

## Unlawful killing: Murder s 302(1)(aa) Murder by reckless indifference

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### Commentary

A charge of murder pursuant to s 302(1) requires proof of unlawful killing in any of the circumstances specified therein. If an unlawful killing occurs where none of those circumstances is proved the offender will be guilty of manslaughter, per s 303(1).

One circumstance, specified at s 302(1)(aa), is that “death is caused by an act done, or omission made, with reckless indifference to human life”. An unlawful killing in that circumstance is known as murder by reckless indifference.

Section 302(1)(aa) came into effect on 7 May 2019. It was introduced by the *Criminal Code and Other Legislation Amendment Act 2019*, following a review into the adequacy of sentences imposed in respect of the death of children. The Explanatory Notes asserted at p 2:

“Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse. ...

“Including recklessness as an element of murder in section 302 of the Criminal Code will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly.”<sup>1</sup>

While murder founded on a mental element of indifference is new in Queensland it is a category of murder of longstanding at common law and in the New South Wales *Crimes Act 1900*.

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<sup>1</sup> [Explanatory Notes](#), Criminal Code and Other Legislation Amendment Bill 2019, 2.

As to the common law, *Stephen's Digest of Criminal Law*, 1<sup>st</sup> ed. (1877) in Art. 223 relevantly stated:

“Murder is unlawful homicide with malice aforethought. Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated.

- (a) An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not;
- (b) Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;
- (c) An intent to commit any felony whatever...” (emphasis added)

Subsections (a) and (b) of this passage were referred to in *R v Crabbe* [\(1985\) 156 CLR 464](#), 467. The High Court there concluded in respect of this category of murder at common law that the mental state necessary was “knowledge by the accused that his acts will probably cause death or grievous bodily harm” (at 468).

The common law test therefore imposes a mental element, requiring knowledge by the defendant of a probability, not merely a possibility. Under that test it is not enough that the defendant knew that death “might occur” but rather the defendant must have known that death “would probably occur” – see *R v Crabbe* [\(1985\) 156 CLR 464](#); *R v Campbell* [\[1997\] 2 VR 585](#).

In NSW s 18(1)(a) *Crimes Act* 1900 relevantly provides:

“Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.”  
(emphasis added)

As with s 302(1)(aa) in Queensland, s 18(1)(a) in NSW uses the term “reckless indifference to human life”, without accompanying statutory definition.

NSW appellate cases have interpreted that term as attracting the common law test – see for example *Reg v Annakin* ([1988](#)) [37 A Crim R 131](#). In *Royall v The Queen* ([1990](#))[172 CLR 378](#), 416, Deane and Dawson JJ endorsed NSW’s importation of the common law test into s 18(1)(a), explaining:

“If at common law, in the context of murder, knowledge of the probability, rather than the possibility, of the consequences is required to constitute reckless indifference to them, then it seems to us that the same requirement should be imported into a statutory provision which purports to define the crime of murder by reference to reckless indifference without any elaboration of what is meant by that term.”

The common law test refers to the probability of causing death or grievous bodily harm. The lesser probability, of causing grievous bodily harm (or “really serious injury”, a term favoured in Victoria – see *R v Barrett* ([2007](#)) [171 A Crim R 315](#)), does not apply to NSW’s statutory form of this offence. NSW’s appellate court’s exclusion of the common law test’s reference to foresight of grievous bodily harm occurred because, as was explained in *Reg v Solomon* ([1980](#)) [1 NSWLR 321](#), 340 [61]:

“[Section 18] requires that the accused be proved to be guilty of reckless indifference to human life, not reckless indifference to some other form of physical harm falling short of death.”

That reasoning was endorsed in *Royall v The Queen*, at 395 per Mason CJ, and at 415 per Deane and Dawson JJ<sup>2</sup>. It is reasoning apt to Qld’s s 302(1)(aa) which is not materially different from the NSW provision.

In the afore-mentioned explanatory notes, at p 3, it was noted that the new definition was consistent with the NSW provision. Further, at p 4 the explanatory notes used the language of the NSW test:

“This new limb under section 302 will require the prosecution to prove the accused person knew that it was probable that death would result from their act or omission. The proposed amendment reflects that a person who acts knowing that death is a probable consequence is just as culpable as the person who intends to kill or do grievous bodily harm and that reckless indifference to human life should be sufficient to establish the offence of murder.” (emphasis added)

The interpretation by intermediate appellate and High Court authorities of the NSW equivalent of s 302(1)(aa) likely makes it unnecessary to refer to extrinsic material like the explanatory

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<sup>2</sup> ([1990](#))[172 CLR 378](#),

notes for guidance. Nonetheless, the explanatory notes support the adoption of that interpretation in Qld.

