

THE LAW SOCIETY OF NEW SOUTH WALES
youngLAWYERS

Practitioner's Guide to Criminal Law

About the Guide

This is the second online edition of the Practitioner's Guide to Criminal Law, an exciting initiative of young NSW criminal lawyers.

This edition was updated by a Senior Editorial Team throughout 2016-17 (Rob Hoyles, Rhonda Furner, Michael Tangonan, Simon Lipert and Sarah Maddox), adding to the work of over 50 contributors for the first online edition release in 2014-15.

Whilst this edition delivers a much needed update to the guide, we note that significant changes to the laws of Sentencing, Committals, Parole, High Risk Offenders, Driver Disqualification are proposed for late 2017 and early-mid 2018. This will require a further update to the guide, which remains an eternal work in progress.

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Chapter 1 - Checklist - When Your Client Is Charged

Overview and checklist of what to do if your client is charged

Introduction

This chapter is a basic guide to some of the things you should do if your client is charged. It is not an exhaustive list because the possibilities are too numerous to address all options.

In particular, this chapter does not deal with trials or sentences once a person has been committed to the District or Supreme Court (see **steps 6 and 7** to determine whether your client will be committed).

Checklist

1. **Get the Court Attendance Notice (CAN) for each charge, the Police Facts Sheet and criminal record**

from police, DPP or from client. If the matter involves a domestic violence allegation, the police should also make available by the first mention (or within a week of the first mention) the domestic violence 'mini brief' (complainant's statement, photos etc.)

2. **Find out - When is your client's next court date?**

Check on the CAN. If the first CAN date has passed, the surest way of finding out the adjourned date is to ask the registry of the Court where the first date was listed.

3. **Find out - Is your client in custody?**

a) Yes:

i. Does your client want to apply for bail (release application)? If so, see **chapter 3** on how to prepare and make a bail application. Check whether your client has already made a release application before a Magistrate and whether there are new facts or circumstances justifying a further application (s74 *Bail Act*).

ii. Find out whether your client is in custody for any other matters (e.g. bail refused on other charges or serving an existing gaol sentence). In addition to referring to an updated criminal history, to determine the dates and details of your client's custodial status, email the Department of Corrective Services, Sentence Administration at sentence.admin@dcs.nsw.gov.au (link sends e-mail).

b) No:

i. Is your client subject to bail conditions? If so, get a copy of the bail agreement from the client, DPP, police or the Court.

ii. Get instructions on whether your client has difficulty with, or wants to change, any bail conditions. If so - the principles in **chapter 3** apply to applications to vary bail conditions.

iii. Is your client subject to an interim or provisional AVO? See **Chapter 17** for limitations on their bail addresses or conduct.

PRACTICAL TIP: Some courts require defence practitioners to provide several days notice before a bail variation application will be heard. Others do not. The DPP often will require that notice of a bail variation is

given so that they can seek instructions from the police Officer in Charge. It is worth checking the practice of the court in which you are appearing before you give your client advice in this respect. A court to deal an application in relation to bail as soon as reasonably practicable.

4. **Find out - Was your client an adult or a child (when the offence was allegedly committed)?**

a) Adult - continue with **step 5**.

b) Child - go directly to **chapters 12 & 13**. Different procedures apply to child defendants. This checklist is written for adult defendants.

5. **Find out - Is your client brought before the Court by a warrant (as opposed to a fresh CAN)?**

a) Yes:

i. Check what type of warrant was issued and executed – an arrest or bench warrant or a warrant pursuant to s25(2) *Crimes (Sentencing Procedure) Act 1999*. The surest way to do this is to seek from the court registry a copy of the actual warrant (not the CAN that purports to summarise it). Do not trust the criminal record provided, especially if it is non-fingerprinted. You should also seek access to the bench papers to determine the history of the matter.

ii. You need to obtain the original CAN and Facts Sheet, not just the papers on the execution of the warrant. It is not uncommon for there to be multiple warrants executed in the same arrest so make sure you have all the necessary paperwork for each matter.

iii. If it is a s25(2) sentence warrant, you need to determine whether your client has been convicted in their absence pursuant to s196 *Criminal Procedure Act 1986* or the sentence warrant was issued following a plea of guilty. Again consult the bench papers to determine that history. If your client has been convicted in their absence, you will need to take instructions on whether to make an application to annul the conviction.

See **chapter 19** for how to lodge an annulment application.

b) No - continue with **step 6**.

6. **Is the alleged offence against Commonwealth law?¹**

a) Yes:

i. Find out whether the offence is being dealt with on indictment or summarily. Check with the prosecutor, or if the prosecutor is unavailable - look at the Act that creates the offence and ss 4G - 4J of the *Crimes Act 1914* (Cth).

ii. If being dealt with on indictment - ask the court to order a brief of evidence. After that, the charge will be for committal and procedures are as described in **step 7(c)**.

iii. If being dealt with summarily - discuss with the prosecutor whether a brief will be served before a plea is entered. If the prosecutor does not agree to do so, take instructions and be prepared to enter a plea on behalf of your client. Then go to **step 8**.

b) No – go to **step 7**.

7. **Find out - Is the client's most serious charge summary, an indictable offence that can be dealt with summarily, or strictly indictable?²**

See **chapter 4**, which discusses in more detail how you find out, and the meaning of the distinction.

a) Summary charge:

- i. Check that the charge has been laid within time.³
- ii. Take instructions and be in a position to enter a plea on behalf of the client at the first mention.
- iii. Go to **step 8**.

b) Table 1 charge (indictable that is dealt with summarily unless the prosecution or defendant elects to proceed on indictment) or Table 2 charge (indictable that is dealt with summarily unless the prosecution elects to proceed on indictment):

- i. Check that police prosecutors are appearing in the matter.⁴
- ii. If it is apparent the matter will proceed summarily, take instructions and be in a position to enter a plea on behalf of the client at the first mention. You have no right to see a brief of evidence before entering your plea (unless it is a domestic violence matter as mentioned above at **step 1**). Go to **step 8**.
- iii. If not, and the prosecution is going to elect - procedure is as for a strictly indictable charge, so go to **step 7(c)**.

c) Strictly indictable charge:

- i. Ask the court to order a brief of evidence - your client is not obliged to enter a plea until the brief has been served.
- ii. Once the brief of evidence has been served - take instructions in preparation for committal.
- iii. See **chapter 6** for details on the law of committals and how to run a committal.
- iv. Consider negotiation with the DPP - see **chapter 9**.
- v. Once the committal has happened, seek assistance from an experienced practitioner in preparing for the District Court trial or sentence.
- vi. If a charge is going to trial, you will usually be briefing counsel. See **chapter 22** for a guide on preparing a brief to counsel.

8. **Is there any way of treating your client as a 'special case' or diverting your client from the usual criminal process?**

a) Is your client mentally ill or developmentally delayed?

- i. Yes - see **chapter 10**.
- ii. No - go to **step 8(b)**.

b) Is your client drug addicted?⁵

- i. Yes - see **chapter 11**.
- ii. No - go to **step 8(c)**.

c) Consider any other intervention programs available that may assist your client, such as the Traffic Offenders Program, CREDIT, Forum Sentencing etc.

9. **Is there any possible advantage in negotiating with the prosecution?**

Think carefully about this step, because many cases are suitable for negotiation. **Chapter 9** discusses the various forms that negotiation may take.

10. Charge(s) being finalised in the Local Court:

a) If the client has entered a plea or pleas of guilty:

i. See **chapter 15** in relation to sentencing options available and how to prepare for sentence.

ii. Go to **step 11**.

b) If the client is defending some or all of the charges:

i. Once the pleas of not guilty have been entered, the court ought to have ordered a brief unless a brief is not required pursuant to cl 21 *Criminal Procedure Regulation 2010*. See under the heading 'Service of the brief in summary matters' in **chapter 4**.

ii If you are not experienced at running Local Court hearings, you will need to seek assistance from an experienced practitioner in preparing for the hearing.

iii See **chapter 14** for some tips on running a Local Court hearing.

11. After appearing for a client on a Local Court sentence:

a) Advise your client about their right to appeal against the severity of any sentence or against any conviction following an unsuccessful defended hearing. If you are of the view that the sentence was excessive or your client ought to have been acquitted, advise your client strongly to appeal.

b) In any event, if your client instructs you to, lodge the District Court notice of severity or conviction appeal (or both) in the Local Court Registry where your client was sentenced or assist your client to do so. See **chapter 20** for details of procedures and time limits and for advice on how to run a severity appeal.

[1] The vast majority of charges you will deal with will be offences against State law. The most common categories of Commonwealth offences are social security fraud, telephone/internet offences (using a carriage service to menace/harass/offend) and prohibited drug importation.

[2] Descending order of seriousness is: strictly indictable; Table 1; Table 2; and summary. The right hand side of the CAN will often indicate S1, T1 or T2 to indicate which category applies.

[3] Six months from the date of the alleged offence, unless a different time is specified under the Act creating the offence—s 179 Criminal Procedure Act.

[4] Only a very small proportion of Table 1 and 2 offences are the subject of election. In particular, it is not customary to ask the prosecution 'are you electing?' where a client's most serious charge is a Table 2 offence. If police prosecutors are appearing and no mention is made by them of an election, that is a clear enough indication that there is no election.

[5] Clients are often understandably reluctant to admit drug use or addiction (for reasons that include: perceived unlikelihood of getting bail if it is admitted and fear of exposing themselves to further charges). Accordingly you may wish to make it clear to your client that there may be advantages to being honest about any drug use, before taking instructions on this point.

Chapter 2 - The Role of the Lawyer at the Police Station

The Special Caution

Since 1 August 2013, the law relating to evidence that police can gather whilst a solicitor is visiting their client at the police station has changed.

The introduction of section 89A of the *Evidence Act 1995* (NSW) means that solicitors should be very cautious in deciding whether to visit their client at a police station.

We aim to provide a simplified explanation in this chapter, but this is not a substitute for reading the provision and applying it to the circumstances of your case.

Before the introduction of section 89A of the *Evidence Act*, a police officer was required to give a person of interest a general caution. That caution would state that the person had the right to remain silent, but that anything they did say could be used in evidence.

Section 89A of the *Evidence Act 1995* (NSW) has changed that provision. In certain circumstances, the police can caution your client that (a) the person does not have to say or do anything, but it may harm the person's defence if the person does not mention something when questioned something that the person later relies on in court, and (b) anything the person does say or do may be used in evidence. It is not necessary that a particular form of words be used in giving a special caution.

PRACTICAL TIP: A special caution can only be given in the presence of a legal practitioner who is, at that time, acting for the defendant. If there is a risk of a special caution, do not visit your client at the police station. If you are reading this in the waiting area of the police station, **leave now**.

When is there a risk of a special caution?

A special caution will only be given where the police officer had reasonable cause to suspect the defendant had committed a serious indictable offence (SIO). An SIO is an offence that carries a maximum penalty of 5 years' imprisonment or more.

Practitioners should be aware that:

- By attending a police station, they may enable the application of s89A where it previously could not apply, because **a special caution can only be given when an Australian legal practitioner is present**; and
- Whilst the provision requires that a legal practitioner is given a reasonable opportunity to consult about the effect of s89A in the absence of the police officer, junior practitioners should never undertake such a course without discussing it with a senior practitioner.

PRACTICAL TIP: A special caution will not apply to the questioning of a child.

Advice to your client via telephone

It is often beneficial to first speak with the OIC (Officer in Charge) or Custody Manager before obtaining instructions from your client. This will allow you to ascertain the charge or charges likely to be laid, the nature of the allegations against your client and whether your client has spoken with police. Perhaps more importantly, you should determine the police attitude toward bail and speak with the senior officer making bail decisions for your client.

Theoretically your client is to be provided with a private area to speak with you over the phone in confidence however that is rarely the case in practice. You should presume that any conversation between yourself and your client is being overheard by officers at the station.

Accordingly, only ask those questions you require immediate answers to. Some questions you may have for your client include:

- Whether your client has spoken with police and, if yes, what was the content of those conversations;
- What happened during arrest (keeping in mind that now is not the best time to discuss the substantive criminal charges); and
- Whether there has been any police misconduct, threats or promises.

You should obtain contact details for your client's close family and friends. You will need these details for a range of reasons – to arrange a surety should your client be granted bail, to organise accommodation whilst your client is on bail and, if represented on a private basis, to organise payment of your legal fees.

If your client is unable to provide contact details and the police have your client's mobile phone you can request contact details be provided to you by the Custody Manager.

If there is no risk of a special caution

The specific advice given to a client will depend on the unique circumstances of each case.

This chapter only deals with adult clients.

Special circumstances apply when juvenile offenders are concerned and one must refer to the *Children (Criminal Proceedings) Act 1987* (NSW) and the *Young Offenders Act 1997* (NSW), both of which are dealt with elsewhere in this guide.

Provisions relating to investigation and questioning after arrest

Before going to a police station or advising a client in custody, you must be thoroughly familiar with Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA') - the investigation and questioning provisions.

In general:

- It is unlawful for police to arrest a person for the purpose of questioning. However, once a person has been lawfully arrested for an offence, their detention can be extended for the purposes of investigation and questioning in accordance with Part 9 of *LEPRA*.
- Where a defendant does not attend court, and is found guilty of the offence, a court may issue a warrant pursuant to section 25(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) for their detention. The purpose of the warrant is to have the defendant brought before court as soon as practicable to be dealt with by way of conviction and sentence, or s 4 application. In the absence of any additional charge, there should be no investigation period and your client should be taken before a court as soon as reasonably practicable for the purpose of sentencing.
- Pursuant to s115 of *LEPRA*, the investigation period is determined by what is reasonable in all the circumstances, up to a maximum of six hours, subject to specific 'time out' periods. A 'time out' is a period in which the 'clock' does not run in determining the 'investigation period'. These 'time out' periods are described in s117 and examples include time spent communicating with a legal practitioner, time that is required to allow a legal practitioner to arrive at the place the person is being detained and time allowed for the person to receive any medical attention required.

Practitioners should study s117 before visiting the police station.

- Section 118(1) *LEPRA* provides that a police officer may, before the end of the investigation period, apply to an authorised officer (an 'after hours/on-call' Local Court Magistrate, Local Court Registrar, or an employee of the NSW Attorney-General's Department) for a warrant to extend the maximum investigation period beyond 6 hours.
- Section 118(3) of *LEPRA* enables the authorised officer to issue a warrant that extends the maximum investigation period of 6 hours by up to a further 6 hours. However, section 118(4) of *LEPRA* provides that the maximum investigation period cannot be extended more than once.

Initial contact

When the client or a police officer initially telephones you from a police station, you should advise the client not to answer any questions, say anything to police or make any statement. See practical tips.

During this telephone call you should try to speak to the Officer In Charge ("OIC") or informant of the investigation. If you plan to attend the police station you should inquire whether a special caution has been issued or will be issued (see sections above) and request that any further attempt to question the client about the offence is suspended until you arrive at the police station. This will probably lead to a 'time out' pursuant to s117. Alternatively if someone else (such as a family member) contacts you, you should telephone the client at the police station yourself and try to speak to the client and the police involved.

If you are not in a position to get to the police station at all, or you decide that it is not in your clients interest that you attend the police station, the police should allow you to speak to your client on the telephone. You can then discuss the matters set out below but in a more limited form due to the lack of face-to-face contact with the client.

PRACTICAL TIP: Be aware that a police station is often not a private and confidential environment. It is likely that your 'private' conversations with your client can be overheard by others, including for example the police custody manager in the charge room. If you are speaking with a client who has been charged with a serious offence such as murder, the cell area is also likely to be tapped by police.

Arrival at the police station

When you get to the police station you should try to speak to the OIC. At this time, you should ask the OIC the following questions so that you can understand the situation:

1. The nature of the allegation(s);
2. What the charge(s) will be;
3. The general nature of the evidence against your client at that particular point in time (for example, was your client caught "red handed"; are the police acting on statements of witnesses or are they following up on an investigation);
4. Whether your client has already spoken to police and what questions were asked;
5. Any relevant documentation including AVO paperwork (even though there may not be an obligation for the police to provide any documentation at that point in time);
6. If arrested by virtue of a warrant you should request a copy of the warrant and any associated documentation; and
7. What the attitude to bail is likely to be (although the determination as to whether police bail will be granted is usually made by a more senior officer at the station after the charges are settled).

Tips for surrendering clients to Police

Contact the OIC to find out whether the police wish to arrest your client or serve the Court Attendance Notice on your client without arrest (often called a Future CAN or No Bail CAN).

If the police intend to initiate proceedings by way of Future CAN or No Bail CAN, consider seeking instructions to receive service of the CAN on behalf of your client rather than exposing your client to a further interaction with the police.

If the police intend to arrest your client or you are aware there is a warrant for your client's arrest, you should:

- If possible arrange with the OIC a future time and place for arrest;
- Organise to enter your client into custody early in morning on a weekday at a NSW Police Station that is near the relevant Local Court. This will allow time for the formal charging process and accordingly time for the court to hear the matter on the same day;
- Identify the court and best time for your client to surrender themselves and consider whether that court has a quieter day of the week where there is a higher chance that the court will be able to deal with any bail application earlier, and more swiftly;

- Discuss any medical requirements with your client in advance (for example insulin injections, asthma sprays, HIV/AIDS tablets etc.) and speak to the OIC/Custody Manager about taking required medication into custody;
- You should advise your client to leave all personal possessions either at home or with a family member or friend. This includes jewellery and cash;
- You should advise your client that they ought to prepare their immediate affairs before attending the police station in the event that he/she has their bail refused; and
- If your client is going to offer that their passport be surrendered to the court as a condition of their bail, ask the client to have it readily available for surrender.

Initial contact with your client

You can ask the OIC or custody manager for time with your client to take instructions and to provide advice. At this time the OIC should provide you with a room so that you are able to speak privately with your client.

PRACTICAL TIP: Some clients are affected by drugs or alcohol, or are aggressive when in custody. If there is some suggestion of this, consider your safety first before being left alone with an accused person and consider whether you should take instructions. Sometimes an accused person in this state will not believe you are acting in their best interests and you should wait for them to regain their faculties before taking instructions.

Some of the questions you may want to ask your client include:

- What happened at the time of arrest?;
- What the police have spoken to your client about? This includes any questions that were asked by the police and any answers given by your client;
- Has your client has already made any statements or comments to police?;
- Was there any mistreatment by police?; and
- Have police made any threats, promises or inducements to your client in relation to cooperating with police or making admissions? For example, police sometimes use the question of bail to pressure persons in custody to assist them in the investigation.

If your client is injured in custody, you should, at the very least, make a note of the injuries or complaints of pain by your client. **If permitted to do so, it is a good idea to photograph any visible injuries.** This may be crucial evidence in the proceedings if the injuries are related to the criminal matter.

The particular circumstances will determine whether you speak to your client about the charges. If you speak to your client about the allegations, you will also want to consider the extent to which you speak about them at this early stage.

After getting the details suggested above you should be in a position to advise your client about what steps they should take from that point on.

Electronic interviews with police and identification parades - to participate or not?

Assuming your client has not been given a special caution, your client has a right to silence. As a very general rule, it is often in your client's best interests not to make any statements, say anything, provide any information, or write anything down, until they completely understand the nature of the charge against them and have had the opportunity to discuss it fully and privately with their lawyer.

In serious matters, where a brief of evidence will be served, it is often more advantageous to wait until the brief of evidence is served before your client decides whether to say anything or make any response to the Crown case.

There are some circumstances in which there may be a positive obligation on your client to divulge certain information. This may be where they have been involved in a car accident and have a 'form of demand' placed on them as the driver or registered owner etc. pursuant to *LEPRA*. Consult a more senior practitioner prior to inviting your client to divulge such material.

ERISP (Electronically Recorded Interview)

There are many considerations involved in advising your client to participate in an electronically recorded interview (known as an ERISP).

Some of the disadvantages of taking part in an ERISP include:

- It may be that the police will be unable to prove their case against your client without some facts being conceded at the interview. There is a very real risk that by participating in an interview with the investigating police the client will be providing evidence to the prosecution that may otherwise be unattainable.
- Admissions to things that seem small or insignificant to an accused person, such as where they stayed on a particular night, whether they visited a particular place or whether they were with a particular person, will assist the police to further their inquiries in building a case against the accused where there may not otherwise be any evidence.
- Any oral admissions made before the recorded interview are generally not admissible in relation to Table 1 and strictly indictable offences (s 281 *Criminal Procedure Act 1986* NSW)). One of the ways that police seek to make these admissions admissible is by asking suspects to adopt the making of the earlier admissions by them in the recorded interview. Without this adoption, it may be that the earlier admissions will not be admissible.
- The police may use a voice track from an ERISP to match to telephone intercepts recordings or SD recordings.
- The police may use the video for facial mapping or body mapping expert reports.
- The police may record unusual habits, identifying marks, features or injuries of your client that are otherwise unknown.
- Evidence taken or admissions made by your client during the ERISP may be out of context and may not aid your case.
- At this early stage of proceedings against your client, neither you nor your client will be fully apprised of the prosecution case.

- Your client is likely to be in a stressed state, may not have had much sleep, may be intoxicated or hung-over and generally not in a good state to participate in an interview with police.

On the other hand, on some occasions it may assist your client to make a statement to police. For example, your client may have a totally innocent explanation for the conduct under suspicion, or the interview may give rise to a defence such as self-defence or honest and reasonable mistake. However, that will be a very rare case.

Identification parades and ‘line ups’

No suspect can be forced to participate in an identification parade (line-up). If, however, a suspect refuses to take part in an identification parade then visual identification or picture identification may be used as described in s114 and s115 of the *Evidence Act 1995* (NSW). If you are present with your client at the time of their ERISP or identification parade, you will be able to monitor how these are performed and assist your client if there are problems. On the other hand, the access to legal advice and presence of a legal representative during investigative procedures is likely to make exclusion of admissions or other evidence obtained as a result more difficult.

Timing of identification parade/ERISP

There is no obligation that an ERISP or identification parade must be conducted at the time of arrest. These procedures can usually be conducted at a later time. Therefore, another option is to advise your client to postpone making an ERISP or participating in a line up until they have had the chance to get more complete advice from their lawyer.

Your role in assisting a client in a police interview

If your client wants to take part in an ERISP it is important that you know that your role is to look after your client's best interests, and not merely to be a passive spectator. This role may require that you object during the interview to the manner and/or form of questioning. For example, you should ensure that the police do not ask any leading questions. At the end of the interview a senior officer will come in to the interview room. This officer has the role of asking your client to adopt/accept the recording of the interview and to put on record that there was no impropriety by the questioning officer.

If you believe there have been any improprieties by the police then it is during this time that you are able to put it on record and bring it up with the senior officer who is not related to the investigation.

However, it is important to be aware that if your client elects to participate in an interview with police whilst you are present as their legal representative, it will likely be more difficult to exclude any admissions on the *voir dire* later at trial or defended hearing.

Recording a refusal to take part in a record of interview on ERISP

If your client instructs that he or she wants to uphold their right to silence and therefore do not wish to participate in a record of interview, there is no requirement for that to be recorded on the ERISP machine. Investigating

police will often request that the 'refusal' to participate in a record of interview be recorded on video and audiotape.

Your client should be advised not to do this, and not to go into the interview room at all, as investigating police frequently go beyond their stated intention and will ask questions about the allegations. Sometimes police will use a handheld audio recording device to record a refusal or interview your client whilst they are still in the dock in the charge room.

It is a good idea to warn your client about this and advise your client to remain firm if they wish to exercise their right to silence.

PRACTICAL TIP: Some police believe they have a right to force a recording of a refusal to interview, particularly for Table 1 or strictly indictable offences. If the police persist, ask to speak to the Custody Manager. It is preferable if pressed for your client to sign a police notebook in your presence, which states that the accused was offered an interview but declined. This protects the officer from any later claim that the accused was not offered an interview, yet ensures that your client does not go beyond stating what he wishes to say. Alternatively, you can send an email or letter to the OIC to confirm in writing that your client was offered an opportunity to be interviewed but declined.

Forensic procedures

Forensic procedures are discussed in detail in **chapter 8** of this book.

Bail

If your client is to be charged you should enquire with the OIC as to his or her attitude to bail. The process by which police determine bail is covered in ss33-39 and 43-47 of the *Bail Act 2013* (NSW). In determining whether bail is appropriate they are required to apply the provisions of the *Bail Act 2013*(NSW) in the same way a Court is. **Also refer to Chapter 3 for Bail.**

Warning your client against speaking to police after formal processes have been completed

After the formal processes the client should be advised not to make any further comments at all to police. Any further comments to the police may be taken by a Court as being outside of the scope of official questioning and may be potentially admissible at a hearing at trial (see *Kelly v R* [2004] HCA 12).

It seems that the protection of the accused against the 'verbal' is slowly dwindling away - see *R v Bryant* [2011] NSWCCA 26 where a claim by a police officer that a spontaneous but unrecorded admission was made in a charge room was admissible in evidence.

Complaints at the police station

If you are not given access to your client or if the police are being obstructive when you are trying to speak to your client you should ask to speak to the OIC of the police station (often referred to as the supervisor) so that

you can make an immediate complaint. Be sure to document your concerns and make a detailed file note of any unacceptable interactions that occur with a police officer.

Becoming a witness in your client's case

When you go to a police station and are involved in your client's case at that early stage, you should be mindful that you could potentially become a witness in your client's case. This may be because of what took place before their arrest or at the police station which may become relevant in Court.

For example, matters to do with the identification parade or the conduct of police during the ERISP. For these reasons it is important for you to make detailed notes of what takes place at the police station.

It is also important that you have a detailed understanding of the Solicitors Rules.

Follow up

Regardless of whether your client has been granted bail or remains in custody, you should contact your client as soon as practicable. A client who is refused police bail must be taken before a court as soon as practicable for a court to determine the question of bail.

Chapter 3 – Bail

The *Bail Act 2013* (NSW) (*Bail Act 2013*) summarises the law of bail in NSW.

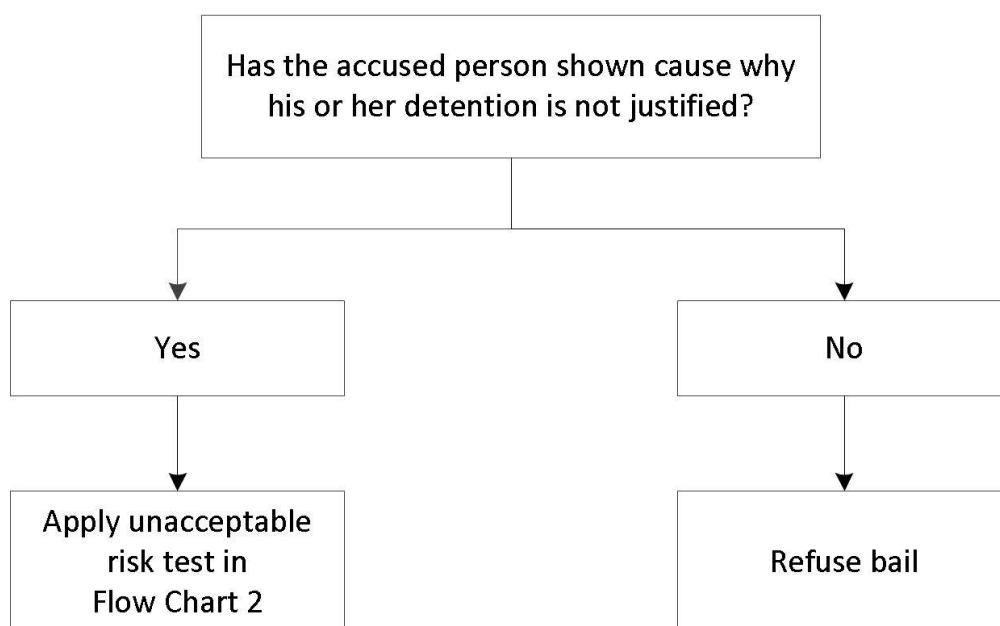
Bail is the process that considers whether or not people are released from custody while they are waiting for their matter to be determined by a court.

The current bail system is based on a two-limb system. If the offence is a 'show-cause offence', then the onus lies on the accused person to show that his or her detention is not justified (Section 16A).

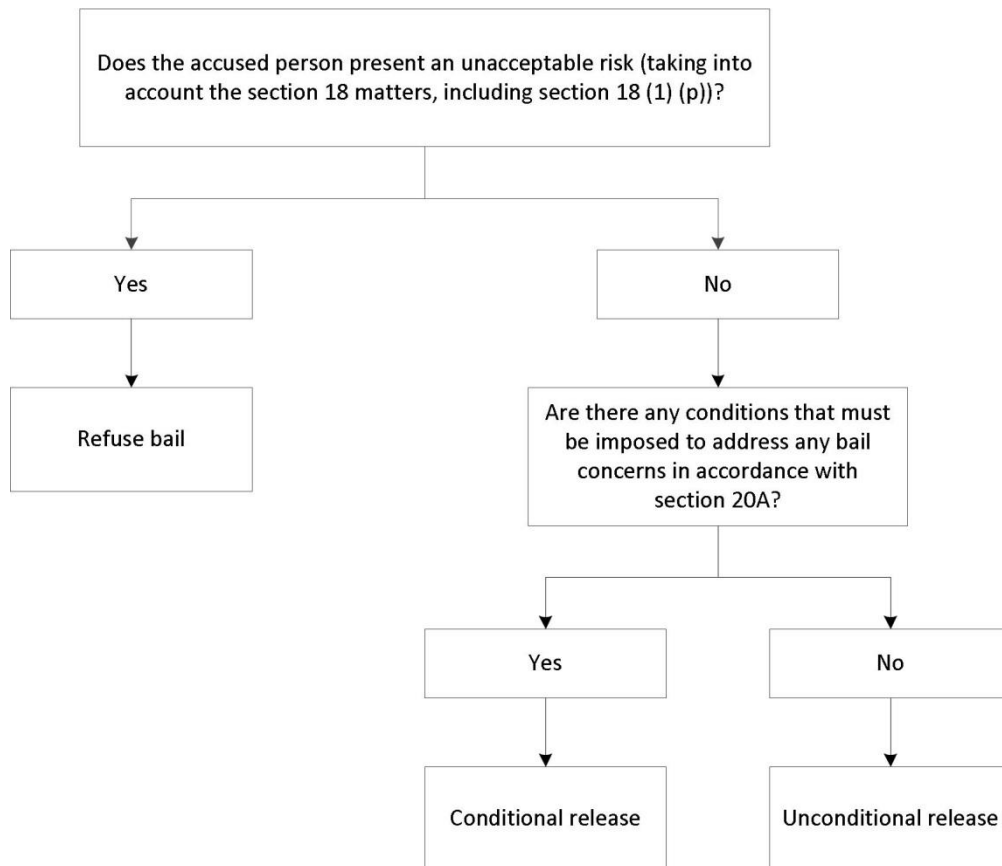
If the offence is not a show-cause offence, then you move directly to consider whether there are 'bail concerns'. Also note whether your client's offence is an offence which has a right to release (Part 3, Division 2A).

