v The Queen* (1985) 156 CLR 473, 487–488, 494, 500, 505–507; [1985] HCA 29.
[61] *R v Stokes & Difford* (1990) 51 A Crim R 25, 38–39; *R v Lam & Ors (Ruling No 20)* (2005) 159 A Crim R 448; [2005] VSC 294.
[62] *Giorgianni v The Queen* (1985) 156 CLR 473, 505 (c.f. 487, 495); [1985] HCA 29.
[63] *Giorgianni v The Queen* (1985) 156 CLR 473, 487–488, 494, 500, 505–507; [1985] HCA 29.
[64] *Giorgianni v The Queen* (1985) 156 CLR 473, 502–503; [1985] HCA 29; *R v Stokes & Difford* (1990) 51 A Crim R 25, 38.
[65] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [228]–[229], [385]–[388].
[66] *Giorgianni v The Queen* (1985) 156 CLR 473, 482, 488; [1985] HCA 29.

63. The phrase 'aid, abet, counsel or procure' can be explained through a range of synonyms, including 'help, encourage, advise, persuade, induce, bring about by effort'.[67]

64. The words 'aid, abet, counsel or procure' are descriptive of a single concept, which is that the secondary party is in some way 'linked in purpose' with the person actually committing the offence and is, by words or conduct, doing something to bring about or render more likely the offence.[68] The prosecution may use all four words in the particulars of an information, and proof of any one term is sufficient.[69]

65. Despite the fact that the phrase is descriptive of a single concept, the nature of conduct which will meet that requirement tends to differ depending on when the relevant acts take place.

66. In the case of conduct at the time of the offending, this involves:[70]

- Intentionally helping the principal commit the crime;
- Intentionally encouraging the principal, by words or presence and behaviour, to commit the crime;
- Intentionally conveying to the principal, by words or by presence and behaviour, that the accused is assenting to and concurring in the commission of the crime.

67. For the purpose of the third form of conduct, mere acquiescence is not sufficient. The focus is on whether the accused intentionally conveyed that he or she was assenting to and concurring in the commission of the offence. This has also been described as 'unilateral agreement', which does not require the form of consensus required for joint criminal enterprise.[71]

68. The third form of conduct has been described as a less direct form of encouragement than the second form of conduct, which is more implicit than explicit. It may involve a passive participation which suggests a willingness to assist, even though the need for assistance may be unlikely.[72]

69. It is not necessary to show that the accessory's conduct had a causal impact on the principal's offending. Instead, it is sufficient to show that the conduct was objectively likely to promote the commission of the offence.[73]

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[67] *Giorgianni v The Queen* (1985) 156 CLR 473, 479; [1985] HCA 29.
[68] *Giorgianni v The Queen* (1985) 156 CLR 473, 480, 493; [1985] HCA 29 (quoting *R v Russell* [1933] VLR 59, 67); c.f. *Attorney-General's Reference (No 1 of 1975)* [1975] QB 773.
[69] *McDermott v The Queen* (1987) 45 SASR 335, 337.
[70] *R v Lowery (No 2)* [1972] VR 560, 561 (quoted with approval in *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [218]; *R v Sully* [2011] SASC 169, [158]–[159]).
[71] *R v Makin* (2004) 8 VR 262, [11], [13], [15]; [2004] VSCA 85.
[72] *R v Makin* (2004) 8 VR 262, [14]; [2004] VSCA 85.
[73] *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [30].

70. It is not necessary to prove that the accused intended that the principal offender commit the crime. The element is that the accused intentionally encouraged or assisted the principal, with knowledge of the essential facts needed for the principal offender to be guilty of the crime charged.[74]

Presence and 'mere presence'

71. Historically, presence at the location of the offence distinguished counselling and procuring from aiding and abetting. However, s 267 does not limit its availability by reference to whether the accused was at, or absent from, the place of the offence. Instead, the words 'aids, abets, counsels or procures' encompass all means employed to bring about an offence.[75]

72. Presence at the location of the offence may be of evidentiary relevance. In some cases, the accused may, through his or her presence, intentionally encourage the commission of the offence.[76]

73. In relation to the second or third form of conduct described above, it is not necessary to use the phrase 'presence and behaviour' in all cases. The phrase is designed to avoid the risk of the jury convicting on the basis of mere presence.[77]

74. In some cases, it may be appropriate to direct the jury that 'mere presence' is not sufficient. This will not be necessary in all cases, and will depend on the issues and arguments raised by the parties. As part of a direction that mere presence is insufficient, the judge should identify the sorts of behaviour that might qualify as 'mere' presence and distinguish those from presence which does assist or encourage the principal offender. For example, depending on the issues, it may be appropriate to direct the jury that presence due to accident or curiosity is not sufficient. Instead, the jury must find the accused intentionally encouraged, or conveyed his or her assent to the offending.

