

LEGAL DIRECTIONS

Jon Michie, Marbury Chambers

March 2026

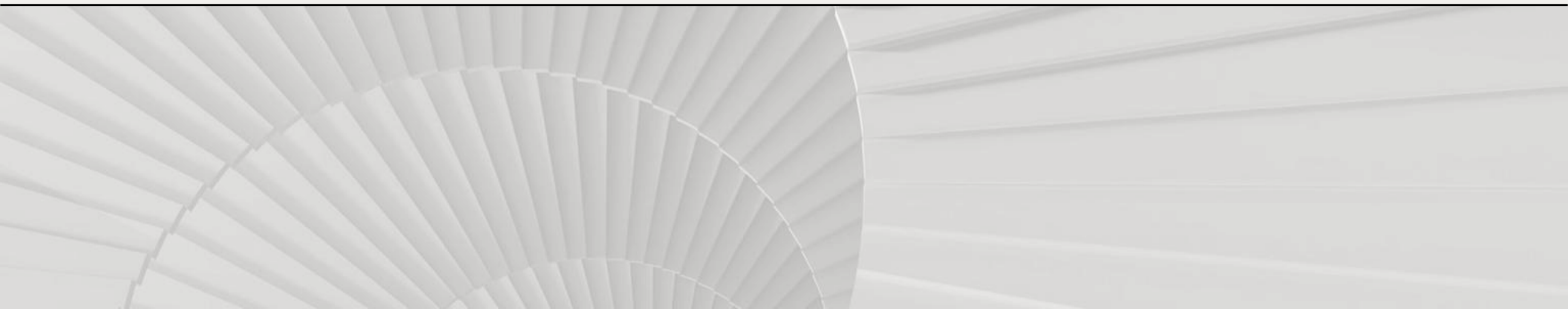


SOURCE

Criminal Trial Courts Bench Book



Judicial Commission of New South Wales



JUDGE- ALONE

“Criminal proceedings in the Supreme Court or the District Court are to be tried by a jury, except as otherwise provided by this Part.”

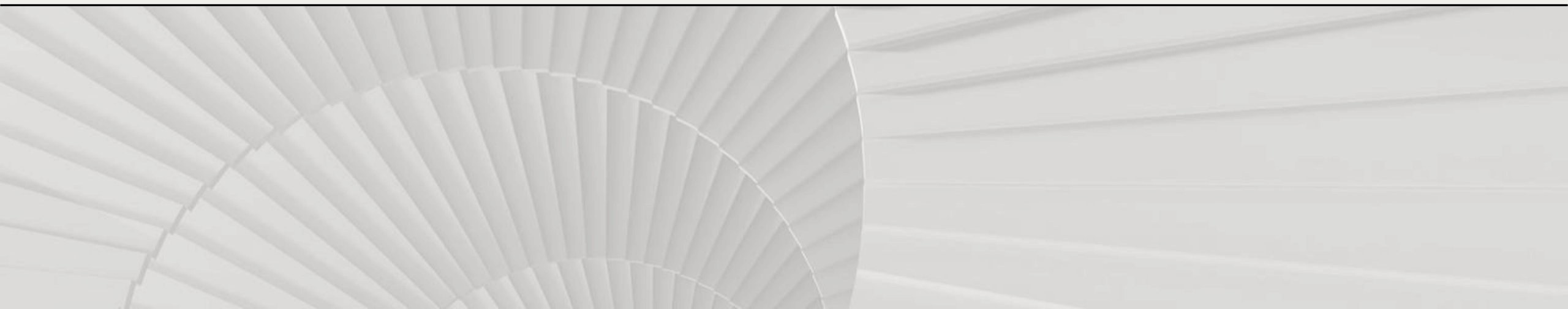
Section 131 of the *Criminal Procedure Act* 1986



JUDGE- ALONE

“[It] must also be remembered that less than 3 percent of the criminal trials in this State now take place with a jury: (McClellan CJ at CL, ‘The future role of the judge - umpire, manager, mediator or service provider’ p 2, 1 December 2011).”

R v Belghar [2012] NSWCCA 86, per McClellan CJ at CJ (Hidden and Hislop JJ agreeing) at [97]

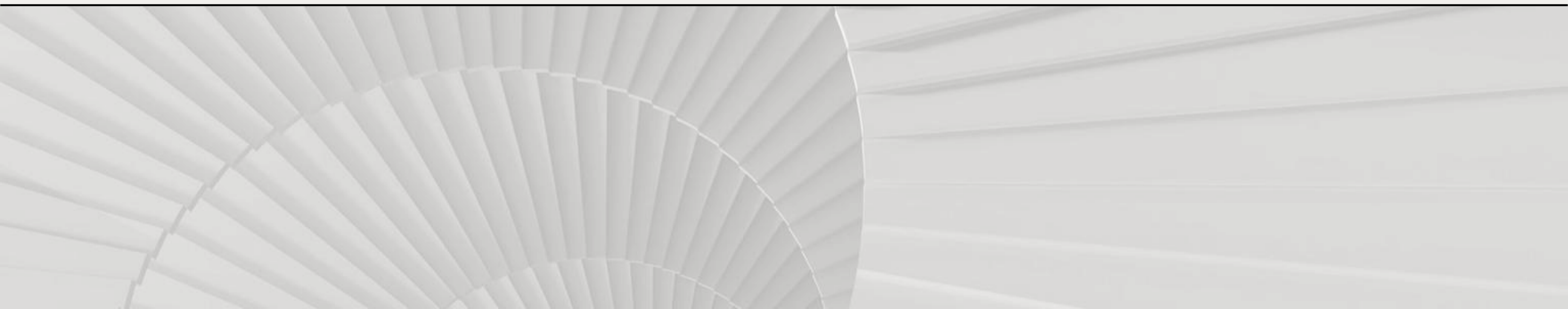


JUDGE- ALONE

“(2) A judgment by a Judge [without a jury] must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.

(3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.”

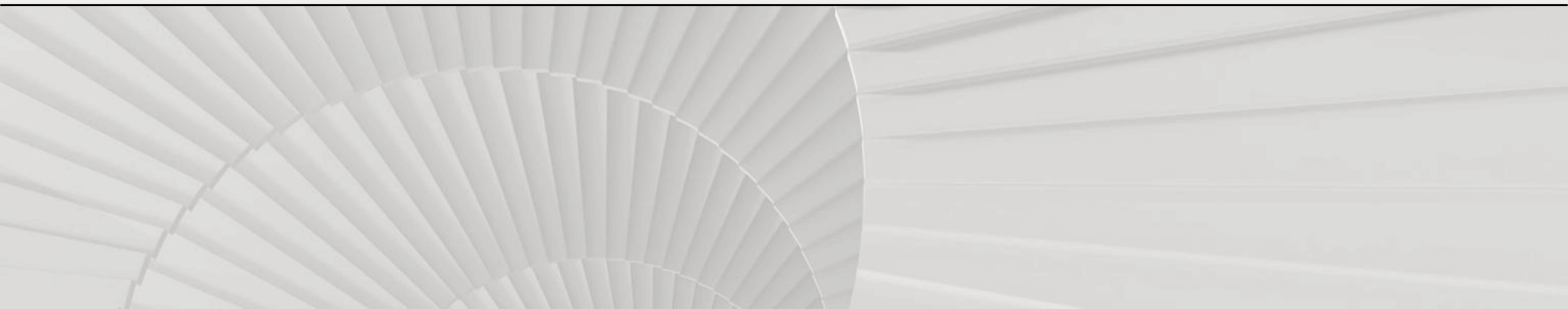
Section 133 of the *Criminal Procedure Act 1986*



MAGISTRATES

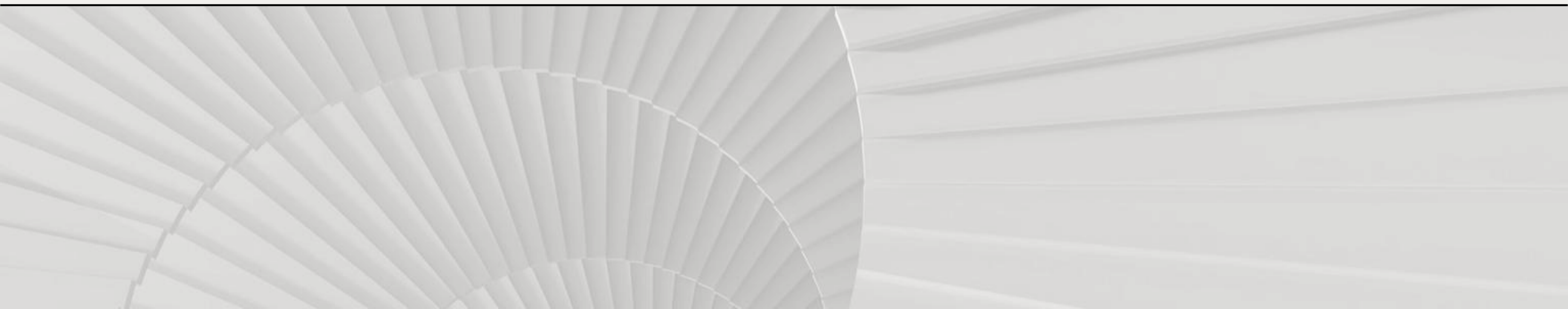
“The Magistrate must get the law right. Principles of law which are applied must be correctly formulated. The Magistrate’s reasoning process must be exposed. ... If a warning is required to be taken into account, the Magistrate is obliged to take the particular warning into account.”

Day (a pseudonym) v R [2022] NSWDC 594, per Haesler SC DCJ at [22]



LEGAL DIRECTIONS

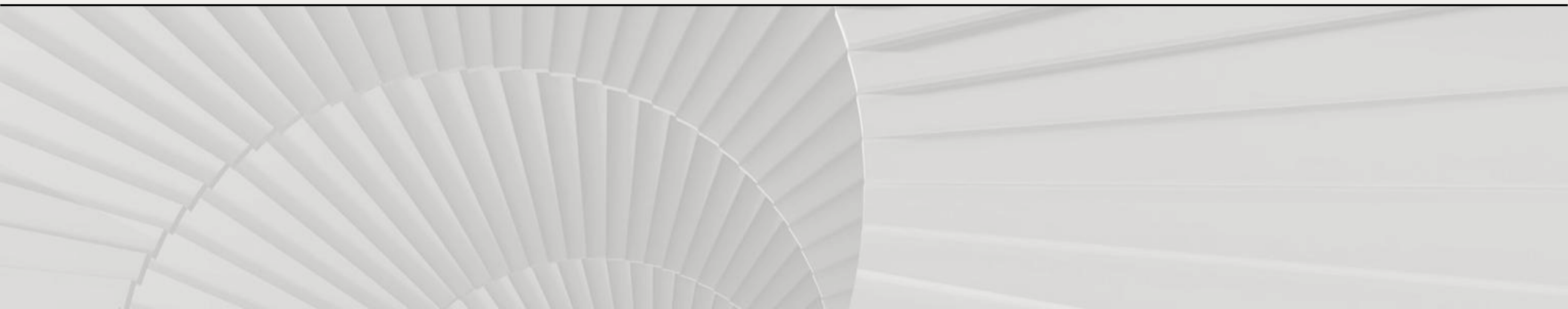
Regardless of whether criminal proceedings are in the Local, District or Supreme Court, and regardless of whether they are being heard by a magistrate, a judge sitting alone or a jury, the legal directions are the same and they must be applied in the same way.



