

## Unlawful striking causing death (s 314A)

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### Legislation

#### 314A Unlawful striking causing death

- (1) A person who unlawfully strikes another person to the head or neck and causes the death of the other person is guilty of a crime.

Maximum penalty—life imprisonment.

...

- (2) Sections 23(1)(b) and 270 do not apply to an offence against subsection (1).

- (3) An assault is not an element of an offence against subsection (1).

- (3A) For subsection (1), the striking of another person is unlawful unless it is authorised or justified or excused by law.

- (4) A person is not criminally responsible for an offence against subsection (1) if the act of striking the other person is—

(a) done as part of a socially acceptable function or activity; and

(b) reasonable in the circumstances.

...

- (7) In this section—

**causing** means causing directly or indirectly.

**function or activity** includes a sporting event.

**strike**, a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.

### Commentary

The elements of the offence are:

1. the defendant struck the deceased to the head or neck;
2. the striking caused the death of the deceased; and
3. the striking was unlawful.

Striking another person is unlawful unless authorised, justified or excused by law (s 314A(3A)), for example by a defence such as self-defence.

Note that as sometimes occurs in respect of defences such as self-defence it may be

necessary to instruct the jury regarding s 24 Mistake of Fact when directing re the s 314A(4) socially acceptable defence. That is because if the defendant held an honest and reasonable but mistaken belief as to the circumstances, the assessment of whether the striking was reasonable in the circumstances, while an objective one, must be based on an assessment of the circumstances as the defendant honestly and reasonably believed them to be.

The defences of accident under s 23(1)(b) and prevention of repetition of insult under s 270 do not apply to this offence because they are expressly excluded (s 314A(2)). Also, because s 314A(3) provides that an assault is not an element of the offence, the defence of provocation under s 269 does not apply. Nor would provocation under s 304 or diminished responsibility under s 304A be available because the offence charged is not murder.

In addition to defences which if not excluded would render a striking lawful, so that element 3 of unlawfulness would fail, s 314A provides for a defence specific to it at s 314A(4), ie. if the striking is reasonable in the circumstances of a socially acceptable function or activity. Where the socially acceptable defence potentially arises on the evidence it is for the prosecution to exclude it beyond reasonable doubt. Where it is raised trial judges may elect to deal with it separately after directing in respect of any other defences, as the direction suggested below does, or could cast it as a fourth element of the offence, for example:

4. the striking was not done as part of a socially acceptable function or activity, or, if it was, the striking was not reasonable in the circumstances.

The allegedly causative act(s) of striking need not be the sole cause of death but must be a substantial or significant cause of death or have substantially contributed to the death – per *Royall v The Queen* (1991) 172 CLR 378 at 398, 411, 423. In *Royall v The Queen* at 387, 411-412, 423, 441, the High Court endorsed the statement of Burt CJ in *Campbell v The Queen* (1980) 2 A Crim R 157 at 161 that it is enough if juries are told that the question of cause 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, appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.

### **Suggested Direction**

**It is an offence for a person to unlawfully strike another person to the head or neck and cause the death of that other person.**

**In order to establish such an offence, the prosecution must prove each of the following three elements beyond reasonable doubt:**

- 1. that the defendant struck the deceased to the head or neck;**
- 2. that the striking caused the death of the deceased; and**

**3. that the striking was unlawful.**

**As to the first of those elements – that the defendant struck the deceased to the head or neck – to strike another person to the head or neck means to directly apply force to the head or neck of that person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument. The prosecution allege that the defendant struck the deceased by ... [Identify the alleged nature of the striking. Then identify the factual issues, if any, to be resolved by the jury in respect of this element.]**

**As to the second element – that the striking caused the death – to cause means to cause directly or indirectly. It does not matter that death did not immediately result. If the striking led to an injury to the deceased which in the ordinary course resulted in the defendant's death, then in law the defendant is responsible for that death [even if it occurred some days after the striking]. The striking need not have been the only cause of death. However, the striking must have been a substantial or significant cause of death or have contributed substantially to the death.**

**[Where the events causing death are uncertain or there are competing innocent causes: Whether it has been proved that the defendant's act(s) of striking the deceased's head or neck, if you find such striking occurred, was a substantial or significant cause of death or contributed substantially to the death is not a question for scientists or philosophers. It is a question for you to answer, applying your common sense to the facts as you find them, appreciating you are considering legal responsibility in a criminal matter and the high standard of satisfaction required is proof beyond a reasonable doubt.]**

**In considering whether the defendant's striking of the deceased's head or neck caused [X]'s death you should take into account what (if anything) is known as to the medical cause of [X]'s death. The medical cause of death in the present case is alleged to be ... [Here identify the evidence based medical cause of death or, if it is unknown, the evidence relied upon to establish**

the mechanism(s) of death by inference. If the mechanism relied upon by the prosecution is in issue identify the material facts and or inferences to be determined.]