75. The intention behind the accused's presence, and the effect of the presence on others, may be established by other evidence that allows a jury to infer that there was intentional encouragement or support.[78]

76. This has been described as distinguishing between "fortuitous and passive presence" and "a calculated presence or a presence from which opportunity is taken",[79] with the ultimate question being whether the accused, by his or her presence, has become linked in purpose with the principal offender.[80]

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[74] *R v Golding & Edwards* (2008) 100 SASR 216; [2008] SASC 68, [46].
[75] *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [12]–[13].
[76] See *Fabinyi v Anderson* (1974) 9 SASR 336 and cases cited within.
[77] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [220].
[78] See *R v Golding & Edwards* (2008) 100 SASR 216; [2008] SASC 68, [37]–[42] and cases cited within.
[79] *R v Beck* [1990] 1 Qd R 30, 37.
[80] *R v Lam* (2008) 185 A Crim R 453; [2008] VSCA 109, [92].

Withdrawal

77. A person is not liable as an accessory if, before the offending, they successfully withdraw from the proposed offending. Withdrawal requires the accused to do or say whatever is reasonably possible to counteract the effect of their earlier assistance. The accused must also communicate their withdrawal to the other offenders.[81]

78. The nature of conduct required to successfully withdraw depends on the facts of the case. The more a person has done to assist the offending, the more that is required to successfully withdraw. In some cases, this might involve leaving the scene and informing those who remain that they are withdrawing from the proposed offending. One way of assessing whether the accused has withdrawn is to examine whether the accessory's encouragement is "spent", even if there is no communication.[82]

79. Withdrawal must be timely. It cannot be contemporaneous with the commission of the offence, or expressed too late to prevent the commission of the offence.[83]

Accessorial liability as an alternative to primary liability

80. Section 267, which allows an accessory to be charged as a principal, allows the prosecution to argue that the accused was either guilty as a principal or as an accessory, but that it is not possible to identify which. This is especially relevant where the accused is charged with murder, and was part of a group who attacked the deceased. In those circumstances, it may not be possible to determine whether the accused, or another member of the group, struck the fatal blow.[84]

81. Uncertainty of the role played by each possible offender may not, in all cases, require resort to principles of aiding, abetting, counselling or procuring. As Gaudron and Gummow JJ recognised in *Osland v The Queen*, a person may be guilty of murder as a principal (and without reliance on the extended meaning of principal created by s 267) even where his or her acts are not the immediate cause of death, if he or she does an act that substantially contributes to the death.[85]

Comparison with joint criminal enterprise

82. This form of secondary participation in the commission of an offence can be contrasted with joint criminal enterprise in several ways.

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[81] *White v Ridley* (1978) 140 CLR 342, [10]; *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [38]–[40]; *R v Duong* (2011) 110 SASR 296; [2011] SASCFC 100, [203].

[82] *R v Sully* (2012) 112 SASR 157; [2011] SASC 169, [75]; *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [37]–[39].

[83] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [157]–[158].

[84] See *R v Rich & Hynes* (1997) 68 SASR 390, [223]; *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [246]–[259]; *R v Conlon* (1982) 30 SASR 176, 180–183; *R v Haydon* [1999] SASC 375, [21].

[85] *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [14]–[17].

83. First, unlike the principle of joint criminal enterprise, there is no need to show there was any agreement or consensus between the primary offender and the secondary party.[86]

84. Second, liability under joint criminal enterprise is primary, whereas liability as an accessory is derivative.

85. Third, the intention for the purpose of accessorial liability is an intention to assist in the commission of the completed offence, whereas for joint criminal enterprise, the relevant intention is the intention that the completed offence be committed.

[86] *Giorgianni v The Queen* (1985) 156 CLR 473, 493; [1985] HCA 29; but c.f. *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [17]–[19] where Kourakis CJ considers whether joint criminal enterprise and extended common purpose are merely subsets of aiding, abetting, counselling and procuring, with the existence of agreement being of evidentiary rather than legal significance.

Jury Direction #18.4 – Aiding, abetting, counselling or procuring

I will now direct you about the elements of [*offence*].

The prosecution does not say that [*accused*] personally [*identify central factual question*, e.g., 'hit [*complainant*]']. Instead, the prosecution says that [*accused*] was an accessory to someone else committing [*offence*]. Under our law, a person who is an accessory to a crime can be charged and convicted of that crime.

