

## Escape from Lawful Custody: s 142

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### Legislation

#### 142 Escape by persons in lawful custody

A person who escapes from lawful custody is guilty of a crime.

Maximum penalty—imprisonment for 7 years.

### Commentary

#### *Meaning of 'escape'*

To escape is to gain freedom from the person or place that has restricted or controlled that freedom. The defendant must be aware that he or she was not free to leave. The lawfulness of a detention may fluctuate with the circumstances but if the defendant understood that he or she was under arrest in order to be taken before a court the position was the same as if he or she had been arrested: *Michaels* (1995) 184 CLR 117 at 126.

The defendant must have acted deliberately to withdraw from actual custody. To continue the crime of escape there must be a conscious and intentional act of withdrawal from actual custody: *R v Scott* [1967] VR 276.

#### *Meaning of 'lawful custody'*

A person is in lawful custody if he or she has been arrested and detained or imprisoned in a manner that has been authorised by law.

See s 145B *Criminal Code* which facilitates proof of lawful custody for the purposes of offences in this Chapter. For the distinction between a person in the Chief Executive's (Corrective Services) custody and a person in the custody of the Commissioner of Police, see ss (7)- (8) *Corrective Services Act* 2000 (opn 1. 7. 2001).

If it is alleged that the defendant was in lawful custody whilst detained after arrest, or for investigation or questioning, or whilst being transported by police to a corrective services facility, or in a watch-house facility it will be necessary to direct the jury to the relevant evidence, and to explain the legislation or court order under which the defendant was detained.

If it is alleged that the defendant was in lawful custody because he or she is detained under the authority of the Chief Executive (Corrective Services), it will be necessary to direct the jury to the evidence of the relevant witness authorised by the Chief Executive pursuant to s 145B *Criminal Code* to give evidence.

The below direction is to be modified if the offence is aiding to escape: s 141; for "harbouring", *Darch v Weight* [1984] 1 WLR 659.

## **Suggested Direction**

**The prosecution must prove that the defendant:**

**1. Was in lawful custody.**

**A person is in lawful custody if he or she has been arrested and detained or imprisoned in a manner that has been authorised by law.**

[It will be necessary to direct the jury either:

- (a) There is no other evidence to suggest that the defendant was not in lawful custody as stated. In those circumstances the jury must proceed on the basis that the prosecution have proved this element of the offence, or**
- (b) There is evidence to suggest that the defendant was not in lawful custody at that time. The defendant has the responsibility of proving on the balance of probabilities that the defendant was not in lawful custody.]**

**2. Escaped from that lawful custody.**

**To escape is to gain freedom from the person or place that has restricted or controlled that freedom. The prosecution must prove that the defendant was aware that he/she was not free to leave and that he/she acted deliberately to withdraw from actual custody.**