The two-limb test is illustrated as follows (Charts courtesy of Office of Parliamentary Counsel NSW):

Flow Chart 1 - Show cause



Flow Chart 2 - Unacceptable risk test



A bail authority for the purpose of this chapter, is a police officer, an authorised justice or a person who exercises criminal jurisdiction at court (see Section 4 of the *Bail Act 2013*).

Show Cause

A Show Cause offence is an offence listed in Section 16B of the Act. Practitioners who appear in bail applications should look at Section 16B and carry a copy of it with them. It lists a number of offences, or circumstances, in which a person must '*show cause*' as the first step to getting bail.

Some of these (although this list is not exhaustive), include:

- Any serious indictable offence (an offence carrying 5 years imprisonment or more as a maximum penalty) whilst on bail, or whilst on parole (Section 16B(1)(h));
- An offence punishable by life imprisonment (Section 16B(1)(a));
- Sexual intercourse by a person over 18 against a person under 16 (section 16B(1)(b));
- A serious personal violence offence (an offence under Part III of the *Crimes Act 1900* (NSW) which carries 14 years imprisonment or more as a maximum penalty) where the accused person has a previous conviction for serious personal violence offence (Section 16B(1)(c));
- Some firearms and weapons offences (Section 16B(1)(d)&(e);

- An offence for supplying, cultivating, possessing, importing or manufacturing a commercial quantity of a prohibited or serious drug under NSW or Commonwealth law (Section 16B(1)(f)&(g));
- Any indictable offence or breach offence committed whilst on a supervision order; (Section 16B(1)(i));
- Any attempt offence or offence arising from accessorial liability in relation to any of the above offences (Section 16B(1)(j)&(k)).

Exceptions

The Show Cause legislation does not apply to children under the age of 18 at the time of the offence (Section 16A(3)). When dealing with a bail application in children's matters go straight to considering 'Bail Concerns'.

Bail Concerns

The court must consider bail concerns before making a bail decision (Section 17(1)).

A Bail Concern is a concern that an accused person, if released from custody, will:

- Fail to appear at any proceedings for the offence, or
- Commit a serious offence, or
- Endanger the safety of victims, individuals or the community, or
- Interfere with witnesses or evidence.

When a bail authority is determining whether there are bail concerns, he or she are to consider the following matters, and only the following matters, in deciding whether there is an unacceptable risk:

- The accused's background, including criminal history, circumstances and community ties;
- The nature and seriousness of the offence;
- The strength of the prosecution case;
- Whether the accused person has a history of violence;
- Whether the accused person has previously committed a serious offence while on bail;
- Whether the accused person has a pattern of non-compliance with bail acknowledgements, bail conditions, apprehended violence orders, parole orders or good behaviour bonds;
- The length of the time the accused is likely to spend in custody if bail is refused;
- The likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;
- If the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before the court, whether the appeal has a reasonably arguable prospect of success;
- Any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment;
- The need for the accused person to be free to prepare for their appearance in court or to obtain legal advice;
- The need for the accused person to be free for any other lawful reason;
- Whether the accused person has any criminal associations;
- In the case of a serious offence, the views of any victim, or any family member of the victim, to the extent that if released from custody the accused person will endanger the safety of the victims, individuals or the community.

Application of the unacceptable risk test

The court must refuse bail if it is satisfied that on the basis of these bail concerns, there is an unacceptable risk of any of the bail concerns occurring.

If there is no unacceptable risk

= bail should be granted - either with conditions, unconditionally or dispense with bail (Section 20)

If there is unacceptable risk that cannot be mitigated

= bail should be refused (Section 19)

Bail Conditions

Where the court decides to impose a bail on an accused person, the court must comply with Section 20A. The bail condition must be:

- Reasonably necessary to address a bail concern; and
- Reasonable and proportionate to the offence to which bail is granted; and
- Appropriate to bail concern in relation to which it is imposed; and
- No more onerous than necessary to address the concern in relation to which it is imposed; and
- Reasonably practical for the accused to comply with, and;
- The bail authority must be satisfied that there are reasonable ground to believe that the condition is likely to be complied with.

Bail Applications

on an accused person appearing in court in custody the prosecutor can make a detention application for the refusal, granting (with or without bail conditions) or revocation of bail for an offence (section 50). In such circumstances, submissions should be made by the prosecutor and defence regarding whether an unacceptable risk exists, and if so, whether it can be mitigated by bail conditions.

It is important to note that a court is not to hear a detention application unless satisfied that the accused person has been given reasonable notice of the application by the prosecutor.

Alternatively, the defence can make a release application for bail for the offence to be granted or dispensed with (section 49). In such circumstances, submissions should be made by the defence and prosecutor addressing any bail concerns and whether unacceptable risk of a bail concern occurring can be mitigated by bail conditions. A prosecutor may oppose a release application without making a detention application.

Restrictions in the Making of Bail Applications

Section 74 of the *Bail Act 2013* provides that a release application cannot be made after bail has been previously refused for the offence, unless there are grounds for a further release application.

The grounds for a further release application are:

- The person was not legally represented when the previous application was dealt with and the person now has legal representation;
- Information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application;
- Circumstances relevant to the grant of bail have changed since the previous application was made;
- The person is a child and the previous application was made on the first appearance for the offence.

Bail Conditions

Conduct Conditions

- Under Section 25 of the *Bail Act 2013*, bail conditions can impose conduct requirements on an accused person. A 'conduct requirement' is a requirement that the accused person do or refrain from doing something, for example, an accused should report to the police every day/
- A self-surety is a Security Condition (see below) not a conduct condition.

Enforcement Conditions

An enforcement condition is a bail condition that requires the person granted bail to comply with specified kinds of police directions which are given for the purpose of monitoring or enforcing compliance with an underlying bail condition.

An enforcement condition can only be imposed by a court and only at the request of the prosecutor in the proceedings.

Section 30(5) provides that an enforcement condition can only be imposed if the court considers it reasonable and necessary in the circumstances, having regard to the following:

- The history of the person granted bail (including criminal history particularly history involving serious offences or a large number of offences);
- The likelihood or risk of the person committing further offences while at liberty on bail;
- The extent to which compliance with a direction of a kind specified in the condition may unreasonably affect persons other than the person granted bail.

Accommodation Condition

Section 28 provides that a bail condition imposed by a court or authorised justice on the grant of bail can require that suitable arrangements to be made for the accommodation of the accused person before he or she is released on bail.

An accommodation condition can only be imposed if the accused person is a child.

The court responsible for hearing bail proceedings must ensure that a matter where an accommodation condition is imposed is re-listed for further hearing at least every 2 days until the accommodation requirement is complied with.

The court may direct an officer of a Division of the Government Service (FACS) to provide information about action being taken to secure suitable arrangements for accommodation of the accused person.

Security Condition

Section 26, provides that a bail condition can require security to be provided for compliance with a bail acknowledgement. This includes an agreement for the accused person or an acceptable person to forfeit a specified amount of money or a requirement that a specified amount of money be deposited with the bail authority.

Section 26(5) provides that a security requirement can only be imposed for the purpose of mitigating an unacceptable risk that the accused person will fail to appear at any proceedings for the offence.

It should be noted that a bail authority is not to impose a security requirement unless the imposing of one or more conduct requirements (see above) is not likely to achieve the same purpose.

Deferral of Bail Determinations

Section 56 provides that a court or authorised justice may defer making a bail decision if an accused person is an 'intoxicated person'. In such cases, the court or authorised justice may adjourn the hearing for not more than 24 hours, and remand the accused person in custody.

Intoxicated person is defined in Section 4 of the Act. An intoxicated person means a person who appears to be seriously affected by alcohol or another drug or a combination of drugs.

Variation of Bail

Section 51, allows an application to vary bail. A variation application can be made by the accused person, the prosecutor, the complainant in a domestic violence offence or the person in need of protection (PINOP) of an ADVO, or the Attorney-General.

The Act does not restrict the timing of a variation application. However, reasonable notice must be given of the application to the accused person if made by a person other than the accused. If an application is to be made by the accused person, a complaint in a domestic violence offence or a PINOP in an ADVO, reasonable notice must be given to the prosecutor.

It is important to note that a Local Court may hear a variation application for an offence if a bail decision for the offence has been made by a higher court (section 64(4)). However, such an application can only be made with the consent of the accused person and the prosecutor (section 57).

Stay of Bail

Section 40 of the Act provides that upon a Court granting or dispensing bail for a serious offence on the first appearance the bail is stayed if:

- A police officer or legal practitioner acting for the Crown immediately informs the court or authorised justice that a detention application is to be made to the Supreme Court, and
- A copy of written approval of an authorised officer or the Director of Public Prosecutions to make a detention application to the Supreme Court is provided to the court or authorised justice.

The stay has effect until one of the following occurs:

- The Supreme Court affirms or varies the decision or substitutes another decision for the bail decision or refuses to hear the detention application, or
- A police officer or someone acting for the Crown files notice that the Crown does not intend to proceed with the detention application, or
- 4pm on the day that is 3 business days after the day on which the decision was made.

Supreme Court Bail - Practice Note Amendments

To refine the Supreme Court Bail Process a practice note (*Practice Note SC CL 11 - Bail*) has been effective since 7 March 2016 with the intention of streamlining the process. Now there are strict timetables to be observed before the matter will come before the Supreme Court. If these are not complied with the matter will not be heard. The applicant is required to file a '*Release or Variation Application to the Supreme Court of NSW*' form (or in the case of the prosecuting authority a '*Detention Application to the Supreme Court of NSW*' form) which is available from the Supreme Court of NSW website. It has to be pointed out that if the bail application is not "completed in its entirety", it will not be accepted for filing.

On receipt by the Registry (by physical delivery to the Registry, or by email, fax or post), a hearing date and a call-over date (the Monday before the hearing date) before the Registrar will be set.

The prosecuting authority (ODPP) will on request provide a copy of the Court Attendance Notice (CAN), statements of facts and the applicant's criminal record.

At the call-over, the Registrar will determine whether the application will proceed to the hearing date, whether an adjournment is required or whether the Bail application is to be withdrawn. This stage is dependent on the applicant's legal representative filing a 'Notice of Readiness to Proceed' before 2pm on the Friday before the call-over. If it is not filed by that time the hearing date may be vacated. Self-represented applicants are not required to complete a Notice of Readiness to Proceed and their matter will not be listed in the call-over.

Any materials that will be relied on in the hearing must be filed with the Registry and served no later than 4pm on the day preceding the hearing date, provided to the court after the cut off time-will only be accepted at the discretion of the presiding judge.

It has to be remembered that a 'material change in circumstances' is required for the bail application to be considered on its merit.

Chapter 4 - Criminal Procedure

The purpose of this chapter is to provide a general overview of the way in which the various types of offences proceed following charge.

This chapter should be read in conjunction with **Chapter 2 – At the Police Station** especially when relating to the client's *Right to Silence* and the exercising of special cautions.

The [Criminal Procedure Act 1986 \(NSW\)](#) (CPA) contains provisions relevant to the administration of criminal matters in every jurisdiction in NSW.

Practitioners must thoroughly familiarise themselves with the relevant chapters of the CPA.

Some of the important parts of the CPA are:

- The distinction between summary and indictable offences ([ss 5-6](#)).
- The procedure for the progress to finality of summary matters (see [Chapter 4](#) of the CPA respectively) and of indictable matters ([Chapter 3](#) of the CPA).
- The summary disposal of indictable matters by the Local Court ([Chapter 5](#) of the CPA).

Initiating criminal proceedings

All proceedings for an offence are to be commenced by the issuing and filing with the court of a court attendance notice (CAN) by a police officer, public officer or other authorised person ([ss 47, 172, 173 and 174 CPA](#)). The court attendance notice is to be filed with the court registry before the matter is listed ([s 177\(4\) CPA](#) and [r 8.7 Local Court Rules 2009](#) (NSW)).

Proceedings are taken to have commenced on the date on which a court attendance notice is filed at the relevant court registry ([s 178 CPA](#)). The court attendance notice, which includes a description of the offence, the particulars of the alleged offence, and the court date, time and place ([s 175 CPA](#)), must be served on the accused ([s 177 CPA](#)).

In this chapter, the word 'charge' is used for convenience to refer to the initiating process for criminal prosecution

Types of offences

Charges may be classified as being for offences in one of three categories:

1. Summary offences (always dealt with in Local Court); or
2. Indictable offences that may be dealt with summarily (that is, in the Local Court or the District Court if the prosecution (or in some cases, the accused) elects to do so); or
3. Strictly indictable offences (offences that commence in Local Court but can only be finalised in District Court or Supreme Court).

Relevance of categorising offences

The first step in preparing a client's matter is to look at a client's charge(s) and determine where the client's most serious charge falls in terms of the three types of charge listed above.

This is because different categories of offence are dealt with differently. For example:

1. A person accused of a strictly indictable offence has a right to be provided with the prosecution's brief of evidence before being asked to respond to the charge. An accused has no such right in summary matters - whilst the court orders a brief for most summary matters, the case will not always be delayed for the brief to be served duly on the accused.
2. A time limit (usually six months - see below) applies to the bringing of charges for summary offences. There is generally no time limit on indictable offences (including indictable offences that can be dealt with summarily).

The relevance of the different categories of offence and how they are dealt with differently are described further below.

Summary offences

Background

Summary offences are generally less serious offences such as offensive language ([s 4A Summary Offences Act 1988 \(NSW\)](#)). A summary offence is to be finalised before a Local Court ([s 7 CPA](#)) by a Magistrate sitting alone. Certain offences must be dealt with summarily ([s 6 CPA](#)), being:

- An offence required to be dealt with summarily under the CPA or any other Act;
- An offence described as a summary offence under the CPA or any other Act;
- An offence for which the maximum penalty available does not include imprisonment for two years or more (unless the offence is required to be dealt with on indictment under the CPA or any other Act);

Time limits apply to commencing proceedings for a summary offence. A charge in connection with a summary offence may only be made or laid within six months from the time when the offence was alleged to have been committed ([s 179 CPA](#)), unless a different period is specified in the Act that creates the offence.

PRACTICAL TIP: If you are dealing with an Act you are unfamiliar with and the charge appears summary and laid outside of 6 months, check the Act carefully. For example, the [Firearms Act 1996 \(NSW\)](#) extends the time for commencing proceedings pursuant to that Act to 2 years, but the provision is hidden towards the end of the Act in [section 85](#). The practitioner should be aware that certain summary offences (e.g. some traffic offences) do not require a brief of evidence even when a plea of not guilty is entered (see [clause 21, Criminal Procedure Regulation 2010 \(NSW\)](#)).

Indictable offences that may be dealt with summarily

Background

Certain indictable offences can be dealt with summarily by Local Courts ([Chapter 5 CPA](#)). These are specified in [Schedule 1](#) of the CPA and fall into two categories: Table 1 offences and Table 2 offences ("table offences"). It

is usual that the CAN given to the accused by the Police will usually indicate the relevant Table either as 'T1' or 'T2'. You should always check for yourself that this is correct.

For some offences whether a matter is a table offence included in Table 1 or Table 2 or a strictly indictable offence will depend on particulars of the offence (for example, some drug offences will depend on the weight of the drug).

For Table 1 offences, the matter is to be dealt with summarily unless either the prosecution or the accused may elect to have the matter dealt with on indictment ([s 260\(1\) CPA](#)).

For Table 2 offences only the prosecution can elect to have the matter dealt with on indictment ([s 260\(2\) CPA](#)).

It is important to note that unlike summary offences, an indictable offence dealt with summarily, proceedings do not have to commence within the six-month time limit ([s 179\(2\)\(b\) CPA](#)).

Note that these limitations apply for all offences dealt with in the Local Court:

- The maximum fine the Local Court can impose is 100 penalty units ([s 267\(3\)](#) and ([268\(2\) CPA](#)). A penalty unit is presently \$110.00 ([s 17 Crimes \(Sentencing Procedure\) Act 1999 \(NSW\)\(CSPA\)](#)).
- The maximum gaol term that the Local Court can impose for an individual offence is two years imprisonment (ss [267\(2\)](#) and [268\(1A\) CPA](#) for Table 1 and 2 offences, respectively).

PRACTICAL TIP: The procedure below is updated in accordance with the Local Court Practice Note 'Crim 1' which outlines the timetables currently followed in the Local Court. Practice notes change regularly and you should check the Local Court website for the latest procedure.

Service of the brief and making of election

Table matters (offences falling under Table 1 or Table 2)

For a table offence the prosecutor (Table 1 & 2 offences) or the accused (Table 1 offences only) may elect to have the matter heard on indictment.

If there is no election decision and a plea of not guilty is entered, a brief order is made (See below).

If there is a plea of guilty, the prosecution is entitled to a two week adjournment to consider whether to make an election, and the facts are not tendered.

Election for an offence must be made within the time specified by the court ([s 263\(1\) CPA](#)), which is generally on the first return date after brief orders are made (usually the second mention). If not, the matter is proceeded summarily.

Standard brief orders

If a plea of not guilty is entered, the Magistrate orders:

1. Service of the prosecution brief of evidence upon the accused in 4 weeks; and
2. Adjourn the proceedings for mention for reply in 6 weeks, allowing 2 weeks for the accused to construct their reply.

This applies in all matters other than those mentioned in [clause 21](#) of the *Criminal Procedure Regulation 2010* (NSW), which do not require a brief of evidence (including some minor fine only offences, some PCA (Prescribed Concentration of Alcohol) charges etc).

See *Local Court Practice Note Comm 1*

Second mention

On the second mention, the practice note requires the Magistrate to set the matter down for hearing. This happens irrespective of whether the brief has been served in compliance with court orders.

- Adjournments can be sought when it is in the 'interests of justice' only.
- Failing to provide a brief is specifically noted as a matter that of itself will not justify the matter to be further adjourned.

Note that the accused's chance to make an election expires after the commencement of the taking of evidence for the prosecution in the summary trial, or in the case of a guilty plea, after presentation of the facts relied on by the prosecution to prove the offence ([s 263\(3\)](#) CPA).

If an election is made, the matter proceeds in accordance with the Committals practice note *Local Court Practice Note Comm 1*.

What if the prosecution elects to proceed on indictment?

If the prosecution elects to proceed on indictment, then prosecution of the charge(s) is handed over from the police prosecutors to the Office of the Director of Public Prosecutions (ODPP). In practice, you will rarely be sent formal notice stating that the ODPP has taken over carriage of a matter.

Guideline 8 of the [Office of the Director of Public Prosecution's Prosecution Guidelines](#) states that (with the exception of standard non parole period offences which are contained in the [Table in Part 4 Div 1A of the CSPA](#)) an election should not be made unless:

- The accused person's criminality (taking into account the objective seriousness and his or her subjective considerations) could not be adequately addressed within the sentencing limits of the Local Court; and/or
- For some other reason, consistent with the Guidelines, it is in the interests of justice that the matter not be dealt with in the Local Court (for example, if a comparable co-offender is to be dealt with on indictment).

If the prosecution has decided to make an election to have the matter dealt with on indictment, you can make representations to the ODPP to have the election withdrawn. See **chapter 9** in relation to negotiating with the prosecution.

Factors for an accused to consider in deciding whether to make an election

The benefits to the accused of having the matter dealt with summarily include:

- The maximum period of imprisonment for a single T1 and T2 offence is 2 years (ss [267\(2\)](#) and [268\(1A\)](#) CPA respectively).
- The limit of consecutive sentences is 5 years, with some exceptions ([s 58\(1\)](#) CSPA). The District and Supreme Courts have no such limitation.
- There is a right of appeal from the Local Court to the District Court against conviction and/or severity of sentence. The District Court Judge determines the case as if hearing the case for the first time and is not limited

by the reasoning of the Local Court Magistrate. By contrast, the rights of appeal to the Court of Criminal Appeal from the District Court are limited and generally require the appellant to demonstrate an error of law.

- It is not uncommon for clients who are sentenced to imprisonment in the Local Court to be granted bail by the sentencing Magistrate while awaiting the hearing of the appeal to the District Court. By contrast, an appellant from the District or Supreme Courts to the Court of Criminal Appeal may apply to the Supreme Court for bail which the Court has discretion to allow or decline (see [s 66 Bail Act 2013 \(NSW\)](#) and the [Supreme Court Practice Note SC CL 11 - Bail](#) for procedural aspects).
- See further **Chapter 3** in relation to bail.

For these reasons, it is rare for an accused to elect to have matter(s) dealt with in the District Court if charged with Table 1 offence(s).

Strictly indictable offences

Strictly indictable offences are the most serious category of offences in the criminal justice system.

Strictly indictable offences, such as murder and manslaughter, commence in the Local Court until the accused is committed for trial or sentence to the District or Supreme Court.

Strictly indictable offences will proceed to the District Court or the Supreme Court unless alternate less serious charges are preferred by the prosecution.

See **Chapter 9** in relation to negotiating with the prosecution.

Shortly after an accused is charged with a strictly indictable offence the matter will be listed before the Local Court for the first mention of the matter.

Progress of strictly indictable offences

For a detailed description of the way in which strictly indictable offences proceed, see **Chapter 6** on Committals.

Back up and related offences

Summary matters that are "back-up" or "related" offences ([s 165 CPA](#)) to a strictly indictable offence are able to be dealt with by the District Court or Supreme Court in the course of their consideration of the substantive offence ([s 166 CPA](#)).

A back up offence is a charge laid as an alternate to the substantive offence, which the prosecution will seek to prove if the elements of the substantive offence cannot be made out. For example the substantive charge may be Wounding or Grievous Bodily Harm with Intent ([s 33 Crimes Act 1900 \(NSW\)](#)) and the back up charge may be Assault Occasioning Actual Bodily Harm ([s 59 Crimes Act 1900 \(NSW\)](#)). Back up offences can be summary offences or indictable offences capable of being dealt with summarily ([s 165 CPA](#)).

If the substantive charge is proved (or the accused pleads guilty), the back up charge is usually withdrawn by the prosecution and dismissed ([s 167\(1\) CPA](#)). If the jury acquits the accused of the substantive offence then the back up charge may be left to the jury to consider.

A related offence is an offence that arises out of substantially the same set of circumstances as the substantive offence. For example, for an offence of Dangerous Driving Occasioning Death ([s 52A\(1\) Crimes Act 1900 \(NSW\)](#)),

a related offence may be Take and Drive Conveyance Without Consent ([s 154A Crimes Act 1900 \(NSW\)](#)). A related offence can be a summary or an indictable offence capable of being dealt with summarily ([s 165 CPA](#)).

If the accused is acquitted of the substantive offence and the related charge is a summary matter then the District and Supreme Courts have jurisdiction to deal with these matters.

If the accused is convicted of or pleads guilty to the substantive offence, they may ask the court to take into account the related charges and any other outstanding summary or indictable offences (whether related to the substantive charge or not) on what is known as a Form 1. However, this can only be done with the consent of the prosecution.

Practical Tip [S 166 CPA](#) back-up charges are different to alternative verdicts. Many indictable offences allow for alternative verdicts if the jury is not satisfied that the charged offence is proven. For example, [s 33\(3\) Crimes Act](#) provides that a conviction under [s 35 Crimes Act](#) Reckless Grievous Bodily Harm can be an alternative verdict. Alternative verdicts do not need to appear on the indictment. It is usually a matter for the prosecution whether an alternative charge will be put to the jury. However, the judge should raise any alternative verdicts with the parties in order to avoid possible unfairness to the defence: *Sheen v R* (2011) 215 A Crim R 208 [82]. In preparing a defence, practitioners should consider whether other offences may be captured by the facts relating to the offences on the indictment. Furthermore, [s 153 CPA](#) provides that an accused may plead guilty to another offence not charged in the indictment. An accused may wish to do so where the offence they are pleading guilty to is less serious than the one on the indictment. The prosecution may elect to accept or reject this plea.

The brief of evidence

The brief of evidence in relation to a prescribed summary offence are documents "regarding" the evidence that the prosecution intends to adduce and includes:

- written statements taken from persons the prosecution intends to call to give evidence; and
- any document, or other thing, identified in such a written document as a proposed exhibit ([s 183\(2\)](#) and [184 CPA](#)).

The scope of the definition of a brief of evidence for the purposes of [s 183\(2\) CPA](#) has been considered in [DPP v Webb \[2000\] NSWSC 859](#). Documents regarding the prosecution's evidence include documents which establish the legality of the evidence, such as warrants.

A brief of evidence may also include a recorded statement in the circumstances of a domestic violence complainant ([s 185A CPA](#)).

Service of the prosecution brief of evidence in summary matters

The brief of evidence must be served on the accused person ([s 183\(1\) CPA](#)) but in accordance with [r 5.10](#) of the *Local Court Rules 2009* (NSW), and so need not be served personally. Evidence not served in accordance with the legislation is inadmissible ([s 188 CPA](#)). The court has the power, however, to order that all or part of the brief not be served if there are compelling reasons for not requiring service or that it could not be reasonably served on the accused ([s 187\(1\) CPA](#)). The Court may adjourn the proceedings to allow the prosecution to comply with [s 183\(1\) CPA](#) (see [s 187\(4\) CPA](#) and [DPP v West \[2000\] 48 NSWLR 647](#)).

Domestic violence offences

Table 2 contains certain offences under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*.

Domestic Violence matters have their own timetable, designed to speed up the process and resolve the matter as soon as possible.

As a result, the proceedings cannot be delayed to allow representations to the prosecution to take place.

- When a person is charged with a domestic violence offence, they should be served as soon as possible and by the first mention date with a 'mini-brief', including the facts sheet, victim's statement and any photographs on which the prosecution rely.
- The court requires a plea on the first date, or an adjournment of not more than 7 days for a plea to be entered.
- Unless there is a plea of guilty, a hearing date is then taken immediately, with an order that the balance of brief is served 14 days before the hearing.
- Once the balance of brief is served, within 7 days of the hearing, the defence should indicate which witnesses are required.

Note that there are now specific rules that address AVO applications, including the filing of statements by both parties. These are addressed in **Chapter 17**.

Commonwealth offences

This chapter only describes procedures for offences against NSW state law, and describing Commonwealth criminal procedure in detail is beyond the scope of this chapter.

However, there are two important points to bear in mind when dealing with Commonwealth offences:

1. Commonwealth charges are generally brought and finalised in state Local and District Courts. These Courts are given the power to deal with Commonwealth charges by cross-vesting legislation. The same rules of bail apply as in the *Bail Act 1978 (NSW)*. See **Chapter 3** in relation to bail.
2. Commonwealth charges are also divided into indictable and summary charges.

Chapter 5 - Tips on Local Court Practice

The purpose of this chapter is to provide some practical tips on Local Court practice and procedure.

The Local Court of New South Wales is constituted under the provisions of Part 2 of the *Local Court Act 2007* (NSW).

In both State and Commonwealth matters, the initial process you will follow is the same. You should obtain a copy of your client's court attendance notice, facts sheets and criminal record before obtaining instructions. If your client has not given them to you, the appropriate prosecutor (Police Prosecutor or solicitor from the Office of the Director of Public Prosecutions) will be able to provide you with a copy.

Attending Court

Preparation

Always be prepared. This avoids situations where you are left feeling 'blindsided' or 'ambushed' at court. Where possible:

- Call the client before court to confirm their instructions and to ensure their attendance at court.
- Make sure you check the court list online or call the Registry the day before to confirm what time Court commences and who the presiding Magistrate will be.
- If mentioning the matter for someone else, make sure your principal solicitor (if he or she is the solicitor with carriage of the matter) has given you all the information you need prior to attending Court. In these circumstances, it is usually necessary to have an idea of what the matter is about and the issues involved, the history of the matter (including previous adjournments), and the intended course the matter is to take (i.e. sentence, hearing etc).

Court etiquette

- Turn off your mobile phone beforehand and do not bring any food or drink into the courtroom.
- Always bow towards the Magistrate when entering or leaving the court room whilst court is sitting.
- Always rise and bow to the Magistrate when they enter and leave a court room.
- You will need to sit at the bar table. If it is busy wait until a chair is available and it is your turn to take it. It is common practice for Counsel, and then senior experienced solicitors to sit and appear before junior solicitors, as a sign of respecting ones elders. It is court practice for solicitors to mention simple short matters first and for solicitors waiting to make lengthy sentencing submissions or run hearings, to wait until after those short matters are dealt with. If you anticipate that your matter will be lengthy or involve complex issues, it may be more appropriate to briefly mention your matter and indicate this to the Court, and seek a 'marking'. This means that the Magistrate will stand your matter in the list and give you a time at which you can return later in the day to deal with your matter.

- Always call the Magistrate 'Your Honour'. It is a good idea to get into the practice of finding out the Magistrate's name beforehand as your Principal will no doubt enquire as to whom you appeared before later in the day. Always call a Registrar 'Registrar', not 'Your Honour'. If you are appearing as an agent solicitor indicate this to the court when announcing your appearance.
- Always stand when addressing the bench, unless it is a Children's Court.
- You should never turn your back to the Magistrate or leave the bar table during your matter, unless you have the Magistrate's permission to do so.
- Do not talk while the Magistrate is speaking or when self-represented litigants or other practitioners are speaking. Never speak or make any noise whatsoever while an oath is being read and administered to a witness.
- If you are asked a question by the Magistrate or Registrar in court and do not know the answer, you should say so. Do not attempt to guess or assume the answer. You may seek to have the matter stood in the list so you may obtain those instructions and/or contact your principal solicitor.
- Always take your mobile phone with you. You can go outside the court and make any necessary phone calls, but remember never keep it switched on whilst in court. If you cannot obtain the information you need and the court still insists on knowing the answer, you may need to seek an adjournment. You could also suggest making an undertaking to the court to provide that information to the court by a certain day or time.
- Always advise your client about court etiquette, including the need to stand when spoken to by the magistrate, to bow towards the magistrate when entering or leaving the courtroom, to turn off their mobile phones and remove their sunglasses or hats before entering the courtroom, and where possible, dressing appropriately..