LEGAL
DIRECTIONS
MUST BE
FOLLOWED

“The jury must follow directions of law stated by the judge ...

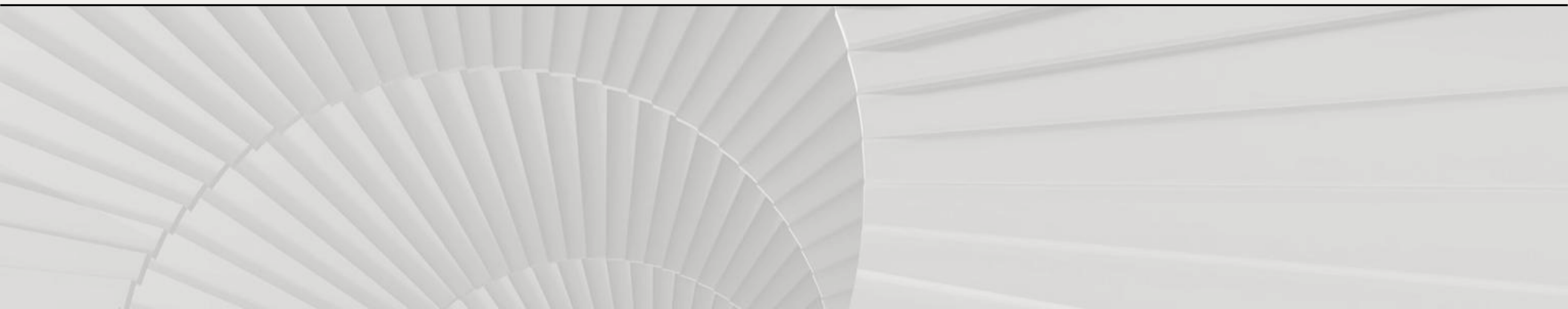
... The judge will give directions of law to the jury as to how they approach their task during their deliberations in a summing up before the jury commences its deliberations.”



LEGAL DIRECTIONS MUST BE FOLLOWED

“The system of criminal justice, as administered by appellate courts, requires the assumption, that, as a general rule, juries understand, and follow, the directions they are given by trial judges.”

Gilbert v the Queen [2000] HCA 15; (2000) 201 CLR 414, per Gleeson CJ and Gummow J at [13]



LEGAL
DIRECTIONS
MUST BE
FOLLOWED

“The jury is to decide facts and issues arising from the evidence and ultimately to determine whether the accused is guilty of the crime alleged.

Investigations or inquiries made outside the courtroom are prohibited.” (Emphasis added)



JUROR MISCONDUCT

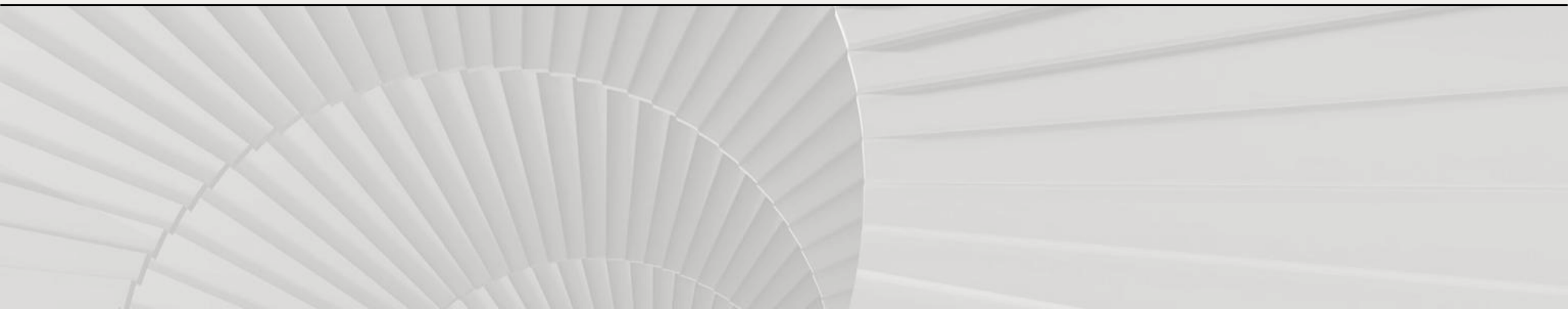
Juror misconduct leads to mistrials, fines and huge emotional cost, so how are courts dealing with it?

By Anna Kelsey-Sugg and Damien Carrick for Law Report

ABC Radio National

Courts

Sat 12 Oct 2024



JUROR MISCONDUCT

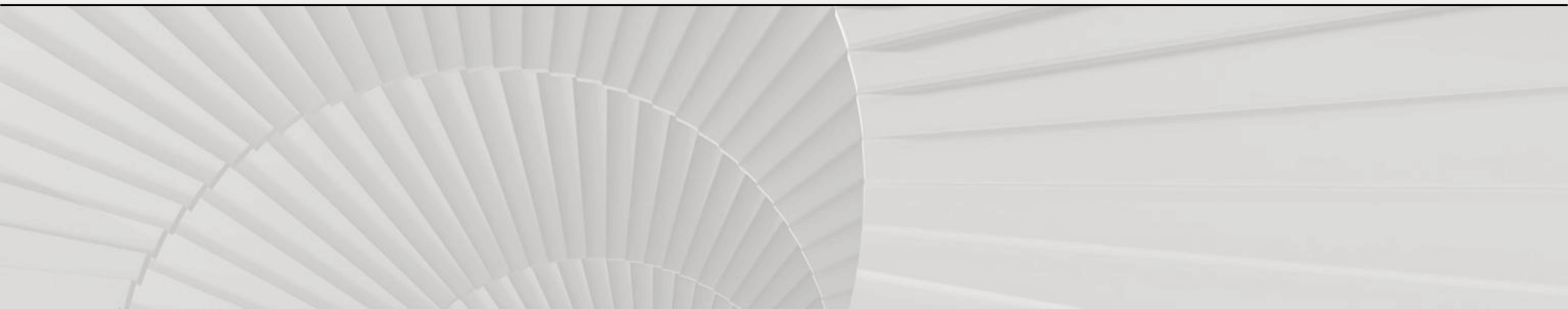
After a four-week trial, the 12-person jury retired to consider its verdict at 1pm on Tuesday. But shortly after noon on Thursday, Judge Phillip Mahony discharged the jury, having received two jury notes about an “experiment” conducted by a juror. He estimated they had deliberated for five hours.



JUROR MISCONDUCT

“[Jurors] are expected to grasp and apply sometimes complex propositions of law, almost always without any prior experience of or training in this activity. Many jurors were and are ‘unaccustomed to severe intellectual exercise or to protracted thought’.”

AK v State of Western Australia [2008] HCA 8; (2008) 232 CLR 438
 (“AK”), per Heydon J at [91]



BOCSAR STATISTICS

Table 9: Jurors' responses regarding to what extent did you understand the judge's instructions on the law

	<i>N</i>	%
Understood completely	575	47.2
Understood most things the judge said	581	47.7
Understood a little of what the judge said	60	4.9
Didn't understand anything the judge said	2	0.2
TOTAL	1,218 ^a	100.0

a. 7 jurors did not answer this question.

BOCSAR STATISTICS

Table H1. Conviction appeals finalised in the NSW Court of Criminal Appeal between 1 January 2021 – 19 December 2023, based on first instance convictions finalised between 20 November 2018 – 6 November 2021

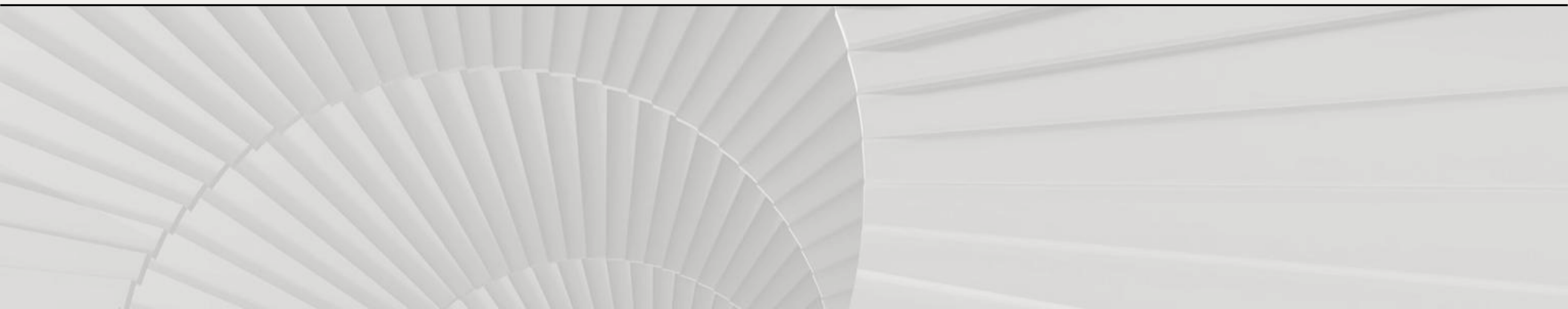
	Judge-alone	Jury	Total
Number of appeals dismissed	32	169	201
Number of appeals allowed	11	70	81
Total number of appeals	43	239	282
Total number of first instance trials	358	1,520	1,878
Total number of first instance convictions	154	903	1,057
Percent of first instance convictions appealed	27.90%	26.50%	
Percent of first instance convictions successfully appealed	7.10%	7.80%	
Success rate on appeal of conviction	25.60%	29.30%	

Source: Data request from the Judicial Commission of NSW (2023), first instance trial data from BOCSAR's COURTS dataset (2023).

A FINAL THOUGHT

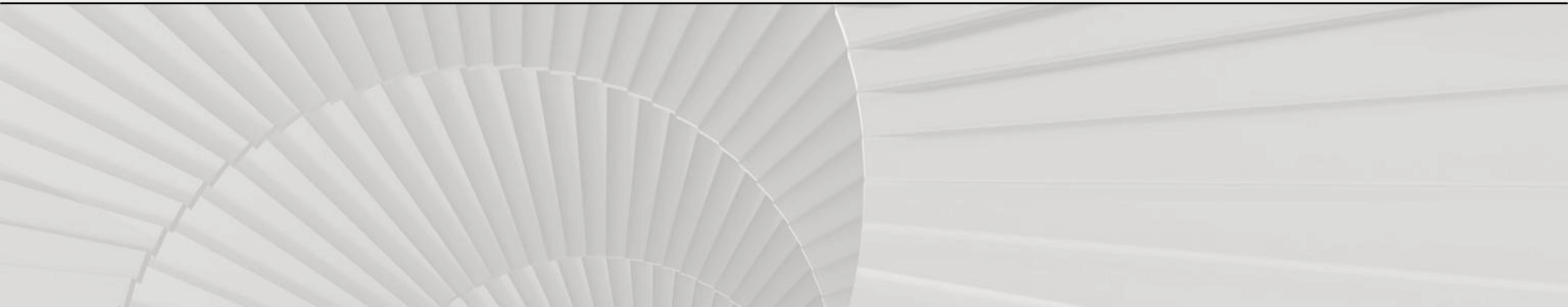
“It is perhaps ironic that in an age when jurors are generally better educated directions are far more complex than they used to be and appellate courts appear to require formulaic precision.”