It will be important to emphasise to the jury that reckless indifference involves a subjective analysis. Reckless indifference to human life requires that the defendant must actually have known the death would probably result from the defendant's acts or omissions and it is not enough that that danger may have been obvious to a reasonable person or to members of the jury – see *Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 171 A Crim R 315.

The jury ought be directed that a defendant's circumstances are relevant to the determination of the defendant's state of mind, which circumstances may include age, educational and social background, emotional state and state of sobriety – see *Pemble v The Queen* (1971) 124 CLR 107 (“*Pemble*”); *R v Barrett* (2007) 171 A Crim R 315.

In comparison to murder with intent to kill or do grievous bodily harm, murder by reckless indifference involves a conceptually different state of mind (intent to cause an outcome -v- knowledge of the probability of an outcome) and prospective outcome (death or grievous bodily harm -v- death only). This heightens the risk of confusion and special need for clarity if both forms of murder are left to the jury. In *Pemble* at 118, Barwick CJ emphasised the need for care in ensuring the evidence can support reckless indifference being left to the jury and observed the occasions for leaving murder by reckless indifference, “where there is material from which an intent to kill can be inferred, must be unusual”. To similar effect see *La Fontaine v The Queen* (1976) 136 CLR 62, at 69; *R v Barrett* (2007) 171 A Crim R 315, at 326-327.

In *Koani v The Queen* (2017) 263 CLR 427 at 436 [21] the High Court observed that “it is axiomatic in an offence of specific intent that the act or omission and the intent must coincide.”

The same reasoning logically applies to an offence of specific knowledge. Proof of murder by reckless indifference requires proof the defendant knew death would be a probable consequence of the defendant's acts or omissions but committed those acts or omissions regardless of that probability and death was caused by those acts or omissions. In a case where multiple acts or omissions of the defendant are relied on collectively as causing death the requisite state of knowledge must be proved to have been present at the time of commission of each and every one of the acts and or omissions. A precursor to ensuring the necessary coincidence of the requisite knowledge with each of the acts or omissions causing death is that the jury must be unanimous as to which acts or omissions caused death.

The need for coalescence of the requisite knowledge with all acts or omissions of the defendant causing death will make proof of this charge challenging in the context of a death occurring after multiple acts or omissions of the defendant towards the alleged victim, possibly on separate occasions, as could occur where the alleged victim is in the care of the defendant. In such a context the prosecution case might be:

- (a) it is uncertain precisely which of the multiple acts or omissions caused death but the inference should be drawn that one or more of them must have done so; or
- (b) it was the combined consequences of multiple acts or omissions which caused death.

In such a case it will be important to clearly identify the collective acts or omissions relied upon as causing death. This will reduce the risk of confusion as between that fatal collection and other acts or omissions of the defendant towards the victim which were relevantly adduced in evidence. It will also assist jury understanding of the direction that if they are to be persuaded death was caused by the collective acts or omissions of the defendant, they must be unanimous as to which acts or omissions constitute the fatal collection. At an earlier stage it will also assist in determining submissions of no case to answer alleging a lack of evidence to support the presence of the requisite knowledge at the time of every act or omission in the fatal collection.

If an alleged case of murder by reckless indifference by a parent or carer in respect of a child or person in care is founded upon a failure to provide the necessaries of life the potential application of s 285 (Duty to provide necessaries) may be considered. Relevant considerations might include the following:

- (a) Section 285 does not alter or substitute the need to prove the knowledge of probable consequence required to prove the murderous element of reckless indifference to life. It may however aid in inferring whether the defendant knew of the probable consequences of the omission, in that it was an omission to perform a duty owed to a person unable to provide himself or herself with the necessaries of life.
- (b) In *Koani v The Queen* ([2017](#)) [263 CLR 427](#) the High Court concluded a conviction for murder with intent to kill was incompatible with the unlawful killing being by way of criminal negligence per s 289, because the requisite intent and acts or omissions did not coincide. Such incompatibility will not arise in the present context as long as the trial judge ensures, as earlier explained, that the jury is unanimous as to which acts or omissions caused death and instructs the jury of the need to be satisfied the defendant had the requisite knowledge of probability of death in respect of every one of those acts

and omissions. Also see *R v Macdonald and Macdonald* [\[1904\] St R Qd 151](#) in which reliance upon breach of a s 285 duty was not incompatible with proof of murder with intent.

**Suggested Direction:**

**I now turn to the law relating to the charge of murder.**

**Our law provides that any person who unlawfully kills another is guilty of a crime which is called murder or manslaughter according to the circumstances of the case. A person who unlawfully kills another and does so in particular circumstances stipulated by law is guilty of murder. Where a person unlawfully kills another but those stipulated circumstances are not present, that person will be guilty of manslaughter.**

**The circumstances stipulated by law which are relied upon here in support of the charge of murder are:**

- **that [X]’s death was caused by an act done, or omission made, with reckless indifference to human life.**
- [If other types of murder pursuant to s 302(1) are also to be left to the jury, list the other types relied upon in the alternative and adjust the draft direction as necessary.]