Adjournments

An adjournment is an application to adjourn or postpone the matter to a later date. A common scenario is where a junior solicitor is sent to seek an adjournment on behalf of their Principal solicitor. If you need to seek an adjournment, make sure you have the correct information and a valid reason to obtain an adjournment.

Adjournments are usually only granted where there are cogent or compelling grounds to do so, at the discretion of the court. It is important to be aware of the history of the matter, including any previous adjournments.

Magistrates will regularly note whether a matter has been adjourned a number of times in the past. Local Court Practice Notes are a useful source of information on court practice and procedure. You should familiarise yourself with the practice notes.

It will usually assist your application for adjournment if you have the consent of the Prosecutor beforehand. Prior to mentioning your matter, it may be helpful to speak with the Prosecutor to learn their position on the proposed adjournment.

Some reasons for granting an adjournment are that:

- you need to obtain instructions from the client;
- you need to make representations to the prosecution; or

- your client has a drug problem and has been accepted into the MERIT Program – Refer to **Chapter 11 on Drug Court and MERIT**;
- the client is sick or in hospital and cannot attend.

In this latter situation you need to have faxed the Registry or handed up in court a medical certificate as evidence.

The Magistrate may refuse to grant you an adjournment if you have not provided sufficient grounds to the court and the matter has been adjourned on a few previous occasions. If necessary, stand the matter in the list to prepare your matter if you are able to proceed, or obtain further instructions. Obviously you must always be truthful in your submissions. Only if you are really struggling to get an adjournment, you should indicate to the court that you are not the solicitor with carriage of the matter and that you are not in a position to proceed with the matter. Adjournments are not always easy so be prepared and try to know the case as best you can before attending court. Remember you can always ask for the matter to be stood in the list if you get stuck.

As a general rule, if a matter is listed for a defended hearing or for sentence, it can be quite difficult to get an adjournment without good reasons. If this is the case, ask your Principal solicitor to give you a good explanation as to why the matter cannot proceed and the steps that your Principal has taken to try to avoid any unnecessary delay.

Obtaining a hearing date

Another common scenario is where a junior solicitor is sent to court to 'obtain a hearing date'. Again you need to be prepared beforehand, as it is not just as simple as obtaining another hearing date. For general guidance, see Local Court Practice Note 1 of 2001 for further details. There are several questions you should consider and potentially ask the client, Counsel or your Principal solicitor if you are unsure:

1. It seems obvious enough but, has the client entered a plea? If not, you will need to enter a plea on the day prior to seeking a hearing date. Apart from Domestic Violence related matters, if a plea of not guilty has not previously been entered, the Court will normally make brief service orders and adjourn the matter for Reply. You should ensure you have advised your client about the benefits of entering a plea of guilty at the earliest possible stage and sentencing discounts and the loss of any discount once a matter proceeds to hearing.
2. Is the client pleading guilty or not guilty to each charge? (Ordinarily, setting a matter down for a defended hearing is an indication that there is a plea of not guilty, but do check). There may be several charges against the defendant and you need instructions on each one. For example, you may need to plead guilty to sequences 1 and 2 but not guilty to sequences 3 and 4. You must indicate this to the Court and the Prosecution.
3. If the client has pleaded not guilty, has the brief of evidence been served? It is usually helpful to have a copy with you at court.

4. Have you completed a Local Court Listing Advice Sheet? You can download one from the Local Court website. If you are mentioning the matter for another solicitor make certain they provide you with a Listing Advice if you are instructed to enter a plea of not guilty and set the matter down for hearing.
5. Have you obtained your or your Principal solicitor's available dates for the hearing?
6. Have you briefed counsel? If so, you will need to obtain counsel's available dates beforehand and try to obtain a hearing date that coincides with one of those dates. You may suggest one of those dates in court to the Magistrate when mentioning the matter.
7. How long do you estimate the hearing will take?
8. How many witnesses do you have?
9. Do you require the prosecution's witnesses for cross-examination? One difficulty you may find is that you have not been served with a brief of evidence. In that case you do not know who the witnesses are, how many there are, how long the case is likely to take and therefore cannot possibly know some of the information the court is seeking. In these circumstances, indicate to the court you have not been served with a brief and therefore do not know that information. The Prosecutor in the matter may ask the Magistrate for a short adjournment in order to make further enquiries with the OIC and arrange for a copy of the brief to be served. Alternatively, if you have been served with a partial brief (i.e. some missing items), you can also ask the court to make a direction that all evidence that the Prosecution seeks to rely upon be served 14 days prior to the hearing. This may alleviate the difficulty of not receiving a complete brief. The prosecution's brief may simply be the charge and fact sheets and the information you are seeking may be extracted from those documents.
10. Have you considered making representations ('reps') to the prosecution? "Representations" is the term used for formal, written negotiations with prosecution. This is essentially obtaining your client's instructions (in writing is best) and writing to the prosecutor and/or informant police officer indicating, without prejudice, that the client would for example, plead guilty to a lesser charge or one charge if they dropped the remaining two charges. A client might instruct you to make reps that he or she would plead guilty to the lesser charge of common assault if the charge of assault occasioning actual bodily harm was dropped. Please note that representations (reps) are not always successful. For reps to be considered you will need to seek an adjournment for approximately six weeks.
11. Is the matter an indictable offence? Is the matter remaining in the Local Court or have the DPP elected to prosecute the matter at the District Court? If so the matter may need to be transferred to the District Court by way of Committal - see **Chapter 6 on Committals**.
12. Is the client on bail? Always read the client's bail conditions and ensure their compliance. It is common for clients to need to vary their bail conditions, for example, a client may need to change their residential address if they are moving. You will normally need to lodge a bail variation application form with the court registry to obtain a court date to vary the bail. You may also need to know about the client's surety and place of residence and any other bail conditions required. It may be helpful to contact the prosecutor before the court date to discuss their position (whether they oppose or consent to bail or any bail variation application). Some prosecution offices require 3 days' notice to take instructions on a bail review.

13. Is the client in custody? You may need to attend the holding cells or local police station cells to speak to your client before court. Be discreet and careful not to breach legal professional privilege in locations such as holding cells and when visiting clients in gaol. Walls are thin and many locations do not have proper facilities to ensure a conversation is confidential and privileged. Try to obtain written and signed instructions from the client. Most lawyers take a pen and paper into the holding cells so they can draft written instructions and then ring the buzzer and ask the officer on duty to pass the instructions on to the client for him to sign them and then return them to you. A diligent lawyer always obtains written instructions. Understand that clients charged with criminal offences may be quite emotional, stressed and indecisive. Should the client be excused if legally represented on the next occasion? If the next date is the date of hearing, they must attend.
14. Should the client be excused if legally represented on the next occasion? If the next date is the date of hearing, they must attend.
15. Will the client be attending court? (Equally importantly, are they required to?) If they are you should make your best endeavours to have your client attend court.
16. Does the client require an interpreter? If so, the court can provide an interpreter for your client if you give the court notice.

Vacating a hearing date

If you are applying to vacate a hearing date you will need to complete an “Application to Vacate a Hearing Date” on the prescribed court form (Attachment C of Local Court Practice Note). The form can be found on the ‘forms’ section on NSW Lawlink website. In order to vacate a hearing date you must make your application at least 21 days prior to the hearing date or as soon as practicable. In your application, you will be need to show “cogent or compelling reasons” to vacate the hearing date. It is usually necessary to attach any supporting evidence to the application such as medical certificates if your client or witnesses are ill. You must give appropriate notice to the Prosecutor of your application. See Local Court Practice Notes for further information.

Client’s attendance at court

If your client is on bail, it is normally part of their bail conditions that they must attend court. It is best practice for your client to attend, particularly in cases where you might need to obtain their instructions or if an adjournment is not granted and you have to make a plea – this can happen so be prepared. However if the client is unavailable for valid reasons, is not on bail or there is a risk of media coverage, it might be worth seeking that the client be excused if legally represented on the next occasion. Obviously you will not be able to do this if you are adjourning the proceedings for sentence or hearing as the client will need to attend.

If there are issues outstanding contact the Prosecutor the day before to find out their position and whether anything can be resolved beforehand.

Enter the court room early so you can speak to the Prosecutor - they will be the person sitting at one end of the bar table with a stack of files in front of them and if it is a busy court room like Central Local Court, possibly a few

other solicitors will be lining up to speak to them. Introduce yourself, tell them your client's name so they can have the file ready, and without breaching legal professional privilege, you may wish to indicate what your intentions are today. For example your intentions could be merely *'to seek an adjournment to obtain instructions as it is the first time in the list'*. Ask for a copy of the facts sheet and client's criminal record if you still do not have them. The Prosecutor might ask you a question. If you don't know the answer you can either speak to the client to obtain their instructions, or if it is a complex issue that requires legal advice, it may be necessary for you to go outside and contact your Principal solicitor and ask them for their advice.

If you have to go outside, make sure there is sufficient time to do so before your matter is called, alternatively wait until your matter is called, make your appearance, request that the matter be stood in the list whilst you confer with your Principal and then go outside once your request has been granted. You should never keep the court waiting, this will only anger the Magistrate!

Ideally the charges and facts sheet should be read through with your client in an earlier conference. This will ensure you are clear that your client understands what is being alleged and you have provided detailed advice and obtained proper instructions in a confidential and privileged environment.

Fact sheets prepared by the police will have a large number of allegations of fact that provide background and context to the offence, but are not essential elements of the offence. Fact sheets might also contain information that your client says is incorrect. For example, your client may have indicated to a police officer during a random breath test that she had consumed a glass of wine but the fact sheet reads your client indicated to the officer that she had consumed a bottle of wine. On most occasions, a client who is pleading guilty will instruct you to admit that the allegations in the fact sheet are true. However, in the example given, your client might admit the offence but dispute some of the alleged facts.

If a plea of guilty is entered, a fact sheet must be handed up to the Magistrate to read before sentencing. If there are discrepancies between your client's version of events and the prosecution's allegations, they should ideally be addressed prior to entering a plea. If there is a discrepancy try to negotiate with the prosecutor beforehand to have the facts amended or the incorrect information deleted. The Magistrate will read and take the facts into consideration when sentencing so it would be essential to remove any information that is incorrect and may have an aggravating effect on your client's sentence. Sometimes this may involve seeking an adjournment in order to prepare representations to the Prosecution, if the Prosecutor is not in a position to amend the facts sheet on the day.

If you are not successful in negotiating agreed facts, your client may instruct you to enter the guilty plea and put the issue of disputed facts before the Magistrate. The Magistrate may then direct that there be a disputed facts hearing at which witnesses will be called to give evidence. Alternatively, your client may instruct you to enter a plea of guilty, accepting the unamended facts sheet. This usually occurs where a client wishes to have the matter finalised quickly or conveniently, to avoid having to return to court or to maximise the discount afforded on sentence for an early plea.

When advising your client in this difficult situation, you must inform him or her that the benefit of between 10 and 25% discount given on sentencing for the utilitarian value of the plea of guilty is primarily based upon the saving

to the court and the community of witnesses not needing to attend and give evidence. This benefit will mostly be lost if witnesses need to attend to give evidence.

If your client takes the course of putting the issue before the Magistrate, then many Magistrates will ask to read the facts sheet and ask you to refer them to the disputed portion.

If the Magistrate forms the view that a finding one way or the other on the disputed issue will not change his or her mind about the appropriate sentence, then the matter can proceed to sentencing regardless of the dispute.

PRACTICAL TIP: In the decision of *R v AB* [2011] NSWCCA 229, the Court of Criminal Appeal confirmed that the utilitarian value of a plea of guilty can be eroded if there are protracted disputed facts proceedings determined adverse to the offender. You must always consider whether a disputed facts hearing will bring any real advantage to your client.

If your client makes the decision to admit the previously disputed facts, you should always obtain signed written instructions to this effect, including having the client sign the actual facts sheet that will be tendered.

Sentencing need not immediately follow a plea of guilty. Short adjournments may be sought, for instance, if you or your client need time to obtain character references or medical evidence or a Pre-Sentence Report (PSR) is requested. However always be prepared to proceed to sentence in the event your request for an adjournment is unsuccessful.

In relation to drink driving offences, some Local Courts allow the defendant an adjournment whilst they complete a traffic offenders program. However, not all Local Court Magistrates grant an adjournment for this reason and if they refuse the adjournment then you will need to proceed with your sentencing submissions. See **Chapter 15 for Local Court Sentencing** for details.

Apprehended Violence Orders ('AVOs')

Always ensure you advise a client of the impact of Apprehended Violence Orders on Family Law proceedings and Family Law Orders. For example, if a defendant consents to an AVO order that he/she will not approach the nominated persons in need of care and protection ('PINOP') or their place of residence, then the defendant may find themselves unable to spend time with their children if the children are listed on the order. Similarly, conditions which prevent all contact with the PINOP, may prevent mediation or conciliation processes from taking place. Please see Local Court Practice Note 2 of 2012 and **Chapter 17 on Apprehended Violence Orders** for further details.

Sentencing Pleas

When making a plea you should always consider and discuss the following:

- the facts of the offence;
- the objective circumstances of the offence (mitigating and aggravating factors);

- subjective factors about the offender (such as their previous criminal and traffic history and state of mental health);
- the purpose of sentencing; and
- relevant sentencing law.

Where possible, you should also try to obtain a few character references from your client's friends, colleagues or relatives. A reference should state that they are aware of the proceedings and can vouch for the client's good character. You should have enough copies to serve on the Prosecutor and hand up in Court to the Magistrate. You should always keep a copy for your file. The reference need not be lengthy (most Magistrates do not want to waste their days reading extensive and lengthy references), References should be typed if possible, signed and dated and addressed to the 'Presiding Magistrate'. **Please see chapter 15 on Sentencing for more information.**

Breaches of court orders

A breach of a good behaviour bond, whether under ss 9, 10 or 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ('CSPA'), occurs when it is alleged a condition of the bond was not complied with. This could be because a fresh offence was committed during the period of the bond (which is a breach of the condition of good behaviour), or because, for instance, your client failed to keep in contact with Community Corrections or follow their reasonable directions, or failed to comply with any other condition attached to the bond.

Breach proceedings can arise in numerous ways, but the most common is that Community Corrections submits a 'Breach Report' or the court makes its own motion.

The second scenario generally occurs because your client has committed a further offence during the period that the bond applied. If your client pleads guilty to the new offence or is found guilty after a hearing, he or she will usually be called up before the court for the breach of the bond to be dealt with.

The sentencing Magistrate may notice (of his or her own volition, or following prompting from the prosecution) that the new offence was committed in breach of a bond, and at the same time as imposing sentence for the new offence, direct that the offender be called up for breach of the bond.

(If the new offence is dealt with in the District Court and the bond was imposed in the Local Court, or vice versa, the sentencing Judge or Magistrate will simply recommend that the original sentencing court call up the offender for breach of the bond).

PRACTICAL TIP: It is usually the case that a breach of a District Court section 12 bond should be dealt with prior to the proceedings in the Local Court being dealt with to finality (See *R v Nicholson* [2010] NSWCCA 80).

When a person is alleged to have breached a good behaviour bond he or she will generally have to appear before the court that imposed the bond in the first instance. Some Magistrates will call the bond in from another court and adjourn the matter for that to occur. When a Magistrate imposes a good behaviour bond, they have the power to direct that breaches are brought back before them. This can sometimes mean that those matters must be sent back before the same Judge or Magistrate who conducted the original sentence proceedings.

An alleged breach of a bond can be admitted or not admitted by your client. Where the breach is a failure to comply with Community Corrections' supervision for instance, and the breach is not admitted, you can formally request that evidence be brought to prove the alleged breach. However, in practice, you should expect that most Magistrates will be reluctant to list the matter for formal hearing on this basis, and will be inclined to accept what is in the Community Corrections' breach reports (unless you can bring evidence that contradicts those reports).

Section 98(2) CSPA refers to the court being '*satisfied that an offender appearing before it has failed to comply with any of the conditions of a good behaviour bond*', but does not prescribe any form of hearing in order for the court to reach that satisfaction. If admitted, arguments can be made to the court that no action should be taken on the breach: see s 98(2)(a) CSPA. The Magistrate has a broad discretion to take no action on the breach for any reason that he or she thinks appropriate.

If the breach relates to a failure to comply with Community Corrections' supervision, then it will make a substantial difference if your client can take steps to remedy that breach before the breach proceedings are first listed in court. The Magistrate may also find the breach proved and impose further conditions upon the bond. The Magistrate will usually only seriously consider this option if there is concrete evidence (such as a recommendation from Community Corrections) that the further conditions will reduce the risk of another breach.

If the Magistrate cannot be persuaded not to take action, or alternatively to add further conditions to the bond, the bond will be revoked and your client will be re-sentenced for the original offence in respect of which the bond was imposed: ss 98(2)(c) and 99 CSPA.

If the bond breached was a section 9 or 10 bond, then any action taken on the breach is likely to involve a more severe penalty. This will not always be the case, however, if you can make appropriate submissions about the reasons for the breach or the subjective circumstances of your client such as medically related factors.

Breaching a suspended sentence (s12)

Where a suspended sentence is revoked following breach, your client will be facing either a period of full-time custody, Intensive Corrections Order or Home Detention.

In some rare cases, you may be able to convince the court to excuse the breach, on the basis that the breach is *trivial in nature* or that there are *good reasons for excusing the offender's failure to comply*. If satisfied that the breach has been established, but not satisfied that the breach is trivial or should be excused, the Magistrate or Judge has no discretion and must revoke the bond: s 98(3) CSPA.

For further guidance on breach suspended sentences, see *DPP v Cooke & Anor* [2007] NSWCA 2

Where a client has breached the s12 bond by committing a fresh offence, the court should first deal with breach of bond first, before sentencing the client for the fresh offence.

If a suspended sentence of longer than 6 months is revoked, the court can consider whether or not to impose a non-parole period.

PRACTICAL TIP: Because a court cannot set a non-parole period for a sentence of 6 months or less (s 46 CSPA), sometimes a suspended sentence of just over 6 months is more beneficial than a suspended sentence of 6 months. Whilst it may mean that your client has to remain on the good behaviour bond for longer, if

a breach occurs it allows the court to set a non-parole period which may see your client released earlier than the 6 month sentence, with a period on parole. As a result, it is not uncommon for defence lawyers to seek that Magistrates to impose suspended sentences of 7 months (or even 6 months and 1 day). This is less significant if your client is homeless, as failing to have an appropriate address upon release may revoke their automatic right to parole in any event. Speak to your client about their circumstances. Upon the revocation of a suspended sentence, the full sentence is imposed, not just the time remaining on the good behaviour bond.

Applications for revocation of community service orders (SCO)

Applications for revocation of Community Service Orders (CSOs) commonly arise in the Local Court. The conditions of performance of CSOs, and the procedure for their revocation, are set out in Part 5 Division 1 (ss 107–117) of the *Crimes (Administration of Sentences) Act 1999* (NSW) ('CAoSA').

Applications for revocation are made because a problem has arisen with your client's performance of the number of hours' work he or she was required to perform under the CSO. In some cases the CSO has been frustrated—for example, your client is in custody (and will remain there for the foreseeable future) or your client has suffered a permanent physical injury that makes him or her unsuitable for all duties. In these situations, there will be little alternative but to consent to revocation of the CSO. This is often described as a '*no fault*' breach of a CSO.

Often an application for revocation will be made because it is alleged that your client has failed to attend work as directed on multiple occasions, or a conflict has arisen between your client and his other Community Corrections officer (for example, about the location, style or hours of work). In these situations, it is always in your client's interests to resolve the dispute or problem that has arisen with the relevant Community Corrections officer:

- Firstly, you must obtain the application for revocation of CSO (which will have been served on your client). The application will contain brief particulars of the alleged breach (a copy can be obtained from the Court file).
- Take instructions from your client about whether, if it were possible, he or she would be prepared to return and complete the outstanding hours.
- If so, contact your client's supervising Community Corrections officer before the court date, to discuss whether she or he is prepared to attempt to re-allocate more work to your client.
- If so, but if the CSO is due to expire shortly (see ss 107 and 110 CAoSA which define the length of a CSO), you can make a consent application to the court under s 114 CAoSA for the CSO to be extended.
- If your client is unwilling to return to complete the CSO, or Community Corrections are unwilling to allocate any more work to them, you will need to obtain instructions from your client as to whether he or she agrees with the breaches of the order alleged in the revocation application.
- If your client admits the work was not completed, but claims a reasonable excuse for the failure to complete the work, then the matter will have to be listed for a hearing as to whether the Magistrate is satisfied that your client has failed with reasonable excuse to comply with his or her obligations under the CSO: s 115(2) and (3) CAoSA.

Remember that a failure to complete the number of hours within the duration of the CSO is deemed to be a failure to comply with the conditions of the CSO (s 115(6) CAoSA). The focus of any hearing will generally be whether your client has established a reasonable excuse for the failure to complete those court mandated hours.

If the failure without reasonable excuse to comply the CSO is admitted or proved, your client will be re-sentenced for the original offence(s) subject to the CSO: s 115(3) CAoSA.

Whichever course the matter takes, you are far more likely to achieve a positive result for your client if you have the relevant Community Corrections officer on side.

Audio Visual Link (AVL)

Audio Visual Link is commonly used for clients who are 'bail refused' and are attending a second or subsequent mention of their matter. The client remains in custody in gaol, and appears via AVL.

It is best practice to ask to speak to your client beforehand via telephone so you can explain the court process, confirm their instructions and alleviate any concerns they may have. All AVL rooms in each gaol have telephone numbers (and facsimile numbers). The numbers should be readily available from the Local Court registry at which you practice, or alternatively contact the gaol switch and ask to be connected to the AVL (or 'video link') room.

Ancillary Advice

You should advise your client of any ancillary issues such as victims' compensation, appeal rights, costs implications, family law implications, care proceedings, legal aid, bail conditions, estate and forfeiture legislation, early release of superannuation entitlements, and restrictions on travel overseas.

If your client is asking you questions about an area that you do not practice in, it is best not to give advice but refer them to someone who is competent in that area of practice.

Chapter 6 – Committals

Committal proceedings

The key legislation which governs committal proceedings is the *Criminal Procedure Act 1986* (NSW) ("**CPA**"). All references in this chapter are references to sections in the CPA unless stated otherwise.

A committal is the main process by which a matter is transferred from the Local Court or Children's Court to the District Court or the Supreme Court.

A committal proceeding will take place where an offence is:

- A strictly indictable offence; or
- A Table 1 Offence (Schedule 1) where the prosecuting authority or the accused elects for the matter to be tried on indictment; or
- A Table 2 Offence (Schedule 1) where the prosecuting authority elects for the matter to be tried on indictment;
- A common law offence that may be prosecuted on indictment.

This chapter is focused on the process of a committal proceeding from the **perspective of the defence**.

The chapter outlines some of the considerations that practitioners should keep in mind when dealing with indictable matters while they are still in the Local Court or Children's Court.

There are some particular considerations with respect to committals in the Children's Court, and these are referred to at the end of the chapter. Otherwise, most of the same principles apply whether the committal takes place in the Local Court or in the Children's Court. For convenience, the Local Court will be referred to throughout this chapter.

As the majority of indictable matters are dealt with in the District Court, this chapter will refer to what happens when matters are committed to the District Court. The same principles apply for matters committed to the Supreme Court.

Predicting possible outcomes for indictable matters

When dealing with an indictable matter, it is important to have an idea as to the different outcomes that are possible. The most likely outcome will essentially depend on the specific offence, and the strength of the Crown case.

The following outcomes may be possible:

- **Matter remains in the Local Court.** The matter may be dealt with in the Local Court. This may be due to negotiations with respect to a more appropriate charge or the Crown's decision to allow the matter to remain in the Local Court. The matter may proceed as a plea of guilty or a defended hearing in the Local Court; or
- **Committal for sentence:** There may be a plea of guilty and committal for sentence - involving either a plea to the offence currently charged or a plea to a less serious offence; or

- **Discharge:** The accused may have all indictable charges discharged at committal in the Local Court. If there are no summary charges remaining at that point, the accused is free to go (subject to the Crown's right to file an ex officio indictment).
- **Committal for trial:** The matter be committed for trial in the District Court. This will mean preparing for such a matter, by, for example, obtaining particulars of the Crown case over and above what is in the brief of evidence, clarifying issues for trial, and having a contested committal hearing where witnesses are required to attend court to give evidence.

Foreshadowing what you believe to be the most likely outcome of the matter, will guide you as to what steps to take when the matter first comes before the Local Court.

The function of committal hearings

Committal proceedings are administrative proceedings and not judicial proceedings. They are an important step in the trial process.

The nature and purpose of a committal proceeding is to receive, examine and permit the testing of the evidence introduced by the prosecutor before the magistrate, in order to determine whether there is sufficient evidence to warrant the person charged being put on trial and, if not, to discharge that person: *Moss v Brown* (1979) 1 NSWLR 114 at 125.

In *Grassby v The Queen* (1989) 168 CLR 1 at 15, Dawson J (with whom Mason CJ, Brennan, Deane and Toohey JJ agreed) said:

A committal hearing enables the person charged to hear the evidence against him, and to cross-examine the prosecution witnesses. It enables him to put forward his/her defence if he wishes to do so. It serves to marshal the evidence in deposition form. And, notwithstanding that it is not binding, the decision of a Magistrate that a person should or should not stand trial has, in practice, considerable force so that the preliminary hearing operates effectively to filter out those prosecutions which, because there is insufficient evidence, should not be pursued.

The important role of committals in ensuring a fair trial was reinforced in *R v Kennedy* (1997) 94 A Crim R 341 at 352 where Hunt CJ at CL said that:

[W]hat must be shown is that such evidence will serve the true purposes of committal proceedings, which exist in order to achieve a fair trial in the trial court.

Types of committal proceedings

There are four different types of committal proceedings:

- Committals for sentence - s 99 CPA;
- Paper committals;
- Contested committal hearings; and
- Waiver of committal - s 68 CPA.

Committals for sentence

Following a plea of guilty being entered in the Local Court pursuant to s 99(1) CPA, a matter may be committed for sentence to the District Court.

A plea of guilty to an indictable offence (like a plea of guilty to any offence) should only be entered after you are satisfied that the admissible evidence establishes the elements of the offence charged, and that your instructions are consistent with entering a plea of guilty to the charges.

In an indictable matter, the brief of evidence will have been served. This will have allowed you to assess whether the elements of the offence have been established.

In an indictable matter, it is arguable that a plea of guilty entered in the Local Court is a plea at the first available opportunity, deserving of a discount on sentence in the order of 25%: see the guideline judgment on pleas of guilty: *R v Thomson and Houlton* (2000) 49 NSWLR 383, *R v Robert Borkowski* (2009) 195 A Crim R 1 and *R v Newman* [2004] NSWCCA 113 for discussion on this point.

An accused entering a plea of guilty in the Local Court will be committed to the District Court for sentence. In the District Court, the accused will be asked whether he/she adheres to the plea of guilty.

Although pre-sentence reports may be ordered in the District Court, it is useful to get the process rolling by seeking that the Local Court make the order at the time the plea of guilty is entered in the Local Court and the offender committed for sentence to the District Court.

Procedure on a committal for sentence

The general procedure in court on a committal for sentence is as follows:

- You indicate that a plea(s) of guilty is/are to be entered and the matter(s) is/are to be committed to the District Court for sentence.
- The DPP solicitor will state what charges the Crown seeks pleas of guilty to.
- You formally enter the plea(s) of guilty on behalf of your client by saying words such as "a plea of guilty is entered".
- If your client is not entering guilty pleas to all the charges currently before the court, you should also note on the record if the pleas of guilty are entered on a particular basis. For example, "On the basis that the prosecution will withdraw sequence 2, I am instructed to enter a plea to sequence 1." This is particularly relevant if there has been charge negotiation, and even more so if the solicitor who appears for the prosecution is not the solicitor with normal carriage of the matter. Other options are that (for example) "I am instructed to enter a plea of guilty to sequence 1, on the basis that sequence 2 will be placed on a Form 1, to be taken into account in the District Court." Be clear about the basis of the plea – it will usually be recorded on the court papers and may become important in the District Court if there is any question about which charges the offender stands to be sentenced for.

- In some courts, a practice remains of the brief being tendered. Indicate (if it is the case) that there is no objection to the tender of the Crown brief on sentence. The Crown brief contains the facts as well as the statements of the witnesses. Increasingly, however, there will have been negotiation of agreed facts on sentence prior to the entering of the plea.
- The agreed facts and/or the Crown brief is tendered. As a plea of guilty is entered, the accused's criminal record is also usually tendered. Note that a copy of the facts (whether agreed or not) is almost invariably required by Community Corrections in the preparation of a Pre- Sentence Report. Since your client will be asked his/her attitude to the offences as part of that process, it is important to ensure your client has an understanding of the facts.
- The Magistrate will read the facts (or brief on sentence).
- The Magistrate will indicate whether the plea(s) of guilty is/are accepted, depending on whether they are satisfied on the information before them that there is evidence supporting the charges to which a plea has been entered.
- If the plea(s) of guilty is/are accepted the Magistrate will commit the matter(s) for sentence to the District Court. Usually, the date the Magistrate commits the matter to date in the District Court is a mention date and not the date for the actual sentencing hearing.
- Bail is reviewed. If a person is on bail and is complying with that bail, it will ordinarily be allowed continued to the District Court. It is prudent to check with the DPP solicitor before the committal as to whether they intend to oppose bail being continued.

