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Amicus

The newsletter of the New South Wales Young Lawyers' Criminal Law Committee

Master Class

***Matthew Eddy** speaks with the President of the New South Wales Bar Association, **Phillip Boulten SC**, about the diminishing right to silence and how practitioners should approach the recent amendments to the* Evidence Act 1995.

On 1 September 2013, section 89A of the *Evidence Act 1995* (NSW) came into operation with the commencement of the *Evidence Amendment (Evidence of Silence) Act 2013* (NSW). The provision alters the right to silence of suspects being questioned by police under a special caution. The special caution can only be given to a person 18 years or older and must be given in the presence of an Australian legal practitioner.

The amendment permits unfavourable inferences to be drawn against an accused person who relies at trial upon a fact that was not mentioned at the time of questioning for the offence charged. The accused must reasonably have been expected to mention the fact in the circumstances at the time of the questioning.

Matthew: ***What warning would you give to people who have the view that 'if you are innocent and have nothing to hide you should just trust the police'?***

Boulten SC: Police usually go into an interview with a very firm mindset. They already have the person identified as the suspect. They usually have cut off all other lines of enquiry and sometimes the person giving them the truth, and the whole truth, will confirm aspects of the police theory. Therefore, it becomes more likely that the prosecutor eventually will be emphasising the admissions in the trial.

People don't always have a clear understanding of what the allegation is, even when it's been put to them. They might think the police are talking about 'circumstance A', whereas the police have got it in their mind that it's something slightly different or completely different.

Inside this issue:

Editor: Liam Cavell

Editorial team / contributors: Nic Angelov, Thomas Barbat, Vanessa Chan, Matthew Eddy, Alex Edwards, Catherine Kirkpatrick, Suzanne Martinez, David Porter, Natasha Reurts and Thomas Spohr.

Special thanks to Phillip Boulten SC, Dina Yehia SC and Dr Matthew Hannon.

Some people have bad memories. Some people tell the police I was at 'point A' where that's just completely wrong. A lot of people are drug affected and intoxicated when they answer questions. Telling the police everything would disadvantage lots of innocent people.

Should defence lawyers stay with their client for the duration of the police interview being conducted in accordance with the new provision?

It depends on the circumstances. What this law does is require defence lawyers to think more carefully about what they're going to be doing. They have to work out whether in the circumstances of that case it really is in their client's interests to stay throughout the interview or not. The default position is much more likely to be that the lawyer will give advice before the person goes to the police station and the lawyer presents them and goes - rather than stays through the interview. But that might change.

Are suspects better off remaining silent during police questioning and having the argument about adverse inferences at the trial rather than disclosing information freely to police?

Again, it's a case-by-case decision. The decision to talk to the police will become a more and more frequent occurrence, especially if very effective adverse inference directions start to become a major feature of criminal trials. The likelihood is that, at the beginning of this process, it will be much the same as it always was. Lawyers will be more likely to advise their clients not to speak than to speak. But, we will all have to see how it develops.

The amendment is based on section 34 of the English* Criminal Justice and Public Order Act 1994 *(UK) c 33. Under that legislation there is a duty of disclosure on police to notify suspected persons of the allegations and evidence against them during questioning.

That's the problem with this amendment in an Australian context. The provision provides the police with all the advantages but the accused with none of the safeguards. I had a client yesterday that the police wished to speak with. I advised the solicitor to find out what the allegation is and the detective's answer was 'we don't do it that way'. Nor do they. The police never do that. Unless the police are going

'The decision to talk to the police will become a more and more frequent occurrence, especially if very effective adverse inference directions start to become a major feature of criminal trials.'

to act completely contrary to the normal pattern, you would be well advised not to prod your client into answering questions because there's just too many traps involved.

Do there need to be certain challenges to section 89A, such as a Constitutional challenge, or is section 89A incompatible with other sections of the* Evidence Act 1995*?

It's not incompatible with other sections. But, other sections may have a contrary intention. It is usual for Judges to have to deal with competing public policy issues in determining whether or not to admit evidence and in determining what to tell juries about how they deal with evidence. As far as a constitutional challenge is concerned, a number of lawyers think that there are constitutional issues. The argument is that the state courts have power under Chapter III of the Constitution. Chapter III requires a trial of a particular type. An inherent aspect of a criminal trial has been that the onus and standard of proof required remains firmly on the shoulders of the prosecution. This provision undoubtedly is shifting the onus of proof in such a way as to be incompatible with trial courts in this State exercising judicial power under the Commonwealth Constitution. Whether that's true, only time will tell.

Generally speaking, should issues that arise under section 89A be dealt with by a Judge on a voir dire before going to the jury?

