

109. Attempting to Pervert Justice: s 140

109.1 Legislation

[Last reviewed: March 2025]

Criminal Code

[Section 140](#) – Attempting to pervert justice

109.2 Commentary

[Last reviewed: March 2025]

The nature of the offence

Despite the use of the word ‘attempt’ in the section, the offence is a substantive offence. The offence is complete upon the doing of the act which has the requisite tendency to, and is intended to, pervert the course of justice (*Meissner v R* (1995) 184 CLR 132).

To be guilty of the offence, the defendant must have:

- (1) engaged in conduct that had the tendency to obstruct, prevent pervert or defeat the course of justice; and
- (2) intended by that conduct to pervert the course of justice.

In *R v Rogerson* [\(1992\) 174 CLR 268](#), 298, McHugh J discussing the cognate common law offence of ‘attempt to pervert the course of justice’, stated that ‘it is the tendency of the conduct which is decisive, and it is irrelevant whether the conduct did or did not bring about a miscarriage of justice’.

The course of justice

The ‘course of justice’ commences when the jurisdiction of the court is invoked. The ‘course of justice’ is synonymous with the ‘administration of justice’ (*R v Rogerson* [\(1992\) 174 CLR 268](#), 276 (Mason CJ)). The course of justice ‘consists in the due exercise by a court or competent judicial authority of its jurisdiction to enforce, adjust or declare the rights and liabilities of persons subject to the law in accordance with the law and the actual circumstances of the case’ (*Rogerson* per Brennan and Toohey JJ at 280).

An act done before the commencement of proceedings may also constitute an offence of attempting to pervert justice where the acts has the requisite tendency, and is done with intent to frustrate or deflect the course of judicial proceedings which are ‘imminent, probable or even possible’ (*R v Rogerson* [\(1992\) 174 CLR 268](#), 277 (Mason CJ)), or

that the defendant contemplates may possibly be instituted (*R v Beckett* (2015) 256 CLR 305; [\[2015\] HCA 38](#)).

For example, while police investigation into possible offences against the criminal law or a disciplinary code do not form part of the course of justice, an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice. (*R v Rogerson* [\(1992\) 174 CLR 268](#), 283-284 (Brennan and Toohey JJ)).

See also *R v Murphy* (1985) 158 CLR 596, 618; [\[1985\] HCA 50](#).

The suggested direction below is based on the judgment of the High Court in *Meissner v The Queen* (1995) 184 CLR 132; [\[1995\] HCA 41](#), which in turn adopted the statements of principle in *Rogerson* at 275-276, 279 and 277.

Aggravation

The offence is a prescribed offence under s 161Q *Penalties and Sentences Act* 1992, so a serious organised crime circumstance of aggravation may be charged.

109.3 Suggested Direction

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The prosecution must prove beyond reasonable doubt that:

- 1. The Defendant did the conduct alleged in the indictment.**
- 2. That the conduct alleged in the indictment had the tendency to [obstruct, prevent, pervert or defeat] the course of justice, i.e., turn it aside from its proper course. The prosecution does not have to prove that the course of justice was perverted or would have been perverted. It is sufficient for the prosecution to establish that there was a real risk that injustice might result.**
- 3. That the Defendant intended to pervert the course of justice by [his/her] actions.**