To prove that [*accused*] committed [*offence*] as an accessory, there are three elements the prosecution must prove beyond reasonable doubt. These are:

One – Someone committed [*offence*].

Two – The accused knew the essential facts involved in the commission of [*offence*].

Three – The accused intentionally aided, abetted, counselled or procured the [*offence*].

I will now explain these three elements and how they apply in this case.

Commission of offence

The first element is that someone committed [*offence*].

A person cannot be an accessory to the commission of a crime if no crime is committed. You therefore need to decide whether the prosecution has proved that someone committed [*offence*].

A person commits [*offence*] when [*insert directions on the elements of the substantive offence*].

[*Identify relevant evidence and arguments*]

Knowledge of the essential facts

The second element is that [*accused*] knew the essential facts involved in the commission of [*offence*].

This means the prosecution must prove that the accused knew [*identify relevant essential facts of principal offence*].

[*Identify relevant evidence and arguments*]

Intentionally aided, abetted, counselled or procured

The third element is that the accused intentionally aided, abetted, counselled or procured the [*offence*].

The words 'aided, abetted, counselled or procured' are a bit of an old-fashioned legal term. In this case, they mean the accused intentionally helped or encouraged [*principal*] to commit the [*offence*].

[**If the relevant actions took place before the alleged offence, add the following direction**: The prosecution says that the accused intentionally helped or encouraged the [*offence*] by [*identify relevant acts*]. You must decide whether the prosecution has proved that the accused did perform those acts, and whether s/he did them to intentionally help or encourage [*principal*] to commit [*offence*]. You do not need to decide what effect those actions had on [*principal*]. In particular, the prosecution **does not** need to show that [*principal*] would not have committed the [*offence*] without [*accused*]'s input.]

[**If the relevant actions took place around the time of the alleged offence, add the following direction:** There are three ways a person can intentionally help or encourage another person to commit an offence.

First, the person might intentionally help them to carry out the offence.

Second, the person might, by words or actions, intentionally encourage them to commit the offence.

Third, the person might intentionally convey, by words or actions, that s/he supports the commission of the offence.

[**If it is appropriate to direct the jury that mere presence is not sufficient, add the following direction**: As part of this, you must consider what the prosecution has proved about the reason [*accused*] was present at the time of the alleged offence. The prosecution must show that the accused was present to help, encourage or support the commission of the offence. The prosecution must exclude the possibility that the accused was present for another reason, such as [*identify reasons that arise on the evidence and arguments,* e.g. by accident, coincidence or curiosity].

[*If conveying assent is relevant, add the following direction*: When you are considering whether the accused intentionally conveyed that s/he supports the commission of the offence, you must be satisfied that the accused communicated that support. The prosecution does not prove this element merely by showing that the accused agreed with the commission of the offence. The prosecution must show the accused communicated, or attempted to communicate, that support to the other person.]

You do not need to decide what effect those actions had on [*principal*]. In particular, the prosecution **does not** need to show that [*principal*] would not have committed the [*offence*] without [*accused*]'s input.]

[*Identify relevant evidence and arguments*]

Withdrawal

[**If relevant, add the following direction**:

If you are satisfied that the prosecution has proved these three elements, you must then go on to consider the issue of withdrawal. A person who has become an accessory to an offence is not guilty if s/he withdraws his/her support before the offence is complete. The prosecution

must therefore prove that the accused did not withdraw his/her support for the offence. There are two ways the prosecution can prove the accused did not withdraw his/her support.

First, by showing that the accused did not do whatever is reasonably possible to reverse the effect of their earlier assistance or encouragement.

Second, by showing that any attempted withdrawal occurred too late to make a difference.

If the prosecution proves **either** of these two matters, then it has proved that the accused did not successfully withdraw his/her earlier support.

For the first part of this issue, there are a range of factors you can consider. The law does not specify exactly what is required. Instead, you must decide whether the accused has done whatever is reasonably possible to reverse the effect of his/her earlier assistance or encouragement. You can consider matters such as whether the accused should have taken back any tools s/he provided, or should have told the offender not to go through with the offence, or should have reported the planned offence to the police.

For the second part of this issue, the withdrawal must have come at a time when it could make a difference.