There may be fights about whether the defence should be able to introduce evidence to explain answers in the record of interview. I think it is likely

that the evidence will flow, people will take forensic positions on the point and then there will be argument about what the direction should be.

There is now a different position in relation to silence at the police station as opposed to silence at trial. What are the key points that defence lawyers should be looking for in directions to the jury concerning adverse inferences?

The ball has been left firmly in the judge's court. The big tension will be whether the omission to speak of facts impacts on credibility or whether it goes further and demonstrates a consciousness of guilt. There was a degree of argy bargy in the lobbying about the shape of this bill to try and limit the direction to a simple credit direction. Defence lawyers were unsuccessful in that lobbying exercise. At a trial there will be the same sort of arguments that are currently had about whether a 'consciousness of guilt' direction should be given or not.

Generally speaking, should defence lawyers adopt the default position of advising their clients to 'remain silent at all times', unless they are 100% certain of advising otherwise?

It's going to be really difficult to provide good advice. Properly measured advice will have riders to it. Real world criminal lawyers are rung on the phone at 3 in the morning and they're not going to be giving that sort of qualified advice about whether a suspect should or shouldn't speak to the police. Most people are not going to give advice like that, but they ought to be.

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E R I S P: DINA YEHIA SC

*Back in Chambers – fresh from the High Court – **Dina Yehia SC** takes time out from her busy schedule to sit down with **Natasha Reurts** about her career from WALS Solicitor to Senior Public Defender (without admissions).*

Travelling 12 hours to court was not unusual for Dina. Then a newly minted solicitor with the Western Aboriginal Legal Service ('**WALS**'), Dina would step off the bus in Broken Hill, Bourke or Brewarrina to be met with the list for the day, and only have a few moments to get ready for court.

In Wilcannia, 'Davo' the field officer would bring clients into Dina's motel room where she would receive instructions sitting on the edge of a single bed.

Although it was hard work, and often relentless, Dina loved what she did. It was the job she had wanted to do since she was 13. Even at such a young age, Dina knew that she wanted to represent people at the margins.

Dina got her first taste of criminal defence work in 1989 whilst completing her Practical Legal Training at Dubbo. The following year she made the move permanent – joining the WALS.

Dina reflects fondly on her time at the WALS, not only because of professional experiences she had, but also because of the family and personal connections she made over the seven years she spent at the WALS. She describes the administrative staff and employees of the WALS as family rather than friends.

On the legal side of things, Dina was thrown in at the deep end. Often representing more than 25 clients in a day, Dina was lucky if she received the papers for each matter the day before. It was more often the case that the papers would arrive on the morning of court.

In 1991, Dina was given the opportunity to instruct Counsel in the Aboriginal Deaths in Custody Inquiry when the Commission came to Brewarrina, holding a hearing in relation to the death in custody of Lloyd James Boney.

Dina became so connected with the communities she worked in that some of the locals confused her Egyptian heritage for being Aboriginal. On one occasion it took Dina producing her passport in a bar to calm down a young Aboriginal man who accused her of denying her Aboriginality. He kept insisting she tell him which mob she was from.

In late 1996, Dina returned to Sydney and joined the Legal Aid Commission as a Trial Advocate. Three years later, Dina was called to the bar and took up a position as a Public Defender. In 2009, Dina was appointed silk, and in 2012 she became the first female appointed Deputy Senior Public Defender.

With 17 years of experience undertaking trial work, Dina has a trove of memorable experiences.

Her first Supreme Court matter involved representing one of the 'K brothers' on charges of aggravated sexual assault before Justice Sully.

She also appeared in the first terrorism trial in New South Wales, which was also her first matter as a silk. The year long trial commenced after nearly eight months of pre-trial arguments, and the jury took five weeks in deliberation. It remains one of the longest jury trials in New South Wales' history with more than 300 witnesses called, 3,000 exhibits tendered, and several days of playing surveillance tapes.

It is unsurprising to hear that *Bugmy v The Queen* will join the list of memorable matters for Dina. Not only is it remarkable because it was Dina's first High Court appearance, but also because it harks back to her days at the WALS and her childhood ambition to give a voice to the marginalised.

Even though she occasionally contemplates a career change to become a florist – something a little less fast-paced – Dina still gets a thrill from receiving a fresh brief. She describes the feeling as akin to reading a gripping novel, and she revels in the excitement of navigating what at times can be a bizarre factual matrix.

'On one occasion it took Dina producing her passport in a bar to calm down a young Aboriginal man who accused her of denying her Aboriginality. He kept insisting she tell him which mob she was from.'