Ewen v R [2015] NSWCCA 117, per Basten JA at [36]



ONUS AND STANDARD OF PROOF

“[The] burden never shifts to the accused. There is no obligation on the accused to prove any fact or issue that is in dispute. It is not for the accused to prove their innocence but for the Crown to prove their guilt.”



ONUS ON THE ACCUSED

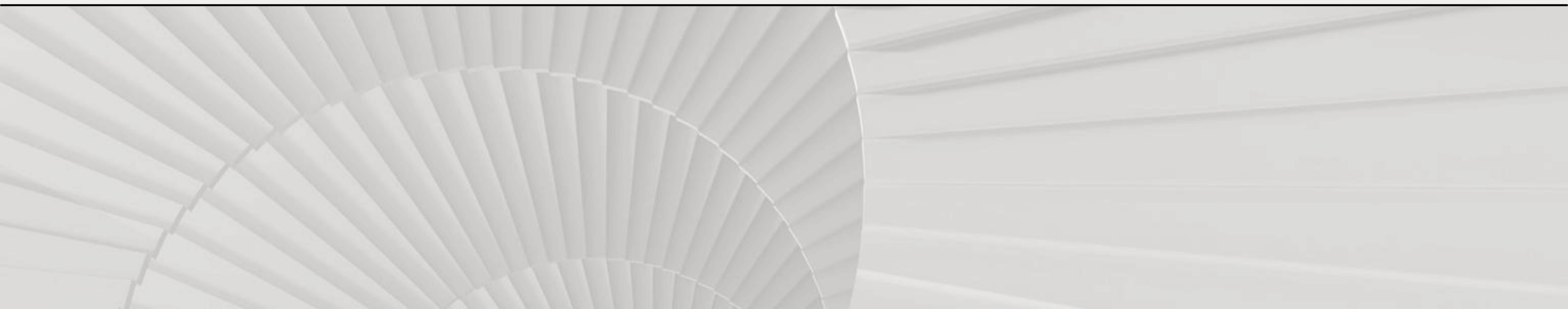
1. That a drug was possessed otherwise than for supply, to overcome the deeming provision in section 29 of the *Drug Misuse and Trafficking Act 1985*
2. A mental health impairment, such that the accused did not know the nature and quality of their act, or did not know that the act was wrong
3. Substantial impairment because of mental health impairment or cognitive impairment, which reduces liability for murder to manslaughter

ONUS AND STANDARD OF PROOF

“First, if you believe the accused’s evidence or the account relied on by the accused in their interview with the police, obviously you must acquit.

Second, if you find difficulty in accepting the accused’s evidence or the account relied on by the accused in their interview with the police, but think it might be true, then you must acquit.

Third, if you do not believe the accused’s evidence or the account relied on by the accused in their interview with the police, then you should put it to one side. Nevertheless, the question will remain: has the Crown, upon the basis of evidence that you do accept, proved the accused’s guilt beyond reasonable doubt?”



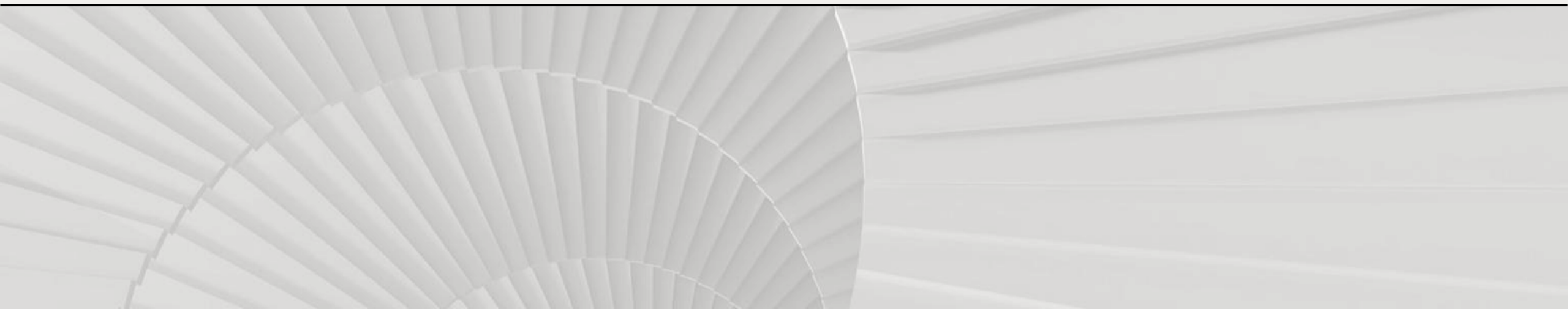
GOOD CHARACTER

“The law provides that a jury is entitled to take evidence of an accused’s good character into account in favour of them on the question of whether the Crown has proved the accused’s guilt beyond reasonable doubt.”



GOOD CHARACTER

“The fact that the accused is a person of good character is relevant to the likelihood of their having committed the offence alleged. You can take into account the accused’s good character by reasoning that such a person is unlikely to have committed the offence charged by the Crown.”



GOOD CHARACTER

“Further, a jury can use the fact that the accused is a person of good character to support their credibility. You may reason that a person of good character is less likely to lie or give a false account either in giving evidence before you or in giving an account of the events in answer to questions asked by the police.”



GOOD CHARACTER

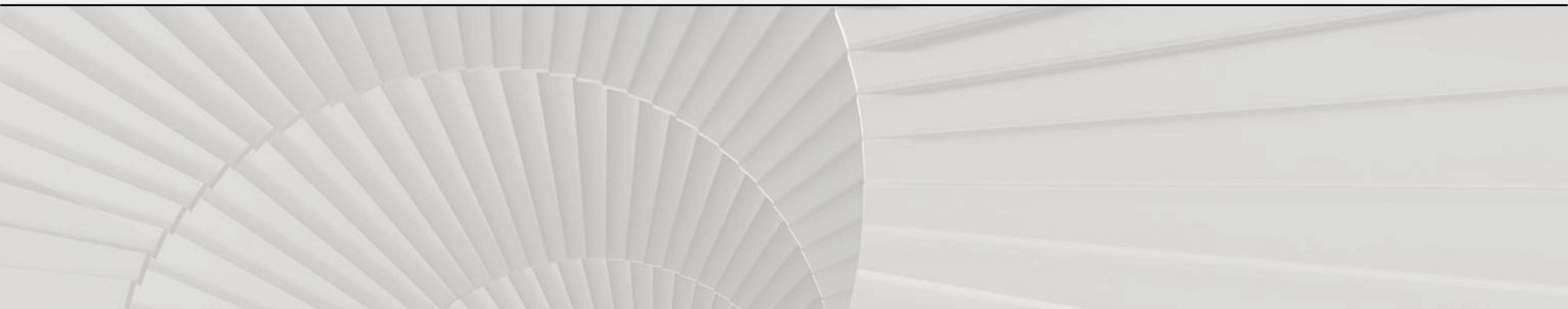
“None of this means, of course, that good character provides the accused with some kind of defence. ... What weight you give to the fact that the accused is a person of good character is completely a matter for you, but you should take that fact into account in the ways I have indicated to you.”



GOOD CHARACTER

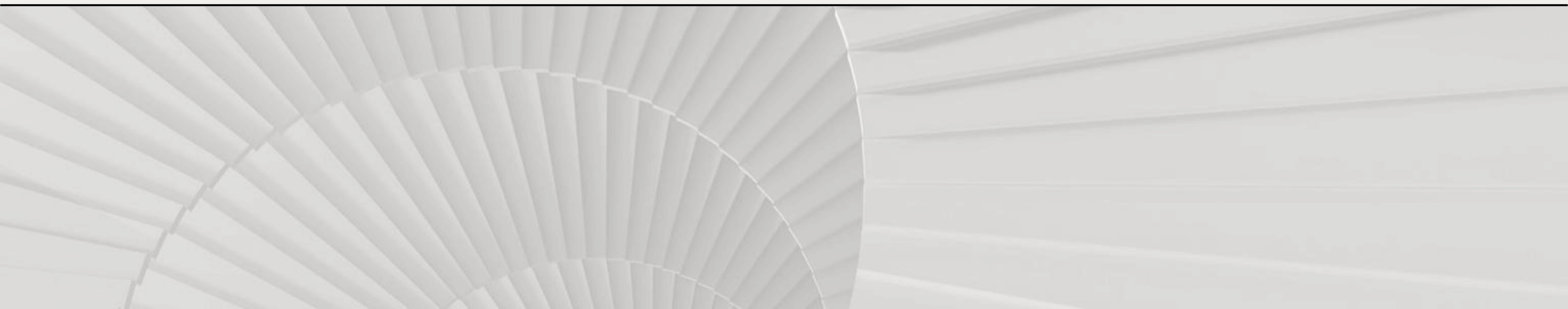
“If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.”

Section 110(2) of the *Evidence Act 1995*



INFERENCES

“Inferences are conclusions of fact reasonably drawn from a combination of proved facts. If A, B and C are established as facts then one might rationally conclude that D is also a fact, even though there might be no evidence that D is indeed a fact. There can be no inference unless there are facts from which to infer the fact which it is sought to establish. The question is whether, on the basis of the primary facts, it is reasonable to draw the inference.”



INFERENCES

“If you find that the facts are equally consistent in establishing more than one inference, then selecting one of them to prefer would amount to guesswork or, in other words, conjecture or speculation. If that is the case, you should not draw any inference.”



INFERENCES

“If you wake up one morning, look through the window and see the ground is wet, you may perhaps infer it had rained overnight.

...