[*Identify relevant evidence and arguments*]

Principal and accessory as alternative cases

[**If there is uncertainty about whether the accused is the principal or an accessory, add the following direction**: In this case there is uncertainty about who [*identify relevant physical act*, e.g., 'inflicted the blows on [*complainant*]']. The prosecution is presenting its case as one of two alternatives. Either the accused personally committed the alleged crime, or s/he is an accessory to the person who did commit the crime. I need to give you directions about how the prosecution's obligation to prove its case beyond reasonable doubt applies here. There are four possibilities.

First, if you are satisfied beyond reasonable doubt that [*accused*] personally committed [*offence*], then you can find him guilty of that offence.

Second, if you are satisfied beyond reasonable doubt that the accused committed [*offence*] as an accessory, in the way I've just explained, you can find him guilty of this offence.

Third, if you are satisfied beyond reasonable doubt that the accused either committed the offence personally, or another person committed the offence and the accused was an accessory, but you cannot decide which, then you can still find him guilty of this offence.

Fourth, if there is a reasonable possibility that the accused did not commit the offence personally, and s/he was not an accessory to someone else committing the offence, then you must find him/her not guilty.]

18.5 – Joint criminal enterprise

86. Joint criminal enterprise is an additional form of liability for a secondary party which is distinct from aiding, abetting, counselling or procuring.[87]

87. Participants in a joint enterprise (whether present at the scene or not) are liable as principals, rather than accessories. Their criminality is primary, rather than derivative.[88] As a result, a person may be liable for a crime committed pursuant to an agreement even if the jury is unable to decide whether the person who physically committed the crime acted with a lawful excuse.[89]

88. There are many names for this form of secondary party liability, including "common purpose", "common design" and "concert". However, "joint criminal enterprise" is the term used in South Australia.[90]

89. The elements of liability under the doctrine of joint criminal enterprise are:[91]

- The accused entered into an agreement with one or more other people to commit the relevant offence;
- The accused participated in the joint agreement;
- While the agreement was on foot, one or more parties to the agreement did the acts necessary to commit the charged offence;
- The accused had the state of mind necessary to commit the charged offence.

90. In *McAuliffe v The Queen*, the High Court described the circumstances in which liability under the doctrine of joint criminal enterprise would arise in the following way:[92]

> Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.

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[87] *McAuliffe v The Queen* (1995) 183 CLR 108, 113–114; [1995] HCA 37.
[88] *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [69]–[72].
[89] *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [25]–[28].
[90] *Miller v The Queen* (2016) 259 CLR 380, 387; [2016] HCA 30; *McAuliffe v The Queen* (1995) 183 CLR 108, 113; [1995] HCA 37. See also *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [19]; *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64, [109].
[91] *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [19]; *R v Tangye* (1997) 92 A Crim R 545, 556–557.
[92] *McAuliffe v The Queen* (1995) 183 CLR 108, 114; [1995] HCA 37. See also *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64, [110]–[111].

Agreement to commit an offence

91. A joint criminal enterprise exists where two or more persons agree to carry out acts which involve the commission of a crime. The agreement need not be express, and may be inferred from their conduct.[93] The agreement also need not be long-standing, and may be formed just before commission of the relevant acts.[94]

92. Joint criminal enterprise liability also extends to any incidental crimes which are committed in the course of carrying out the agreed offence, which are within the scope of the agreement. An incidental crime is within the scope of the agreement if the parties all agree that it may be committed as a possible incident of committing the agreed offence.[95]

93. Correct identification of the scope of the agreement may be important in determining liability for incidental crimes. The principle of joint criminal enterprise does not require a complete meeting of the minds between the parties to a proposed criminal venture. In *Gillard v The Queen*, the High Court held that an agreement to commit an offence may still exist where two people agree to confront the victim with a loaded weapon, even though one party thought the confrontation was for the purpose of robbery, while the other intended to kill the victim. The focus must be on the acts and omissions which the parties agreed upon, rather than the identification of the particular crime those acts and omissions would constitute.[96]

94. Where a co-offender intentionally kills the victim in the course of an alleged agreement to rob the victim, the accused may be guilty of either manslaughter by joint criminal enterprise, if he foresaw the possibility that the co-offender may cause death in the course of the robbery, or murder by extended common purpose, if he or she foresaw the possibility that the co-offender may cause death with murderous intent during the robbery.[97]

95. It is not necessary to prove a common fault element in relation to the planned offence. The focus of the element is on an agreement to do the acts which form the actus reus of the ultimate offence, and it is not necessary to prove a shared intention to commit the ultimate offence.[98]

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[93] *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [4]; *McAuliffe v The Queen* (1995) 183 CLR 108, 114; [1995] HCA 37.

[94] *R v Polanski* [2005] SASC 361, [24].