On a softer note, Dina also comments on how her work has provided her with an appreciation for her own life and all that she has.

Her advice to young criminal lawyers and those interested in practicing criminal law is simple: leave the comfort of Sydney and work in Aboriginal communities or for the Aboriginal Legal Service. Not only will you learn quickly, gain important advocacy skills, and become a talented lawyer, but it will also be a rich and rewarding experience. In meeting and interacting with Aboriginal people and communities, you will find yourself surrounded by their generosity, humour and warm nature.

Dina also stresses the importance of being surrounded by good mentors and making sure that you love what you do.

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HEARSAY

Anecdotes, judgments, war stories…

***Fairfield City Council v Quality Handling Systems Pty Ltd* [2013] NSWLC 7** provides a lesson on how not to carry out an environmental inspection; the following is an extract from the judgment of His Honour Magistrate van Zuylen.

'[11] … A Statement from Ms S, a senior Environmental Officer with Fairfield City Council, said that whilst carrying out the initial inspection she had a conversation with Mr P, the Operations Manager. During the conversation and after conceding they had been cleaning the stainless steel with the passivating gel (or acid), the following was said:

Ms S: "Where have you been doing the cleaning?"
Mr P: "Out there in the corner on the concrete outside the building [referring to the eastern boundary of the subject premises]…."
Ms S: "How long have you been doing this washing process?"
Mr P: 'Two years. Before we could handle it but now we have such demand. We've got a tank to do a wash bay but we've been falling behind so we haven't done it…."

Later on this conversation occurs:

Mr W [another Senior Environmental Health Officer]: "Have you ever done anything to neutralise it [the washing off the pickling paste or acid from the stainless steel] after you've done it?"
Mr P: "Well that's what the water's for."

[12] Shortly after the abovementioned exchange between Mr W and Mr P, Mr W realised that he had come into contact with the pickling paste and was experiencing an acid burn. [He] then immediately attended the Emergency Department […] following advice from Poisons Information.'

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Do you have a contribution to Hearsay? Email:

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Criminal law and mental health: what you need to know when reading psych reports

***Vanessa Chan** speaks to **Dr Matthew Hannon**, Psychiatric Registrar at Royal Prince Alfred and Concord Hospitals, about common mental health conditions and how to approach reading psychiatric and psychological reports.*

Despite having no medical training, legal practitioners are often required to navigate material relating to the mental health of those in the criminal justice system. With little to no understanding of psychiatric conditions, it is very difficult to assess the relevance and clinical foundation of findings contained in psychiatric and psychological reports.

This article aims to provide some information about common mental health conditions and what to look for when reading psychiatric and psychological reports.

Common mental health conditions

Paranoid Schizophrenia

What is it?

Paranoid schizophrenia is a chronic mental illness with brain cell death in which people lose touch with reality and function poorly. It affects around 1% of the population (usually males). There are certain features that must be present for a diagnosis to be made under the Diagnostic Statistics Manual IV ('**DSM IV**'). There must be a lengthy history of voices and delusions and vocational and social decline.

Other features can include:

- two or more admissions into mental health facilities, starting in teens or 20s;
- lengthy use of antipsychotic medications;
- Community Treatment Orders with long lasting injection medication (this signifies the person is non-compliant to standard treatment);
- illicit drug use (not recreational but as a coping mechanism); and
- poor motivation and low IQ.

How does the condition relate to the offence?

Paranoid schizophrenia is relevant to offences that

appear to be psychotically driven. Look for evidence their schizophrenia is unstable, that they are in chronic relapse, or there is a strange motivation for the offence. For example, 'that guy was following me everywhere, so I hit him'.

Major Depression

What is it?

Major Depression, also referred to as 'Clinical Depression' and 'Major Depressive Disorder', is a mood disorder that causes persistent sadness, loss of interest and can cause physical slowing-type symptoms. An episode of Major Depression is more severe than 'the blues', but is shorter in duration than always feeling sad and pessimistic.

Major depression *must* be diagnosed by clinical interview using DSM criteria. The DSM requires that all of the following be present for a diagnosis to be made (if some are absent, then a person cannot be diagnosed with Major Depression):

- a trigger in the form of a stressful event (but depressed mood continues long after the event);
- a low mood, especially on waking up (not simply being anxious);
- Anhedonia, that is, the inability to experience pleasure from usually enjoyable activities (this will result in the individual stopping working, socialising, hobbies or exercise);
- neuro vegetation, which manifests in the individual moving slowly, weight loss, always fatigued, cannot concentrate, wakes early and naps – this is a biological depression caused by a problem in the brain's serotonin system;
- excessive guilt, hopelessness and/or worthlessness; and
- responsiveness to anti-depressants and psychotherapy (unless alcohol and drug use is a factor).