**I will for convenience refer to those particular circumstances as reckless indifference to life. Proof of reckless indifference to human life requires proof the defendant knew it was probable that death would result from the defendant’s acts or omissions. I will enlarge upon that requirement later.**

**Proof of any offence requires proof of the elements of the offence. The elements of an offence are the essential ingredients of it, all of which must be proved beyond a reasonable doubt to prove the offence.** (It will assist to accompany the direction with a jury handout listing the elements)

**In order for the prosecution to prove murder by reckless indifference it must prove all of the following elements beyond a reasonable doubt:**

- 1. That [X] is dead;**
- 2. That the defendant caused [X]’s death;**

3. That the defendant did so unlawfully; and
4. That in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death.

I will discuss each element in more detail shortly.

(Where multiple limbs of s 302(1) are to be put in the alternative consider expanding element 4 by listing the relevant alternative elements within it.)

The first three of those elements are the elements of an unlawful killing. Proof of them without proof of the fourth element would prove the offence of manslaughter. Manslaughter is an inherent alternative charge to murder but it only becomes available as an alternative in the event you find the defendant not guilty of murder.

So, after your deliberations have concluded, in taking your verdicts my associate will ask you, *“How do you find the defendant: guilty or not guilty of murder?”* If you find the defendant *“guilty”* of murder, that would be the end of the process (on that charge). However, if you were to say, *“not guilty”* then my associate would go on with a second question, *“How do you find the defendant: guilty or not guilty of manslaughter?”* and you would return your verdict of *“guilty”* or *“not guilty”* as the case may be in respect of manslaughter.

You will appreciate from what I have said that the first three elements are elements common to both murder and manslaughter. If any one of the first three elements have not been proved there will not have been an unlawful killing and must you find the defendant not guilty of murder and not guilty of manslaughter.

I will now discuss each element.

Element 1 requires that [X] is dead. In this case it has been admitted [and/or you might think there is persuasive evidence] that [X] is dead. [If there is an issue as to whether X is dead, explain the relevant issue(s) of fact which the jury must determine in deciding whether X is dead].

Element 2, the element of causation, requires that the defendant caused [X]'s death. To decide whether the defendant caused [X]'s death you will need to

**decide whether [X]'s death was caused by the acts or omissions alleged against the defendant.**

**Our law provides a person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person.**

**[If death was delayed - It does not matter that death was not immediate. If the acts or omissions of the defendant led to the injury/condition of the deceased which in the ordinary course resulted in the death, then in law the defendant is responsible for that death however long after the defendant's acts or omissions the death occurred.]**

**The means by which a person causes the death of another may be direct or indirect, as long as those means are, or are caused by, the defendant's acts or omissions. To prove the defendant's acts or omissions caused death it is not necessary to prove they were the sole or only contributing cause of death. However, it must be proved the defendant's acts or omissions were a substantial or significant cause of death or contributed substantially to the death.**

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

**In considering whether the defendant caused [X]'s death you should take into account what (if anything) is known as to the medical cause of [X]'s death. The medical cause of death in the present case is alleged to be ... [Here identify the evidence based medical cause of death or, if it is unknown, the evidence relied upon to establish the mechanism(s) of death by inference. If the mechanism relied upon by the prosecution is in issue identify the material facts and or inferences to be determined].**

**Your consideration of the defendant's conduct as potentially causing death must be confined to such of the defendant's acts or omissions, if any, as have been**



**proved beyond a reasonable doubt. This element of causation will only have been proved if you are satisfied beyond a reasonable doubt that acts or omissions of the defendant which you find to have been proved beyond a reasonable doubt were a substantial or significant cause of death or contributed substantially to the death.**

[Where more than one act or omission is alleged to have caused death - **In the event you find that [X]’s death was caused by the combined effect of a number of the acts or omissions of the defendant it is essential, before you can find this element has been proved, that you reach unanimous agreement on which of the defendant’s acts or omissions had that combined consequence. That is necessary because an offence can only be committed by acts and or omissions. For a jury to reach unanimous agreement that an offence has been committed each juror must be satisfied the offence is constituted by the same acts and or omissions. So, if you are satisfied element 2 is proved, when you refer to the acts or omissions of the defendant in considering elements 3 or 4 they must be the same acts or omissions which you have unanimously agreed caused death for the purposes of element 2.)**

**The act(s) or omission(s) of the defendant alleged by the prosecution to have caused death is/are ...** [Here list the act(s) and or omission(s) relied upon. Where the occurrence of any acts or omissions is in dispute, identify the factual dispute(s) which the jury must resolve. This may require a direction about circumstantial evidence where an act or omission is alleged as an inference arising from proved facts. If the prosecution rely upon omissions in the form of a s 285 failure to provide the necessities of life as causing death, a direction should be given about the effect of s 285].