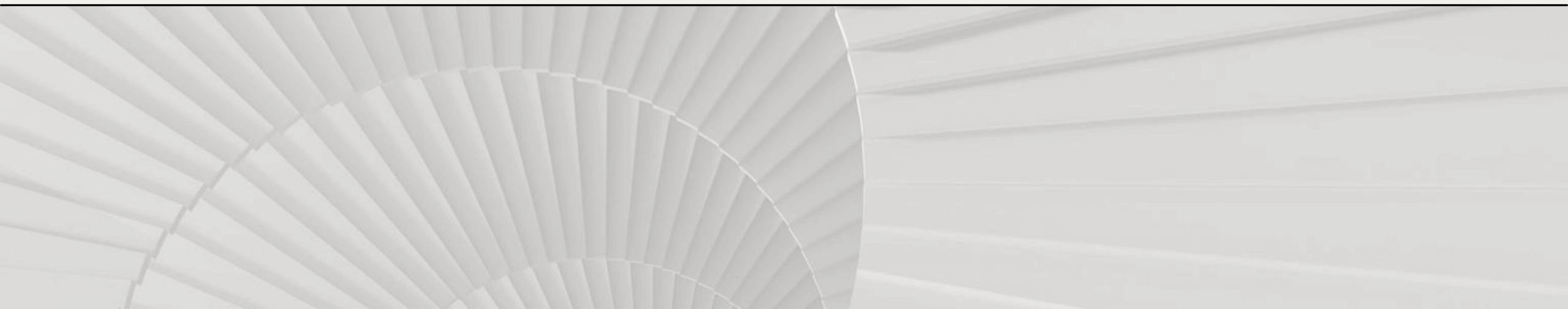
In my example about the wet ground, you will, when you think about it, realise that the possible inference I suggested might be questionable. Someone may have used a hose or sprinkler, or a water pipe may have leaked instead.”



INFERENCES

“First, the jury should not have been directed that it should be ‘very careful about drawing the inference asked of you by the defence’. There was nothing wrong with directing the jury that the process of drawing an inference should be a rational one, but it will rarely be appropriate for a jury to be warned that it needs to be ‘very careful’ about drawing an inference favourable to an accused in a criminal trial.”

Waldron v R [2023] NSWCCA 128, per Hamill J (Button and Sweeney JJ agreeing) at [39]



CIRCUMSTANTIAL EVIDENCE

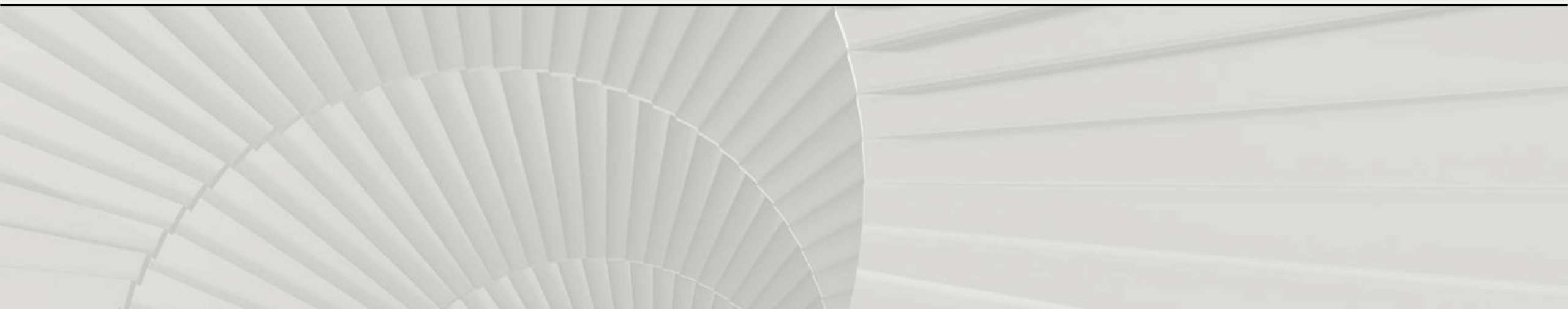
“Circumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts. It is traditionally contrasted with direct or testimonial evidence, which is the evidence of a person who witnessed the event sought to be proved.”

Shepherd v The Queen [1990] HCA 56; (1990) 170 CLR 573, per Dawson J

CIRCUMSTANTIAL EVIDENCE

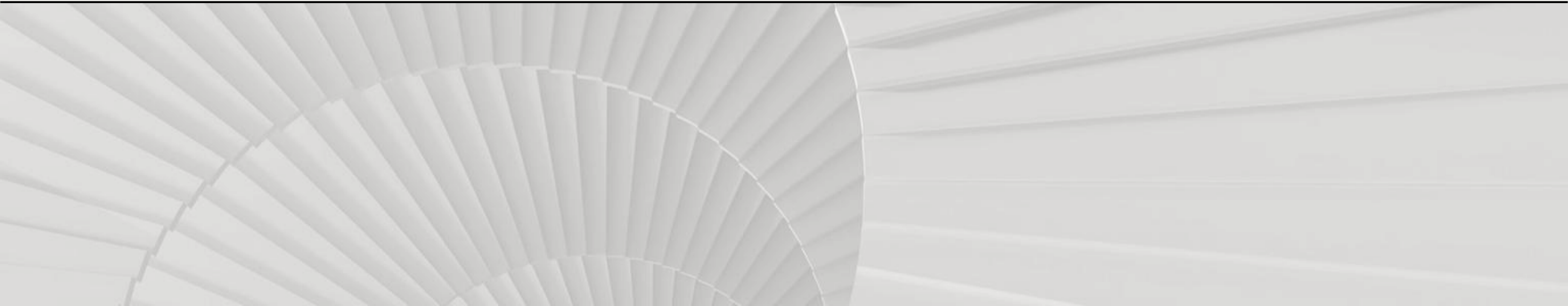
“Where the Crown case rests substantially on circumstantial evidence a jury cannot return a guilty verdict unless the Crown has excluded all reasonable hypotheses consistent with innocence”

The Queen v Baden-Clay [2016] HCA 35;(2016) 258 CLR 308, per French CJ, Kiefel, Bell, Keane and Gordon JJ at [46]



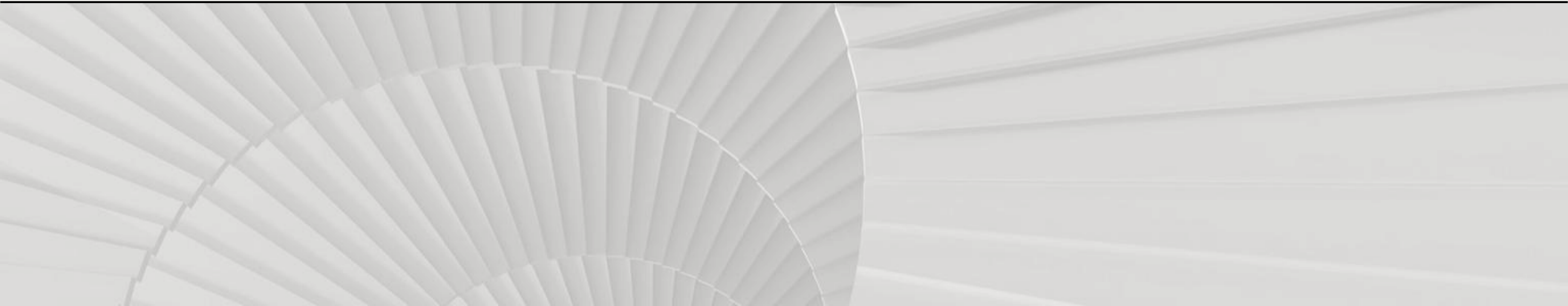
CIRCUMSTANTIAL EVIDENCE

1. Links in a chain
2. Strands in a cable



CIRCUMSTANTIAL EVIDENCE

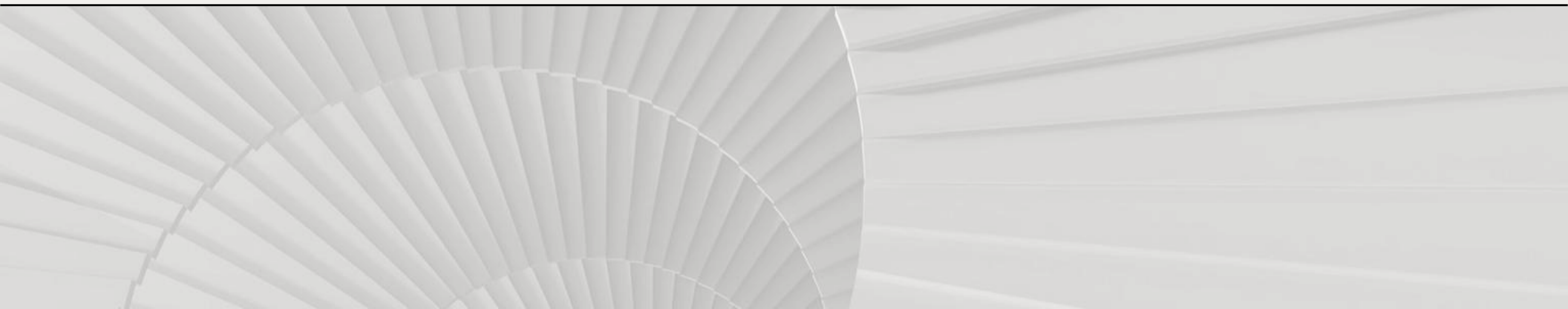
1. Links in a chain
2. Strands in a cable



MULTIPLE COUNTS

“Giving separate consideration to the individual counts means that you are entitled to bring in verdicts of guilty on some counts and not guilty on some other counts if there is a logical reason for that outcome.

If you were to find the accused not guilty on any count, particularly if that was because you had doubts about the reliability of the complainant’s evidence, you would have to consider how that conclusion affected your consideration of the remaining counts.”



TENDENCY EVIDENCE

“Evidence of the character, reputation or conduct of a person, or a tendency that a person has or had, is not admissible to prove that a person has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind unless—

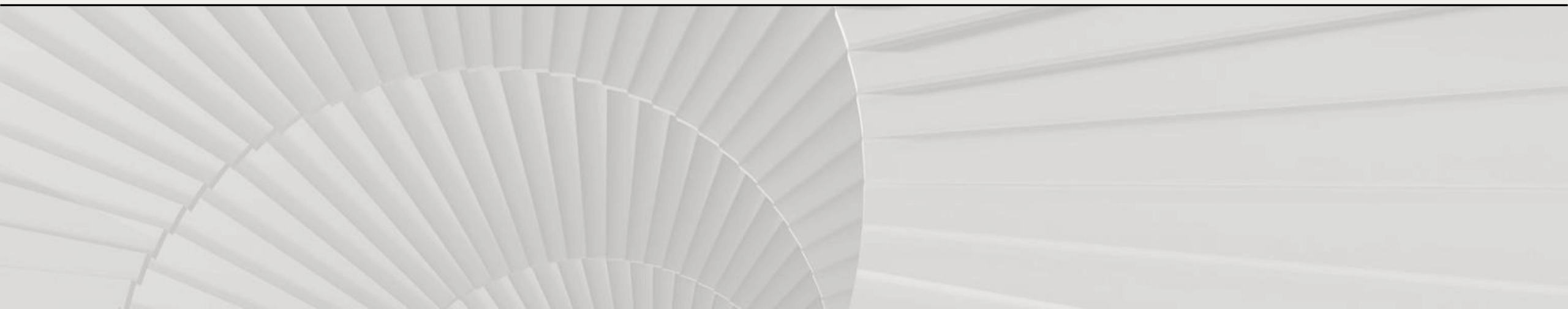
Section 97(1) of the *Evidence Act 1995*