Be wary if you read 'depressed', 'depressive episodes,' or 'chronic depression' in a report. When a person experiences a period of Major Depression, the correct diagnosis is 'Major Depressive Episode'.

How does the condition relate to the offence?

Major Depression affects an individual's concentration, not their judgment. People with Major Depression are unable to work or socialise, and are flat and withdrawn. Realistic consideration should be given to the activity alleged and the person's capacity to commit the offence if they were experiencing a Major Depressive Episode. Major Depression does not usually motivate criminal behaviour (with the exception of drug use).

Bipolar Disorder

What is it?

Bipolar Disorder is a mood disorder associated with distinct mood swings that range from depression to mania. At least twice a year, individuals with non-medicated Bipolar Disorder will fluctuate into manic and depressive cycles that will last around 2-3 weeks. Bipolar Disorder is an organic illness that required aggressive treatment and is very difficult to manage. Typical medications include Lithium, Epilim, Zyprexa or Valpro and treatment with a Psychiatrist must be ongoing.

How does this relate to crime?

Manic episodes could result in sudden and bizarre offending behaviour that is out of character. Individuals who are manic may appear as if they are on cocaine or ice. Conversely, when individuals are in the depressive part of the cycle, they are unable to work, socialise and engage, and as with Major Depression, it should be considered whether they would have been able to commit the alleged offence in this state.

Borderline Personality Disorder

What is it?

Borderline Personality Disorder is a disorder that results in significant emotional instability, which can lead to mental and behavioural issues. Diagnosis according to the DSM IV will necessarily need to identify:

- severe childhood emotional abuse, physical or sexual abuse, self harm behaviour, volatile relationships, impulsivity, manipulative behaviour, rage and dissociation events;
- long periods of mild depression and anxiety; and
- self-medication with drugs and inappropriate medications as a coping mechanism.

How does the condition relate to the offence?

Individuals with Borderline Personality Disorder normalise crime. The disorder is associated with instability and rage reactions. Certainly, a diagnosis

of Borderline Personality Disorder is not inconsistent with the commission of violent offences. However, it is not regarded as a mental illness and generally does not affect concentration or judgment.

Anti-Social Personality Disorder

What is it?

Anti-Social Personality Disorder is a learned condition in which individuals have dysfunctional thinking and perception. These individuals have little regard for what is 'right' and 'wrong', and their disregard for the effect of their actions on others may be considered a mild psychopathy. Factors that may indicate the presence of Anti-Social Personality Disorder include:

- repetitive crime;
- deception;
- impulsivity;
- aggression;
- recklessness;
- irresponsibility; and
- a lack of remorse.

Such behaviour is likely to start in a person's early teenager years. Individuals with Anti-Social Personality Disorder are mostly male, the ratio being 10 males to one female.

How does the condition relate to the offence?

Individuals with Anti-Social Personality Disorder are likely to return to their offending behaviour when released from gaol. The iceberg principle applies to these individuals: they are often well versed in manipulating psychiatrists, and what they admit to may be a small percentage of their actual anti-social thoughts. Treatment is intense and very difficult. Individuals rarely get the treatment needed to recover.

Characteristics of a good report

Good psychiatric and psychological reports will usually have the following features:

- patient histories that corroborate diagnoses. Histories should:
  - ask 'why they were unwell on the day?' and 'why they committed the offence?';
  - document the person's childhood; and
  - document history of mental illness and treatment to date – this should be verifiable with reference to medical records if necessary;
- facts are presented simply, objectively and preferably in chronological order;
- diagnosis adheres to DSM;
- personality disorders and drug use are screened;
- the focus is on an objective assessment rather than advocating on the person's behalf;
- there is a clear relationship between the conclusion and the presented facts;
- weak points and uncertainties are outlined comprehensively; and
- the author attaches their CV to the report (check that the report writer is registered with their relevant professional body – look for a registration number in CV).

Be wary of reports that:

- use overly dramatic and emotive descriptions – reports should be objective and dispassionate;
- use questionnaires without malingering scales;
- have an imprecise and cluttered chronology of life events;
- poorly attempt to explain motive;
- provide a vague prediction of prognosis in prison;
- provide poor recognition of why the particular assessment took place; and
- do not confirm facts with hospital reports or the offender's partner/family.