**Your consideration of the defendant's conduct as potentially causing death by striking must be confined to such of the defendant's act(s) of striking the deceased's head or neck as have been proved beyond a reasonable doubt. This element of causation will only have been proved if you are satisfied beyond a reasonable doubt that such striking of the deceased's head or neck by the defendant which you find to have been proved beyond a reasonable doubt was a substantial or significant cause of death or contributed substantially to the death.**

**As to the third element – that the striking was unlawful – the striking of another person to the head or neck is unlawful unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse such striking, making it lawful. A well-known example is acting in self-defence. Where the facts raise the possibility such a defence may apply it is not for the defendant to prove it applies. Rather it is for the prosecution to exclude the application of such a defence beyond a reasonable doubt. The prosecution must do this because if there lingers a real possibility that such a defence operates to excuse the defendant then the prosecution will not have proved beyond reasonable doubt that the accused's actions were unlawful.**

**In the present case ... [Here indicate which if any defences, such as self-defence or compulsion (see relevant chapters of this Benchbook) arise for the jury's consideration and, if any do, proceed to explain the operation of the defence(s) including the prosecution's obligation to exclude them].**

**I remind you that if any one of elements 1, 2 or 3 is not proved beyond a reasonable doubt then the offence of unlawful striking causing death will not have been proved. In that event you must find the defendant not guilty of the offence. [Where a s 314(A)(4) socially acceptable defence does not**

potentially arise: **If you are satisfied all three elements have been proved beyond a reasonable doubt then you must find the defendant guilty.]**

[Where a s 314A(4) socially acceptable defence does potentially arise: **Even if you are satisfied all three elements have been proved beyond a reasonable doubt it would remain for you to consider a defence specific to this offence which I will call the socially acceptable defence. Our law provides a defendant is not criminally responsible for an offence of unlawful striking causing death if the act of striking the other person is: (a) done as part of a socially acceptable function or activity; and (b) is reasonable in the circumstances. A function or activity includes a sporting event.**

**In order for the prosecution to exclude this socially acceptable defence it must prove beyond a reasonable doubt either that the striking was not done as part of a socially acceptable function or activity or, if it cannot disprove that the striking was done in such circumstances, it must prove beyond a reasonable doubt that the striking was not reasonable in the circumstances.**

**In considering the first element of the defence, whether the striking was done as part of a socially acceptable function or activity, it is a matter for you to determine, as members of the community, whether the function or activity is socially acceptable. Also, whether the striking was done as part of that function or activity is a matter of fact for you to decide. [Here identify the issues of fact to be resolved by the jury in determining this issue.]**

**In the event you conclude the striking was or may have been done as part of a socially acceptable function or activity then you should approach the second element on the basis the striking was done in those circumstances. That element is whether the striking was reasonable in the circumstances. Your assessment of whether it was reasonable in the circumstances is a question of objective fact for you to decide. You will appreciate the bare circumstance that the striking was done as part of a socially acceptable function or activity will not of itself mean it was**

**reasonable in the circumstances. Of course, your view as to the reasonable bounds of conduct which is part of such a function or activity may inform your assessment, but you must have regard to the whole of the circumstances in making your assessment.**

[Here identify the issues of fact to be resolved by the jury in considering this issue. Also direct on s 24 Mistake of Fact, if relevant ie. if the defendant may have acted on an honest and reasonable but mistaken belief as to the prevailing circumstances.]

**If the prosecution cannot exclude this socially acceptable defence by excluding beyond reasonable doubt the possibility the striking was done as part of socially acceptable function or activity or, failing that, by excluding the possibility the striking was reasonable in the circumstances, then the defendant would not be criminally responsible for the offence of unlawful striking causing death and your verdict would be not guilty. However if the prosecution has excluded the socially acceptable defence beyond a reasonable doubt and, if it has also proved the elements of the offence beyond a reasonable doubt, your verdict would be guilty.]**