In relation to the charges that the Crown seeks pleas of guilty to, it is important to note that not all the charges that a person was originally charged with may be committed for sentence. For example, charges may be withdrawn or may be put on a Form 1, or a section 166 Certificate (informs the court of any backup/related offences that are also to be transferred), or simply may not be proceeded with at all.

Paper committals

A paper committal occurs where no witnesses are called to give oral evidence. The Magistrate reads the brief and then makes a determination in relation to the tests under ss 62 and 64 CPA (see below). A paper committal can be with, or without submissions – the difference being that in the latter case it will normally be assumed that the accused is not disputing that the matter should proceed to the District Court.

Procedure for a paper committal

- You indicate that the matter(s) is/are to proceed by way of paper committal.
- The DPP solicitor indicates on what charges the DPP seeks committal. Not all charges may be proceeded with. There may be matters that can only be dealt with in the Local Court, and there may be back-up and/or related charges placed on a s166 Certificate (CPA) which will also be tendered.
- The DPP solicitor tenders the brief of evidence. You should indicate whether is objection to the tender of the brief, or any part of it.

- It is useful to indicate at this stage whether you intend to make submissions pursuant to ss 62 or 64 CPA (see below).
- The brief may contain a statement of facts. If the facts accurately reflect what is contained in the brief, you should indicate that by saying something like “The facts accurately reflect what is contained in the brief and [if it is the case] I have no objection to Your Honour reading the facts”. If this concession is not made, the Magistrate will have to read the whole of the brief of evidence. Note, however, that the prosecutor is entitled to make an opening, and that this opening is often no different to what would have been set out in the facts; unless the facts are heinously misleading, you may be best inviting the prosecutor merely to remove certain aspects of it.
- The Magistrate reads the facts/brief.
- After hearing any submissions you might make, the Magistrate makes a determination pursuant to s 62 CPA.
- If the Magistrate finds the requirement under s 62(1) CPA has not been met, the Magistrate will discharge the accused (s 62(2) CPA).
- If the Magistrate finds that s 62(1) CPA has been met, the Magistrate will give the accused a warning in the form required by Clause 3.3 of the Local Court Rules and then continue, by considering s 64 CPA, and to ask the accused the following questions:
 - Do you wish to say anything in answer to the charge(s)?
 - Do you want to give evidence (in the Local Court)?
 - Do you want to call any evidence (in the Local Court)?
- You will need to let your client know about these questions beforehand. You can assist your client in court with their answers. Ordinarily, the answer to each of these questions will be “No, Your Honour”.
- Any submissions pursuant to s 64 CPA are made.
- If the Magistrate is satisfied that the test contained in s 64 is not met, the accused will be discharged.
- If the Magistrate is satisfied that the test contained in s 64 is met, he/she will commit the accused for trial to the District Court. A date will be given as the arraignment date (the date on which the indictment is to be presented).
- Copies of certain formal notices relating to legal representation and alibi evidence are given to the accused or to you.
- Bail is reviewed. If a person is on bail and is complying with that bail, bail to the District Court will ordinarily be allowed to continue. Again, it is prudent to check with the DPP solicitor beforehand as to the attitude towards bail once your client is committed from the Local Court.

Paper committals with submissions

Submissions may be made at committal stage for a number of reasons. For example, you may be of the opinion that:

- The tests under ss 62 and 64 CPA are not met; or

- The matters should be committed to the District Court on different charges to those that the accused currently faces. A Magistrate may commit a matter to the District Court on any indictable offence (because of the references to “an indictable offence” - emphasis added - contained in ss 62 and 64 CPA).

If extensive submissions are to be made at committal stage, this would ordinarily not be done on a list day, due to the amount of time that would need to be spent on the matter. If extensive submissions need to be made, you should notify the Magistrate that the matter on the court date prior to the committal that the matter will take some time and request that the matter be set down for a day other than a list day. Occasionally, orders will be made for the service and filing of submissions prior to the hearing.

Waiver of committal

Section 68 CPA permits committal proceedings to be waived, if the Crown agrees.

Section 68 CPA enables the committal procedure to be expedited. If the matter is one where no submissions are to be made and the brief seems to establish the Crown case, it may be worthwhile to waive the committal proceedings. This can save time and costs for your client, and avoids the disclosure of the accused's case to the prosecution, which typically enables time for them to resolve any issues you raise.

In every case, therefore, the defence will have to consider whether there is any tactical advantage in waiving a committal over having a paper committal.

When a committal is waived, the Magistrate does not make a determination on the brief of evidence, nor does the Magistrate ask any questions of the accused. The matter is simply committed for trial to the District Court.

The DPP will usually seek that the brief of evidence is tendered even though the committal is waived, and there is little benefit in objecting to this. The current practice of the Local Court *requires* the tender of the brief. Many Local Courts only notionally require the tender of the brief, which is then immediately returned to the prosecution, although a brief index is maintained on the Local Court file.

If committal proceedings are waived, a form called an 'Application to Waive Committal Hearing' is to be filled out and signed by the DPP solicitor and yourself. You can ask the DPP solicitor to prepare the form. Note that the DPP solicitor has standing instructions not to waive committal where the brief is not complete (or, less relevantly, where the accused is unrepresented).

Contested committal hearings

There are significant advantages at trial that can flow from a well-run committal. On the other hand, the running of a committal can also shore up a prosecution case by disclosing the accused's case or identifying holes in the prosecution case (which can then be fixed). Even where an accused person is discharged, the prosecution may still file an *ex officio* indictment in the District Court - which is ultimately no different than if the committal had not been successful the first time.

The attendance of witnesses at committal hearings

Generally, witnesses are not required to attend at court. Even where witnesses *do* attend, they may only be cross examined on limited areas. Securing the attendance of witnesses requires you to consider s 91 or (if applicable, depending on the type of offence, and who the witness is) s 93 of the CPA. If a direction is made for the attendance of witnesses, the Local Court will hear oral evidence before considering whether the charge (or another indictable charge) is to be committed for trial.

Where the prosecution and defence do not agree as to the witnesses who should attend the committal, or do not agree on the areas for cross examination, a hearing may be required to determine that issue. The prosecution tenders the brief - including the statements of the witnesses who are sought by the accused. The Magistrate determines the issue of whether witnesses should attend.

If the application by the accused to have witnesses attend is unsuccessful, the Magistrate will typically proceed immediately to s62/64 committal. If the application to have one or more witnesses attend is allowed, the matter will be adjourned to a future date to enable the attendance of those witnesses. In either case, the usual practice of the Local Court is that the Magistrate who heard the s 91/93 application/argument is part heard in the committal proceedings.

The evidence of witnesses at contested committal hearings

On the Committal hearing itself, the DPP may seek your consent to witnesses having their statements tendered rather than giving evidence in chief orally. Ordinarily a witness called at committal has to give evidence orally because the effect of ss 91(1) and 91(4) is that if a witness is directed to attend court that witness's statement is not admissible in evidence.

It is generally preferable to have witnesses give evidence orally rather than have their statements tendered at the committal hearing as the evidence in chief. As it is likely that there will be inconsistencies between the written statement and the actual oral evidence. This may form the basis of cross-examination at committal or at trial.

A Magistrate who orders a witness to give oral evidence at a committal hearing will normally only allow cross-examination in respect of the matters that are the basis for the giving of the direction to attend court to give evidence. This will be the case unless there are substantial reasons in the interest of justice why the witness is to be questioned about other matters (s 91(7) CPA). For this reason, it is important that the application for a contested committal clearly states all the grounds/areas for cross-examination.

The different tests for calling of witnesses - Section 91/93:

The right of the accused to call witnesses at committal is restricted by ss 91 and 93 CPA.

Section 91 applies to offences that do not involve violent conduct. In such a case, the Magistrate must be of the opinion that there are substantial reasons why in the interests of justice a witness should attend to give oral evidence.

Such a direction may not be given requiring the attendance of a complainant:

- in proceedings for a prescribed sexual offence if the complainant is a cognitively impaired person – section 91(7A); or

- in proceedings for a child sexual assault offence if the complainant was under 16 at the time of the offence, and is under 18 at the time of the order being made.

If the Crown does not consent to witnesses being called, then you will have to make an application to the court. This application will have to address the different tests that apply to the calling of witnesses

Section 93 CPA states that where the witness to be called is the victim of an offence involving violence, the Magistrate may not direct the attendance of an alleged victim unless the magistrate must be satisfied that there are 'special reasons' why in the interests of justice the witness should attend to give oral evidence. This is so even if the Crown consents.

An 'offence involving violence' is defined in s 94 CPA. This definition needs to be examined carefully as it includes a range of offences not intuitively involving violence (such as prescribed sexual offences).

If the offence is one that requires special reasons in the interests of justice to be established before a witness can be called to give evidence, the Magistrate must be satisfied that special reasons exist. This is so even if the Crown consents.

Substantial reasons in the interests of justice

The test for substantial reasons is less stringent than that of special reasons.

Losurdo v DPP (1998) 101 A Crim R 162 (affirmed on appeal - 103 A Crim R 189) is one of the major cases on 'substantial reasons'. These points, among others, were made in the case:

- The word 'substantial' means, among others, 'of real worth or value'.
- 'Substantial' does not mean 'special' and to establish 'substantial reasons' for the attendance of witnesses at committal proceedings it is not necessary to show that the case is exceptional or unusual. It may be that 'substantial reasons' could be shown in a majority of cases.
- It is not necessary to show that the cross-examination might lead to the discharge of the accused under ss 62 and 64.
- The definition of 'substantial reasons' would encompass all of the considerations listed below which have been held to be 'special reasons'.

Some of the examples of 'substantial reasons' given by the Attorney General in the Second Reading Speech on 26 September 1996 (in relation to the then relevant legislation) include:

- If cross-examination would be likely to result in the discharge of the accused pursuant to ss 62 or 64 CPA.
- Where there is a likelihood that cross-examination would demonstrate grounds for a 'no bill' application.
- Where it appears that cross-examination is likely to substantially undermine the credit of a significant witness.
- Where cross-examination of witnesses will avoid the accused being taken by surprise at trial.

Furthermore, in *Sim v Magistrate Corbett and Anor* [2006] NSWSC 665 at [20] Whealy J set out in summary form some of the relevant principles as follows:

1. The purpose of the legislation is to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal;
2. The onus is on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses.
3. The process is an important part of the committal proceedings. The refusal of an application may have a significant impact upon the ability of the defendant to defend himself. As well, the prosecution has a real interest in ensuring only appropriate matters are sent for trial.
4. In relation to matters falling within s 91 *Criminal Procedure Act*, the defendant must show that there are reasons of substance for the defendant to be allowed to cross-examine a witness or witnesses.
5. The obligation to point to substantial reasons is not as onerous as the reference to “special reasons” in s 93; nevertheless it raises a barrier, which must be surmounted before cross-examination will be permitted.
6. Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.
7. Substantial reasons might exist, for example, where the attendance of a witness is sought to enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.
8. The expression “substantial reasons” is not to be ascertained by reference to synonyms or abstract dictionary definitions. The reasons advanced must have substance in the context of the committal proceedings, having particular regard to the facts and circumstances of the particular matter and issues, which critically arise or are likely to arise at trial.

Special reasons in the interests of justice

‘Special reasons’ should not be defined in an unduly restrictive way. Such evidence will be allowed where there is at least a serious risk of an unfair trial if the witness is not available for cross-examination. There must be some feature of the case which takes it out of the ordinary and which establishes that it is in the interests of justice that the witness be called to give oral evidence.

In *B v Gould* (1993) 67 A Crim R 297 at 303, Studdert J, in considering ‘special reasons’ in relation to an earlier version of s 91 (s 48EA *Justices Act*) said that:

There can be no rigid definition of what may constitute ‘special reasons’ in the setting of s 48EA and ‘the interests of justice’, whilst necessitating careful consideration of the interests of the accused cannot be limited to the consideration of his interests alone.

The reasons must be special to the particular case. There must be some features of the particular case by reason of which it is out of the ordinary and by reason of which it is in the interests of justice that the alleged victim should be called to give evidence.

The apparent strength or weakness of a prosecution case is a relevant matter. If the material placed before the Magistrate suggests that there is a real possibility that if the alleged victim is subject to cross-examination the defendant will not be committed, that may in the particular circumstances afford special reasons to require the alleged victim's attendance for cross-examination.

In *R v Kennedy* (1997) 94 A Crim R 341 at 352 Hunt CJ at CL said:

What are 'special reasons' and what are not will vary from case to case and cannot be defined in advance. The decision should not be approached in an unduly restrictive way; what must be shown is that such evidence will serve the true purposes of committal proceedings, which exist in order to achieve a fair trial in the trial court. Something more than the disadvantage to the accused from the loss of the opportunity to cross-examine the complainant at the committal must be shown. There must be some feature of the case by reason of which it is out of the ordinary and which establish that it is in the interest of justice that the complainant be called to give oral evidence.

In *O'Hare v DPP* [2000] NSWSC 430 at [26] and [51] – [52], O'Keefe J said:

Whilst there are particular considerations that have been identified as being, or as capable of being, within the category known as 'special reasons', the category is not closed. It will accommodate many different matters in different factual situations. However, the matters must have certain characteristics that make them, in the particular case, 'special reasons...in the interests of justice' why the power conferred by s 48E(2)(a) of the Act should be exercised.

In summary, the decided cases in New South Wales establish (and, in Victoria and South Australia indicate) that the facts or situations that constitute 'special reasons' should not be confined by precise legal definition, are not a closed category, should not be approached in an unduly restricted way and need to be:

- Special in relation to the particular case;
- Solid, that is substantial, in nature;
- Not common or usual;
- Out of the ordinary;
- Unusual or atypical;
- Clearly distinguishable from the general run of cases; and must be
- Relevant to the interests of justice.

In this regard, relevance to the interests of justice will involve a consideration of the interests of the accused and the interests of the complainant, as well as other wider considerations of justice. In this context, it is relevant to consider:

- the strength or weakness of the prosecution case;
- whether there will be a real risk of an unfair trial should oral evidence not be permitted;

- the prospect of prejudice to the accused beyond the ordinary in such event;
- the real possibility that an accused may not have to stand trial if oral evidence is permitted;
- the existence of inconsistent statements by or different versions from a complainant or witness.

This is a useful checklist of material considerations for the Magistrate to be addressed in an application for a witness to attend court where special reasons in the interests of justice must be established.

Circumstances that may amount to special reasons

The case law has referred to the following circumstances as amounting to special reasons:

- Where there is reason to suppose that some cross-examination will eliminate possible areas of contention and refine the matters really in dispute (*Goldsmith v Newman* (1992) 59 SASR 404).
- Cross-examination may be desirable to establish important facts to establish a defence, for example, intoxication (*Goldsmith v Newman, supra*).
- It may be necessary for a fair trial that the defence has a limited opportunity to explore in advance of the trial the key issues which may be relevant to possible defences such as a bona fide claim of right or duress (*Goldsmith v Newman, supra*). By analogy this reasoning would extend to an issue such as self-defence.
- Limited questioning of scientific witnesses to explore possible avenues of inquiry (*Goldsmith v Newman, supra*).
- Where there has been inadequate disclosure by the prosecution by the filing of statements and documents (*Goldsmith v Newman, supra*).
- Where the witness is an informer, an indemnified witness, a co-accused or a person who 'might reasonably be supposed to have been criminally concerned in the events giving rise to the proceedings' (s 165 *Evidence Act 1995* (NSW)). Such a witness's testimony may be unreliable.
- Where cross-examination will enable the accused to establish or investigate an alibi (*R v Kennedy, supra*).
- Where the material placed before the Magistrate suggests that there is a real possibility that, if the alleged victim or witness is subject to cross-examination, the accused will not be committed (*B v Gould, supra*).
- Where the witness is willing to give evidence and wishes to do so (*B v Gould, supra*).
- Where identity may be disputed and defence counsel wishes to pin the victim or witness down to a description of the accused before he or she has had further opportunity to familiarise themselves with the appearance of the accused (*R v Gun; ex parte Stephenson* (1977) 17 SASR 165).
- Where there are special grounds to suspect collusion or there is some special factor relating to the admissibility of a complaint which should be explored in cross-examination (*W v The Attorney General* [1993] 1 NZLR 1).
- Where particulars have been sought from the prosecution and the reply is inadequate or is refused (*R v Kennedy, supra*).
- Where a complete brief has not been served on either the prosecution or defence and the missing material is significant, for example, prior statements of witnesses.
- Where the victim has retracted his/her statement or has given an inconsistent version (*B v Gould, supra*).
- Where alleged inconsistencies result in a clear situation in which a defendant simply cannot know the case which he has to meet, the inconsistency may be elevated to a higher place such that the statutory hurdle may have been cleared (*Murphy DPP* [2006] NSWSC 963).

Written submissions on s91/93

If there is disagreement about whether a witness should be called to give evidence, the matter will typically be adjourned with a timetable for “s 91/93 submissions”.

This requires that the accused send the prosecutor their submissions and that the prosecutor respond (often also in writing, although in practice it is sufficient if the prosecutor simply responds that he or she does or does not consent). There is usually a requirement that written submissions are filed with the court.

It is important to understand that submissions present an opportunity to persuade your opponent as to the reasonableness of calling a witness. However, prosecutors frequently indicate that these submissions are poorly drafted by representatives of the accused, in the sense that they do not address the relevant factors and the consequence is that consent will not be forthcoming.

Submissions that simply assert “inconsistencies” are not usually sufficient basis for a prosecutor to consent - especially if s 93 applies. Similarly, it is not sufficient to simply set out reasons without providing a set of proposed areas for cross examination in the event the witness attends. Accordingly, it is vital that submissions set out:

- The witness sought;
- The test that applies to the witness;
- The substantial or special reasons relied upon, including the detail of any asserted inconsistencies or vagueness (e.g. dates of offences), and (importantly) the disadvantage that would be occasioned against the accused if they were not allowed to cross-examine the witness at committal; and
- Ideally, a pithy description of the proposed areas of cross-examination (e.g. “Questions that would enable more specificity in the dates of the alleged offences,” or “Questions about the complainant’s movements after the alleged offence”)

Paper committals and committal hearings: ss 62 and 64 CPA

Whether the matter proceeds by way of paper committal or a committal hearing, the Magistrate must apply the two-stage process of inquiry set out in ss 62 and 64 CPA.

Stage 1 – s 62 CPA

The first stage requires the Magistrate to form an opinion as to whether all the evidence of the prosecution is ‘capable of satisfying a jury, properly instructed, beyond reasonable doubt that the accused person has committed an indictable offence’ (s 62 CPA). The test is whether a jury could convict on the evidence.

If the Magistrate is not of that opinion, the accused must be discharged.

Stage 2 – s 64 CPA

If the Magistrate is of the opinion stage 1 is satisfied, the Magistrate then moves on to consider all of prosecution evidence and any defence evidence taken in the committal proceedings. The Magistrate must form an opinion as

to whether, having regard to all the evidence before the Magistrate, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence (s 64 CPA).

If the Magistrate is not of that opinion, the accused must be discharged.

If the Magistrate is of that opinion, the accused is then committed for trial to the District or Supreme Court.

Submissions as to being discharged at committal

If you consider that your client should be discharged at committal, then you should be prepared to make detailed submissions in respect to the two-stage process referred to above.

The defence case at committal

It would be a very unusual case where the defence would lead evidence at committal since it is essentially testing the strength of the prosecution case. It cannot be a condition of a committal hearing that an accused person give evidence (*DPP v Paterson* [2004] 148 A Crim R 410).

It is important also to note that the rule in *Browne v Dunn* (1893) 6 R 67 does not apply to committal hearings.

This rule is a rule of procedural fairness where the defence puts its version of the case to the witnesses (see chapter 14 on defended hearings).

Therefore, the defence case is almost always reserved at committal. After the consideration of s 62 CPA and before considering the s 64 test, the magistrate will warn your client if they have any evidence to call at the committal. The standard response is for you to direct your client to say “No, Your Honour” and make no further response.

Committals in children's matters and doli incapax

You should bear in mind the special considerations when appearing in a committal matter for a child, the doctrine of *doli incapax* may apply. See Chapter 12 for further information relating to this.

Appendix: Sample written submissions seeking witnesses at committal hearing

These sample submissions have been provided by Mark Dennis, Barrister, Forbes Chambers.

IN THE LOCAL COURT

AT GLENROWAN

Director of Public Prosecutions

Edward Kelly

Charged with: Robbery

Applications under *Criminal Procedure Act 1986* s 93 to Require Witnesses to Attend and Give Evidence at Committal

For the purposes of this application only, the accused has no objection to the tendering of the brief of evidence as served on the accused.

The accused reserves his defence. Everything remains in issue.

Application under s.93 for Noah Idea

Idea is the alleged victim in the matter. He alleges that he was walking in Glenrowan Street when robbed by an unknown assailant. He attends Glenrowan police station immediately after the incident to report his wallet stolen. He provides a statement to Detective Headlock. He provides a description of his assailant as “short, about 150cm tall, stocky, brown hair, looked a bit Indian, had a moustache.”

The next day, Idea is shown an array of photographs. He selects the accused, recording in his second statement that ‘this is the one that most resembles my attacker’.

It is noted for the information of the court that the accused is of Malaysian background, as noted on the custody management records.

It is submitted that the identification evidence of the alleged victim is in issue and that therefore ‘special reasons’ are established such as to require the attendance of the alleged victim to give evidence at committal. Reliance is placed on *B v Gould* (1993) 67 A Crim R 297 at 303. Additionally, the accused relies on Wells J in *R v Gun, ex parte Stephenson* (1977) 17 SASR 165 at 187-188 in that the accused wishes to cross examine the alleged victim as to identification at this early stage and prior to the alleged victim convincing himself, in hindsight that the identification made to police is correct.

Application under Criminal Procedure Act s.91 for Witnesses to Attend and Give Evidence at Committal

The accused makes application under s.91 for the attendance at committal of Fairlie Unreliable, Detective Headlock, and Doctor Witchcraft.

Fairlie Unreliable

Fairlie Unreliable is an eyewitness to the alleged robbery. She attends Glenrowan police station the next day and provides a statement. She states that she is shown a single photograph (of the accused) by Detective Headlock who says to her “This would be the bloke you saw wouldn’t it?” Unreliable then proceeds to identify the accused.

It is apparent from the statement of Detective Headlock that at the time of speaking with Fairlie Unreliable the accused is in police custody. He is not offered the opportunity of an identification parade. Nor is Fairlie Unreliable shown an array of photographs.

It is submitted that the identification evidence of Fairlie Unreliable is made contrary to the provisions s 114 *Evidence Act* and is therefore inadmissible. It is submitted that such exclusion would give the accused a real prospect of discharge at committal. It is submitted that such prospects establish special reasons and is certainly sufficient to constitute substantial reasons under Section 91 - see Studdert J in *Hanna v Kearney* [1998] NSWSC 227.

Even if a trial judge established some initial basis for the admission of such evidence, it is submitted that the trial judge would exclude such evidence in the exercise of his or her discretion as the circumstances for the identification are such that it was unlawfully or improperly obtained. Further, the prejudicial effect of the evidence clearly outweighs its probative value. Substantial reasons are found in the need to cross examine the witness with an eye to discretionary exclusion by a trial judge: see Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 at p.167 as affirmed on appeal in *DPP v Losurdo* (1998) 103 A Crim R 189. Even if the evidence were not to be excluded at trial, cross - examination of Fairlie Unreliable would substantially undermine the credibility of her identification evidence (and may influence the formulation of the warning given to the jury regarding her evidence pursuant to Evidence Act s.116). That cross-examination is likely to substantially undermine her credit is of itself is sufficient to constitute substantial reasons: see *Hanna v Kearney* [1998] NSWSC 227.

It is further submitted that cross examination of Fairlie Unreliable, when taken together with the evidence and cross examination of other witnesses may demonstrate grounds for a no -bill application and thus substantial reasons should be found: see *Hanna v Kearney* (*supra*) at 6-7.

Detective Headlock

Headlock makes no reference in his statement to failing to show an array of photographs to Fairlie Unreliable. Headlock is responsible for compiling the array of photographs shown to the alleged victim Noah Idea. It is noted that the array contains only four photographs, and only one person of non - Anglo appearance (the accused) and only one person who is wearing a moustache (again the accused).

It is submitted that substantial reasons are established for Detective Headlock to attend and give evidence at committal. Cross - examination of Headlock will have a substantial bearing on the credibility of Fairlie Unreliable as a witness: see *Hanna v Kearney* (*supra*).

Further, the array of photographs is such that a trial judge may exclude the identification evidence of Noah Idea (assuming that it is held to be otherwise admissible) on discretionary grounds, as it is both improperly obtained (due to the inherent unfairness of the array) and its prejudicial effect outweighs its probative value - see the NSW CCA decision in *Blick* (2000) 111 A Crim R 326. Cross examination of Headlock with an eye to such discretionary exclusion is sufficient to constitute substantial reasons: See Hidden J in *Losurdo v DPP* (1998) 101 A Crim R 162 as affirmed in *DPP v Losurdo* (1998) 103 A Crim R 189.

Doctor Witchcraft

Doctor Witchcraft sees the alleged victim Noah Idea at Glenrowan General Hospital shortly after Idea finishes giving his statement to police. Witchcraft is a psychiatrist.

Witchcraft states that he observed bruising to the victim "of recent origin" and further states that "having administered certain psychometric tests and personality assessments to Mr Idea I have no doubt whatsoever that Mr Idea was robbed in the main street of Glenrowan. Based on a séance and voodoo principles, tests indicate that the perpetrator is highly likely to be of East Asian descent and is probably left handed. The perpetrator would have low self esteem and probably came from a broken home".

Objection is taken on behalf of the accused to the relevance of these opinions. Further, the accused seeks to cross - examine Doctor Witchcraft to ascertain the exact basis of his expertise and qualifications.

Even if such opinions were held to be relevant and admissible, it is submitted that the accused should have the opportunity of cross - examining Doctor Witchcraft to ascertain an understanding of the basis upon which these opinions have been formed. In that regard the accused relies upon Studdert J in *Hanna v Kearney (supra)*.

Submitted for the information and assistance of the court.

Counsel for the accused

Chapter 7 – Subpoenas

In order to gather evidence in a case, you may require information from a third party. A subpoena is a court order secured by a party to litigation to request an individual or an organisation who is not a party to the litigation to either give evidence or produce documents.

This chapter deals with issuing subpoenas in the Local, District and Supreme Courts, broadly outlining some of the most important aspects of the legislation and practice.

Legislation relating to subpoenas

The main legislation relating to subpoenas is Part 3 (ss 220-232) of the *Criminal Procedure Act 1986*(NSW) ('CPA').

Procedures relating to issuing and setting aside subpoenas are also covered by the court rules in each jurisdiction. In New South Wales, these are:

- Local Court, Part 6 (rules 6.1-6.9) of the *Local Court Rules 2009*.
- District Court, Part 53, Division 2 (rules 53.18-53.25) of the *District Court Rules 1973*.
- Supreme Court, Part 75, Division 1, rule 75.3(1)(g) of the *Supreme Court Rules 1970* (which provides that the *Uniform Civil Procedure Rules*, with some exceptions, applies to most Supreme Court criminal proceedings).

PRACTICAL TIP: There is no substitute for going directly to the most up to date version of the Rules.

All references to legislation in this chapter are references to the *Criminal Procedure Act*, unless stated otherwise.

Alternatives to issuing subpoenas

It is important to keep in mind that once documents are subpoenaed, the other party will also have access to these documents and the information contained in them. There are many circumstances where it may not be beneficial to your client for the documents to be obtained in this way. Therefore, you should always consider whether there are more cost - effective or practical alternatives to issuing a subpoena.

Some agencies or individuals may agree to provide documents without the need for the issue of formal process - a simple telephone call and letter of confirmation may be sufficient.

Relevant documentary material from government agencies or Ministers may be obtained through an application under freedom of information legislation (see Part 4 of the *Government Information (Public Access) Act 2009* (NSW) and Part 3 of the *Freedom of Information Act 1982* (Cth)).

It is relevant to note that some government agencies (for example, agencies with Commission of inquiry powers and secrecy provisions) are not amenable to subpoenas. Such bodies disseminate information only in

compliance with their governing legislation. It is always worth checking the websites of such statutory bodies, or contacting them directly, before the time and expense of process is undertaken.

In relation to witnesses, while a subpoena is the primary way to compel a witness to attend court in criminal proceedings, s 36 of the *Evidence Act 1995* allows a court to order a person - already present at a hearing and compellable to give evidence - to give evidence and/or produce documents even though a subpoena has not been issued.

The different types of subpoenas

A subpoena can be issued for any one of the following purposes:

- To direct a person to give oral evidence in Court (a ***subpoena to give evidence***);
- To direct that a person or organisation produces documents (a ***subpoena for production***); or
- To direct that a person, either personally or on behalf of an organisation, attend court to give oral evidence and to produce documents (a ***subpoena both to give evidence and for production***).

Who can be subpoenaed?

The prosecution has broad obligations of disclosure in a criminal matter. While the NSW Police is still the most common object of a subpoena issued at the request of the defendant, there should rarely be a need to issue a subpoena to the Office of the DPP - they should provide you with all relevant documents in the case, either of their own volition or at your request.

Subpoenas for documents are often directed to third parties, including hospitals, doctors, government departments, holders of street security videos (usually local councils), and telecommunications companies.

Issuing subpoenas - section 222

Any party to the proceeding may request a registrar to issue a subpoena.

A subpoena must be addressed to an individual person. In the case of a subpoena to the New South Wales Police, the personal addressee is the Commissioner of Police.

In the case of a subpoena to a corporation or government instrumentality, the addressee will usually be 'The Proper Officer' in the organisation as a whole, or the appropriate section of the organisation.

A party may request that a subpoena for production be returnable on any day:

- On which the proceedings are listed before a court;
- Not more than 21 days before any such day; or
- With the leave of the court or a registrar, on any other day.

Serving subpoenas - section 223

- A subpoena is to be served within a reasonable time and at least 5 days before the day on which it must be complied with, unless a registrar orders otherwise.
- A subpoena may be served by delivering a copy of the subpoena to the person named or in any other manner prescribed by the rules
- If a person refuses to accept a subpoena, it may served by putting it down in the person's presence after the person has been told of the nature of the notice (see rule 6.4 of the *Local Court Rules 2009*, rule 53.20 of the *District Court Rules 1973* and rule 10.21 of the *Uniform Civil Procedure Rules 2005*).
- Service on witnesses outside New South Wales but within Australia is enabled under the *Service and Execution of Process Act 1992* (Cth).