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Quarterly Law Report

***Suzanne Martinez** provides a snapshot of recent criminal law and policy developments.*

Case law

The recent High Court decision in ***Bugmy v The Queen*** [2013] HCA 37 (2 October 2013) considered the relevance of an Aboriginal offender's childhood of social deprivation in sentencing. The Court rejected the approach taken in the Court of Criminal Appeal that the effects of a deprived background diminish over time, particularly where there has been a history of offending. Rather, the High Court stated that such factors should be given full weight as part of the sentencing process.

Like in ***Bugmy***, the High Court also considered the relevance of an offender's social disadvantage, and particularly their Aboriginality, in ***Munda v Western Australia*** [2013] HCA 38 (2 October 2013). Although stating that an offender's circumstances of disadvantage were relevant in the sentencing process, the Court cautioned that these factors must not be allowed to lead to the imposition of a penalty that is disproportionate to the gravity of the offence.

In ***Melbom v R*** [2013] NSWCCA 210 and ***Montero v R*** [2013] NSWCCA 214, the Court of Criminal Appeal hinted that it may be open to re-examining the interpretation of section 21A(2)(eb) of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Montero also raised the issue of finality in the context of out-of-time appeals being brought following the High Court decision of ***Muldrock v R*** (2011) 244 CLR 120.

In ***Poidevin v Semaan*** [2013] NSWCA 334, the Court of Appeal overturned the decision of the Supreme Court regarding the effect of non-compliance with section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (‘***LEPRA***’) (see case note on page 12 for further details).

Practice Notes

A new Practice Note (SC CL 2) commenced on 1 October 2013 and outlines procedures applying to criminal proceedings in the Common Law Division (including time frames for disclosure), which have the objective of facilitating timely resolution of matters.

Legislative amendments and reform

The consultation draft of the ***Crimes Amendment (Provocation) Bill 2013*** was released on 16 October 2013. Notable proposed changes to section 23 of the *Crimes Act 1900* (NSW) include provocation being called ‘extreme provocation’; conduct of the deceased needing to have been a serious indictable offence; and the partial defence now not applying to non-violent sexual advances.

As pre-empted by a number of media releases, a new bill to broaden and ‘clarify’ police officers’ powers of arrest without a warrant was introduced into Parliament on 30 October 2013. The proposed law will give police the power to arrest without warrant when satisfied that it is reasonably necessary ‘to protect the safety of welfare of any person’ (cf. section 99(3)(f) of *LEPRA*).

An entire review of *LEPRA*, (particularly addressing section 201 and Part 9) will be conducted and tabled in a report due for release at the end of this year. The new legislation is proposed to be introduced in 2014.

A controversial new amendment to the *Crimes Act 1900* (NSW), the ***Crimes Amendment (Zoe’s Law) Bill 2013 (NSW)*** has been introduced into Parliament. The bill effectively seeks to broaden the scope of personhood to a child in utero for the purpose of certain offences committed against the mother. Debate is expected to resume on the bill soon.

The ***Drugs and Poisons Legislation Amendment (New Psychoactive and Other Substances) Bill 2013 (NSW)*** was assented on 24 September 2013. This amendment aims to restrict the sale of synthetic drugs, which are termed in the bill as ‘psychoactive substances’. Serious flaws in its drafting / operation have been identified based upon the definition of psychoactive substances and the food exemption.

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HOW TO WRITE (BETTER) COMMITTEE SUBMISSIONS

*The Young Lawyers’ Criminal Law Committee has a proud and distinguished record of making submissions on issues of law reform and review. The Committee’s Submissions Co-ordinator, **Tom Barbat**, shares his tips on how to prepare contributions to Committee submissions.*

The two main types of submissions the Committee makes are:

1. Preliminary (or general) submissions, and;
2. Submissions in answer to a question paper.

Preliminary (or general) submissions

These can be very broad – there may be terms of reference / issues for discussion, but there are not any particular questions.

We have wide discretion as to what we submit on – but this means we have to tailor the issues.

Sometimes, and particularly where time is of the essence, a small number of experienced members of the Committee will be selected to write a short submission. There is no consultative process per se, but rather trust is placed in the hands of those who have consistently prepared high calibre contributions in the past.

At other times, the Chair or Submissions Co-ordinator will prepare a questionnaire for contributors to answer. This will then be used as the basis of the submission. The questionnaire will often be divided into one for those currently practicing in criminal law and another for those who are not. The former will focus more on practical issues, whilst the latter will be more theoretical.