TENDENCY EVIDENCE

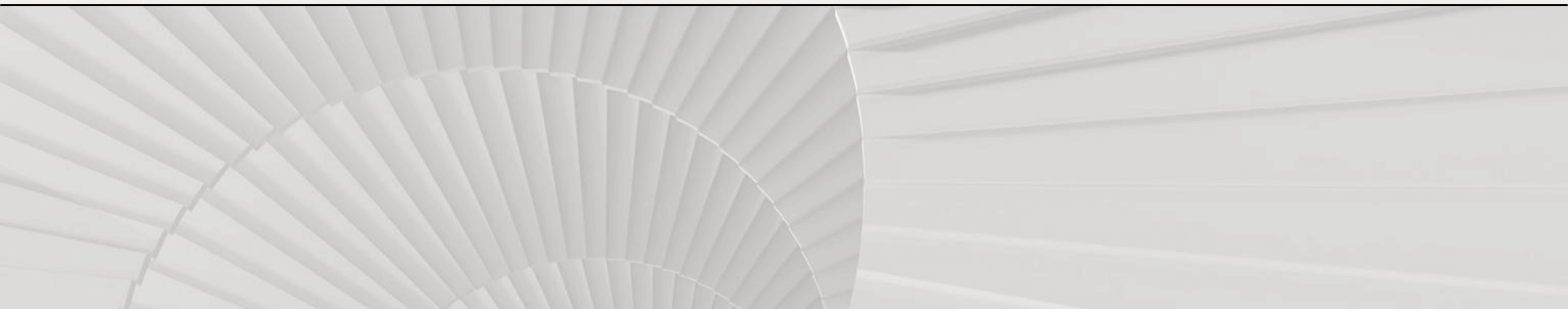
“(a) the party seeking to adduce the evidence gave reasonable notice in writing to each other party of the party’s intention to adduce the evidence, and
(b) the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value.”

Section 97(1) of the *Evidence Act 1995*



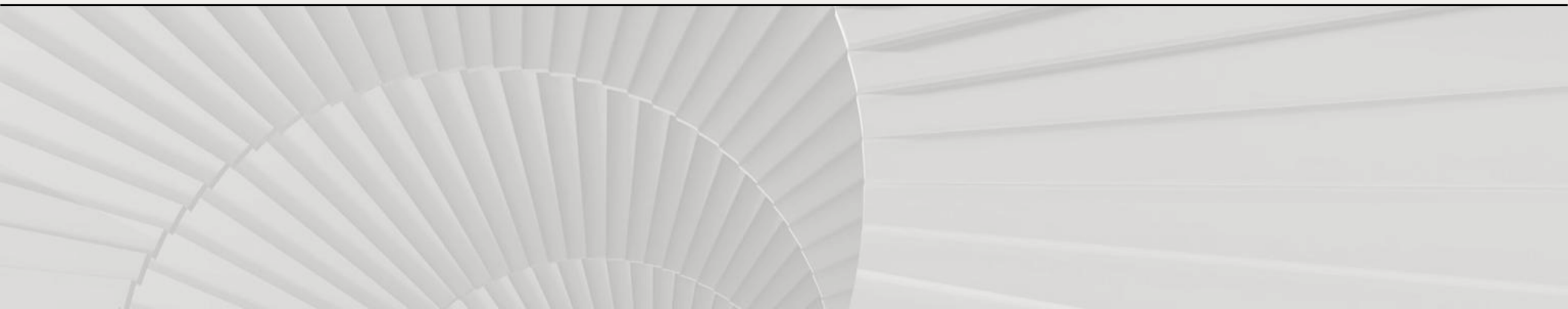
TENDENCY EVIDENCE

“Determining whether the asserted tendency is established involves the drawing of an inference. You will recall the direction I gave to you about the care that needs to be applied to the drawing of inferences which included that you must consider whether there might be alternative explanations for the evidence. You should bear in mind those directions in deciding whether you can draw the inferences contended for by the Crown.”



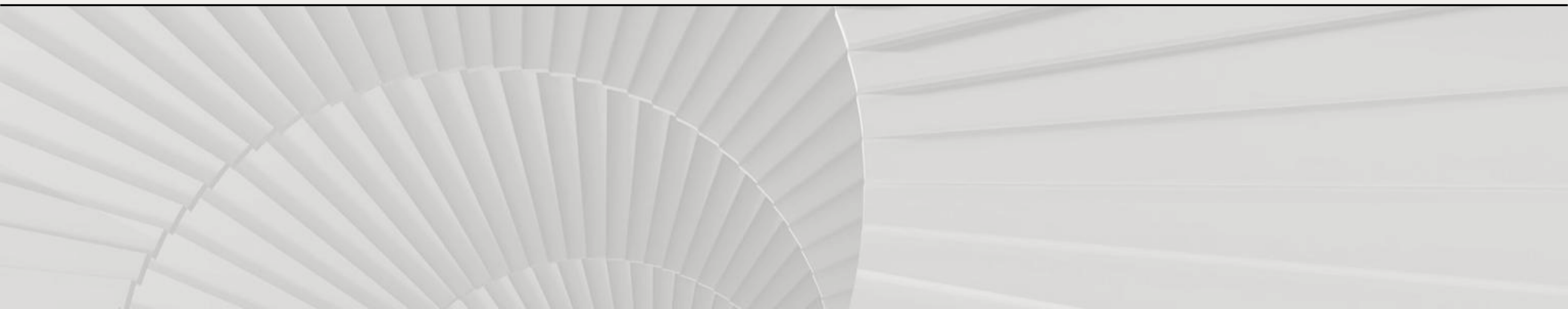
TENDENCY EVIDENCE

“If you find the accused did have the asserted tendency, then you can use that in considering whether it is more likely they committed the specific offence(s) with which they are charged. However, it is essential you consider in relation to each charge whether the accused acted in conformity with that tendency on that specific occasion alleged in each separate charge in the indictment.”



ESSENTIAL PROSECUTION WITNESS

“[Unless] you are satisfied beyond reasonable doubt that the essential Prosecution witness is both an honest and accurate witness in the account they have given, you cannot find the accused guilty. Before you can convict the accused, you should examine the evidence of the essential Prosecution witness very carefully to satisfy yourselves you can safely act upon that evidence to the high standard required in a criminal trial. In considering the essential Prosecution witness’ evidence and whether it does satisfy you of the accused’s guilt, you should of course look to see if it is supported by other evidence.”



ESSENTIAL PROSECUTION WITNESS

“(1) A judge in any proceedings to which this Division applies must not direct a jury, or make any suggestion to a jury, that complainants as a class are unreliable witnesses.

(2) Without limiting subsection (1), that subsection prohibits a direction to a jury of the danger of convicting on the uncorroborated evidence of any complainant.

(3) Sections 164 and 165 of the *Evidence Act 1995* are subject to this section.”

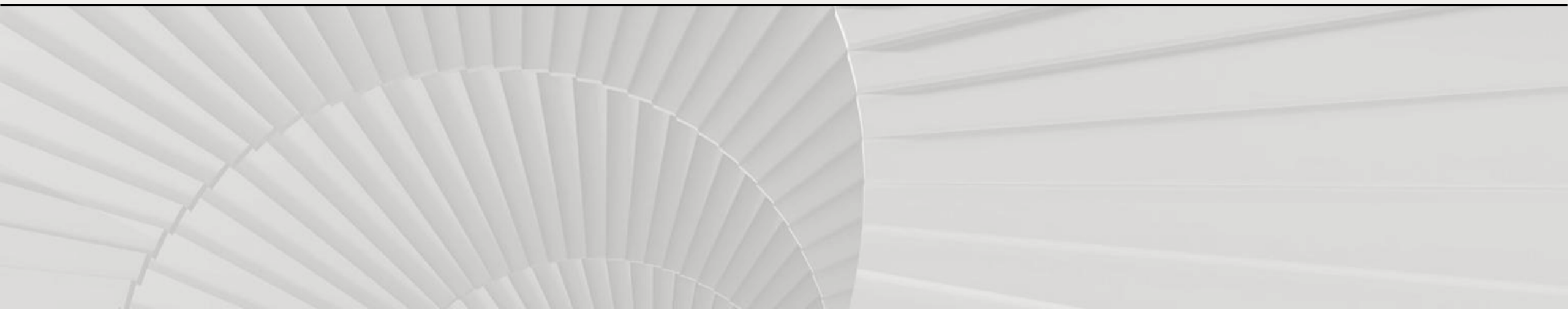
Section 294AA of the *Criminal Procedure Act 1986*

ESSENTIAL PROSECUTION WITNESS

“(1) It is not necessary that evidence on which a party relies be corroborated.

(2) Subsection (1) does not affect the operation of a rule of law that requires corroboration with respect to the offence of perjury or a similar or related offence.”

Section 164(1)-(2) of the *Evidence Act 1995*

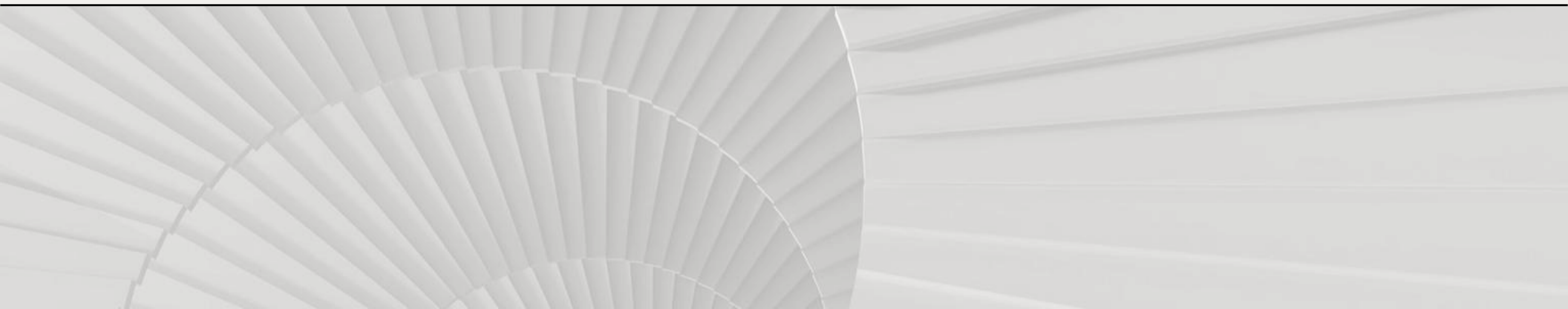


ESSENTIAL PROSECUTION WITNESS

“(2) If there is a jury and a party so requests, the judge is to-

- (a) warn the jury that the evidence may be unreliable, and
- (b) inform the jury of matters that may cause it to be unreliable, and
- (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.”

Section 165(2) of the *Evidence Act 1995*



ESSENTIAL PROSECUTION WITNESS

“A (if not the) central proposition that emerged from *Longman* is:

‘[that] the general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case.’”