Conduct money - section 224

- A subpoena issued at the request of a party other than a public prosecutor cannot require attendance or production of a document unless an amount prescribed by the rules for expenses incurred in compliance with a subpoena is paid to that person. Conduct money must be paid at the time of service or a reasonable time before the required date for compliance.
- The amounts payable to a witness required to give evidence for expenses incurred in complying with a subpoena are equivalent to the currently prescribed Scale of Allowances Paid to Witnesses and is gazetted in the NSW Government Gazette (see rule 6.5(a) of the *Local Court Rules 2009*, rule 53.21(b) of the *District Court Rules 1973* and rule 33.11 of the *Uniform Civil Procedure Rules 2005*).
- In the case of a subpoena requiring the production of a document the amount payable is “the reasonable expenses of the person named of complying with the requirement to produce the document” (see rule 6.5(b) of the *Local Court Rules 2009*, rule 53.21(b) of the *District Court Rules 1973* and rule 33.11 of the *Uniform Civil Procedure Rules 2005*).

Short service of subpoenas

- Where a subpoena is not served within reasonable time or at least 5 days before required date of compliance an application may be made to the Registrar to permit a subpoena to be served later (s 223(2)). The later time must be endorsed on the subpoena by the Registrar.
- The District and Supreme Courts have specific procedures for shortening service of subpoenas. For example, the [District Court's procedures are set out on its website](#).
- In respect of Supreme Court proceedings, the *Uniform Civil Procedure Rules 2005* provides that the date specified in a subpoena must be the date of the trial, or any other date as permitted by the court (Rule 33.3(6)).

Limits on obligations under subpoena - section 225

- The person named in a subpoena is not required to produce any document or thing if it is not specified or sufficiently described in the subpoena, or if the person named would not be required to produce the document or thing on a subpoena for production in the Supreme Court.

- It is therefore important to sufficiently set out what documents are sought in the subpoena.
- If you know exactly what documents you are after, name them. For example: “Statement prepared by Constable John Smith relating to the arrest of Peter Maxwell Jones on 21 June 2001” or “COPS entry relating to the arrest of Peter Maxwell Jones on 21 June 2001”.
- If you do not know exactly what documents you are after, clearly categorise the type of documents you are after. Seeking ‘all documents’ in relation to a matter may be too oppressive on the named party (and so render your subpoena liable to be set aside) if that party is likely to have a very large number of documents relating to the matter.

Setting aside a subpoena - section 227

A court may, following application of the person named in a subpoena, set aside the subpoena wholly or in part.

If this application is made, it will generally be made by the end of the time listed for return of the subpoena, and an argument will then be heard before a Magistrate, Registrar, Judicial Registrar or a Judge who will decide whether the subpoena should in fact be set aside.

Grounds for setting aside a subpoena include:

1. The subpoena is an abuse of process.
2. The subpoena is oppressive or is a fishing expedition:
 - a) A subpoena is oppressive in placing an undue burden on the person served to the point of discovery.
 - b) A subpoena is a fishing expedition where there are calls for production of a large number of documents which are inadequately particularised to the point the purpose is to find out what the party holds.
 - c) (*Commissioner for Railways v Small* (1938) 38 SR (NSW) 564; *Spencer Motors Pty Ltd v LNC Industries Ltd* [1982] 2 NSWLR 92).
3. There is an alternative statutory procedure to compel the attendance of witnesses or the production of documents (*R v Hurlle - Hobbs* [1945] KB 165).

Inspection of subpoenaed documents or things - section 228

A party may, if a court or Registrar orders:

- Inspect documents *or things produced* in compliance with a subpoena; and
- Take copies of any documents so inspected.

Generally, the party producing the documents named in the subpoena will have no objection to the documents being inspected and copied, and the Magistrate or Registrar will simply make the order for inspection and/or copying on the return date for the subpoena.

Objection to production or access to documents produced on subpoena

If the subpoena is not set aside (see above), generally, the named party must produce the documents to the court on the specified date. However, the named party can object orally before the court on the return date of the subpoena to the inspection of subpoenaed material (see rule 6.8 of the *Local Court Rules 2009* and rule 53.24 of the *District Court Rules 1973*).

In respect of subpoenaed documents produced other than on attendance before the Court in Supreme Court proceedings, the named party or a party with sufficient interest must notify the registrar in writing of the objection and the grounds relied upon (see rule 33.9 of the *Uniform Civil Procedure Rules 2005*).

Such an oral objection may be made on most of the grounds of objection which could have been raised to set aside the subpoena, even if an objection was not raised at the time.

If there is an oral objection to inspection of subpoenaed documents, the party producing the documents will usually be legally represented at the return date for the subpoena, and inform the Court of its objection. The Crown Solicitors Office usually represents the New South Wales Police Service.

The essential question to be answered is whether to allow inspection of documents produced on subpoena is whether, in the circumstances, the requirements of justice in the proper conduct of the litigation between the parties outweigh the interest of keeping the documents private.

There are a few main grounds on which to object to production or access to documents produced on subpoena. These are:

1. There is no legitimate forensic purpose.

The court must be satisfied that the documents sought are reasonably likely to add to the evidence in the case, i.e. would materially assist the accused in his defence, before granting access to such documents where objection has been taken that no legitimate forensic purpose exists for their production (*Saleam v R* (1989) 16 NSWLR 14; *Roads and Traffic Authority of NSW v Conolly*(2003) 57 NSWLR 310).

2. There is no relevance.

The Court must be satisfied that the plaintiff can show that it is 'on the cards' that the documents to which he or she seeks to have access will bear upon and have relevance to the issues in the case (*Alister v R* (1984) 154 CLR 404); *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667).

3. Legal professional privilege (also known as client legal privilege) applies.

Legal professional privilege attaches to documents which are brought into existence for the dominant purpose of legal advice or for use in legal proceedings. The leading case is *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49. Note that the client legal privilege provisions of the *Evidence Act 1995* (ss 117–126) apply to the adducing of evidence only and do not apply to a pre-trial procedure such as the production of documents on subpoena.

4. Public interest immunity exists.

Determining a claim of immunity involves balancing whether or not the public interest in disclosing information or documents is outweighed by the public interest in preserving its secrecy or confidentiality where disclosure may cause harm to the community's interest, for example in failing to protect the identity of informers (*Alister v R* (1984) 154 CLR 404; *Cain v Glass* (No 2) (1985) 3 NSWLR 230).

5. Sexual assault communications privilege applies.

Protected confidences are counselling communications made by, to or about a victim or alleged victim of a sexual assault offence subject to certain limited exceptions. See ss 295 - 306.

What to do if a subpoena is not complied with - section 229

A party can apply to a court to issue a warrant for the arrest of a person who has, without just or reasonable excuse, not complied with a subpoena.

The provisions of s 229 need to be considered in detail before seeking the issue of a warrant for non-compliance with a subpoena. For example, subpoenas for production of documents are almost invariably issued to large organisations, and if documents are not produced, it may not be a question of deliberately avoiding Court process, but rather you ensuring that your subpoena has not become lost in the system.

In practical terms, if the party named in a subpoena has not produced any documents, and has not corresponded with you or the court before the return date, on most occasions you would ask that the court extend the return date for as long as you need to pursue the named party. This means that a new date is given for the return date of the subpoena.

If you are satisfied after further inquiries that the named party does not intend to comply with the subpoena, you would consider making application for a court to issue a warrant.

Factors for consideration regarding subpoenas

- Analyse the evidence early, and determine how subpoenaed documents can assist you in building your case. Some documents and items, if not subpoenaed early, will be taped over, destroyed or lost by the time of the hearing.
- Subpoenas should be issued well in advance of the hearing date. Practitioners need to be aware of the time limits imposed on service of subpoenas and the possible need to make a formal application to vacate a hearing date should a critical witness be unavailable.
- When you are drafting a subpoena, it is important that you bear in mind the possible grounds on which a subpoena may be set aside (see above). You should prepare your subpoena so that it cannot be objected to those grounds.
- Remember that the named party does not have to comply with the subpoena at all unless their reasonable costs of compliance are paid by you before the date that the party is expected to comply. In practice, a cheque is usually also provided to the named party at the time of service of subpoenas to produce documents.

- It is often prudent to subpoena a defence witness, even if they tell you they will come to court without a subpoena. If you do not issue a subpoena, and your witness does not attend court, the Magistrate or Judge may not have sympathy with your adjournment application. Do not risk all your hard work and preparation.
- Be courteous. Where issuing a subpoena to attend and give evidence, always telephone the witness (if possible) to tell him or her that he or she is being subpoenaed. The witness will appreciate the notice, and will be less intimidated by the process.
- Always check with the court registry whether documents have been produced on subpoena. Frequently an envelope will have been received but not attached to the court file.
- It is preferable to make the return date for subpoenas for production as early as possible before the hearing date. This allows sufficient time to inspect documents produced. In addition, if the subpoena is resisted, setting an early return date will allow time for argument as to whether the subpoena should be set aside to be held prior to the substantive hearing of the case. Early return dates for subpoenas for production of documents may also be particularly important where there is a likelihood that the documents produced on subpoena are to lead to further avenues of inquiry which may, for example, require the issue of further subpoenas.
- The court may grant general access over the documents produced under subpoena. Each court has various procedures relating to uplifting and photocopying subpoenaed documents. Check the court websites and practice notes for the applicable procedures.

Appendix: Sample schedules to subpoenas to produce documents

To the Commissioner of Police

Schedule

1. This subpoena [for subpoenas for production]
2. All records relating to the investigation, apprehension, arrest, interrogation, charging and prosecution of [name] (DOB: []), Vehicle: [], Registration No: [], Other Driver: [], Vehicle: [], Registration No: [], relating to an incident involving [name] at [time] on [date] for which he or she was charged with [offence] by Constable [name] on [date and time], Event Reference No. [] (copy attached), including but not confined to:
 - a) All Police reports, COPS records, notebooks, occurrence pads, maps, sketches, papers, charge sheets, correspondence, records of interview, witness statements, reports and all other documents relating to [] (DOB: []).
 - b) The police notebooks of [] and [] of [] Police Station.
3. All reports and/or statements received by police or received from [name];
4. All statements (whether in notebooks or otherwise) taken by police;
5. All photographs and videos taken by police or held by police; and
6. All exhibit book entries.

To a medical doctor/hospital

Schedule

1. This subpoena [for subpoenas for production]
2. All clinical notes, nursing notes, admission summaries, casualty treatment records, out-patient treatment records, discharge summaries, operation notes, recovery room notes, organ imaging reports, X-rays, pathology reports, reports of clinical tests, doctors' reports, social workers' reports, rehabilitation reports, physiotherapy reports, speech and occupational therapy reports and documents relating to treatment of [name] (DOB) across the period [date a] - [date b].

To the Ambulance Service

Schedule

1. This subpoena [for subpoenas for production]
2. All clinical notes, nursing notes, admission summaries, casualty treatment records, out-patient treatment records, discharge summaries, operation notes, recovery room notes, organ imaging reports, X-rays, pathology reports, reports of clinical tests, doctors' reports, social workers' reports, rehabilitation reports, physiotherapy reports, speech and occupational therapy reports and documents howsoever relating to treatment received by [] (DOB: []), Date of Transport: [], Approximate Time of Transport: [], Location where patient transported from: [], Location where patient transported to: [].

Chapter 8 - Forensic Procedures

The legislative framework for the taking, testing, destruction and storage of forensic samples is established by the *Crimes (Forensic Procedures) Act 2000* (NSW) (“the Act”) and the *Crimes (Forensic Procedures) Regulation 2008* (NSW) (“the Regulations”).

This chapter will provide an overview of the application of the legislation to:

- The obtaining of DNA samples from suspects;
- The admissibility of forensic material;
- The DNA database;
- The rules relating to the carrying out of forensic procedures on specific categories of persons; and
- The destruction of DNA material

Any reference to a section of legislation in this chapter is a reference to a section of the *Crimes (Forensic Procedures) Act*, unless otherwise specified.

A person who is the subject of an application for an order authorising the carrying out of a forensic procedure (the collection of a DNA sample) is referred to as ‘the suspect’.

What is a Forensic Procedure?

Section 3 defines “forensic procedure” as:

- An intimate forensic procedure, involving examining or taking a sample or impression from someone’s private parts, blood or teeth, including an other-administered buccal swab; or
- A non-intimate forensic procedure, involving the taking of any other photographs, impressions or bodily samples, including fingerprints, hair and nail clippings, and self-administered buccal swabs.

A forensic procedure does *not* include any intrusion into a person’s body cavities (except the mouth) or the taking of a sample for the sole purpose of establishing the identity of the person from whom the sample is taken (s 3).

What is informed consent?

According to the legislation it generally applies, under s 9 where:

- (1) (a) a police officer intends to ask a suspect to consent to a forensic procedure, and
(b) the suspect does **not** identify as an Aboriginal person or Torres Strait Islander.
- (2) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:
 - (a) asks the suspect to consent to the forensic procedure under section 11, and
 - (b) personally or in writing, gives the suspect:

(i) the information that the suspect must be given under section 13 (1) (a), (e), (f), (g), (i), (j) and (k), and

(ii) a description of the nature of the information that the suspect must be given under section 13 (1) (b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure), and

(c) informs the suspect about the forensic procedure in accordance with section 13, and

(d) gives the suspect a reasonable opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the suspect's choice and, subject to subsection (3), to do so in private.

(3) If the suspect is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the Australian legal practitioner in private if the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

The obtaining of informed consent from an Aboriginal person or Torres Strait Islander (s 10)

This section applies where a procedure if the suspect consents and is an Aboriginal person or Torres Strait Islander.

The police officer must ask the suspect to consent to the forensic procedure under section 11, and gives the suspect a written statement that sets out:

- The information that the suspect must be given under section 13 (1) (a), (e), (f), (g), (h), (i), (j) and (k), and
- the nature of the information that the suspect must be given under section 13 (1) (b), (c) and (d) (but not the specific information that the suspect is to be given under these paragraphs in relation to the particular forensic procedure), and
- informs the suspect about the forensic procedure in accordance with section 13, and
- complies with the rest of this section.

The matters that the suspect must be informed of under s 13 include

- the purpose for which the procedure is required;
- the offence in relation to which it is required;
- the manner in which it will be conducted;
- that the suspect may refuse consent;
- and the consequences of failing to consent.

(3) The police officer must not ask the suspect to consent to the forensic procedure unless an interview friend is present, or the suspect has expressly and voluntarily waived his or her right to have an interview friend present.

(4) Before asking the suspect to consent to a forensic procedure, the police officer must inform the suspect that a representative of an Aboriginal legal aid organisation will be notified that the suspect is to be asked to consent to a forensic procedure, and notifies such a representative accordingly.

The police officer is not required to comply with 10 (4) if he or she is aware that a representative of an Aboriginal legal aid organisation has already been arranged, or if the suspect has expressly and voluntarily waived his or her right to have a legal representative present, while the suspect is being asked to consent to the forensic procedure.

After asking a suspect who has waived their right to an interview friend to consent to a forensic procedure, the police officer must give the suspect a reasonable opportunity to communicate, or attempt to communicate, with an Australian legal practitioner of the suspect's choice and, subject to subsection (8), to do so in private.

If a suspect covered by sections 10 (6) (a person who waived their right to an interview friend) or 10 (7) (a suspect accompanied by an interview friend) is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the Australian legal practitioner, or the suspect's interview friend or legal representative, in private if the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

An interview friend (other than a legal representative) of the suspect may be excluded from the presence of the police officer and the suspect if:

- the interview friend unreasonably interferes with or obstructs the police officer in asking the suspect to consent to the forensic procedure, or in informing the suspect as required by section 13, or
- the police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend may be a co-offender of the suspect or may be involved in some other way, with the suspect, in the commission of the offence.
- if an interview friend is excluded under subsection (9), a suspect may choose another person to act as his or her interview friend. If the suspect does not waive his or her right to have an interview friend present and does not choose another person as an interview friend, the police officer may arrange for any person who may act as an interview friend under section 4 to be present as an interview friend.

Withdrawal of consent (s 14)

If a person expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the person's conduct) before or during the carrying out of the forensic procedure:

- the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and
- the forensic procedure is not to proceed except by order of a senior Police officer under Part 4 or a Magistrate or other authorised officer under Part 5.

Information provided to the suspect about the forensic procedure and the suspect's response to such information must be electronically recorded or, where electronic recording is not practicable, done in the presence of an independent person who is not a Police officer (s 15).

The matters that the suspect must be informed of under section 13 include:

- the purpose for which the procedure is required;
- the offence in relation to which it is required;
- the manner in which it will be conducted;
- that the suspect may refuse consent; and
- the consequences of failing to consent.

The Categories - How can a DNA sample be obtained?

DNA Samples can be obtained:

1. With the informed consent of the suspect; or
2. With the authorisation of a senior police officer; or
3. Pursuant to an order from a court.
4. Following the conviction of a person for a serious indictable offence; or
5. Where the person is a registrable person under the Child Protection (Offenders Registration) Act 2000(NSW); or
6. A person volunteers to give a sample; or
7. A sample is obtained under an application as an Untested Former Offender.

Forensic Samples Obtained With Consent (Part 3)

A forensic procedure may be carried out on a suspect with the **informed consent** of the suspect. There are two exceptions to this rule (s 7):

- A child, defined in s 3 as a person who is at least 10 years of age but under the age of 18, cannot consent to a forensic procedure; and
- An incapable person, defined in s 3 as an adult who is incapable of understanding the general nature and effect of a forensic procedure, or who is incapable of indicating whether he or she does or does not consent to the forensic procedure being carried out, cannot consent to a forensic procedure.

A Police officer must not ask a suspect to undergo a forensic procedure unless satisfied that there are reasonable grounds upon which to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed either the offence in respect to which they are a suspect or some other prescribed offence defined in s 3.

On Application by a Senior Police Officer

If a suspect cannot or does not consent to the taking of a forensic sample, an order may be made by a senior police officer (Sergeant or above) — in the case of a non-intimate forensic procedure on a person under arrest who is not a child or incapable person, pursuant to section 17.

A senior police officer may order the carrying out of a non-intimate forensic procedure on a suspect (other than a child or incapable person) who is under arrest if (s 18):

- The suspect has been asked to consent under Part 3 of the Act; and
- The suspect has not consented; and
- The officer is satisfied that (s 20):
- There are reasonable grounds to believe that the suspect committed an offence;
- There are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed such an offence; and
- The carrying out of the forensic procedure without consent is justified in all the circumstances.

Self-administered buccal swabs should be ordered in preference to the taking of a sample of hair unless the suspect requests the latter or the suspect has failed to indicate that he or she will carry-out a self-administered buccal swab (s18(2)(b)).

The senior police officer must make a record of the order and the reasons for making it as soon as practicable after the making of the order (s 21(4)).

Pursuant to an order from a court

- A court can make an order for a forensic procedure, under the authority of: An authorised justice — in the case of an interim order (s 32); or
- A Magistrate — in the case of a final order (s 24).

If a person does not or cannot consent to a forensic procedure, a Magistrate may order the carrying out of a forensic procedure (s 24). However, before doing so, the Magistrate must be satisfied on the balance of probabilities that the procedure is justified in all the circumstances (s 24(1)(b)).

In determining this, the Magistrate must balance the public interest in obtaining the evidence against the public interest in upholding the suspect's physical integrity, having regard to such factors as (see s 24(4)):

- The gravity of the offence,
- The subjective characteristics of the accused including their age, cultural background. and physical and mental health to the extent which they are known.
- In the case of a child or incapable person, the best interests of that child or person.
- Any such other practicable ways of obtaining evidence as to whether or not the suspect committed the alleged offence that are less intrusive,
- Any such reasons the suspect may have given for refusing to consent to the carrying out of the forensic procedure concerned,
- In the case of a suspect who is in custody, the period for which the suspect has been in custody and the reasons for any delay in the making of an application for an order under this section,
- Any other matters that the Magistrate considers relevant to the balancing of those interests.

Intimate forensic procedures:

In the case of intimate forensic procedures (s 24(2)):

- There must be reasonable grounds to believe that the suspect has committed a indictable offence; and
- There must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence.

Non-intimate forensic procedures:

In the case of non-intimate forensic procedures (s 24(3)):

- There must be reasonable grounds to believe that the suspect has committed an offence; and
- There must be reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence (s 24(3)(b)).

Final Orders (Part 5, Div 2)

Who can apply for a final order?

An “authorised applicant” may apply to a Magistrate for a final order (s 26(1)). Section 3 defines an authorised applicant as:

- The police officer in charge of a police station;
- A custody manager within the meaning of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) (“LEPRA”);
- An investigating police officer in relation to an offence; or
- The Director of Public Prosecutions.

Section 26(2) provides that the application must:

- Be made in writing;
- Be supported by evidence on oath or affidavit dealing with the matters referred to in s 24(1); and
- Specify the type of forensic procedure to be carried out

If a Magistrate refuses an application, the authorised applicant may not make a further application unless there is additional information that justifies the making of a further application (s 26(3)).

An authorised applicant may apply to a Magistrate for an order to repeat a forensic procedure of the same type that has already been carried out in accordance with Part 6 if the forensic material collected the first time is insufficient or contaminated lost or it is for and any other reason unavailable for analysis and repeating the procedure is justified in all the circumstances (s 27).

It is an offence to give false or misleading information to a Magistrate in making an application for a forensic procedure (s 43 A).

If a suspect is not under arrest the Magistrate may, on the application of a police officer, (s 29(1)):

- Issue a summons for the appearance of the suspect at the hearing of the application if satisfied that the issue of a summons is necessary to ensure the appearance of the suspect; or
- Issue a warrant for the arrest of the suspect for the purpose of bringing the suspect before the Magistrate for the hearing of the application.

The hearing of an application for a final order

The suspect or their legal representative is entitled to cross examine the applicant and may address the court (s 30(6)(a) and (c)). Additionally, with the leave of the Magistrate, the suspect or their legal representative may call or cross examine any other witness (s 30(6)(b)).

Before giving leave the Magistrate must be of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined (s 30(7)).

The making of a final order

If a Magistrate makes an order authorising a forensic procedure, s 31 states that the Magistrate must:

- Specify the forensic procedure which is authorised to be carried out;
- Give reasons for the making of the order;
- Ensure that a written record of the order is kept;
- Order that the suspect attend for the carrying out of the forensic procedure; and
- Inform the suspect that reasonable force may be used to ensure that he/she complies with the order.

Forensic Samples Pursuant To An Interim Order (Part 5, Div 3)

When can an interim order be authorised?

If a person does not or cannot consent to a forensic procedure, an authorised justice (as defined in s 3 of the Act as 'authorised officer' may make an interim order authorising the carrying out of a forensic procedure (s 32)).

Before making the order the authorised justice must be satisfied that:

- Section 23 states the circumstances in which a Magistrate or authorised person may order a forensic procedure and the applicable circumstances such as whether they have consented to a forensic procedure, they are under arrest and whether they are a child or a person incapable of consenting; and
- The probative value of the evidence obtained as a result of the forensic procedure is likely to be lost or destroyed if there is delay in carrying out the procedure; and
- There is sufficient evidence to indicate that a Magistrate is reasonably likely to be satisfied, as referred to in section 24 (1), when the application is finally determined.

If an interim order is granted by an authorised justice, the forensic procedure must be carried out without delay (s 32). An interim order operates only until a Magistrate confirms or disallows the interim order by way of the granting of a final order (s 32(3)).

An order confirming an interim order must adhere to section 24(1) and is considered to be made under s24.

An interim order for the carrying out of an 'intimate' forensic procedure can only be granted if the person is a suspect in relation to a prescribed offence (s 32(2)). "Prescribed offence" is defined in s 3 as an indictable offence or any offence described as such for this purpose by the Regulations.

Who can apply for an interim order?

Section 33 states that only an authorised applicant may:

- Without bringing a suspect before an authorised justice; and
- Without obtaining an order from a Magistrate under s 24;
- Make an application seeking an interim order authorising the carrying out of a forensic procedure without delay.

If an application is made in person it must be supported by evidence on oath or by affidavit dealing with the matters contained in s 32(1) and must specify the type of order sought to be carried out (s 33(3)).

An application for an interim order must be made (s 33(4)):

- In person; or
- If not practicable, by fax; or
- If not practicable, by other means of communication.

However, if the application is not made in person, an authorised justice must not issue the interim order unless satisfied that (s 33(4A)):

- It is required urgently; and
- It is not practicable for the application to be made in person.

If the application is not made in person, the application must be supported by evidence on oath or affidavit as soon as practicable after the making of the application but before the interim order is made (s33(9)).

The provisions that relate to the hearing, making and recording of an interim order (ss 34-38) are not canvassed in detail in this chapter on the basis that lawyers are rarely involved at this early stage of the matter. It is important, however, to note the following:

- A sample taken under an interim order must not be analysed until a final order is made, unless the sample is likely to perish before the final order is made (s 38).
- An interim order will not be void if it does not specify a time and place for the taking of the forensic sample or a time limit for taking it: *JW v Detective Sergeant Karol Blackley & Anor* [2007] NSWSC 799 [23]-[24].
- An interim order should not stand indefinitely and the status of the order should be determined by an appropriate hearing on the s 24 criteria: *Kerr v Commissioner of Police* [2001] NSWSC 637[57].

On Conviction of a serious indictable offence

The general rules for the carrying out of forensic procedures outlined in Part 6 of the Act (see above) apply to forensic procedures undertaken in relation to the aforementioned groups of persons.

The respective parts of the Act should be consulted for specific rules governing each group of persons.

Generally, however, the following rules apply:

- Intimate and non-intimate forensic procedures can be conducted with the consent of the person.
- If consent is withheld, a senior police officer may authorise the carrying out of a 'non-intimate' forensic procedure in certain circumstances from a serious indictable offender, an untested former offender or an untested registrable offender but NOT from a volunteer.
- If consent is withheld, a court may authorise the carrying out of an intimate or non-intimate forensic procedure on a serious indictable offender, an untested former offender or an untested registrable offender if satisfied that such a procedure is justified in all the circumstances.
- A Magistrate may authorise the taking of a forensic sample from a child (between the ages of 10 and 18) or an incapable person in certain circumstances.

Part 7 of the Act authorises the taking of DNA samples from serious indictable offenders. A serious indictable offender is a person who has been convicted of a serious indictable offence (s 3). This part only applies if the serious indictable offender is serving a sentence of imprisonment in a correctional centre and applies regardless of whether that person was convicted before or after the commencement of this part (s 61(4)).

Untested registrable persons (Part 7B)

Part 7B of the Act regulates the taking of forensic samples from untested registrable persons.

An untested registrable person for the purposes of the Act is a person who is a registrable person under the *Child Protection (Offenders Registration) Act 2000* (NSW) who is required to comply with the reporting obligations under that Act if that person's DNA profile is not contained on the offenders index of the DNA database system (s 75P(3)).

People who Volunteer (Part 8)

Part 8 sets out the rules regarding the taking of forensic samples from volunteers.

A volunteer is a person (other than a child under 10 years or incapable person) who consents to the taking of a forensic sample by a police officer. Excluded persons, suspects and children under 10 years of age cannot be a volunteer under the Act (s 76(1)). Certain persons are excluded from volunteering where they have volunteered to undergo a forensic procedure under certain provisions of the *Crimes Act 1900* (NSW) (s 76 A), generally speaking as a victim or for elimination purposes.

A child above the age of 10 but below the age of 18 can be a volunteer with their parent or guardian and their own informed consent or under a Magistrate's orders (s76(2A)). An incapable person can also be a volunteer with the consent of their parent or guardian (s 76(1)).

Untested former offenders (Part 7A)

Part 7A of the Act provides for the taking of a DNA sample from an untested former offender. An “untested former offender” is a person who has served a sentence of imprisonment for a serious indictable offence in a correctional facility or has been served a CAN for an indictable offence, however, that person’s DNA profile is not contained on the offenders index of the DNA database system (s 75A(3)).

This part will apply where an untested former offender is brought before the court in regard to a further indictable offence.

The Admissibility of Forensic Material

Time limits

Section 6 of the Act provides the following table that outlines the time limits for carrying out forensic procedures:

Time limits for forensic procedures			
Suspect’s status	Procedure with suspect’s consent (Part 3)	Procedure by order of a senior police officer (Part 4)	Procedure by order of a Magistrate or an authorised officer (Part 5)
Child or an incapable person, not under arrest	Not applicable	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding “time out” (see section 40)
Suspect, including person identifying as Aboriginal person or Torres Strait Islander (not a child or an incapable person), not under arrest	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding “time out” (see section 16)	Not applicable	Procedure must be carried out within 2 hours after suspect presents to investigating police officer, disregarding “time out” (see section 40)
Child or an incapable person, under arrest	Not applicable	Not applicable	Procedure must be carried out not later than 2 hours after the end of the investigation period permitted under section 115 of LEPR, disregarding

			"time out" (see Division 4 of Part 5)
Suspect, including person identifying as Aboriginal person or Torres Strait Islander (not a child or an incapable person), under arrest	Suspect may be detained in accordance with Part 9 of LEPR, for 2 hours after the end of the investigation period permitted under section 115 of LEPR, disregarding "time out" (see section 7 (3) and (4))	Suspect may be detained in accordance with Part 9 of LEPR, for 2 hours after the end of the investigation period permitted under section 115 of LEPR, disregarding "time out" (see section 17 (3) and (4))	Procedure must be carried out not later than 2 hours after the end of the investigation period permitted under section 115 of LEPR, disregarding "time out"

Procedure for taking the forensic sample (Part 6)

There are a series of legislative obligations that need to be met to satisfied during the taking of a forensic sample. Part 6 of the Act deals with the practical process and associated requirements.