[95] *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [1], [37]; *Johns v The Queen* (1980) 143 CLR 108, 130-131.

[96] *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64, [23]-[25], [124], [127]. See also *R v Zappia* (2002) 84 SASR 206; [2002] SASC 354, [82]-[83].

[97] See *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64, [25]. See 18.6 – Extended common purpose below.

[98] *R v Spence* [2015] VSC 322, [110]-[121]. See also *McEwan v The Queen* [2013] VSCA 329, [38].

96. An agreement may exist between two people even where one of the people will have a defence to the proposed offence.[99]

Participation and presence

97. Historically, decisions in this area have referred to the need for the parties to be present at the scene of the crime.[100]

98. More recently, the common law seems to have moved away from presence being a strict requirement. Instead, the requirement is now referred to as 'participation', which can include giving assistance before, or away from the location of, the offence.[101]

99. Participation can also include being present when the crime is committed in accordance with the agreement, and, unlike the doctrine of aiding, abetting, counselling or procuring, further steps are not necessary to elevate presence in accordance with the agreement from 'mere presence'.[102] In particular, it is not necessary to prove that a party to the agreement who does not perform the relevant physical acts intended, by his or her presence, to assist or encourage.[103]

Commission of relevant acts in accordance with the agreement

100. The third element of proof under the doctrine of joint criminal enterprise has been expressed in various ways, and this has produced some measure of confusion.

101. The division principally relates to whether the prosecution must prove that one or more of the parties to the agreement committed the relevant offence, which may then be attributed to other parties to the agreement, or whether the prosecution only needs to prove that one or more of the parties to the agreement committed the relevant acts.

102. While it is not free of difficulty, the better view appears to be that joint criminal enterprise is a doctrine that focuses on attribution of acts committed within the scope of the agreement. It is not necessary to prove that the principal offender acted with the relevant fault element, or in the absence of any defences.[104]

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[99] See *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75; *IL v The Queen* (2017) 262 CLR 268; [2017] HCA 27, [35]–[40].

[100] See, e.g., *R v Lowery & King (No 2)* [1972] VR 560; *R v Childs* (2007) 98 SASR 111; [2007] SASC 195, [110].

[101] See *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [94]; *Johns v The Queen* (1980) 143 CLR 108; *McAuliffe v The Queen* (1995) 183 CLR 108, 114; [1995] HCA 37; *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [21].

[102] *Huynh v The Queen* (2013) 295 ALR 624; [2013] HCA 6, [38]; *KA v The Queen* (2015) 251 A Crim R 308; [2015] NSWCCA 111, [7], [92], [101]; *Clarke v Tasmania* (2013) 24 Tas R 384; [2013] TASCCA 11, [27].

[103] *Clarke v Tasmania* (2013) 24 Tas R 384; [2013] TASCCA 11, [45], [135]–[136].

[104] See *IL v The Queen* (2017) 262 CLR 268; [2017] HCA 27, [2], [40], [106]. *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [73]–[93]; *Huynh v The Queen* (2013) 295 ALR 624; [2013] HCA 6, [37]; *Campbell v Western Australia* (2016) 50 WAR 331; [2016] WASCA 156, [231]–[236]; But c.f. *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [19]; *R v Bentley & Ors* [2018] NSWSC 332, [4]–[14].

103. There is no necessary inconsistency with a person acting in accordance with an agreement, and having a defence particular to themselves. This may result in one party to an agreement being not guilty, while other parties to the agreement are guilty. And this may follow even if the person who is acquitted is the person who committed the physical acts constituting the offence.[105] Where defences may arise, the judge must give the jury detailed directions on how defences operate in relation to both the person or people who physically committed the alleged offence, and the position of any other party to a purported joint criminal enterprise.[106]

104. The defence of withdrawal applies to the doctrine of joint criminal enterprise. Principles of withdrawal are explained in 18.4 – Aiding, abetting, counselling or procuring (Accessories) above. The structure of the model charge treats withdrawal as an issue to be considered as part of the third element, as successful withdrawal will result in the conduct not being committed while the agreement remains on foot.

Accused's state of mind

105. The fourth element is that the accused had the state of mind necessary to commit the offence.[107]

106. There are differences in the authorities on when the relevant state of mind is assessed. Some cases have suggested that the state of mind must be at the time of the commission of the acts that constitute the ultimate offence,[108] while others have identified the relevant moment to be the time when the accused performed the relevant act of participation,[109] and other cases have held that the state of mind must exist at the time of the formation of the agreement, and is presumed to exist unless the accused successfully withdraws from the agreement.[110]

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[105] See, e.g., *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75.