Tips for responding to questionnaires:

- *Be honest* – your questionnaires will remain confidential and only the Chair and/or Submissions Co-ordinator will be privy to authorship. Honest and genuine responses are very helpful.
- *Be insightful* – reflect on your experiences and knowledge (regardless of your level of professional experience) and provide pertinent examples where appropriate.
- *Be succinct* – sometimes less is more.
- *Make a judgment call* – some questions will necessitate this. Sitting on the fence is okay if you are genuinely undecided on an issue. If this is the case, setting out reasons why you cannot decide will suffice. But if you have an opinion, we would love to hear it. It does not always have to correlate with which side of the fence you practice (or intend to practice) in – you are permitted to use your own value judgment.
- *Answer all the questions* – sounds obvious. If you are unable to answer a particular question, an explanation of why (for example, lack of experience) is a sufficient answer.
- *Justify your position* – even where it may seem obvious, an explanation of why you have a particular belief / opinion can be very useful to the editors.
- *Do not fret* – if you are struggling with a particular question, please do not hesitate to contact the Submissions Co-ordinator for guidance. If there is a question you would prefer not to answer (and do not wish to disclose why), just say, 'I would prefer not to answer this question'.
- *Do not worry too much about formalities* – we are looking for views and perspectives here. The Chair, Submissions Co-ordinator and selected Committee members will help draft and prepare the actual submission.

Question papers

Whilst question papers narrow the issues, submissions in response to question papers require detailed analysis and engagement with the questions.

Tips for responding to question papers:

- *Read the question paper* – if time permits, read the whole question paper, not just the section relevant to your contribution. They are often a few dozen pages long, but this will give context to the question/s allocated to you and they are a valuable learning tool.
- *Use the question paper* – often, bodies such as the New South Wales Law Reform Commission, who research and prepare the question papers, have done a lot of the hard work for us. For example, question papers often contain footnotes. In relation to your question/s, read cases / articles / legislation referred to in the footnotes where relevant to issues you are submitting on. This will enhance your knowledge and probably enhance your contribution.
- *Do not restate the question or contents of the question paper* – you can take it as assumed knowledge that the reader will have read them both.
- *Less is more* – again, pithy but pertinent contributions make for effective submissions. Sometimes a simple 'Yes' or 'No' is a sufficient and emphatic response, albeit only where the answer is patently obvious.
- *Use formal language* – without needing to be excessively formalistic, we aim to write our submissions in clear, concise, high-level English. The better the job done by the contributor, the easier it is for the Chair and Submissions Co-ordinator to synthesise and edit the submission.
- *Answer the question* – as obvious as it sounds, when proofreading your contribution try to

ensure that the question has actually been answered, rather than the issues raised by the question having merely been discussed.

- *Be responsive to the question* – there are times when it is clear that authors wish to make a number of points in their contribution which are not germane to the question/s they have been allocated. If you wish to make some general comments, please insert such a section at the end of your contribution (that is, separate from the question/s).
- *Do not fret* – if you are having difficulty, please do not hesitate to contact the Submissions Co-ordinator for guidance. If you are allocated a question/s that you simply do not feel you are able to properly answer, please raise your concerns with the Submissions Co-ordinator as soon as possible so that the question can be re-allocated.
- *Make a judgment call* – in addition to coming to a view yourself, it is important to stress that the question papers often demand judgment calls to be made by the Committee. A clear example of this is where the question starts with the word 'Should…' So, a response to such a question might begin as follows, 'The Committee is of the view that the Court of Criminal Appeal should be able to…'
- *Read previous submissions of the Committee* – this is a great way to get a feel for the style, tone and level of detail to use when writing your contribution. They are available on the Committee's website and are also distributed through the email list.
- *Use the pro forma submissions template* – this is simply a formatting consideration, but using the pro forma saves the editors having to re-format your contribution.
- *Do not fear the cutting room floor* – do not worry too much about what may become of your contribution. If the call you made does not seem to accord with the final submission, or your contribution has been largely or even entirely re-written, that does not necessarily mean you made the wrong call or did a bad job – it just might not have reflected the Committee's views as a whole.
- *Ask for feedback* – again, please do not hesitate to contact the Submissions Co-ordinator for feedback. If some of your contribution did not make the cut, and you would like to know why, we are happy to provide an explanation and even make suggestions for future contributions.
- *Adhere to deadlines* – contributors are usually given a few weeks to write their individual submissions. The editors are often left with a week or two to collate, review, synthesise and proof the entire submission. This is generally an immense task, and therefore it is important that you either meet the deadline or provide notice that you will not be able to. If you miss the deadline, the editors will proceed to write responses to the questions that were originally allocated to you.

Finalisation

Once all contributions have been received, they are collated into a single document. There is then an editing process whereby a number of experienced Committee members are selected to review the document and make substantive and stylistic suggestions before the final submission is approved by the Chair and submitted to the Young Lawyers Office Bearers for final review. Members of the Committee who have consistently made excellent contributions are likely to be selected as reviewers.