Section 44 of the Act specifies general applicable rules for carrying out forensic procedures, namely:

- Must be carried out in circumstances affording reasonable privacy to the suspect and must not be carried out in the presence of a person who is of the opposite sex to the suspect unless permitted under the Act; and
- Must not be carried out in the presence of a person whose presence is not necessary or permitted under the Act; and
- Must not involve the removal of more clothing than is necessary for the carrying out of the procedure; and
- Must not involve more visual inspection than is necessary for the carrying out of the procedure.

Sections 45-48 make provision for the relationship between suspect and police during the procedure. These sections state:

- There must be no questioning of the suspect whilst the forensic procedure is being carried out (s 45).
- The suspect must be cautioned by a police officer before the forensic procedure is conducted (s 46).
- Although reasonable force may be used to enable a forensic procedure to be carried out and to prevent the loss, destruction or contamination of any sample (s 47), the procedure must not be carried out in a cruel, inhuman or degrading way (s 48).

Forensic Samples from Children, an Incapable Person or an Aboriginal or TSI Person

If the suspect is a child, the person carrying out the forensic procedure should be of the sex chosen by the child.

If the child does not wish to make such a choice, the person should be of the same sex as the child (s 51).

A child, incapable person, Aboriginal person or Torres Strait Islander must, if reasonably practicable, have an interview friend and/or legal representative present while the forensic procedure is being carried out (s 54 and 55).

An interview friend who is not a legal representative may be excluded if (s 54(3) and 55(4)):

- They unreasonably interfere with the procedure; or
- The investigator forms a reasonable belief that the interview friend could be prejudicial to the investigation because the interview friend is in some way involved.

In such a case, the suspect may choose another interview friend (s 54(4) and 55(5)).

The investigating police officer must ask the suspect if he or she identifies as an Aboriginal or Torres Strait Islander (s 55(1A)). An Aboriginal or Torres Strait Islander may waive the right to an interview friend (s 55(3)).

Authorised Parties and Medical Practitioners

Section 50 contains a table outlining the persons who may conduct a forensic procedure. Such persons include; medical practitioners, nurses, dentists (where relevant), and appropriately qualified police officers. However, a suspect may self-administer a buccal swab in the presence of another person, whether of the same sex as the suspect or not (s 51A).

A suspect is entitled to have a medical practitioner of their choice (as prescribed by s 50) present during (s 53):

- The carrying out of an intimate forensic procedure; or
- The carrying out of a non-intimate forensic procedure that involves the taking of an impression or cast of a wound from a part of the suspect's body.

Recording of Procedure

The carrying out of the forensic procedure must be recorded by electronic means unless the suspect objects to the recording or where to record the procedure would be impracticable (s 57(1)). The requirement of recording does not apply to the taking of a hand print, finger print, foot print or toe print or to the taking of a photograph where the taking of that photograph constitutes a non-intimate forensic procedure (s 57(1A)).

The Sample – A Suspect's Rights

If, after taking a DNA sample from a suspect, there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect the investigating officer must ensure that, if the suspect so requests (s 58):

- A part of the material sufficient for analysis is given to the suspect;
- Reasonable care is taken to protect and preserve the sample until it is given to the suspect; and
- The suspect is reasonably assisted to protect and preserve the sample until it is analysed.

Results of Analysis

The result of the analysis of any forensic sample must be made available to the suspect if the suspect so requests, unless to do so would prejudice the investigation of any offence. The results must be made available to the suspect a reasonable time prior to the evidence being adduced in any proceedings (s 60).

Admissibility of Forensic Material (Part 9)

When appearing for a client at hearing or trial, it is important to consider whether any evidence in the police brief that is to be used or relied upon by the prosecution has been (or ought to have been) obtained pursuant to an order under the Act.

If forensic material obtained pursuant to an order under the Act is to be relied upon at hearing or trial, the admissibility of such evidence should be closely considered.

Part 9 of the Act deals with the admissibility of evidence that arises from unlawful forensic procedures. It applies when a forensic procedure is carried out on a person and there is a breach of, or failure to comply with, any provision in relation to carrying out the forensic procedure or a breach of any provision of Part 11 in respect of the recording or use of information on the DNA database system (s 82(1)) (discussed below).

When assessing the inadmissibility of evidence from improper forensic procedures the applicable threshold tests per s 82(3) are:

- Evidence of forensic material taken from a person by a forensic procedure;
- Evidence of any results of the analysis of the forensic material;
- Any other evidence made or obtained as a result of, or in connection with, the carrying out of the forensic procedure.

If the section applies, such evidence is not to be admitted in any proceedings unless (s 82(4)):

- The suspect does not object to the admission of the evidence;
- In the opinion of the court, the desirability of admitting the evidence outweighs the undesirability of admitting the evidence (s 82(5)); or
- In the opinion of the court, the breach of, or failure to comply with, the provisions of the Act arose out of a mistaken but reasonable belief as to the age of a child.

Destruction of Forensic Material (Part 10)

Part 10 of the Act outlines the provisions regarding the destruction of forensic material. The Part prescribes the destruction of forensic samples if:

- The sample was taken pursuant to an interim order where the interim order is quashed by a Magistrate (s 86);
- A conviction is quashed (s 87(1));
- The forensic material was given voluntarily for elimination purposes (s 87A);

- A period of 12 months has elapsed since the taking of the sample and proceedings against the suspect have not been instituted or have been discontinued (the 12 month period may be extended by the Magistrate if satisfied that there are special reasons to do so) (s 88(2));
- The sample was taken from a suspect and one of the following applies (s 88(4)):
- No conviction is recorded; or
- The suspect is acquitted and there is no appeal lodged against the acquittal; or
- The appeal is unsuccessful; or
- The forensic material is inadmissible by reason of s 82 (s 89).

DNA Database (Part 11)

Part 11 of the Act establishes the regime for the DNA database system. Section 90 sets out the types of DNA indexes which are contained within the database. These include; an offenders index, a suspects index, an index of material found at crimes scenes, a volunteers index and a missing persons index.

A person is only permitted access to information stored on the DNA database system if accessed in accordance with the Act (s 92(1)). Section 92(2) outlines the purposes for which a person may access information stored on the database, including lawful forensic matching and for coronial inquests or inquiries.

PRACTICAL APPLICATION AND CONSIDERATIONS

Please remember to:

- Read the Act in detail.
- Be conscious that any DNA sample obtained from a forensic procedure may be used not only in relation to the particular matter in which you appear, but also may be kept on the database for future use.
- Do not hesitate to seek a short adjournment (or seek to have the matter stood down in the Court list) if you need to research or speak to your supervising solicitor.
- A police officer must not ask a suspect to undergo a forensic procedure unless satisfied that there are reasonable grounds.
- An interim order for the carrying out of an intimate forensic procedure can only be granted if the person is a suspect in relation to a prescribed offence (s 32(2)).
- Information provided to the suspect about the forensic procedure and the suspect's response to such information must be electronically recorded (s 15).
- Make sure the time limits are adhered to.

When considering forensic material that has been supplied in a police brief of evidence, a practitioner should carefully examine:

- Whether there is evidence which was obtained pursuant to a forensic procedure;
- Whether there has been a failure to comply with a provision of the Act;
- Whether the evidence should arguably be rejected per the s 82 criteria.

Prior to appearing for a client on an application for an order authorising a forensic procedure, a practitioner should closely examine and be able to answer the following questions:

- Is the application in the correct form?
- Is the applicant an “authorised applicant”?
- Does there need to be an interview friend present?
- Do I need to cross-examine the applicant?
- Do I need to seek leave to cross-examine any relevant witness or call any evidence?
- Has the status of “suspect” been established?
- Has the requirement of “reasonable grounds” been established?
- Do the circumstances require such a procedure?

Chapter 9 - Negotiations With The Prosecution

Introduction

In many matters there is room to negotiate facts and/or charges with the prosecution. This is called "charge negotiation" and may lead to a "charge agreement" and/or a statement of agreed facts.

The NSW Office of the Director of Public Prosecutions (ODPP) applies the Director of Public Prosecution's Prosecution Guidelines, as does the New South Wales Police Service (it is claimed). The Prosecution Guidelines should always be addressed in charge negotiations with officers from the ODPP or with Police Prosecutors.

The following chapter is an edited version of a paper on negotiating with the DPP (updated to reflect the revised Prosecution Guidelines issued in October 2003) and was written by Mr Nicholas Cowdery AM QC, New South Wales Director of Public Prosecutions from 1994 to 2011.

The references within the chapter to the Samuels Report are references to the report of the Samuels inquiry (*"Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts"*). This inquiry was commissioned by the Attorney General on 18 September 2001 as a result of public criticism of a number of particular instances involving charge bargaining (as it was then called) and communications with victims and police.

The following article is reproduced directly from the 3rd printed Edition of the Practitioner's Guide to Criminal Law, and was kindly written by the then Director of Public Prosecutions in NSW, Nicholas Cowdery AM QC.

Negotiating with the Director of Public Prosecutions

Nicholas Cowdery AM QC

Former Director of Public Prosecutions, NSW

Charge negotiation is a good thing, to be actively undertaken by prosecutors and pursued by defence representatives in the best interests of their clients.

We used to call it "charge bargaining", leading to a "charge bargain". The Samuels Report was critical of those terms and recommended that they be replaced by "**charge negotiation**" leading to a "**charge agreement**".

Prosecutors are directed to engage in charge negotiation in compliance with the Prosecution Guidelines. The Guidelines are issued pursuant to section 13 of the *Director of Public Prosecutions Act 1986*. They are guidelines to ODPP officers and others appearing for the Director for the conduct of prosecutions and the making of prosecutorial decisions and they have the force of directions. They are available on the ODPP website at www.odpp.nsw.gov.au and are reproduced in the standard criminal law services.

Charge negotiation

Mr Samuels said: “the optimum outcome of a criminal prosecution is resolution by a plea of guilty to a charge which adequately represents the criminality revealed by facts which the prosecution can prove beyond reasonable doubt, and which gives the sentencer an adequate range of penalty. A charge bargain must not compromise the principle - which I will call ‘the criminality principle’ - made up of these three ingredients.”

Essentially it is a question of adequacy: adequate reflection of the criminality involved and adequate scope for sentencing. Therefore, a prosecutor may in certain circumstances properly withdraw a charge which the available evidence supports (and which, therefore, the prosecution can prove) in return for a plea to a less serious charge.

Defence representatives should always be mindful of the possibility of negotiating a plea of guilty to an appropriate charge - not necessarily the existing charge. There are sentence discounts available to those who plead because there are obvious benefits to the criminal justice system resulting from a guilty plea: the earlier the plea, the greater the potential for such a discount (see s 22 *Crimes (Sentencing Procedure) Act* 1999 and *R v Thomson and Houlton* (2000) 49 NSWLR 383.) For the same reasons, prosecutors should also be on the lookout for an appropriate charge agreement.

There are a number of different circumstances where acceptance of a plea to a lesser or alternative charge might properly arise, including the four discussed below. Defence representatives may be in a position to identify such opportunities just as readily as prosecutors will; however, in some cases (eg. a timorous or reluctant witness), where there is no obligation of disclosure on the prosecution, there may still be the possibility of an agreement if it is sought.

1. The **timorous or reluctant witness**. Typical cases are those involving sexual assaults of young victims. Sometimes the victim may have such a fear of giving evidence that she (or he) initially simply refuses to do so. Sometimes a witness who does not actually refuse to give evidence is nevertheless in such a state of emotional turmoil that he or she may well be neither coherent nor convincing. Sometimes the personal circumstances of the victim may have changed so significantly that further harm may be done by forcing him or her to testify. In such circumstances the prosecutor, to save the witness testifying, is justified in accepting a plea to a less serious charge, or one taken on the basis of a statement of agreed facts which omits or reduces certain matters of aggravation initially alleged - provided always that the criminality principle is observed.

Reluctant witnesses are those who, for reasons other than fear of the judicial process itself, become uncooperative and express a desire not to testify. This is not uncommon where there is a close relationship between the accused and the victim, such as in domestic violence offences. A typical case is one where a woman is regularly beaten by her partner but “forgives” him every time after he has been charged and expresses a reluctance to proceed with the prosecution. Frequently in such cases the public interest will require that the prosecution proceed, despite the reluctance of the victim; but if charge negotiation could lead to a conviction on an appropriate lesser charge in such circumstances, it would be a desirable outcome for all concerned.

2. The **unpersuasive witness**. Sometimes the victim's evidence, solid enough on paper, may appear at committal or in conference to be significantly short of persuasive. This might not be because of any element of deliberate untruth. It might be because the victim's statement includes matter which is hearsay or which for other reasons is inadmissible at the trial or would not carry much weight. In such a case, the criminality principle requires that any negotiated plea adequately reflect the criminality demonstrated by the witness's admissible evidence.
3. In cases where there is **overlapping of adequate penalties** it may be appropriate to accept a plea to a lesser charge. For example (instancing a common occurrence), the indictment may contain a charge under section 33 of the Crimes Act of maliciously inflicting grievous bodily harm with intent and the defence may offer a plea to section 35 - malicious wounding or infliction of GBH without the intent. The first carries a penalty of 25 years; the second seven years. In some circumstances, seven years might give completely adequate scope for the sentencing judge. The prosecutor's reasoning might therefore be that the Crown can prove the offence under section 33, but at the cost of a lengthy trial which will consume resources, time, money and grief; at the end of which the sentence likely to be imposed will be one of considerably less than the seven years maximum for the less serious offence.
4. **Multiple offences**. This situation often arises in child sexual assault matters, where there may also be the added complication of a timorous or unpersuasive witness. In such circumstances a plea to some only of the charges might be preferable to proceeding on all with the possibility of an entire acquittal. In such cases there should be careful consideration of which charges are pleaded to. If the offences occurred over a considerable period of time it would usually be preferable to select representative charges that indicate activity over the span of that period. It might also be appropriate in such a matter to include in the agreed facts reference to some or all of the other incidents. Multiple offences can also be encountered in corporate crime and fraud. Such trials are often complex and lengthy and a charge agreement could therefore have considerable public and individual benefit.

Rationale

Charge agreement depends upon the balanced satisfaction of two public interests. One is the interest of the community in ensuring that criminal conduct is punished according to its deserts. The other is the interest of the community in reducing, so far as possible and appropriate, the expenditure of resources in the criminal justice system and the delay between charge and arraignment and trial.

Strict adherence to the criminal prosecution process and all that it prescribes is not the only way to address criminal offending.

Agreed facts

The Samuels Report noted that the version of the DPP's Policy and Guidelines then in existence (since replaced by one consolidated document) did not say much about Statements of Agreed Facts. However, in October 2003

a revised version of the Prosecution Guidelines was issued which includes Guideline 20, '*Charge Negotiation and Agreement; Agreed Statements of Facts; Form 1*', a detailed and centralised statement of the requirements relating to agreed facts.

The guideline states that a document reflecting the agreement as to facts on sentence should be part of the charge agreement. A charge agreement must be principled and must comply with the criminality principle identified by Mr Samuels. It would usually be impossible to assess whether an agreement results in an adequate reflection of the criminality involved and provides adequate scope for sentencing unless there was also a clear indication of the facts that were to be taken into account by the sentencing judge. This agreed version of the facts should be signed and dated on behalf of both parties.

Usually the issues concerning Statements of Agreed Facts relate to aggravating and mitigating circumstances surrounding the commission of the offence. An agreement to accept a plea goes no further than accepting an admission of the elements of the charge. The objective facts and surrounding circumstances add meaning, significance and colour to those bare elements, enabling the sentencing judge to gauge the degree of criminality and assess the appropriate sentence. They are also of great interest and concern to victims.

Care should be taken on both sides in preparing Statements of Agreed Facts. In all but the simplest of cases, the police facts prepared at the time of charging will not be sufficient. Apart from their inadequacies of grammar and expression they often contain much that is irrelevant or superfluous. Sometimes they are prepared primarily for the purpose of bail and stress matters that are relevant for bail but not for the sentence. Often in circumstantial cases they contain recitals of all of the evidence that supports a finding of guilt: but for sentencing purposes it might be necessary to refer only to the inferences or intermediate inferences that flow from that evidence.

Preparing a statement of facts has the benefit of causing both parties to turn their minds to the question of exactly what is involved in the plea and the considerations that will be relevant on sentence. This could also, possibly, produce happier judges. If a judge is presented with a police statement of facts that is a grammatical dog's breakfast, is full of superfluous material and omits much of the relevant evidence, there is not likely to be a happy hearing. In complicated matters charts, tables and chronologies should be used wherever possible in preference to long narrative accounts.

Which matters surrounding the commission of the offence are included in and excluded from an Agreed Statement of Facts will often quite properly be an integral part of the charge negotiation between the parties. The Crown's approach to this aspect of the negotiation should, as always, be governed by the criminality principle. Adequacy will be the test: adequate reflection of the criminality involved and adequate scope for sentencing. That requires individual judgment. There will be a need for the prosecutor to remain sensitive to the positions of victims and police and consult with police and victims when forming that judgment. Defence representatives should be aware of that requirement and not be concerned that time is taken to attend to this step in the procedure. (The defence should also be assured that such consultation is not undertaken for the purpose of obtaining "instructions" – it is undertaken in order to obtain and express views about the proposed course of conduct.)

If there is strong evidence of a relevant aggravating feature, then the Crown should not usually agree to a statement of facts that does not include it (bearing in mind, of course, the *De Simoni* principle if relevant). Where the prosecution agrees not to rely upon an aggravating feature, no inconsistent material should be placed before the sentencing judge. If the evidence is not strong, however, then there might be scope for omitting reference to that feature. In the spirit of compromise which is an essential part of charge negotiation, it might also be appropriate in some cases to agree to the inclusion of reference to mitigating features if there is clear evidence of them. Defence representatives should press for that in appropriate circumstances.

Victims and police will need to be consulted in the process. Prosecutors are instructed to make a record of offers or representations on behalf of accused persons and the responses to them and to place them on the relevant file. In cases of complexity or sensitivity, defence lawyers may be asked by prosecutors to put offers in writing on a without prejudice basis and to indicate the reasons why this is considered an appropriate disposition of the matter. In some cases defence lawyers may be advised that the prosecution will not consider an offer unless its terms are clearly set out in writing, or may be asked to adopt a prosecution document recording the agreement. The content and timing of such communications is significant to the defence as well as the prosecution, given the weight to be accorded to early and appropriate pleas.

It will not always be possible to reach agreement on all facts surrounding an offence. Sometimes it might be appropriate to have an agreed statement as to most of the facts relevant on sentence, but on the further understanding that evidence will be led in connection with certain disputed aspects of the offence. The more narrowly these aspects can be confined in advance, the better for all concerned.

Victims

What has been said so far has failed to deal completely with one crucial aspect of charge negotiation and agreement - that is the involvement of the victim. All ODPP lawyers and Crown Prosecutors should be aware of - and defence representatives should also be sensitive to - the legislation (*Victims Rights Act; which includes the Charter of Victims Rights*) and Prosecution Guidelines relating to victims, in particular Guideline 19, '*Victims of Crime; Vulnerable Witnesses; Conferences*'.

Victims should be treated with courtesy, compassion and respect for the victims' rights and dignity. Victims should also be kept informed in a timely manner of the progress of a prosecution and their views taken into consideration - this action now must be taken pro-actively by officers of the ODPP and Crown Prosecutors and defence lawyers need to be aware of that.

In the context of charge negotiation, the fundamental rule is that the victim should be informed when any such negotiation is initiated and the views of the victim must be obtained, recorded and taken into consideration before there is any formal decision concerning a charge agreement and before there is agreement as to the contents of a statement of facts. Since a Statement of Agreed Facts is now to be an integral part of any charge agreement, it follows that the victim must be kept informed of all aspects of the negotiation regarding the proposed statement of facts, in particular any proposed deletion of references to aggravating features.

However, the views of victims (and of police officers) will not alone be determinative of the outcome of charge negotiation: it is the general public, not any private sectional, interest that must be served at all stages of the prosecution process.

Negotiation in Practice

This sub chapter provides a practical guide to negotiating with Police Prosecutors and solicitors from the Office of the Director of Public Prosecutions (DPP)¹.

What is charge negotiation?

Charge negotiation has five basic forms:

- Attempting to persuade the prosecution to withdraw all charges. This is also known (where the DPP is involved) as ‘making a *no bill* application’;
- In relation to a single criminal offence, attempting to persuade the prosecution to accept a plea of guilty to a less serious charge and to withdraw a more serious charge. This may also allow a matter that would have otherwise have had to be dealt with in the District Court to be dealt with in the Local Court or Children’s Court;
- In relation to clients facing multiple charges, arranging with the prosecution that your client will plead guilty to some of the charges if others are withdrawn or placed on a Form 1; and
- Where a client is pleading guilty as charged, attempting to persuade the prosecution to tender an agreed set of facts on sentence, more favourable to your client than the facts initially prepared by police at the time of charge.
- Persuading the prosecution not to make an election or to withdraw an election for your client’s matters to be dealt with in the District Court (see chapter 4 in relation to elections)

When the lawyer for an accused person pursues charge negotiation by writing to the prosecution, this is frequently referred to as ‘making representations’.

Why negotiate charges?

Successful charge negotiation can result in the defence and the prosecution reaching agreement on the charges (if any) to proceed at court and on the facts to be tendered before the court on sentence.

The two fundamental reasons why it is in the interest of the defence to conduct charge negotiation with the prosecution are that:

- You may be able to secure a better result for your client by negotiation than you could secure in a contested court hearing; and
- A negotiated settlement allows you to approach the court prepared.

The benefits of charge negotiation are substantial, and include the following:

- Knowing what course your client's matters are going to take. Successful charge negotiation eliminates the risk that your client may proceed to a hearing or trial on a plea of not guilty and be convicted. Such a situation is a 'worst case' for any defence lawyer. Proceeding to trial produces the double disadvantage that your client may be convicted of a more serious charge than he/she would have faced if he/she was prepared to negotiate charges, as well as your client not being entitled to the benefit of a plea of guilty on sentence. It is ultimately your client's decision whether to plead guilty or not guilty, and improper pressure should obviously never be put on your client to plead guilty.
- Enabling the prosecution to withdraw its case, if it is appropriate to do so, and therefore avoiding putting your client through the delay, stress and cost of a hearing or trial.
- By negotiating a less serious charge that your client is willing to plead guilty to, the maximum potential penalty that your client faces will be reduced. Your client will also receive the benefit on sentence that flows from entering a plea of guilty.
- Avoiding multiple trials or hearings arising out of the one criminal incident. At trial or hearing on a plea of not guilty, it may become apparent that the prosecution cannot establish all the elements of the offence charged, but it does have enough evidence to establish the elements of a less serious offence. Acquittal at trial or hearing in relation to the more serious charge will usually not prohibit the prosecution from laying the less serious charge and taking it to a hearing. That scenario would involve your client going through two sets of court cases in order to get a result that could have been negotiated by agreement at the beginning;
- Making it possible to keep your client in the Local Court, either for sentencing or for defended hearing, where otherwise he/she would have to be dealt with in the District Court.

How do you determine that your case is an appropriate one to negotiate?

Review the materials

Look at the Court Attendance Notice. Is it properly drafted? Does it describe an offence known to the law at all?

If the Court Attendance Notice does not disclose a charge or is impossible to understand, then it will usually be in your client's best interest for you to tell the prosecution early on. If the prosecution does not quickly move to correct a misconceived or poorly drafted charge, you may have grounds to claim costs (see chapter 18).

If the charge sheet is properly prepared, make sure you know the elements of the offence that it alleges and what the prosecution will need to prove.

Read the facts sheet.

Does it contain enough factual material to support the allegations in the Court Attendance Notice? If you presume that everything in the facts sheet is true, does the Court Attendance Notice give the Magistrate or Judge enough information to allow him/her to know what happened for the purpose of sentencing?

Consider whether the facts sheet contains prejudicial material, irrelevant material or unproven assertions.

No accused should be sentenced with a facts sheet being tendered by consent that contains such material. For example, a facts sheet which says “[your client] has assaulted the victim on a number of occasions in the past” where your client has never been charged in relation to the alleged assaults, or one which says “[your client] is a known associate of the criminal element who will continue to offend if released” should never be tendered. Many facts sheets drafted by police at the time of charge contain statements just like these. Even where everything else is admitted by your client and your client instructs you to plead guilty, you must ask the prosecutor to delete inappropriate statements before tendering any facts sheet on sentencing.

If you have a brief, then read it.

Does the brief live up to the promises made by the facts sheet? Presuming for the moment that all of the statements are fundamentally true, do they make out the charge against your client? Do they make out the facts asserted in the facts sheet?

If you can get it, a prosecution brief is your best resource in charge negotiation. Prosecution briefs when analysed, will frequently show that:

1. An element of the charge cannot be proved; or
2. There is insufficient evidence to support a crucial assertion in the facts sheet; or
3. Your client is clearly not guilty.

You would rarely make submissions in written representations based on what your client tells you (see below for more detail as to why). Your written representations will be far more persuasive if they are based on the evidence of the prosecution’s own witnesses.

Consider appropriate alternative charges

When working out possible alternative charges your client might plead guilty to, there is no alternative to a good working knowledge of the law.

However, it is not difficult - most alternative charges suggest themselves, and you will see them again and again. To cite a few common examples:

- Your client is charged with break, enter and steal, but the evidence leaves open the possibility that a door or window was open - the alternative charge would be stealing from a dwelling house.
- Your client is charged with maliciously inflicting grievous bodily harm, but the medical evidence is not strong enough to prove
- Your client is charged with robbery in a ‘bag snatching’ case, but the evidence does not prove that any actual or threatened violence occurred before or at the time of the taking - the alternative charge would be stealing from the person.

When devising possible alternative charges, never forget that your greatest achievement will be to keep your client out of the District Court, where penalties are higher and he/she is far more likely to go to gaol. For example, a charge of robbery must be dealt with in the District Court and carries a maximum penalty of 14 years gaol. A

charge of stealing from the person, even though it is laid under the same section of the same Act², may be (and usually is) dealt with in the Local Court where the maximum penalty that the Local Court can impose is 12 months imprisonment.

Advise your client and obtain instructions to negotiate

You should usually have instructions from your client before you commence charge negotiation.

On some occasions, you might discuss possible appropriate charges informally with the prosecution. However, unless there are compelling reasons for the prosecution to withdraw all charges, you will not be able to move forward in charge negotiations without instructions from your client. There is no point in suggesting an alternative charge if your client will not plead guilty to it, nor in proposing a plea of guilty to some charges if others are withdrawn or placed on a Form 1, if your client will not admit the charges you are putting forward.

You are bound by your client's instructions about the way the case is to be conducted (subject to your ethical responsibilities). However, your client cannot be expected to know about the availability of charge negotiation. In an appropriate case, it is your responsibility to provide your client with appropriate advice about the virtues of charge negotiation, and seek your client's instructions to negotiate.

Regardless of your perspective on the evidence, your negotiations will be pointless unless they are within the bounds of your instructions on the facts. You are wasting time trying to negotiate a charge of dangerous driving down to a charge of negligent driving if your client's instructions are that he/she was not driving the car at all.

Charge negotiation - practical steps

Where the police prosecutors have carriage

Where police are prosecuting, representations - whether for withdrawal of charges or other charge negotiation - must generally be made in writing.

The representations should be in letter form, addressed to the Local Area Commander where the informant (the name given to the police officer in charge of the matter) is stationed. If you are unsure of the address for the Local Area Commander, the informant's police station is written on the Court Attendance Notice and facts sheet - call the station and inquire.

There are two exceptions to this general rule:

- Where you are on the door of the court on the day of a defended hearing, and an adjournment for the consideration of representations is unlikely to be granted, many police prosecutors will be happy to negotiate informally rather than go through with a doomed or highly risky hearing.
- On a plea of guilty, police prosecutors will generally be prepared to negotiate the statement of facts to be tendered. Where the proposed change involves altering the facts of the offence itself, the prosecutor will need to consult the informant (and often the victim), and written representations may be required. However, where the proposed change to the facts sheet merely involves deleting material that should not be put

before the Magistrate on sentence, a competent prosecutor should be prepared to delete it on the spot.

Speak with the prosecutor and explain to him/her why the deletion you seek is appropriate.

Where the DPP has carriage

There will be a particular solicitor at the DPP who has carriage of your client's matter. Your representations, if they are written, should be directed to that solicitor.

Always find out the name of the solicitor with carriage and speak with that person before writing any representations. These conversations will frequently save you a great deal of time. The solicitor with carriage may already be writing an internal memo to the DPP suggesting what you are about to propose. He/she may be quite happy to negotiate orally (and then send a memo to the DPP for approval of the provisional agreement). Even if your representations ultimately have to be in writing, informally defining the scope of the issues and getting a sense of the thinking of the solicitor with carriage will save you valuable time and allow you to write more convincing and focused representations.

If you can develop a good working relationship with a solicitor from the DPP, you will significantly expedite the process of charge negotiation. You can informally discuss potential agreed outcomes before you have formal instructions - then if you reach a point of possible agreement, you can seek instructions while the solicitor with carriage seeks approval from the DPP.

In the case of amendments to the facts that change the criminality of the offence, the solicitor from the DPP will usually consult with at least the informant and the victim. In the case of irrelevant or prejudicial material such as those described under the heading 'Reviewing the materials' - the solicitor with carriage should have authority to amend or delete it on the spot.

Time standards for representations

Procedure for matters to be dealt with in the Local Court

The procedure is:

- When a party informs the Court that it intends to make representations for withdrawal, before granting an adjournment for this purpose Court will ask whether the representations have been prepared for lodgement with the prosecution.
- If the representations have not been prepared, the Court will direct that they be completed within 7 days.
- The proceedings are then to be adjourned for a period of 5 weeks to allow for the completion and service of the representations upon the prosecution.

The prosecution is to acknowledge in writing that they have received the representations within seven days of service.

- The defence lawyer is to inform the Court in writing of the fact and date of service of the representations.
- A copy of the representations is not to be filed with the Court.
- On the adjournment date, the Court is to be informed of the result of the representations.

- If the representations are still under consideration on the initial adjournment, the proceedings are to be adjourned for another three weeks.
- If the representations are unsuccessful, a plea of guilty or not guilty must be indicated to the Court.
- Where a plea of not guilty is entered, the proceedings will be listed for hearing and the Court will order service of the brief within two weeks.
- Where the representations have not been resolved by the further adjourned date, no further adjournment is to be granted other than for the purpose of a defended hearing unless the Court considers it in the interests of justice to do so.