[106] See *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [128]–[129], [174]; *McEwan v The Queen* (2013) 41 VR 330; [2013] VSCA 329, [38] and compare *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [152]–[155]. See also *R v Bosworth & Ors* (2007) 97 SASR 502; [2007] SASC 150, [101]–[120].

[107] Where there is no fault element for the relevant offence, this element is unnecessary. See, e.g., *IL v The Queen* (2017) 262 CLR 268; [2017] HCA 27, [28] on the use of joint criminal enterprise in the context of constructive murder.

[108] *KA v The Queen* (2015) 251 A Crim R 308; [2015] NSWCCA 111, [8], [18]; *Osland v The Queen* (1998) 197 CLR 316; [1998] HCA 75, [93].

[109] *Likiardopoulos v The Queen* (2012) 247 CLR 265; [2012] HCA 37, [19].

[110] *McEwan v The Queen* (2013) 41 VR 330; [2013] VSCA 329, [35].

Jury Direction #18.5 – Joint Criminal Enterprise

I will now direct you about the elements of [*offence*].

The prosecution does not say that [*accused*] personally [*identify central factual question*, e.g., 'hit [*complainant*]']. Instead, the prosecution says that [*accused*] was part of a joint criminal enterprise to commit [*offence*]. Under our law, a person who is part of a joint criminal enterprise to commit a crime can be charged with, and convicted of, that crime.

To prove that [*accused*] committed [*offence*] as part of a joint criminal enterprise, there are four elements the prosecution must prove beyond reasonable doubt. These are:

One – The accused entered into an agreement with one or more other people to commit [*offence*].

Two – The accused participated in the agreement.

Three – While the agreement was on foot, one or more parties to the agreement committed the acts necessary to commit [*offence*].

Four – At the time of the accused's participation, s/he had the state of mind required to commit [*offence*].

I will now explain these four elements and how they apply in this case.

Agreement

The first element is that the accused entered into an agreement with at least one other person to commit [*offence*].

Such an agreement does not need to be expressly stated, or formally recorded. The participants also do not need to have known that what they were agreeing to do was a crime.

For this element, you must decide whether the accused and others agreed to do something that includes the offence of [*offence*].

A person commits [*offence*] when [*identify elements of completed offence*].

[*Identify relevant evidence and arguments*]

Participation

The second element is that the accused participated in the agreement.

The prosecution must show that the accused did something beyond merely agreeing that the offence should be carried out. That is, the prosecution must show the accused did something that contributed to the commission of the offence.

[**If the accused participates by being present, add the following direction**: The prosecution has argued that [*accused*] participated by being present for the commission of the offence, in

accordance with the agreement. If you are satisfied that [*accused*] was present when [*identify principal offender and relevant acts*], and s/he was there because of the agreement, then that is enough to prove this element.]

[*Identify relevant evidence and arguments*]

Commission of offence

The third element is that, while the agreement was on foot, one or more parties to the agreement committed the acts necessary to commit [*offence*].

There are three parts to this element.

The first part is that the agreement remained on foot. That is, the parties did not call off the proposed crime, and the accused did not withdraw from the agreement.

[**If withdrawal is in issue, add the following direction**:

You have heard argument that [*accused*] attempted to withdraw from the agreement. There are two parts to the issue of withdrawal, and the prosecution can prove the accused did not withdraw by proving that either one of them does not exist.

First, withdrawal requires the accused to have done whatever is reasonably possible to reverse the effect of their earlier participation and agreement.

Second, withdrawal must not be too late.

For the first part of this issue, there are a range of factors you can consider. Some factors you can consider is whether the accused should have taken back any tools s/he provided, or should have told the offender not to go through with the offence, or should have reported the planned offence to the police. The law does not specify exactly what is required. Instead, you must decide whether the accused has done whatever is reasonably possible to reverse the effect of his/her earlier participation and agreement.

For the second part of this issue, the withdrawal must have come at a time when it could make a difference.

[*Identify relevant evidence and arguments*]]

The second part of the third element is that, in accordance with the agreement, a party to the agreement performed the acts necessary to commit [*offence*].

To do this, the prosecution must prove that [*principal*] [*insert directions about physical elements of offence*].

The third part is that the acts must have been committed in accordance with the agreement.

This requires you to consider the scope of what was agreed, and decide whether the acts were within the scope of the agreement.