Conclusion

Making submissions is a valuable way in which members can contribute to the work of the Committee and to the legal professional as a whole. We are routinely cited by the New South Wales Law Reform Commission and other relevant organisations. We have even had members of our Committee appear before Parliamentary committees to give evidence in relation to Parliamentary inquiries. This reflects the quality of our submissions and the importance of our voice as a stakeholder in the New South Wales justice system.

There are a number of upcoming submissions in the pipeline, and we would like as many people to get involved as possible, regardless of professional background and/or experience. Keep an eye on the Crimlaw mailing list for more information about contributing to the next submission. Your efforts are always highly valued and our submissions would simply not be possible without your help.

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From the list…

Catherine Kirkpatrick compiles the highlights from the Criminal Law Committee's mailing list from August, September and October.

What can I do if the Roads and Maritime Service ('RMS') has imposed a different disqualification from what the Magistrate announced in court and I am out of time to appeal a Local Court decision?

Nic Angelov states:

If you believe there is nothing wrong with the Magistrate's orders, it may just be a matter of providing the transcript to the RMS. However, if it is not a question of a simple mistake, but rather the RMS purporting to correct 'wrong' orders, there is a broader issue at play. These issues were dealt with in *Fewel v DPP* (2010) 12 DCLR(NSW) 1 and *RTA v Higginson* [2011] NSWCA 151, where the RMS were castigated for overriding Court orders on their own accord.

The road transport legislation provides for disqualifications to apply by administrative fiat in certain circumstances. For example, where the court makes no order, and an automatic disqualification applies upon conviction, the RMS is within its power to impose the automatic period if the person is convicted. However, the RMS cannot, on its own accord, decide that a disqualification order of a court is 'wrong' and either ignore it or substitute it with some different decision. Any error with a court order, if one has been made, must be corrected within the judicial system.

If the RMS will not correct its decision in line with the Magistrate's orders, and its view is that there is some error with the Court's order, the onus should be on the RMS to withdraw any decision / action in conflict with the court's orders and, if it believes the orders are wrong, make an application to correct them. Your client is entitled to have the orders enforced / implemented as they were made, unless and until such time as they are lawfully changed.

Thomas Spohr also offered the following:

The fundamental question is do the orders in the record of the Court (JusticeLink) reflect the orders intended by the Magistrate at the time they were made?

If, having looked at JusticeLink, the Court file, and the transcript, you think order that has been entered into JusticeLink is not what the court intended, then you are in murky waters. You might have a difficult problem because the Local Court, for very technical reasons, does not have the power to correct its own record where those orders have been 'perfected'. In general, the rule is that a perfected order cannot be varied except on appeal.

Most people's first port of call is the 'slip rule'. Technically, assuming an order was legal and validly made, section 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) does not provide a solution. If the orders in the record of the Court do not entirely reflect the effect of the orders they 'announced' on the transcript but were otherwise valid, on its own, that does not show that the court imposed a penalty that was 'contrary to law'. If, with the benefit of hindsight, they might have made a different order, that will not help your client so long as the original orders were validly made. Nevertheless, very many courts may consider themselves (dubiously) to have 'inherent powers' under section 43 to correct things to accord with their 'actual' intentions.

If the orders on JusticeLink are wrong – You might be able to go to the Supreme Court, or the Court of Appeal (depending on a number of factors) and have the record of the Local Court corrected if you think it doesn't reflect the orders intended.

Be careful about this – it can be costly because your clients might end up bearing all the legal costs for both sides if you lose. You also want to be absolutely sure that the orders you are asking the court for are actually available to them.

If you are sure that the RMS has got it wrong – You might be able to seek declaratory, injunctive, or mandatory relief from the Supreme Court in its supervisory jurisdiction that the orders carried out by the RMS are different to the orders on the Court record. Again, be careful for costs reasons – and make sure you are across the quite-technical requirements for discretionary remedies if you go down that route.

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Committee update

Committee Chair, Alex Edwards, tells us about the launch of the Practitioner's Guide, upcoming trivia night, and Committee submissions.

Last meeting and trivia night

The Committee's last meeting for the year will be held on **27 November** (there will not be a December meeting for obvious reasons). There will probably some sort of social event after that, but mostly you should be locking in the date of our trivia night, which is **5 December**. Have you bought a ticket yet?