Ewen v R [2015] NSWCCA 117, per Simpson J at [113]

ESSENTIAL PROSECUTION WITNESS

“None of this has the effect that an appropriate direction, as envisaged in *Longman*, cannot be given in prosecutions for sexual offences. ... Delay in bringing proceedings is one such circumstance that calls for a direction. Such a direction does not transgress s 294AA; it discharges the judge’s duty to direct the jury in accordance with the circumstances of the case, and not according to suppositions about the reliability of any class of witnesses.”

Ewen v R [2015] NSWCCA 117, per Simpson J at [143]

ESSENTIAL PROSECUTION WITNESS

“If the court, on application by a party, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of that disadvantage and the need to take that disadvantage into account when considering the evidence.”

Section 165B(2) of the *Evidence Act 1995*

ESSENTIAL PROSECUTION WITNESS

“[The] Judge

(a) must direct the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

(b) must direct the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and

(c) must not direct the jury that delay in complaining is relevant to the victim’s credibility unless there is sufficient evidence to justify such a direction.”

Section 294(2) of the *Criminal Procedure Act 1986*

ESSENTIAL PROSECUTION WITNESS

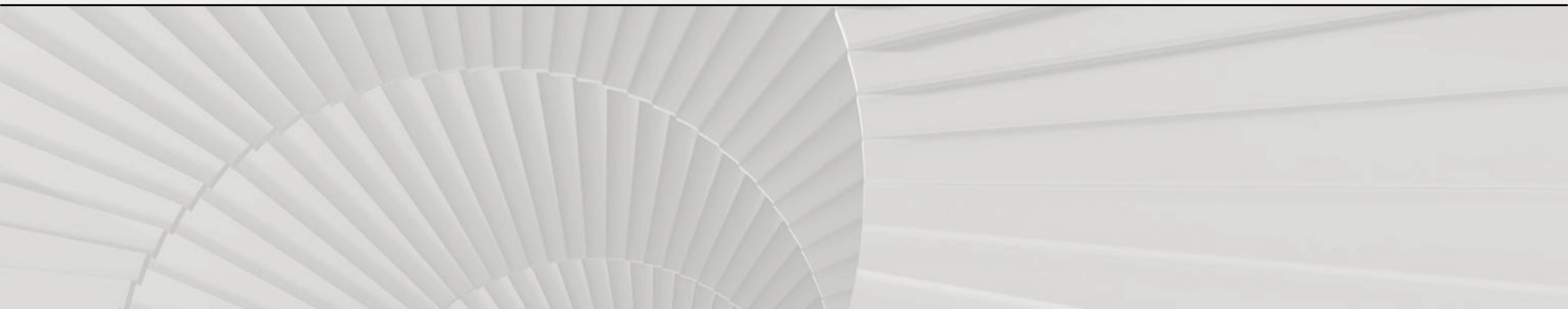
“(i) people may not remember all the details of a sexual offence or may not describe a sexual offence in the same way each time, and

(ii) trauma may affect people differently, including affecting how they recall events, and

(iii) it is common for there to be differences in accounts of a sexual offence, and

(iv) both truthful and untruthful accounts of a sexual offence may contain differences...”

Section 293A(2) of the *Criminal Procedure Act 1986*

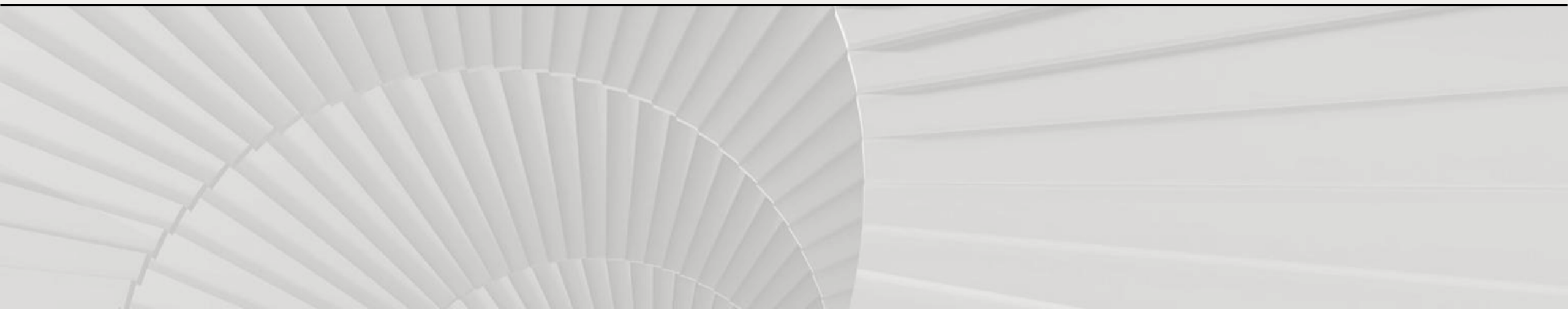


CONSENT

“(1) A person *consents* to a sexual activity if, at the time of the sexual activity, the person freely and voluntarily agrees to the sexual activity.

(2) A person may, by words or conduct, withdraw consent to a sexual activity at any time.

Section 61HI of the *Crimes Act 1900*



CONSENT

“(3) Sexual activity that occurs after consent has been withdrawn occurs without consent.

(4) A person who does not offer physical or verbal resistance to a sexual activity is not, by reason only of that fact, to be taken to consent to the sexual activity.

Section 61HI of the *Crimes Act 1900*

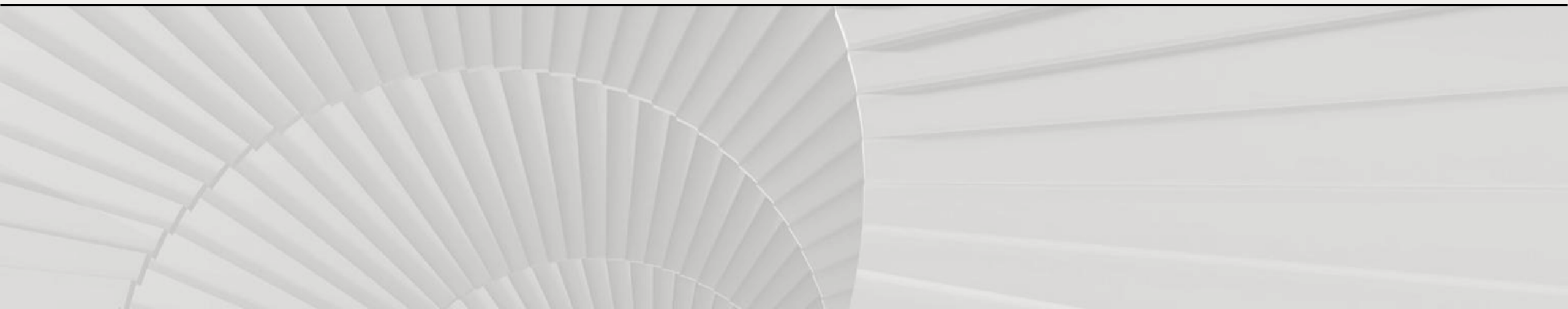
CONSENT

“(5) A person who consents to a particular sexual activity is not, by reason only of that fact, to be taken to consent to any other sexual activity.

Example—

A person who consents to a sexual activity using a condom is not, by reason only of that fact, to be taken to consent to a sexual activity without using a condom.

Section 61HI of the *Crimes Act 1900*



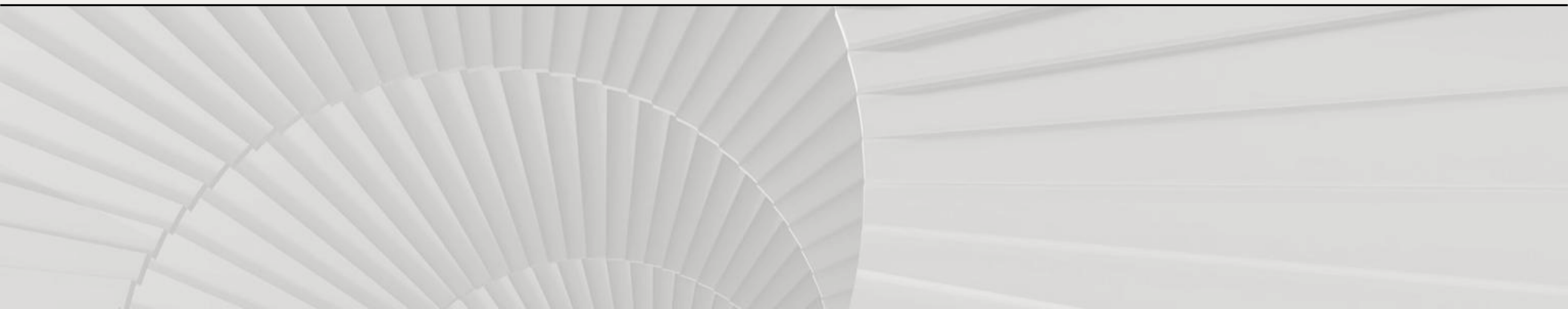
CONSENT

“(6) A person who consents to a sexual activity with a person on one occasion is not, by reason only of that fact, to be taken to consent to a sexual activity with—

(a) that person on another occasion, or

(b) another person on that or another occasion.”

Section 61HI of the *Crimes Act 1900*

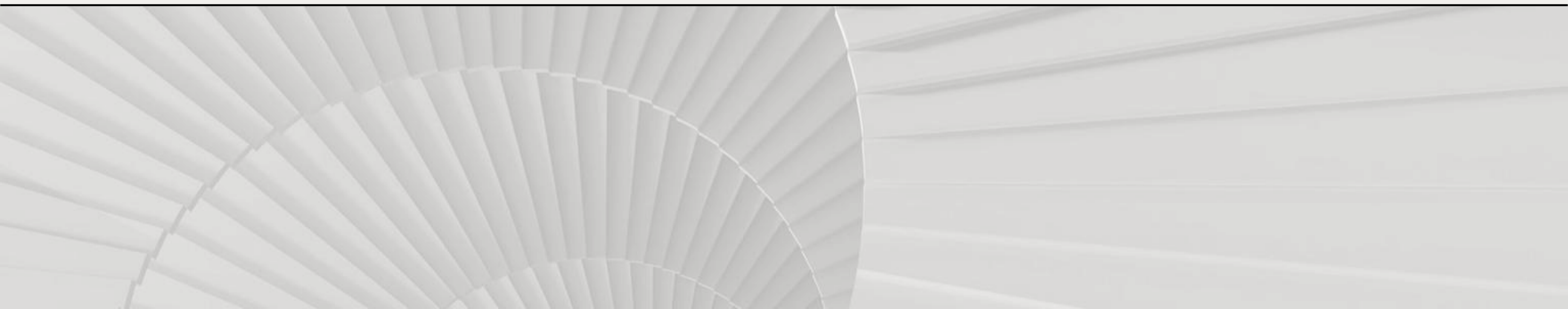


CONSENT

“Non-consensual sexual activity can occur—

- (a) in many different circumstances, and
- (b) between different kinds of people including—
 - (i) people who know one another, or
 - (ii) people who are married to one another, or
 - (iii) people who are in an established relationship with one another.”