To decide whether the acts were within the scope of the agreement, you must consider what the parties to the agreement believed at the time they made the agreement. The prosecution must show that the parties all either agreed that someone would [*identify acts involved in commission of the offence*], or believed that [*identify acts involved in commission of the offence*] could be committed as part of carrying out the agreement. For this purpose, an agreement includes any contingencies planned as part of the agreement, even if the participants believed or hoped that those contingencies would not be necessary.

[*Identify relevant evidence and arguments*]

Accused's state of mind

The fourth element the prosecution must prove is that, at the time s/he participated in the agreement, the accused had the state of mind necessary to commit [*offence*].

To do this, the prosecution must prove that [*accused*] [*insert directions about fault elements for offence*].

[**If withdrawal is relevant, add the following**: As I explained to you earlier, in order to withdraw from a joint criminal enterprise, a person must do everything s/he can reasonably do to undo the effects of his/her previous agreement and participation, and the withdrawal must not be too late. For the purpose of this element, it is not enough that [*accused*] privately regretted the agreement, or hoped that the offence would not go ahead, or would fail. If s/he had the state of mind necessary to commit [*offence*] at the time s/he performed the acts of participation, then a change of heart is not relevant unless it is enough for him/her to withdraw from the agreement.]

[*Identify relevant evidence and arguments*].

18.6 – Extended common purpose

108. Extended common purpose is a doctrine which extends a secondary party's liability beyond the crimes which are within the scope of the agreement for the purpose of joint criminal enterprise.

109. It applies where:[111]

- The accused agreed with another person to commit one offence (the foundational offence);
- The accused participated in that agreement;
- In the course of carrying out the agreed offence, another party to the agreement committed the charged offence;
- The accused had foreseen the possibility that another party to the agreement may commit the charged offence.

Agreement to commit foundational offence

110. The prosecution must clearly identify the foundational offence which they allege. This may influence the admissibility of evidence and the structure of the case of both the prosecution and the defence.[112]

111. The foundational offence must be an offence. It is not enough to allege a course of action which might involve the commission of offences.[113]

112. The prosecution must prove that the agreement related to the alleged foundational offence. This may be more difficult where a situation arises unexpectedly, or where there is a lack of evidence about the accused's plans.[114]

Participation

113. The prosecution must prove the accused did something to participate in the agreement. This is the same requirement that applies for joint criminal enterprise. As discussed in 18.5 – Joint criminal enterprise, it can include being present at the time of the planned commission of the foundational offence, in accordance with the agreement.

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[111] *McAuliffe v The Queen* (1995) 183 CLR 108, 114; [1995] HCA 37; *Gillard v The Queen* (2003) 219 CLR 1; [2003] HCA 64; *Clayton v The Queen* (2006) 81 ALJR 439; [2006] HCA 58; *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11; *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [1]; *R v Spilios* (2016) 124 SASR 520; [2016] SASCFC 6, [65].

[112] *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11, [9]–[10], [31].

[113] *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11, [21], [51].

[114] See, e.g., *R v Taufahema* (2007) 228 CLR 232; [2007] HCA 11, [9], [20], [28].

Commission of charged offence

114. For this element, the prosecution must prove that another party to the agreement committed the charged offence. This requires proof that the other party committed the relevant acts with the relevant state of mind.[115]

Foresight of possibility

115. The fourth element is that the accused foresaw the possibility that another party to the agreement may commit the charged offence. This includes proof that the accused foresaw the possibility of the other party acting with the state of mind necessary to constitute the charged offence and in the absence of any relevant defences.[116]

116. This element is not established where the accused considers the possibility and dismisses it as a fanciful risk. While such cases are likely to be rare, where the issue arises, the jury must be instructed that a possibility dismissed as negligible does not suffice.[117]

117. Moral responsibility for liability under the doctrine of extended common purpose stems from the accused's choice to continue to participate in the agreed criminal enterprise while being aware of the possibility that another party may commit the acts required for the charged offence with the necessary state of mind. It is not necessary to show that the accused wished or intended that the charged offence would be committed.[118]

118. The prosecution may show either that the accused foresaw the relevant possibility at the time of entering into the agreement, or while participating in the agreement. The inquiry is not limited to the accused's foresight at the moment the agreement was formed.[119]

119. There is no general requirement that the accused foresee the possibility that a particular party to the agreement would commit the charged offence. The focus of the doctrine is on the accused's continued participation after having foreseen the possibility of a party to the agreement committing the charged offence. However, the circumstances of any particular other party to the agreement may be relevant to take into account in determining whether the prosecution can prove the necessary foresight.[120]

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[115] *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [181]–[183].
[116] *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [45]; *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [184]–[185]; *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; [2006] HCA 58.
[117] *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [43]–[44].
[118] *Hartwick, Clayton & Hartwick v R* (2006) 231 ALR 500; [2006] HCA 58, [17].
[119] *R v B, FG & S, BD* (2012) 114 SASR 170; [2012] SASC 157, [96].
[120] See *R v Jones* (2006) 161 A Crim R 511; [2006] SASC 189, [186]–[187].