Procedure for matters to be dealt with in indictment

Practice Note 11/2003 sets out procedures that apply to matters which are listed in the Local Court but which will ultimately be dealt with on indictment.

The procedure is:

- When a party informs the Court that it intends to make representations for withdrawal, the Court, in accordance with Practice Note 9/2003 will adjourn the matter for not less than eight weeks, allowing six weeks for service of the brief and two weeks for reply.
- Representations for withdrawal are to be served on the prosecution by the date for reply
- The representations are to specify so far as relevant those particulars referred to in Practice Note 10/2003.
- On the date for reply, the Court is to be informed of the fact and date of service of the representations.
- A copy of the representation is not to be filed with the Court.
- The proceedings are then to be adjourned for four weeks to enable the prosecution to consider the representations.
- On the adjourned date, the Court is to be informed of the result of the representations.
- If the representations are unsuccessful or not resolved, the proceedings are to be managed by the Court according to Practice Note 9/2003 (see chapter 6).

What should be included in written representations?

Formal aspects

There are a number of formal parts of information that should be included in written representation.

These aspects are stated in Practice Note 10/2003 and are:

- The full name of the defendant
- The name of the informant
- The station of charging
- The CAN numbers
- The last court date and next court date
- The court location
- The name and address of the defendant's lawyer.

Substance

Good representations will conform to the rules of good letter-writing.

Specifically, your representations should:

- State at the beginning what result you are seeking.
- Outline why the result you are seeking is appropriate, with reference to the evidence where necessary.

Any reason that might persuade a reasonable objective third party can be employed, but your representations (even if made to police prosecutors) should always be directed at what is contained in the Director of Public Prosecutions Guidelines³. Written representations should be marked as being 'without prejudice' but you must still be careful in what you write.

Generally, it is dangerous to make representations on the basis of your uncorroborated instructions about the facts of the case or any other assertion of fact that is not made out in the prosecution brief of evidence. (It is perfectly acceptable to base your representations in part on any assertions made in a police interview in which your client has participated - the transcript of that interview is part of the prosecution brief). Putting forward 'your client's version' deprives the defence of its most important tactical advantage - the right to silence and the resultant prosecution uncertainty of what the defence case might be. In any event, you should not expect that the prosecution will have any reason to believe what your client says.

So far as your representations are based on assertions of fact, those assertions must be supportable by reference to material that the prosecution has provided to you.

In a case where you are certain that you are on very firm ground, you might provide (or point the prosecution towards) third-party evidence that indicates the prosecution should not proceed. However, only contemplate doing so if you are certain (preferably after rigorous testing) that the third-party source of evidence will not 'blow up in your face' and in fact strengthen the case against your client.

In your written representations, you may point out deficiencies in the evidence as a reason why a charge should be withdrawn or a plea to a lesser charge accepted. However, beware: unless it is already too late (for example the potential evidence has been lost, destroyed or contaminated), bringing gaps to the attention of the prosecution may just result in those gaps being filled. Do not state in representations that no photographic identification parade has been conducted, unless you have considered the risk that police will conduct one and that it will implicate your client; do not state that no fingerprint analysis has been conducted unless you have considered the risk that it may be done now and that it will implicate your client.

Examples of written representations are provided in the **Appendix** to this sub-chapter.

What if charge negotiations are unsuccessful?

Not all charge negotiations and representations will be successful.

You will frequently only be told very close to your clients next court date that your representations have been unsuccessful. Therefore, before you get a response to your representations, you should formulate a plan (and get

instructions where appropriate) on how you intend to run the case if you are unsuccessful in charge negotiations and representations.

Where your representations have been unsuccessful, it will be extremely rare for the prosecution to provide you with written reasons. You will generally just receive a *pro forma* letter stating in effect, 'It has been determined that the charge(s) should proceed in the usual course'.

It will often be difficult to prise even informal reasons out of police prosecutors for a refusal to charge negotiate.

However, where the DPP is running the case, the solicitor with carriage will usually be forthcoming (at least to some degree) on the reasons for the course the DPP is taking. In a good case, the DPP may even put a counter-offer to you.

It may be possible to overcome the problem that led to your proposed negotiated solution being rejected. It may be that you have aimed too high, and that if another proposal is put that is closer to the DPP's position, it will be successful.

Even if the problem cannot be overcome in the short term, if the case goes to trial it is likely that defence counsel (properly instructed by you) will be able to re-open informal discussions with the Crown Prosecutor assigned to run the trial. In some cases, fundamentally the same representations need to be put (in slightly different ways) two or three times before they are successful.

The simple rule is: do not be afraid to ask. You may be surprised how often you get what you ask for.

Appendix: Examples of written representations

Making an arrangement for some pleas to be entered in full satisfaction

(Omitting formal parts.)

I act for Mr Brutal. Mr Brutal is charged with two counts of armed robbery: one on 4 May 2003 at BP service station, Canley Vale and one on 28 May 2003 at BP service station, Liverpool.

I write to seek an agreed resolution of these matters. Mr Brutal has instructed that he will plead guilty to the 4 May 2003 offence if the charge relating to the 28 May 2003 offence is withdrawn.

The case against Mr Brutal in relation to the 28 May 2003 armed robbery is essentially that the robber is alleged to have said, "Don't you think I mean business? Haven't you heard about the job that I did on your mate's place a few weeks back?" (paragraph 6, statement of the victim Mr Sarjwan Ague dated 29 May 2003). In addition, there is a general similarity between the description of the armed robber in the 4 May 2003 offence and the 28 May 2003 offence.

For present purposes, I presume in the prosecution's favour that the fingerprint evidence, DNA evidence, CCTV video footage and subsequent photographic identification establishes a case against Mr Brutal in relation to the 4 May 2003 robbery. Even from that point, the evidence in the 28 May 2003 offence is incapable of proving beyond a reasonable doubt that the same person committed both offences.

There are four reasons for the above submission:

1. The offence of armed robbery is a prevalent one. There is nothing about the modus operandi of the two robberies that is so strikingly similar that it would be impossible or improbable for different people to have committed them;
2. The references to “job” and “mate’s place” in the statements apparently made by the 28 May 2003 robber are too vague to compel the conclusion beyond reasonable doubt that the later robber was referring to an armed robbery on another BP service station at all, much less the specific robbery of 4 May at Canley Vale;
3. The description of the robber by the victim in the 28 May 2003 robbery as being “about 30, Caucasian and about 180cm in height”, while generally consistent with the robber in the 4 May 2003 offence, is consistent with thousands of males, and incapable of proving that the two offenders have a single identity. There is effectively no CCTV video footage in the 28 May 2003 offence as apparently the cameras were all facing away from the robber’s point of entry and the counter;
4. The victim in the 28 May 2003 offence failed to identify any person as being the robber despite being shown a photoboard containing 20 photos including that of Mr Brutal: see the later statement of Mr Sarjwan Ague dated 29 June 2003.

All of these considerations point towards withdrawal of the 28 May 2003 charge being appropriate. In addition, Mr Brutal would be conferring a benefit on the prosecution by pleading guilty to the 4 May 2003 armed robbery through not testing the prosecution case in that matter.

This letter is written without prejudice for the purpose of negotiations. I would be pleased to discuss this proposal with you.

Evidence does not support the charge laid but supports an alternative charge

(Omitting formal parts.)

I act for Ms Fingers. Ms Fingers is charged with break, enter and steal at Croydon Park on 25 July 2003.

I write to make representations in relation to this matter. I propose that if a fresh charge of stealing from a dwelling-house is laid and Ms Fingers pleads guilty to that charge, then the charge of break, enter and steal be withdrawn.

The basis for these representations is that the prosecution cannot prove the element of breaking.

The victim states that he “might have left the front window open” at the time of the offence “so that my cats could run in and out”: paragraph 8 of the statement of Wakelin Fright dated 28 July 2003. Neither the victim nor any police witnesses give evidence to suggest that any window was broken, any lock forced or any door damaged when the premises were “thoroughly inspected” (paragraph 5, statement of Detective George Retentive dated 26 July 2003) after the theft.

Accordingly, the evidence is incapable of proving beyond reasonable doubt that Ms Fingers committed any breaking, and so the charge of break, enter and steal must fail. Stealing from a dwelling house is the appropriate charge on the evidence.

This letter is written without prejudice for the purpose of negotiations.

I would be pleased to discuss these representations with you.

[1] Referred to together as 'the prosecution'.

[2] Section 94 Crimes Act 1900 (NSW).

[3] <http://www.odpp.nsw.gov.au/guidelines/guidelines.html>

Chapter 10 - Intellectual Disability and Mental Illness

Chapter 11 - Drug Court & MERIT (Magistrate's Early Referral into Treatment)

Drug Court of New South Wales

What is the Drug Court?

The Drug Court is a court set up to deal with drug-dependent offenders. The Drug Court allows offenders to remain at liberty after serving a two week detoxification period if they comply with a court-supervised treatment program.

The Drug Court sits at Parramatta, Sydney and Hunters area and has jurisdiction over both District Court and Local Court charges.

Why would I want to refer a client to the Drug Court?

The obvious benefit to your client in being referred to the Drug Court is that, after starting the program (if accepted), your client will be allowed liberty to participate in the Drug Court program, rather than being in prison serving a gaol sentence.

How do I get a client onto the Drug Court program?

There are a number of mandatory tests that your client must satisfy before he or she can be accepted onto the Drug Court Program.

Mandatory tests

Read ss 5, 6 and 7 of the *Drug Court Act 1998* (NSW) and clauses 4 and 5 of the *Drug Court Regulation 2015* carefully to determine a client's eligibility before seeking to refer a client to the Drug Court.

In summary, your client needs to fit all of the following criteria before seeking a referral to the Drug Court:

1. To be referred from the District Court at Sydney, Campbelltown, Liverpool, Parramatta, Penrith, East Maitland or Newcastle, to be referred from the Local Court at Bankstown, Belmont, Blacktown, Burwood, Campbelltown, Central, Cessnock, the Downing Centre, Fairfield, Kurri Kurri, Liverpool, Maitland, Mount Druitt, Newcastle, Newtown, Parramatta, Penrith, Raymond Terrace, Richmond, Ryde, Toronto, Waverley or Windsor.
2. The person's usual place of residence must be within one of the following local government areas:
 - a. City of Auburn, Bankstown City, Blacktown City, Campbelltown City, Cessnock City, Fairfield City, Hawkesbury City, Holroyd City, Lake Macquarie City, Liverpool City, Maitland City, Newcastle City, Parramatta City, Penrith City, Port Stephens, City of Sydney, The Hills Shire,
 - b. Look closely at this requirement, as it is more restrictive than the court location requirement. For example, clients who live in Lakemba, Burwood or Ryde are ineligible even though offences

committed in those suburbs are likely to be charged before referring Courts. Note also that having one's "usual place of residence" as being within a western Sydney gaol or remand facility does not qualify: *R v Duggan* [2001] NSWDRGC5.

3. Must be "highly likely" to receive a full-time custodial sentence in relation to the charge (s) faced.
4. Must be pleading guilty or having indicated that he or she intends to plead guilty to the charge(s)...
5. Appear to be dependent on prohibited drugs.
6. Not be facing a charge involving a strictly indictable supply of prohibited drugs, "violent conduct or sexual assault".
7. Not be suffering from any mental condition that could prevent or restrict the person's active participation in a Drug Court program. Even though this is a mandatory criterion, do not fail to refer a client merely because they suffer from a mental illness. If the client suffering from a mental illness is successful in the ballot, the Drug Court will usually adjourn their case for a report on whether the person, if properly medicated, is capable of participating in a Drug Court program.

Be of or above the age of 18 years, and not facing a charge before the Children's Court

Mandatory test - pleading guilty

It is possible at law to ask to be referred to the Drug Court in relation to some matters and defend other outstanding matters (related or unrelated). However, in practice, this rarely works unless the defended matters are trivial.

Firstly, in this scenario your client will have to maintain contact with lawyers in relation to defended matters and appear at other courts, in addition to participating in a time-consuming Drug Court program. In the early stages of a Drug Court program, few clients manage to do this. Secondly, if the defended charges are serious, then your client will be facing a gaol sentence if convicted after a defended hearing, which may spell the end of his or her Drug Court program.

A further difficulty arises if a client is otherwise eligible to be on the Drug Court program, but bail refused in relation to the defended matters. If bail continues to be refused (and the hearing date is not very close), your client is likely to have the Drug Court refuse to accept him/her into the program, because the program cannot be done whilst in custody. It is possible to be referred to the Drug Court without formally entering a plea of guilty—see criterion 4 above. However, such an approach is ill-advised for 2 reasons:

1. "I will only tell them I am intending to plead guilty to get a referral to the Drug Court and I'll plead not guilty if I don't get it" are ethically questionable instructions on which to represent a client. In addition, such instructions are usually the hallmark of a person who is not genuinely sorry for their drug-related offending and will not succeed on the program.
2. When before the Local Court, if you enter the guilty plea and have the facts sheet handed up, the conviction is 'locked in'. If you do not, the DPP can and often will elect to have your client sentenced in

the Drug Court's District Court jurisdiction, with the likely result that your client will face a higher sentence.

You may refer your client to the Drug Court if he or she has been convicted in his or her absence of the relevant offences (provided, of course, your client admits guilt and does not intend to attempt to have the convictions overturned): *R v Wilson* [1999] NSWDRGC 4.

Mandatory test - offence involving “violent conduct”

As stated above (see criterion 6 above), offences involving violent conduct are not eligible for referral to the Drug Court.

The definition of an ‘offence involving violent conduct’ is a concept that has triggered much debate and case law. The fundamental point of debate is whether the concept relates to the elements of the offence or the alleged physical actions of the particular accused. Related issues are whether the actions of a co-accused (not the applicant) bring the applicant's offence within the rubric of ‘violent conduct’, and whether the law draws any distinction between threats of violence and actual violent contact.

In *DPP v Allan Ebsworth* [2001] 124 A Crim R 410, the Court of Appeal held that the correct test is that it is the elements of the charge that are significant, not the particular conduct alleged. The particular charge in that matter was robbery armed with an offensive weapon.

Meagher JA stated at paragraph 20:

In the present case, if one looks at the charge, it is implicit ... from the verb, to rob, and the accusation of an offensive weapon, that violence was necessarily involved. Those two elements together constitute violent conduct.

In *DPP v Hilzinger* (2011) 212 A Crim R 149 the New South Wales Court of Appeal confirmed Ebsworth and found a person eligible for the Drug Court in re a charge of Agg B&E (persons present) even 'though the facts depicted a situation which sounded like a violent kidnapping and robbery. Again, the emphasis is upon whether the elements of the offence, not the factual situation, involve an aspect of violence.

It is now clear that offences of dangerous driving occasioning death or grievous bodily harm (*Chandler v DPP* (2000) 113 ACrimR 196), and armed robbery, are not eligible to be referred to the Drug Court.

If you are concerned about the appropriateness of referring a particular charge to the Drug Court, you should contact the Drug Court Legal Aid solicitors for advice on **P 9685-8020**.

Drug Court ballot

If a person appears to be eligible for the Drug Court, a Magistrate or Judge must ascertain if the person wishes to be referred to the Drug Court - see s 6(2) *Drug Court Act*. If that person does wish to be referred, that person will be placed into the Drug Court ballot.

The computerised ballot is conducted because there are usually insufficient places on the program to service the number of referrals to the Drug Court.

You may not simply adjourn your client's matters to the Drug Court. If you were to do this the Drug Court will send them back to the original court to be placed in the ballot. The ballot is currently conducted on Thursdays at 1 pm (at Parramatta and Sydney) and Mondays at 1pm (at Hunter). The referral to the ballot must have been made not later than 3.00pm the day before the running of the ballot

If you have a client who wishes to enter the Drug Court program, then that client's matter/s should be adjourned to the applicable Local or District Court on a Thursday or Monday. The should be mentioned at 2.00pm at your Local or District Court, by which time the Drug Court Registry will have notified your Court's registry as to the outcome of the ballot. If your client has been successful in the ballot, your registry will have been notified of a date for your client's matter to be at the Drug Court, and you should adjourn the matter until that date.

After the ballot

Successful applicants will be given a date for their first appearance at the Drug Court.

Assuming that no issues are raised regarding your client's suitability to enter the program (see below), it will be at least two weeks from that first appearance at the Drug Court (and often some weeks longer) before the client's Drug Court program is drawn up, he/she receives a Drug Court 'initial sentence', and is released onto the program. During this time, your client will be held at the Drug Court "Detox" unit of the MRRC Silverwater (for males) or Mulawa (for females).

It is important to note that even clients who already have bail at the Local Court or District Court level, will be required to enter into custody for a minimum two week detoxification and preparation phase prior to commencing the program. When seeking your client's instructions to be referred to the Drug Court program, if your client is on bail you must emphasise that they cannot come onto the Drug Court program without spending a bare minimum of two weeks in the detox unit.

If a client is not successful in the ballot he/she will continue to be dealt with by the referring court as though he/she never sought referral to the Drug Court.

Discretionary test - "section 7A(2) hearing"

Simply because a person is eligible and has gained a place through the ballot does not necessarily mean that he or she will be accepted onto the program. In addition, the Court must be satisfied that the person is "appropriate" for the Program. Here the Drug Court exercises a discretion (conferred by s 7 A (2) *Drug Court Act* (1998)) not to allow a person to enter into a Drug Court program where that person is deemed to be "inappropriate".

The decision in relation to "appropriateness" can be made summarily (i.e. On the day when the matter is first listed at the Drug Court) or else on a later date when Court time is set aside for the consideration of evidence in a hearing situation.

Generally (and not exclusively) an appropriateness hearing will be required where:

- Even though the referred charges do not involve violent conduct, the person's prior record of violent behaviour is such that the court may be concerned that the person would not behave violently whilst on the program. The content of the person's bail/convictions report, and the Facts Sheets of the matters appearing therein will be of great significance here.
- A history of repeated or recent serious driving offences can give rise to a finding of inappropriateness, as can a history of involvement in repeated or recent drug supply.

Senior Drug Court Judge Murrell (as her Honour then was), said in *R v Sloane* [1999] NSWDRGCRT 3:

Everyone on a Drug Court program represents some degree of risk to the community in that he or she might relapse and commit further offences. The court must endeavour to ensure that if a Drug Court participant does relapse there is no substantial prospect that any further offences will be violent or seriously threatening offences.

Availability

Despite being otherwise eligible and appropriate, a person will be unable to participate in a Drug Court program where he or she is in custody and will remain in custody for the foreseeable future, or has had bail refused.

Suspended sentences and s9 bonds

If a person has been previously suspended under s12 of *Crimes (Sentencing Procedure) Act* (1999), or when committed an offence when on a s9 good behaviour bond, then he or she can be referred to the Drug Court, assuming that the requirements of eligibility and appropriateness referred to above have been made out.

Why would I advise an otherwise eligible client not to seek referral to the Drug Court?

You need to advise your client of the disadvantages of being on a Drug Court program:

- If a client has any chance of getting an alternative to a full-time custodial sentence, he/she may choose not to apply to enter the Drug Court program, as entering a Drug Court program involves an acceptance that a full-time custodial sentence is inevitable. However if the client does receive a custodial sentence in the Local Court, it is still possible to lodge a severity appeal and ask for the appeal to be referred to the Drug Court through the ballot process.
- Your client needs to be aware that the sentences imposed at the Drug Court are often significantly longer than might be imposed at the Local or District Court. Although the sentence will be suspended under the Drug Court Act while the client participates in the Drug Court Program, if your client is not ready to commit fully to the (minimum) this Program, then he or she will face a the risk of being terminated from the Program and serving a longer sentence in custody than they would otherwise have had. For clients facing short gaol sentences, he or she may prefer to serve the sentence and attend to rehabilitation upon release. The question of whether to refer the matters for sentence to the Drug Court is a decision for your client to make.

- Your client should be advised that the Drug Court program is not an easy option. The requirements of the program are quite onerous and your client should have a genuine desire to address their drug dependency before agreeing to enter the program.
- Not everybody is able to graduate from the program. Graduation requirements include: the participant having has been free from all illicit drug use (as confirmed by regular monitored urine tests); being well established in a "positive activity" (employment, education or voluntary work) and so be significantly re-integrated into the community. If a participant appears to be incapable of meeting the stringent graduation requirements and has had a lengthy initial sentence, the participant may receive a substantial reduction from his or /her initial sentence, but will still face a custodial sentence when the program ends.

The Drug Court program

Once a client is accepted as a candidate for the program, the client generally spends about 2 weeks in a special detoxification unit of MRRC Silverwater (for males) or Mulawa (for females), whilst a Drug Court program is being prepared for him/her. All time spent in custody prior to the initial sentence is noted and can be taken into account should the person be unsuccessful on the Program and have to be returned to custody.

On the same day the initial sentence is imposed, the imposition of that sentence is suspended for the duration of the Drug Court program. The client signs an undertaking to abide by the terms of his/her Drug Court program, and becomes a participant in the program.

The program is divided into three phases:

- Phase One (minimum three months) revolves around stabilisation.
- Phase Two (minimum four months) is concerned with consolidation and early reintegration.
- Phase Three (minimum five months) is concerned with reintegration.

Graduation from the program takes a minimum of 12 months from commencement on the program, and during this time the participant will be subject to a rigorous regime of supervision, including:

- Urine tests three times each week.
- Twice weekly report- backs before the Drug Court Judge.
- Weekly counselling and more frequent group therapy sessions.
- Regular scheduled and unscheduled monitoring by Probation and Parole, including home visits.
- Other obligatory requirements as imposed by the Court from time to time.

The Drug Court team (comprising representatives from the Legal Aid Commission, the Office of the DPP, the Probation & Parole Service, the Health Services and the Drug Court Judge) meets prior to commencement of court each day to discuss the progress of every participant appearing for report- back that day.

When Court commences, participants report-back to the court in person. Participants advise the court of any drug use, compliance with program appointments, compliance with any medications prescribed, and other issues in their lives.

Participants' lawyers may be required to give advice or appear in relation to legal issues. However, participants are encouraged to appear for themselves in report-backs. Legal Aid solicitors are available to represent participants in every strictly 'legal' matter, such as arguments about termination of the program (see below), 'section 7A (2) arguments' (see above), initial sentences and final sentences.

If the Court becomes aware or suspects that a participant is not complying with the program, the Court may issue a warrant for the participant's arrest (s 14 *Drug Court Act*). When arrested the participant must be brought before the Drug Court and the *Bail Act* does not apply.

Termination from the Program

Sections 10 and 11 of the ***Drug Court Act*** deal with proceedings for terminations and non-compliance with the program. Apart from "graduation" where a client successfully completes the Program, a Drug Court program may be terminated in 3 ways:

1. If a participant requests it ('self-termination')
2. If the court finds that the participant is unlikely to make any further progress in the program ("no potential to progress"). This would generally only be found where a person has been on the Program for a long period of time but is continuing to use drugs or is otherwise not showing signs of being able to comply with the Program conditions.
3. If the court finds that the participant's ongoing participation in the program poses an unacceptable risk of re-offending. This will commonly arise where a participant has (or is alleged to have) committed a criminal offence while on the program.

Where the Office of the DPP (or the Court of its own volition) contends that categories (2) or (3) may apply, the participant will be listed for an argument before the Drug Court as to whether his or her program should be terminated.

Final sentence

Section 12 of the *Drug Court Act* deals with the imposition of final sentences after the program has been terminated. In situations where appropriate, the sentencing Judge can effectively reduce the initial sentence, and will almost invariably specify a non-parole period in accordance with the relevant provisions of the *Crimes (Sentencing Procedure) Act*. The final sentence imposed will vary from case to case, but must take into account the participant's level of participation in the Drug Court program.

Getting assistance

Once a person has been successfully referred to the Drug Court, Legal Aid solicitors based at the Drug Court will represent the person with no means or merit test. Because it is a specialised jurisdiction, very few private practitioners appear at the Drug Court.

Legal Aid solicitors can be contacted at the Drug Court in order to answer any questions that you may have in relation to referrals to and appearances at the Drug Court. phone: 9685-8020 (Sydney and Parramatta Drug Court Legal Aid) and phone: 4935-8392 (Hunter Drug Court Legal Aid) . Other relevant telephone numbers are listed in the Contacts chapter of this book.

MERIT

What is MERIT?

The Magistrates Early Referral into Treatment (MERIT) program is a government funded program which aims at diverting people with drug problems into effective drug treatment. MERIT is only available to defendants appearing in Local Court matters (that will be finalised at the Local Court).

Treatment offered by MERIT is specific to an individual's needs and includes: detoxification, residential rehabilitation services, counselling, case management, welfare support and other assistance.

Eligibility for MERIT

One of the features of MERIT that distinguishes it from other diversionary programs is that entry into the program is not dependant on a plea of guilty. A client who has a problem with illicit drugs will have the opportunity to participate in the program without making any admissions of guilt to the offence(s) charged. The drug problem is dealt with in isolation from legal matters.

MERIT is a voluntary program.

Exactly how referral is made to the program usually depends on each individual Local Court's practices. Referrals to the program can usually be made by a practitioner. The Magistrate or police can also identify defendants who would be suitable for the program. If you have a client who has an illicit drug problem and he or she wants to participate in MERIT, you should ask the Magistrate to adjourn the matter for two weeks so that your client can be assessed for MERIT. Following that adjournment order being made, the relevant facts and antecedents must be provided to the MERIT team (phone numbers are in the Contacts chapter of this book).

Eligibility criteria

Merit program eligibility can differ from program to program, so it is worth checking with the relevant MERIT office covering the court your client is due to appear at as to their individual eligibility requirements.

To enter the MERIT program your client must:

- Be an adult.
- Have an illicit drug problem - alcohol cannot be the primary drug for most MERIT programs (though it can be for some, so worth checking).
- Be willing to participate in the program and consent to treatment.
- Not be involved in offences related to physical violence, sexual assault or District Court matters, although individual MERIT offices may carry out a risk assessment.
- Have a treatable problem.
- Be approved by the Magistrate to participate in the program.

PRACTICAL TIP: Some MERIT offices are rather flexible with the criteria. If you are eager to have a client enter the program but they seem not to meet a particular criteria, it is advisable to contact the closest MERIT office and discuss your client's eligibility with MERIT directly.

If your client is not accepted into MERIT

If your client is not assessed as suitable he or she will return to court and his or her matter will be dealt with in the usual way, for hearing or for sentence.

If your client is accepted into MERIT

If your client is assessed as suitable for the program he or she will return to court and an extra bail condition is usually added to his or her existing bail conditions, namely, that s/he abide by the reasonable directions of the MERIT team. MERIT programs work through the same Local Court that referred your client for assessment - participants do not get sent to a different court in order to participate in MERIT.

Your client will then have to appear before the Magistrate during the program, usually at intervals of 6 weeks, and the MERIT team will provide the court with an update on your client's treatment progress.

Failure to participate

If during the MERIT program the defendant commits a further offence or breaches his/her bail conditions, the MERIT team will notify the court. He/she may then be excluded from the program. However, the presiding judge is not permitted to use this failure adversely against your client.

After completing MERIT

Once the program is completed your client will return to court. A report is prepared by the MERIT team for the court. The report does not contain any details about the offence but will detail treatment provided and further treatment recommendations. Your client can complete the program and still enter a plea of not guilty. However, in terms of streamlined case management, it may be better to formally enter the pleas of not guilty at an earlier

stage so that orders for service of the prosecution brief can be made. Also be aware that MERIT reports may contain material (such as admissions by your client) that the prosecution may attempt to tender at the hearing.

If your client is convicted (whether after a plea of guilty or following a defended hearing), the fact that your client has completed the program will be taken into account on sentencing.

Chapter 12 – Children’s Court

Chapter 13 - Young Offenders Act 1997 (NSW)

If you are representing a person who was between 10 and 18 years old when the alleged offence occurred ('a child'), the matter may be finalised by warning, caution or referral to a youth justice conference ('YJC') under the provisions of the Young Offenders Act 1997 (YOA) rather than finalised in the criminal jurisdiction of the Children's Court. Practitioners should be familiar with the YOA because it sets out the eligibility requirements and procedures for the diversionary scheme. The benefits of the diversionary scheme include that the child does not receive a criminal conviction and that the matter is finalised relatively quickly (the investigator, if practicable, is to determine whether to deal with the matter by warning, caution or YJC within 14 days of becoming aware of the alleged offence (s. 9(2B)). All sections referred to in this chapter are references to the YOA unless otherwise specified.

What is the purpose of the YOA?

- to provide an alternative process to court proceedings for dealing with children who commit certain offences through the use of YJCs, cautions and warnings;
- to provide an efficient and direct response to the commission of certain offences by children;
- to use YJCs to enable a community-based, negotiated response to offences involving all affected parties, emphasise restitution and acceptance of responsibility by the offender and meet the needs of victims and offenders; and
- to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system (s. 3).

The principles of the diversionary scheme are:

- imposing the least restrictive form of sanction on the child;
- informing the child about the right to obtain legal advice and providing the opportunity to do so;
- not instituting criminal proceedings against a child if an alternate (and appropriate) way of dealing with the child is available;
- not instituting criminal proceedings solely to advance the child's welfare or the child's family's welfare;
- dealing with children in their communities (if appropriate) to assist reintegration and to sustain family and community ties;
- including parents in the process as primarily responsible for the child's development;
- informing victims about their potential involvement in any action under the YOA; and
- addressing the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system (s. 7).

What offences are covered by the YOA?

Practitioners can ask that the matter be dealt with under the YOA if the child allegedly committed a summary offence or an indictable offence that may be dealt with summarily (s. 8(1)).