Section 292A of the *Criminal Procedure Act 1986*



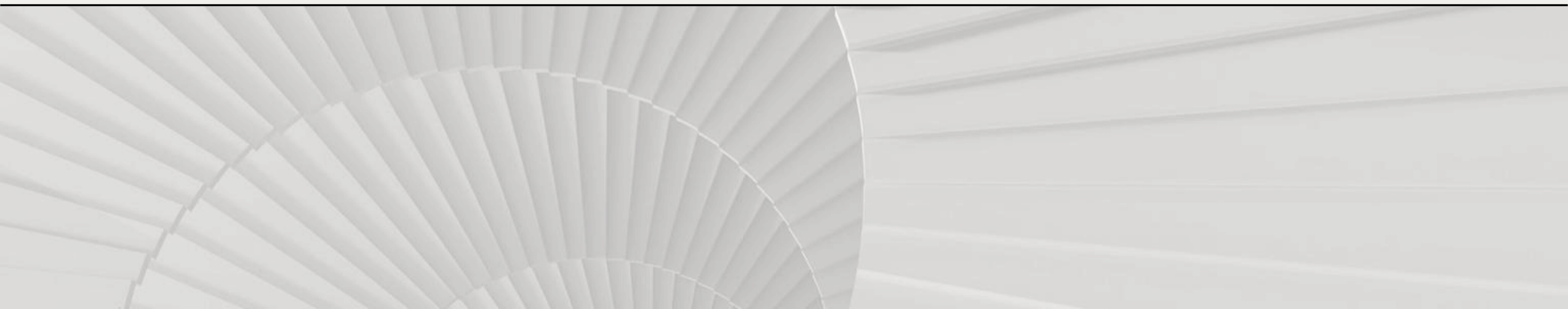
CONSENT

“(a) there is no typical or normal response to non-consensual sexual activity, and

(b) people may respond to non-consensual sexual activity in different ways, including by freezing and not saying or doing anything, and

(c) the jury must avoid making assessments based on preconceived ideas about how people respond to non-consensual sexual activity.”

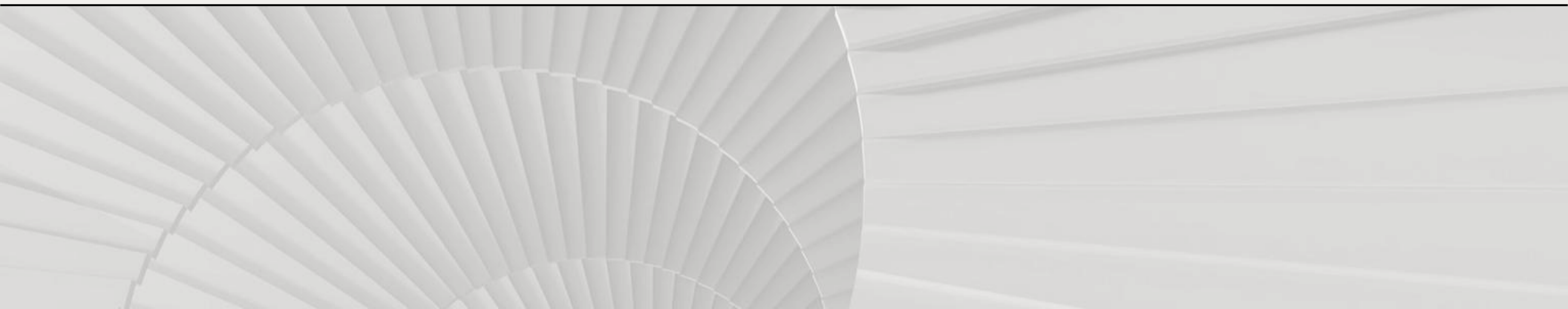
Section 292B of the *Criminal Procedure Act 1986*



CONSENT

“(a) people who do not consent to a sexual activity may not be physically injured or subjected to violence, or threatened with physical injury or violence, and
(b) the absence of injury or violence, or threats of injury or violence, does not necessarily mean that a person is not telling the truth about an alleged sexual offence.”

Section 292C of the *Criminal Procedure Act 1986*



CONSENT

“(a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and

(b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.”

Section 292D of the *Criminal Procedure Act 1986*



CONSENT

“It should not be assumed that a person consented to a sexual activity because the person—

(a) wore particular clothing or had a particular appearance, or

(b) consumed alcohol or another drug, or

(c) was present in a particular location.”

Section 292E of the *Criminal Procedure Act 1986*



SPECIFIC DEFENCES

[6-000] Defences

[6-000] Alibi

[6-050] Automatism – sane and insane

[6-150] Duress

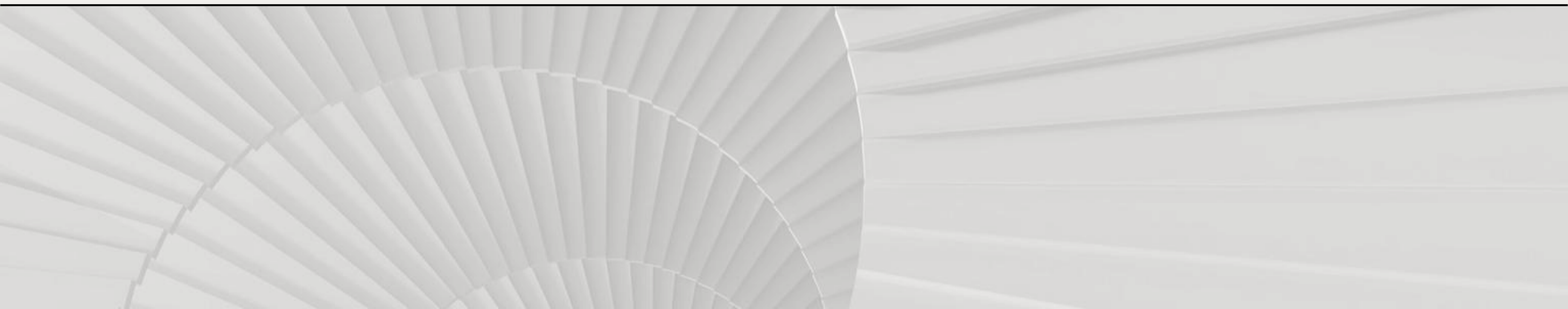
[6-200] Defence of mental health impairment or cognitive impairment

[6-350] Necessity

[6-400] Provocation/extreme provocation

[6-450] Self-defence

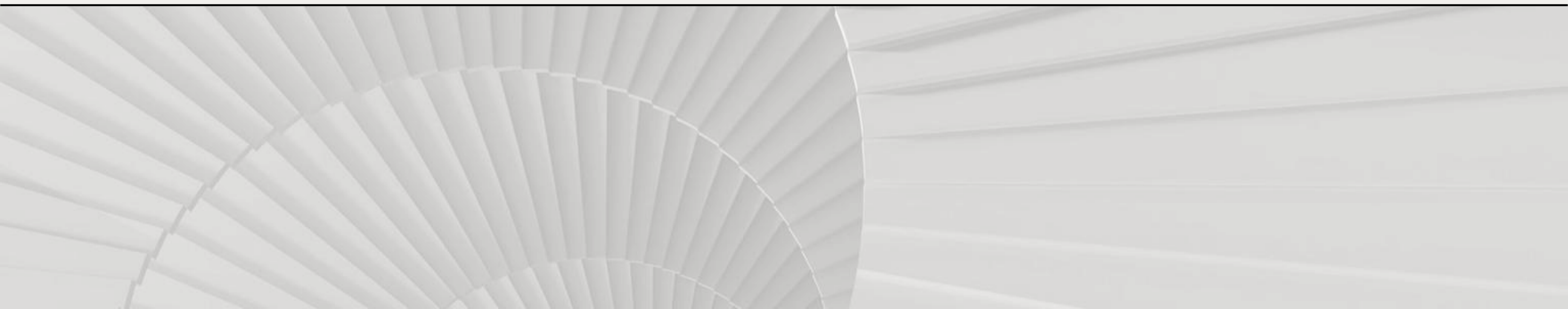
[6-550] Substantial impairment because of mental health impairment or cognitive impairment



ALIBI

“The accused has tendered evidence intended to show that at the time the offence was being committed, they were somewhere else and therefore could not have committed the offence. This is what lawyers call an ‘alibi’.

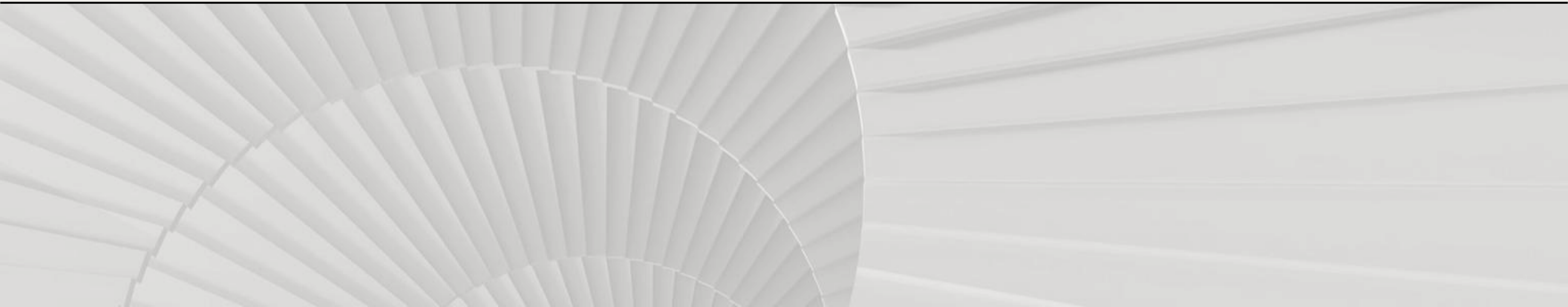
... When an accused person puts forward an alibi, the burden of proving the accused’s guilt continues to rest on the Crown.”



ALIBI

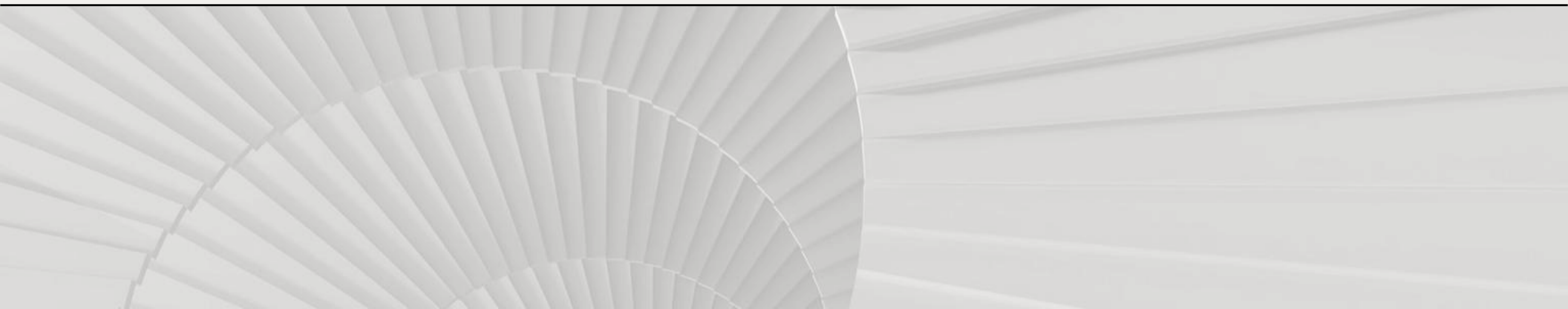
“If the Crown fails to satisfy you beyond reasonable doubt that the alibi evidence should be rejected, then you must acquit the accused.