Launch of Practitioner's Guide online edition

Public Defender Craig Smith launched the online edition of the Practitioner's Guide to Criminal Law in September. It's been short listed for a Patron's Award this year, and you can see it for yourself at **www.crimlawguide.com.au.** It's a practical guide to all the fields of criminal law that a junior practitioner is likely to encounter. We've even made it mobile-friendly to accommodate the rise of tablets in court. Anyone can log in and leave comments on errors and changes to the law for the editors to review, and it's simple for us to go in and make the relevant changes ourselves.

A massive thanks to Patrick Gardner for developing the site, and congratulations to Rob Hoyles and his team of contributors for the great success of their project.

2014 One-Day CLE

The Criminal Committee is holding its One-Day CLE on 8 March 2014. We've got an absolutely stellar line-up, including Justice R A Hulme, Judge Peter Zahra, Magistrate Greg Grogin, Robert Sutherland SC, Dina Yehia SC, and Gabrielle Bashir. Lock this one in; you really don't want to miss it.

Criminal Law Committee Submissions

The Committee has responded to the Law Reform Commission's paper on criminal appeals and parole, and a Sentencing Council paper on standard non-parole periods. The Committee was invited to attend two stakeholder meetings at the Law Reform Commission in relation to the criminal appeals reference. I must give a huge vote of thanks to Thomas Barbat, who has stepped into the role of Submissions Coordinator (*and* Secretary!).

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Case note

Poidevin v Semaan [2013] NSWCA 334

By David Porter

Headnote

- Non-compliance with section 201 of *LEPRA* does not retrospectively affect whether a police officer has acted in execution of their duty for the purpose of resist arrest.

Procedural history

Previously, we covered the Supreme Court decision in *Semaan v Poidevin* [2013] NSWSC 226, relating to breach of the peace, resisting police, and the duty for police to give reasons. An appeal was made under section 52 of the *Crimes (appeal and Review) Act 2001* (NSW). The Court of Appeal has now handed down its decision in *Poidevin v Semaan* ('***Poidevin***'), upholding the decision of the Local Court.

Ratio decidendi

The Court of Appeal made multiple specific comments that the grounds upheld in the Supreme Court had not been argued before the Local Court. *Poidevin* is then not necessarily a conclusive disapproval of the appellant's arguments in *Semaan v Poidevin*, but rather a stern disapproval of raising new arguments on appeal.

In relation to honest and reasonable mistake of fact, the Court of Appeal stated that the parties on appeal did not raise this point. It was instead raised by the primary judge in the Supreme Court, and led to a further hearing. In *Poidevin*, it was conceded by the Appellant that the point had not been raised. Consistent with *He Kaw The v R* (1985) 157 CLR 523, the Court of Appeal found that this ground failed by virtue of not having been raised. No onus could lie on

the prosecution, and therefore no error on the part of the Magistrate.

The Court of Appeal also found that Mr Semaan was resisting a lawful police act, despite no reasons having been given for the act prior to the charge of resist. It found that non-compliance with section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (‘**LEPRA**’) cannot retrospectively affect the ‘in the execution of their duty’ element of resist officer. The Court of Appeal declined to express a view on what retrospective effect section 201 might have on the civil liability of police officers.

In relation to breach of the peace, and the associated police powers to stop or prevent same, the facts in Poidevin were found to support the police act in question – the temporary seizure of a mobile phone.

Obiter dicta

The Court of Appeal confirmed that the ‘reasonably practicable’ test in section 201 is an objective one. Further, it rejected Mr Semaan’s submission that the prosecution has a duty to lead evidence of the police officer’s views as to the practicability of giving reasons at the time of the exercise of police powers.

Justice Leeming also cautioned against a preference to reason via hypotheticals. Every case depends on its full complement of relevant facts, whereas hypotheticals are reverse-engineered to only contain chosen facts.

Conclusion

The primary effect of *Poidevin* is to remove the utility of running a section 201 argument as the basis of a voir dire on the elements of resist/hinder/assault police. However, section 201 remains a mandatory responsibility, and non-compliance is still relevant to the admissibility of subsequent evidence under section 138 of the *Evidence Act 1995* (NSW).

Poidevin is required reading for defence practitioners handling ‘execution of duty’ matters, but is worthwhile reading for anyone anticipating a trip to the Supreme Court on a question of law alone.

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Have an article idea? Join the *Amicus* team.

Contact:

amicus.newsletter@younglawyers.com.au

This is the final edition of *Amicus* for 2013.

This has been a big year for *Amicus*.

***Amicus* would not be possible without the hard work of its contributors and the feedback of its readers.**

Thank you for all the tremendous support *Amicus* has received. I am both extremely grateful and incredibly humbled.

Have a fantastic holiday and watch out for *Amicus* in 2014!

Liam, Editor.