Comparison with joint criminal enterprise

120. There are two significant distinctions between joint criminal enterprise and extended common purpose.

121. First, in extended common purpose, the charged offence is not an agreed incident of carrying out the foundational offence. To be an agreed incident, it would need to be in the contemplation of all participants to the enterprise. However, under the doctrine of extended common purpose, it is sufficient that the incident offence is a possibility foreseen by an individual accused, who continues with the enterprise with that knowledge.[121]

122. Second, extended common purpose extends liability for completed offences. For this reason, the prosecution must prove that the principal offender committed the offence with the relevant state of mind. In contrast, joint criminal enterprise attributes acts committed in accordance with the agreement, and so it is not necessary to consider the principal offender's state of mind.

[121] *Miller v The Queen* (2016) 259 CLR 380; [2016] HCA 30, [1], [37]–[38]; *McAuliffe v The Queen* (1995) 183 CLR 108, 115–118; [1995] HCA 37.

Jury Direction #18.6 – Extended common purpose

I will now direct you about the elements of [*offence*].

The prosecution does not say that [*accused*] personally [*identify central factual question*, e.g., 'hit [*complainant*]']. Instead, the prosecution says that [*accused*] was part of a joint criminal enterprise to commit one offence, and knew that [*offence*] might be committed. Under our law, a person who is part of a joint criminal enterprise to commit one crime can be charged and convicted of another crime, committed in the course of carrying out the agreement, if he or she is aware that different crime might be committed. This is called the principle of extended common purpose.

To prove that [*accused*] committed [*offence*] due to the principle of extended common purpose, there are four elements the prosecution must prove beyond reasonable doubt. These are:

One – The accused entered into an agreement with one or more other people to commit [*foundational offence*].

Two – The accused participated in the agreement.

Three – In the course of carrying out the agreement to commit [*foundational offence*], another party to the agreement committed [*charged offence*].

Four – The accused had foreseen the possibility that another party to the agreement may commit [*charged offence*].

I will now explain these four elements and how they apply in this case.

Agreement

The first element is that the accused entered into an agreement with at least one other person to commit [*foundational offence*].

Such an agreement does not need to be expressly stated, or formally recorded. The participants also do not need to have known that what they were agreeing to do was a crime.

For this element, you must decide whether the accused and others agreed to do something that includes the offence of [*foundational offence*].

A person commits [*foundational offence*] when he or she [*insert elements of foundational offence*].

[*Identify relevant evidence and arguments*]

Participation

The second element is that the accused participated in the agreement.

The prosecution must show that the accused did something beyond merely agreeing that the agreed offence should be carried out. That is, the prosecution must show the accused did something that contributed to the commission of the agreed offence.

[**If the accused participates by being present, add the following direction**: The prosecution has argued that [*accused*] participated by being present for the commission of the offence, in accordance with the agreement. If you are satisfied that [*accused*] was present when [*identify principal offender and relevant acts*], and s/he was there because of the agreement, then that is enough to prove this element.]

[*Identify relevant evidence and arguments*]

Commission of charged offence

The third element is that in the course of committing [*foundational offence*], a party to the agreement committed [*charged offence*].

A person commits [*charged offence*] if s/he [*insert directions on charged offence*].

[*Identify relevant evidence and arguments*]

Foresight that charged offence may be committed

The fourth element is that the accused foresaw that a party to the agreement may commit [*charged offence*].

In other words, the prosecution must prove that [*accused*] realised that someone *might* commit [*charged offence*] in the course of carrying out the agreement to commit [*foundational offence*].

It is not necessary to show that [*accused*] intended that someone would commit [*charged offence*], or thought it was likely that someone would commit [*charged offence*].

Instead, the prosecution must prove that the accused foresaw the possibility that someone would [*reiterate elements of charged offence, including relevant mental states and any defences*].

[**If it is necessary to direct the jury to ignore fanciful or negligible possibilities, add the following direction:** You must apply this test of whether the accused foresaw something as a possibility with common sense. Proof that the accused was aware that 'anything *might* happen' or 'anything is *possible*' is not enough. A possibility which the accused considered and dismissed as fanciful or negligible is not enough.

[*Identify relevant evidence and arguments*]