**Element 3, the element of unlawfulness, requires that in causing [X]’s death the defendant did so unlawfully. All killing is unlawful, unless authorised, justified or excused by law. Our law creates some defences which can operate to excuse an unlawful killing, for example acting in self-defence. In the present case....**[Here indicate whether any defences, such as self-defence, emergency or accident arise for the jury’s consideration and, if any do, proceed to explain the operation of the defence including the onus. Where referring to the defendant’s acts or omissions make plain they are confined to those about which the jury must be in unanimous agreement before being satisfied of element 2.]

**Before turning to element 4 I remind you that if any one of elements 1, 2 or 3 is not proved beyond a reasonable doubt then element 4 is irrelevant because the defendant could not be found guilty of murder or manslaughter.**

**Element 4, reckless indifference to life, requires that in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death. If at the time the defendant committed the acts or omissions that caused the death of the deceased, the defendant knew the acts or omissions would probably cause the death of the deceased but the defendant continued to commit those acts or omissions regardless of that consequence, then the defendant would be guilty of murder.**

**In considering this element you are solely concerned with the defendant's knowledge of the probable consequences of the same acts or omissions of the defendant which you must be unanimously agreed caused [X]'s death as required in element 2. (Where more than one act or omission is relied upon it will be necessary to emphasise that the requisite knowledge must have accompanied all such acts or omissions.)**

**A person cannot be recklessly indifferent to life unless the person is conscious of the danger to life the person's conduct represents, if proceeded with. It is the defendant's consciousness of the danger, coupled with the decision to proceed regardless, which is the focus of this element. Here the danger you are concerned with is the probable death of another person. By probable I mean likely. By consciousness of the danger I mean the defendant knew of the danger, in the sense that the defendant was aware of, realised or foresaw that death was a probable consequence of his acts or omissions.**

**In ascertaining whether the defendant knew, in the sense that the defendant was aware of, realised or foresaw, that death was a probable consequence of the defendant's acts or omissions you are drawing inferences from facts which you find established by the evidence concerning his state of mind.**

**Knowledge may be concluded or inferred from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. You should also consider**

anything the defendant has said of relevance to whether or not he had the requisite knowledge.

Importantly, in drawing inferences as to the state of the defendant's knowledge you are not concerned with what you or some other reasonable or ordinary person might have foreseen the consequences of the defendant's acts or omissions would be. Your concern is with the knowledge, if any, which the defendant had. In considering what his knowledge was you should have regard to circumstances personal to him which may have influenced whether or not he was aware of, realised or foresaw that death was a probable consequence of his acts or omissions. Examples of such circumstances include age, educational and social background, emotional state and state of sobriety.

In cases of this kind the situation may sometimes arise where the evidence sustains the possibility of more than one inference – an inference consistent with guilt as well as an inference consistent with innocence. For example, what if you considered the evidence supports the guilty inference that the defendant knew that death would probably result from the defendant's conduct but that it also supports the innocent inference he did not think of the probability of death and merely thought injury might result? In such a situation you could not draw the guilty inference unless you were satisfied the innocent inference had been excluded beyond reasonable doubt.

This simply reflects the prosecution's obligation to prove beyond reasonable doubt an offence which is concerned with reckless indifference to life itself, not merely the quality of life. It is not enough if you infer the defendant believed that serious harm might result from the defendant's conduct or that the defendant merely thought that there was a possibility of death. Nothing less than a realisation on the part of the defendant that death was a probable consequence of the defendant's acts or omissions is sufficient to establish murder in this way. [Here canvass the competing inferences and the issues of fact informing the drawing of inferences about the state of the defendant's knowledge at the time he proceeded to commit each relevant act and omission.]

If you are satisfied beyond reasonable doubt the defendant did know that [X]'s death would be a probable consequence of the defendant's acts or omissions but committed those acts or omissions regardless of that probability, and if

**death resulted from those acts or omissions, then element 4 will have been proved. If so, and you are also satisfied beyond reasonable doubt of elements 1, 2 and 3, then your verdict on the charge of murder would be guilty. (The preceding sentence will need adjustment if provocation is under consideration.)**

**If Element 4 has not been proved beyond a reasonable doubt your verdict on the charge of murder would be not guilty. In that event it would remain for you to deliver a verdict on the inherent alternative charge of manslaughter; a verdict which will depend upon whether or not the prosecution has proved all of elements 1, 2 and 3 beyond a reasonable doubt.**