The Crown must disprove the alibi.”



ALIBI

“If the Crown satisfies you beyond reasonable doubt that the alibi evidence should be rejected, it does not follow that you must necessarily convict the accused. In other words, you must not assume that because the alibi fails that the accused is guilty. You must still be satisfied beyond reasonable doubt, upon the evidence as a whole, that the Crown has made out its case against the accused before you bring in a guilty verdict.”



SELF- DEFENCE

“A person carries out conduct in self-defence if and only if the person believes the conduct is necessary—

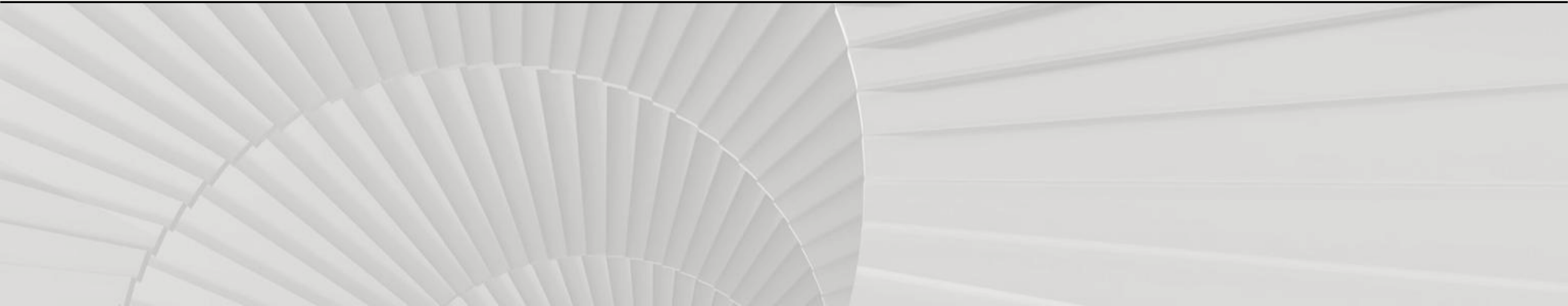
- (a) to defend himself or herself or another person, or
- (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
- (c) to protect property from unlawful taking, destruction, damage or interference, or
- (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.”

Section 418(2) of the *Crimes Act 1900*

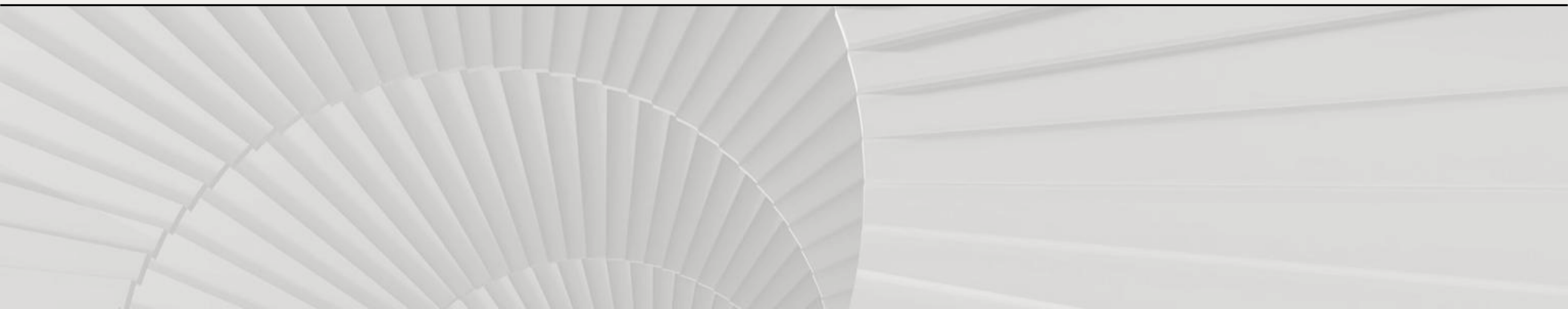
SELF- DEFENCE

“[There] are two parts to self-defence and in relation to both of them the Crown bears the burden of proof. It is not for the accused to prove that they were acting in self-defence. It is for the Crown to prove that they were not.”



SELF- DEFENCE

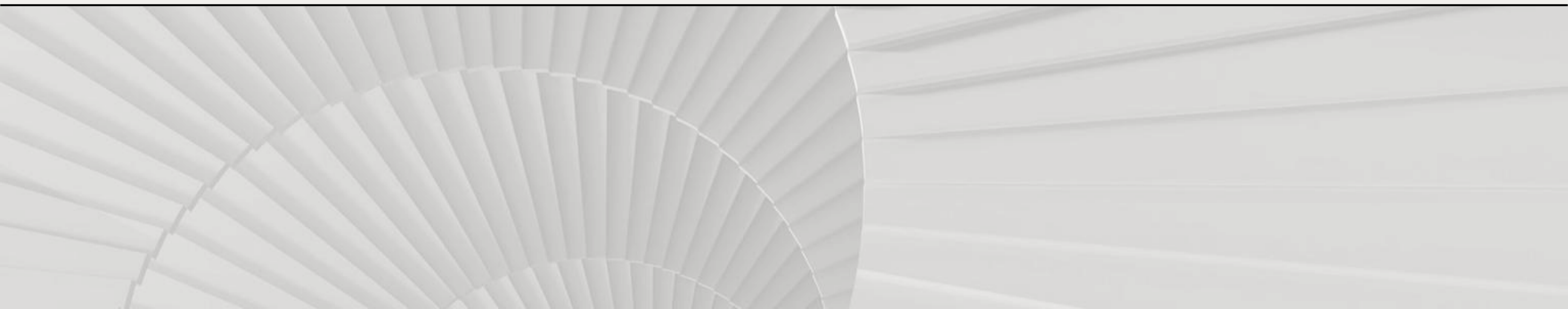
1. Has the Crown proved beyond reasonable doubt that the accused did not believe at the time of the impugned conduct that it was necessary to do what they did in order to defend themselves?
2. Has the Crown proved beyond reasonable doubt that the impugned conduct by the accused was not a reasonable response in the circumstances as they perceived them?



SELF- DEFENCE

“The issue as to the reasonableness of the accused's response is objective in so far as the jury is not concerned with what the accused believed was necessary to respond to the circumstances as he or she perceived them to be.”

R v Katarzynski [2002] NSWSC 613, per Howie J at [24]



SELF- DEFENCE

“The accused’s intoxicated state —

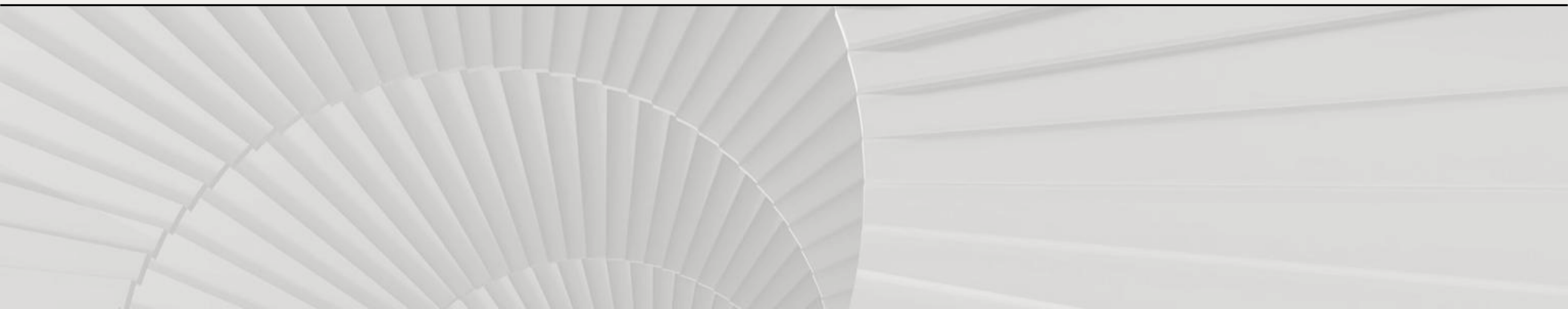
1. must be taken into account in determining whether the accused believed that their conduct was necessary to defend themselves;
2. must be taken into account in determining the circumstances as the accused perceived them to be;
3. must not be taken into account in determining whether their response to those circumstances was reasonable.”



SELF- DEFENCE

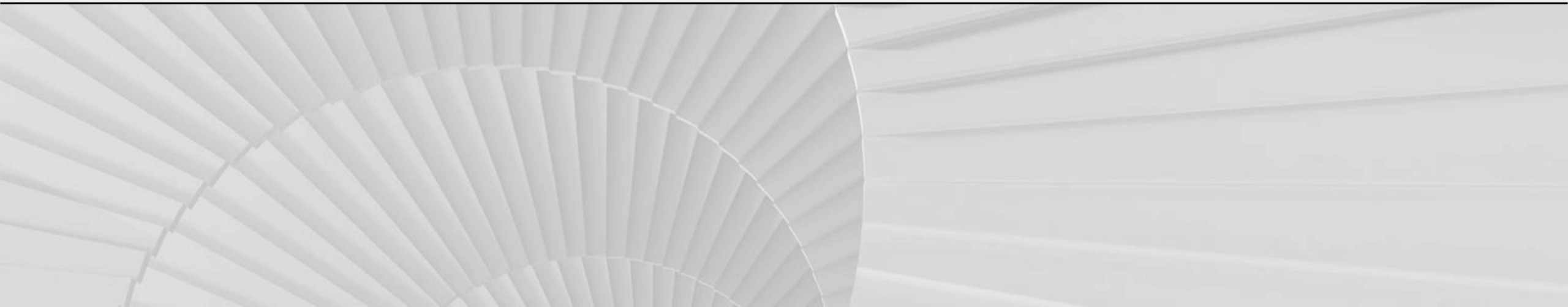
“This Division is not excluded merely because—
(a) the conduct to which the person responds is lawful, or
(b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.”

Section 422 of the *Crimes Act* 1900



SUMMARY

The Criminal Trial Courts Bench Book is an important source of legal directions, and those directions apply in respect of criminal proceedings before juries, magistrates and judges sitting alone.



Q&A