You cannot ask that the matter be dealt with under the YOA if the child allegedly committed any of the following offences (s. 8(2)):

- traffic offences committed when the child was of licensable age (16 years for a motor vehicle and 16 years and 9 months for a motor cycle);
- sexual offences under ss. 61E, 61L, 61M, 61N, 61O(1), (1A) or (2), 66C, 66D, 80, 81A, and 81B of the *Crimes Act 1900* (NSW);
- domestic violence offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
- drug possession, supply, administration and obtaining offences under Division 1 of Part 2 of the *Drug Misuse and Trafficking Act 1985* (NSW) involving more than a small quantity;
- drug cultivation, possession, supply and manufacture offences under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985* (NSW) (apart from possession or cultivation offences under ss. 23(1)(a) or (c) or aiding or abetting such offences which involve not more than half a small quantity or, in exceptional circumstances, not more than a small quantity if it would be in the interests of rehabilitation and appropriate in all the circumstances to deal with the offences under the YOA);
- offences where the investigator is not an 'investigating official' as defined by s. 4; and
- offences that result in death.

When can a child receive a warning?

A warning is the least serious option under the YOA. A warning can only be given by the investigator, and only for a summary offence that does not involve violence (see Part 3). A child can receive a warning even if the child has previously committed other offences or been dealt with under the YOA (s. 14(3)).

If you act for a child who has not yet been charged, you can make representations to the investigator that the child is entitled to be dealt with by a warning. The investigator can give a warning for a summary offence covered by the YOA if the circumstances of the offence do not involve violence and the investigating official considers it appropriate (s. 14 (2)). A warning cannot have any conditions or additional sanctions attached (s. 15). A child should not be arrested for the purpose of giving a warning.

If you act for a child who has already been charged, you cannot ask the Children's Court to give a warning under the YOA. You will instead need to seek a caution or a referral to a YJC (see below).

When can a child receive a caution?

A caution is more serious than a warning. A caution can be given by the investigator or by the Children's Court. A child can receive a caution even if the child has previously committed offences or been dealt with under the YOA - but not if the child has already been cautioned on 3 or more occasions (ss. 20(7) and 31(5)).

If you act for a child who has not yet been charged, you can make representations to the investigator that a caution is appropriate. The investigator can give a caution if it is inappropriate to give a warning and it is in the interests of justice to instead give a caution (s. 20(1)-(2)). The child must admit the offence (not a plea of guilty), consent to the caution and be entitled to be given the caution (s. 19). The admission must be made in the presence of:

- a person responsible for the child (or a person nominated by the person responsible);
- if the child is 14 years of age or over - an adult chosen by the child; or
- a legal practitioner chosen by the child (s. 10).

Your representations should address the following factors that the investigator is to consider in considering whether it is appropriate to give a caution:

- the seriousness of the offence;
- the degree of violence;
- the harm caused; and
- the number and nature of any previous offences and the number of times the child has been dealt with under the YOA (s. 20(3)).

If you act for a child who has been charged, you can ask the Children's Court to give the child a YOA caution and dismiss the proceedings. The Court may give a caution if the child admits the offence (not a plea of guilty) and the offence is one for which a caution may be given (s. 31).

If the investigator or the Court decide to give a caution, a statement by the victim may be read out to the child when the caution is given (ss. 24A and 31). If the investigator or the Court declines to give a caution, you may instead seek a referral for a YJC (see below).

When can a child be referred to a YJC?

A YJC is more serious than a caution, and should be reserved for offences that are relatively serious and for which there is an identifiable victim (individual or corporate). A YJC is a conference conducted with the conference convenor, the specialist youth officer, the child, the child's family, the child's legal practitioner, the victim and the victim's support person (and others) to agree on an outcome plan for the child (ss. 47 and 52). The outcome plan is a realistic timetable of action - for the child to apologise, make reparation, participate in counselling/rehabilitation/education programs and/or take action towards the reintegration into the community within 6 months (s. 52; cl. 6 *Young Offender Regulation 2010*). The outcome plan cannot contain sanctions that are more severe than those that a court may impose for a similar offence, and the number of hours agreed for any community work (including work for the victim) cannot exceed the maximum number of community service hours that may be imposed under the *Children (Community Service Orders) Act 1987* (NSW) (s. 52; cl. 7 *Young Offenders Regulation 2010*).

A specialist youth (police) officer, the DPP or the Children's Court can refer the child to a YJC (ss. 38 and 40). A child can be referred for a YJC even if the child has previously committed offences or been dealt with under the

YOA (s. 37(5)). No limit is set on the number of prior referrals to a YJC. If practicable, the YJC must be held within 28 days after the referral is made and then must be completed within 7 days (ss. 43 and 48). In practice, a YJC may take up to one month to be organised, depending on the number of potential participants and the complexity of the matter. If your client is referred to a YJC by the court, you should make contact with the relevant Youth Justice Conference manager in Juvenile Justice to whom the child has been referred. Practitioners may participate in a YJC, but may not represent the child [s 47(1)(f)].

A child can be referred to a YJC if the child admits the offence (not a plea of guilty), the child consents to the YJC, the child is entitled to be dealt with by YJC, the offence is one for which a YJC may be held and a caution would not be appropriate (ss. 36, 37 and 40).

If you act for a child who has not yet been charged, you can make representations to the specialist youth officer that a YJC is appropriate. If you act for a child who has already been charged, you can ask the DPP and/or the Children's Court to refer the matter for a YJC.

Your representations to the specialist youth officer, DPP and/or the Children's Court should address the following:

- the principles and purposes YJCs (s. 34);
- the seriousness of the offence;
- the degree of violence;
- the harm caused; and
- the number and nature of any offences and the number of times the child has been dealt with under the YOA (ss. 37(3) and 40(5)).

During a YJC, a child may be *advised* by a legal practitioner (s. 50(1)), may seek permission to be *represented* by a legal practitioner (s. 50(2)), may request an adjournment to speak to family (s. 48(6)) and has a right to veto the proposed outcome plan or any part of it (s. 52(4)).

If the parties agree on an outcome plan at the conclusion of the YJC, the outcome plan is approved by the Children's Court (if it made the referral) and the conference administrator monitors whether the child satisfactorily completes it (ss. 54 and 56). Once the child satisfactorily completes the outcome plan, the Court must dismiss the charge. If the YJC cannot agree on an outcome plan, the matter is referred back to the specialist youth officer, DPP or the Children's Court who made original referral.

What are the implications of a warning, caution or YJC?

A warning, caution or YJC under the YOA is generally a better outcome for the child than being sentenced in the Children's Court. Warnings, cautions and YJCs do not result in convictions and do not form part of the child's criminal history - unless the child later applies for specified employment such as child related employment (s. 68). If the child receives a caution or satisfactorily completes a YJC outcome plan, no further proceedings may be taken against the child for the offence or for any other offences in respect of the same incident (ss. 32 and 58). Unlike children sentenced in the Children's Court, most children dealt with under the YOA are usually not liable to

pay restitution under the *Victims Support and Rehabilitation Act 1996* (NSW). However, the VCT may make a restitution order against a child who has been dealt with by a YJC for an offence involving injury to a victim.

A warning, caution or YJC is recorded (ss. 17, 33 and 59), on the child's Court Alternatives History rather than on the child's Criminal Record. Such records may be disclosed to the investigator, the DPP and the Children's Court when considering whether to deal with other offences under the YOA in future (s. 66). The record of a warning must be destroyed when the child turns 21 (s. 17(3)). Any finger prints, palm prints or photographs of the child obtained in connection with an offence for which a caution is given must be destroyed (s. 33A).

Any statement, confession, admission or information made or given by a child during the giving of a caution or a YJC is not to be admitted in evidence in any subsequent criminal or civil proceedings but may be used by police to *investigate* other offences (ss. 67 and 69).

Be sure to also advise the child about the potential disadvantages of dealing with the matter under the YOA. If the Children's Court releases a child on condition that the child complies with an outcome plan, and the child fails to comply with the outcome plan, the child may be brought back before the court to be dealt with in some other way or by a further YJC referral (s. 41 of the *Children (Criminal Proceedings) Act 1987* (NSW) ('CCPA'). If the child elects not to proceed with a caution or YJC, fails to attend a caution or YJC, fails to reach agreement at the YJC or fails to satisfactorily complete an outcome plan, proceedings may be continued or commenced within 3 months of the referral back to the specialist youth officer, DPP or Children's Court – even if the limitation period for the offence has already expired (s. 64).

Practical tips on the YOA

- If you are seeking to have a matter finalised under the YOA by way of a caution or referral to a YJC, an admission (not a plea of guilty) to the offence is indicated to the Children's Court. If the Magistrate does not accede to the request to deal with the matter under the YOA, the child may withdraw the YOA admission and enter a plea and the matter will be dealt with under the CCPA.
- If possible, it is preferable to have a matter finalised by way of a YOA caution rather than a caution under s 33(1)(a) CCPA, because a YOA caution is an entry on a Court Alternative History as opposed to an entry on a Criminal Record.
- It is well recognised in case law that deprivation of liberty following arrest is the most restrictive form of sanction. In light of the principles of the YOA, more particularly, 'that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act', it is inappropriate and unsatisfactory for a child to be arrested for the purpose of delivery of a YOA option, or to be arrested when the application of a YOA option would have been an appropriate penalty. Arrest, when a YOA option would have been appropriate, may be relevant to sentence and (in appropriate matters) form the basis for submissions that a child be extended the benefit of a more lenient YOA option than otherwise appropriate in the absence of arrest.
- It is often thought that any offence involving domestic violence is excluded from the YOA. This is not correct. The only domestic violence offences specifically excluded from the Act are offences under the

Crimes (Domestic and Personal Violence) Act 2007 (NSW). An assault or malicious damage offence which arises in a domestic situation is not specifically excluded from the Act.

- If appearing for a client charged with an assault and contravene Apprehended Domestic Violence Order (ADVO) (if otherwise eligible for a YOA option) it may be appropriate to make representations to the Police that the Contravene ADVO charge be withdrawn or alternatively, seek to have the assault referred under the YOA and adjourn the sentence of the Contravene ADVO charge until completion of the outcome plan for the assault matter.
- The Young Offender Regulation 2010 makes particular provision for arson, bushfire and graffiti offences. If you act for a child regarding referral to YJC in relation to such offences, you will need to be familiar with cls. 8 and 9 of the Young Offender Regulation 2010 because they set out more onerous requirements which must be included in outcome plans for these offences. You may find it useful to outline these more onerous requirements to rebut any notion that a referral to a YJC is a 'soft option'.
- The YOA is not suitable for all child offenders. Children with a legitimate defence should instead elect to defend the charge in the Children's Court and, if under 14, consider raising *doli incapax*. Children with intellectual disability or mental illness should instead seek to have the matter dealt with under ss. 32 or 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).
- You are generally not permitted to represent the child during a YJC by speaking on the child's behalf because the YJC should not become adversarial. However, you are generally permitted to advise the child during the YJC by answering the child's questions and discussing the child's rights and responsibilities. Practitioners are encouraged to participate in youth justice conferences with their clients to familiarise themselves with this restorative justice alternative to court proceedings for children and to build their knowledge about this process for advising future child clients who are eligible and entitled to be dealt with in this way.

Chapter 14 - Local Court Defended Hearings

This chapter ONLY applies to Local Court hearings. If your charge is strictly indictable, DO NOT read this chapter, for obvious reasons. For strictly indictable offences, refer to [Chapter 6](#)

Preparing Local Court defended hearings

The purpose of this chapter is to set out ways to approach preparing a defended hearing in the Local Court. There are several ways to approach a defended hearing, and each advocate will have a different approach.

This chapter is written from a defence perspective and addresses the matters to be considered when preparing for a Local Court defended hearing.

What is your client charged with?

It is important to be aware of the precise offence(s) that your client is charged with and to thoroughly research the law in relation to that offence.

A number of offences include specific legal principles. You will find commentaries on the law relating to specific offences in a good loose-leaf service on criminal law. Some of these include phrases such as 'break' (with a break and enter offence), 'road related area' and 'dwelling-house'.

The elements of the offence

It is very important at the outset to identify the elements of each offence with which your client is charged. The prosecution must prove each of these elements to the criminal standard of proof beyond reasonable doubt.

One way to analyse whether the elements of an offence are established is to do the following:

- Divide a page into two columns;
- Label one column "the elements of the offence" and the other column "the evidence".
- Write down each element of the offence in one column, and in the other column, the evidence on which the brief indicates the prosecution intend to rely to prove each element.

This will assist you in identifying where the prosecution case may be weak or strong.

An offence may include a number of different types of possible conduct. It is important to be aware of exactly what exactly the type of conduct is alleged by the prosecution.

For example, Goods in Custody (s 527C *Crimes Act*) encompasses:

1. Any person who:
 - a. has any thing in his or her custody,
 - b. has any thing in the custody of another person,
 - c. has any thing in or on premises, whether belonging to or occupied by himself or herself or not, or whether that thing is there for his or her own use or the use of another, or

- d. gives custody of any thing to a person who is not lawfully entitled to possession of the thing, which thing may be reasonably suspected of being stolen or otherwise unlawfully obtained.

It is important to know which subsection your client has been charged under.

Duplicity

After you have examined the elements, you should re-examine the wording of the charge for possible defects.

Sometimes police charge your client more than once for the same conduct. Sometimes this means you can argue that one of the charges should be withdrawn. This is referred to as the charge being 'duplicitous.'

The date of the offence

The date of the offence will be found on the Police Facts Sheet and Court Attendance Notice. Different time limits apply to commence different proceedings. For strictly indictable offences, Table 1, and Table 2 Offences, there is normally no time limit unless the legislation states otherwise.

For strictly summary offences, proceedings must normally be commenced within 6-months from the date of the alleged offence (s179 Criminal Procedure Act).

However, there are some exceptions:

- If an Act specifies a different period within which proceedings can be commenced, or
- If an indictable offence is being dealt with summarily, or
- If an offence involves the death of a person that is or has been the subject of a coronial inquest.

Note also that proceedings for a summary offence that relates to the death of a person that is or has been the subject of a coronial inquest must be commenced:

- h. within 6 months of the conclusion of the inquest, or
- i. within 2 years from the date on which the offence is alleged to have been committed,
- Which ever came first

Consider checking the Judicial Commission Local Courts Bench Book. Here is the

link: <https://www.judcom.nsw.gov.au/publications/benchbks/local/>

Note: If the *Crimes Act* provisions have been amended, repealed or substituted, the correct section to lay an offence under depends on the date of offence.

The maximum penalty for the offence

You should know the maximum penalty for each offence with which your client is charged.

You will find out the maximum penalty by looking at the relevant legislation.

Almost all offences in the Crimes Act state the maximum penalty in the relevant legislative provision. For other offences, such as those found within the *Drug (Misuse and Trafficking) Act*, the maximum penalty will be found within the Act but not necessarily in the section of the Act where the particular offence is set out.

Note that the maximum penalty for an offence may be lower if the matter is heard in the Local Court. One of the most common offences where this occurs is common assault (s 61 Crimes Act), which carries a maximum penalty of two years, but a maximum penalty of 12 months if dealt with in the Local Court.

The brief of evidence

The brief of evidence contains the statements and other evidence on which the prosecution intend to rely to prove its case.

The prosecution is usually required to serve the brief of evidence on the defence on or before a date ordered by the Magistrate [see Chapter 4 Part 2 Division 2 *Criminal Procedure Act* and Local Court Practice Note Crim 1]. Failing this, the brief of evidence must be served no later than 14 days before the hearing date.

The brief of evidence will usually include:

- Police statements.
- The statement of the victim.
- The statement of the alleged victim/complainant
- Statements of civilian witnesses
- Statements of expert witnesses
- Results of forensic tests, such as blood alcohol tests
- Photographs, plans, sketches and other similar documents

Always check that the statements in the brief have been signed.

Note that a DPP prosecutor is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor, which may be relevant to a fact in issue (see the Office of Director of Public Prosecutions Guideline 18 1995 NSW).

There may be rare occasions where in the overriding interests of justice, or to prevent danger to life or personal safety, the Director or Deputy Director may approve the withholding of disclosable information

Making requisitions and requests for particulars: sections 166–169 Evidence Act 1995 (NSW)

Once you have read the police brief of evidence, consider if you need further information. Often there will be additional information or details you require that is not contained in the brief.

The best way to obtain this information is to make requisitions or to seek particulars from the prosecution. This is done by writing to the officer in charge and sending a copy of that letter to the Police Prosecutors at the courthouse where the matter is going to be dealt with.

Examples of matters that might be requisitioned, if relevant, are:

- Your client's criminal record.
- The criminal records of the alleged victim/complainant or other relevant witnesses
- Original medical and other records (this could be subject to Public Interest Immunity).

- Applications for search warrants and listening device warrants.
- Part 10A Crimes Act custody management records.
- Other documents that are referred to in the brief but are not contained in the brief.

Requests are dealt with in ss 166 - 169 *Evidence Act 1995*.(NSW). Those sections set out matters about which requests can be made, the time limits for making requests and the consequences of failure or refusal to comply with such requests.

Your instructions

What is your client's version of the events?

You must take instructions from your client in relation to their version of events and on the statements and other material contained in the police brief of evidence.

You should always get your client to sign his/her instructions to you.

Does your client have a defence?

Your client may deny the allegation altogether, dispute certain facts alleged by the police in support of one or more elements of the offence or raise a defence at law.

It is important to be aware of what defences may be available in a particular case.

There are a number of defences at law including duress, necessity, claim of right and self-defence. Strictly speaking, not all of these are "defences" but are matters which, once raised, the prosecution generally must negative beyond reasonable doubt.

There are other offences where there are specific types of defences available provided certain requirements exist, such as specific intent in the case of certain offences (see Part 11A Crimes Act).

Evidence of good character (sections 109–112 Evidence Act)

The provisions relating to evidence of good character are contained in ss 109 - 112 Evidence Act. These sections should be considered in detail if you are considering leading evidence of good character.

Evidence of good character, if available, can be led in a general sense or in a specific sense. If your client has no criminal record, or if they have a limited criminal record, you should carefully consider leading evidence of good character.

Be careful not to raise good character if it allows the Prosecution to adduce evidence to bad character in order to rebut your client's 'good character.'

Corroboration from defence witnesses

In the same way as you take a statement from your own client, you should also take a statement from your defence witnesses, if you have any. Defence witnesses may support your client's case in important respects.

Make sure you get instructions from your client as to what witnesses may be able to give evidence in the defence case. These may include witnesses that the prosecution has overlooked or that the prosecution does not intend to call to give evidence.

Before the hearing

Issuing subpoenas

Subpoenas are often issued to obtain material that might not have been provided by the prosecution. Refer to [Chapter 7 - Subpoenas](#).

Speaking to the prosecution

There are several reasons why it is beneficial to speak to the prosecutor before a hearing, including:

- To clarify any parts of the case you are unsure of
- To identify the issues in dispute
- To clarify which charges are for hearing
- To make enquiries about the evidence to be led, or
- To make sure that prejudicial or clearly inadmissible evidence is not led.

Speaking to prosecution witnesses

There is no property in witnesses. Therefore, you are permitted to speak to the prosecution witnesses.

That said, it is unlikely that you will want to speak to prosecution witnesses in all cases in which you appear.

You should be cautious when speaking to prosecution witnesses. It is preferable, before speaking to a witness, to speak to the officer in charge as well as the DPP solicitor with carriage or the police prosecutor, to let them know that you intend to speak to the witness. You should also note that the Law Society has issued Guidelines (<https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1254699.pdf>) in relation to contact with complainants in apprehended violence orders and family violence matters (see chapter 17).

You should always consider speaking to expert witnesses who are to be called by the prosecution before the hearing date. Most experts pride themselves on their impartiality. You will benefit from speaking to the expert by talking to them about their evidence and how they arrived at their opinions.

The hearing

Both the *Criminal Procedure Act 1986* (NSW) (particularly Chapter 4 Part 2) and the *Evidence Act 1995* (NSW) contain a number of important sections relating to the adducing of evidence from witnesses.

Some of the important sections to be aware of are set out below.

How evidence is to be taken

Section 195 *Criminal Procedure Act*—A prosecutor and an accused may each give evidence and may examine and cross-examine witnesses called by the prosecution or by the accused

Section 27 *Evidence Act*—A party may question any witness, except as provided by the Evidence Act

Section 28 *Evidence Act*—Unless the court otherwise directs, examination in chief of a witness takes place first, then cross-examination, and then re-examination.

Questioning witnesses

- Section 29 *Evidence Act*—A party may question a witness in any way the party thinks fit, except where such questioning contravenes the Evidence Act or a direction of the court. A court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form.

Such a direction may include directions about the way in which evidence is to be given in that form.

Evidence may also be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

Police officers can seek leave to read their statements in court or to be lead through their written statements if the statement was made at the time of, or soon after the event to which the statement refers (s 33 *Evidence Act*). Therefore, if a police officer's statement is made weeks or months after an alleged offence, the police officer will not normally be able to read their statement onto the record and you can object to them doing so.

Section 37 *Evidence Act*—A leading question is one that suggests the answer, or presumes matters not yet in evidence. A leading question must not be put to a witness in examination in chief or in re-examination except in certain circumstances, including where the court gives leave or the question relates to a matter that is not in dispute.

Section 39 *Evidence Act*—On re-examination, a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, and other questions may not be put to the witness unless the court gives leave.

Section 42 *Evidence Act*—Leading questions in cross examination. A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

The court may take into account a number of matters in deciding whether to disallow a question or give such a direction, including the extent to which evidence that has been given by a witness in examination in chief is unfavourable to the party who called the witness, the witness' age, or any mental, intellectual or physical disability to which the witness is subject, and which may affect the witness' answers.

Improper questions

Section 41 *Evidence Act*—Improper questions. The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is:

- misleading or confusing, or
- unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive, or
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate, or
- has no basis other than a stereotype (for example, a stereotype based on the witness's sex, race, culture, ethnicity, age or mental, intellectual or physical disability).

The Court's control over questioning of witnesses

Section 26 *Evidence Act*—The Court's control over questioning of witnesses. The court may make such orders as it considers just, including in relation to the way in which witnesses are to be questioned; the order in which parties may question a witness; the presence and behaviour of any person in connection with the questioning of witnesses; the production and use of documents and things in connection with the questioning of witnesses.

Preparing questions

It is always more persuasive to be able to look at a witness and to listen to the answers that a witness gives. For this reason, writing down every question you propose to ask is rarely helpful.

It may be more helpful to write down a list of topics or areas for examination in chief and cross examination. If you are well prepared, you will have a good understanding of the case and the evidence you are trying to elicit, and you can rely on your notes less.

The prosecution case

The prosecution will present their case first. In the Local Court, the prosecution often calls witnesses in the following order:

- Police witnesses
- The alleged victim
- Other witnesses, if any.

The Prosecution can call witnesses in any order they see fit unless it leads to unfair prejudice.

Exclusion of evidence

Admissibility of evidence

You should consider how the *Evidence Act* applies to the material contained within the brief of evidence to determine what evidence is admissible. This will help you determine what the issues will be at the hearing.

For example, identification evidence is only admissible in certain circumstances (see ss 114–116 *Evidence Act*) and, even if admissible, the evidence may be subject to a warning in relation to its reliability (s 165(1)(d) *Evidence Act*).

See below for a discussion of some of the grounds on which evidence can be excluded.

Objections

You object to evidence by standing and stating, 'I object'.

It is useful to begin your objection by saying, for example, "This is hearsay evidence..." or "I object on relevance", or otherwise articulating what the objection is.

Similarly, when you answer an objection you should commence with a direct explanation of the response to the objection. For example, "This is not hearsay evidence, because..."

There can be no substitute for a thorough understanding of the Evidence Act and the grounds for objection contained in the Evidence Act. It is useful to have a list of headings of the most common grounds for objection to assist you in determining the basis of your objection. Some of these grounds are:

- Relevance (Part 3.1 *Evidence Act*).
- Hearsay (Part 3.2 *Evidence Act*).
- Opinion evidence (Part 3.3 *Evidence Act*).

Discretionary exclusion of evidence

There might be discretionary reasons for a Magistrate to exclude or limit certain evidence.

The discretions to exclude evidence are contained in the *Evidence Act* and include:

- The discretion to exclude admissions (s 90).
- The general discretion to exclude evidence (s 135).
- The general discretion to limit use of evidence (s 136).
- The exclusion of prejudicial evidence in criminal proceedings. Such evidence must be excluded if the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant (s 137)
- The exclusion of improperly or illegally obtained evidence (s 138).

Unlawfully or improperly obtained evidence

Aspects of the law relating to the propriety of police conduct include:

- The suitability of arrest: see *DPP v Lance Carr* (2002) 127 A Crim R 151; *DPP CAD* [2003] NSWCCA 196; *DPP v Coe* [2003] NSWSC 363. Also see *Williams v Director of Public Prosecutions* (NSW) [2011] NSWSC 1085 where it was found that an arrest found to be unnecessary with reference to the s.99(3) of the *Law Enforcement (Powers and Responsibilities) Act* 2002 may also constitute an illegality and defeat a charge where "execution of duty" is an element.
- Compliance with the detention after arrest provisions contained in Part 10A *Crimes Act* and the Crimes (Detention After Arrest) Regulation, especially in relation to vulnerable persons.
- Powers of search and seizure.
- Oral questioning of witnesses in the absence of videotape or audio taped questioning of the witnesses (s 13 *Children (Criminal Proceedings) Act* 1987 (NSW); s 281 *Criminal Procedure Act* 1986 (NSW)).
- Police impropriety (ss 84, 85, 86, 90 *Evidence Act*).
- Proven impropriety in the conduct of police may lead to the exclusion of evidence improperly or illegally obtained (s 138 *Evidence Act*).

Challenging prosecution evidence

You can challenge the evidence, which is admitted in a number of ways.

Challenging the credibility of the police or their witnesses

Examples of ways that you may challenge the credibility of police or their witnesses are:

- You may have reliable instructions that a prosecution witness has a motive to give false evidence or has given false evidence before.
- You may cast doubt on the ability of a witness to observe the events they have stated they saw, for example because the lighting was poor, their eyesight is poor or they were not present.
- You may also be aware of any prior inconsistent statement made by a witness and you should cross-examine the witness on that prior inconsistent statement to challenge their credibility.

Inconsistency with the evidence of other witnesses

You can cast doubt on the evidence of a prosecution witness by using the evidence of another witness which is inconsistent with the evidence of the first witness.

Corroboration of the defence case from prosecution witnesses

Not all prosecution witnesses necessarily hurt the defence case. In some situations, prosecution witnesses (whether they are independent witnesses or police) may support evidence given by the accused or the accused's witnesses. In these circumstances, the goal of cross-examination will be to elicit the favourable evidence which substantiates your client's version, or evidence which poses difficulties for the prosecution's case.

The rule in *Browne v Dunn*

The rule in *Browne v Dunn* (1894) 6 R 67 is a rule of procedural fairness. It provides that a witness being cross-examined should have the opportunity to agree or contradict evidence which touches upon the evidence of that witness.

If the rule is breached there are a number of potential consequences. One of the consequences is that a court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined, pursuant to s 46 *Evidence Act*. See *R v Birks* (1990) 19NSWLR 677 at 688–689 and *R v Liristis* [2004 NSWCCA 287] for a detailed discussion of the rule, its principles and cases in which it has been applied.

One of the advantages of getting written instructions from your client is that you can use your client's statement to help you make sure that you comply with the rule in *Browne v Dunn*.

The defence case

At the close of the prosecution case you must decide whether or not to call evidence. At the end of the prosecution case, you may make a submission that your client has "no case to answer". The court is required to decide whether a prima facie case exists. When determining whether a prima facie case exists, the question is not whether the accused *ought* to be convicted on the evidence as it stands, but whether on the evidence as it stands the accused *could* lawfully be convicted. This is a question of law (*May v O'Sullivan* (1955) 92 CLR 654).

Alternately, you may make a submission (commonly referred to as the 'second limb of *May v O'Sullivan*') that on the whole of the evidence before it, the Court would not be satisfied beyond reasonable doubt that the accused is guilty. This is a question of fact.

You need to be mindful about making a 'second limb of *May v O'Sullivan*' submission as some Magistrates take the view that, if the submission is made and is unsuccessful, the defendant is precluded from giving evidence or calling evidence in the defence case. It is advisable to ask the Magistrate about his/her opinion on this rule before making such a submission, if you are contemplating calling your client to give evidence.

If you are not making either of these submissions, you then must decide whether you open a positive defence case.

Opening statements

Section 159 *Criminal Procedure Act* allows an accused person or his/her counsel to make opening addresses at two points:

- Immediately after the opening address by the prosecutor. Any such opening address is to be limited generally to an address on the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and the matters to be raised by the accused person.
- If the accused intends to give evidence or to call any witness in support of the defence, the accused person or his or her counsel is entitled to open the case for the defence before calling evidence, whether or not an address has been made to the jury after the prosecutor's opening address.

Your opening address will be the first opportunity to tell the Magistrate what the case is about. The Magistrate is likely to be assisted by being given a general indication of what matters are in issue, and what matters are not in dispute.

In your opening address, you should clearly and logically outline the facts, and perhaps give a general outline of the issues involved in the case. The purpose of the opening address is not to put a legal argument (that is for the closing address). You should always be mindful about not disclosing too much of your case to the Crown.

(*R v MM* [2004] 145 A Crim R 148 NSWCCA 81 Levine and Howie JJ)

To call your client or not to call your client?

If you are going to call evidence on your client's behalf you need to consider whether to call your client. If you decide to call your client to give evidence, generally your client will be the first witness you call.

Every accused has a right to silence. They do not have to give sworn evidence in the witness box. The decision to call your client to give evidence is an important one. One advantage is that the magistrate will hear your client's sworn evidence.

There are a very small number of cases in which a client may have been given a special caution pursuant to s89A of the *Evidence Act*. (Insert link to 'at the police station') If your client has received a special caution, there are additional considerations in exercising their right to silence, and adverse inferences can be drawn from their silence.

There can be some dangers in your client giving evidence:

- Your client might not cope well under cross-examination
- Your client may not make a good witness (you will be able to assess this through conferences with your client prior to the hearing).

There may be good reasons, such as proof of technical matters which the prosecution may be assisted with, if your client was to give evidence.

However, it is important to note that if you do not call evidence in the Local Court, you are precluded from calling fresh evidence on an appeal against any conviction to the District Court, unless you have the leave of the District Court and only if it is in the interests of justice (s 18 *Crimes (Appeal and Review) Act*).

Calling a client to give evidence is not a necessity, and in some cases, it may be better for the client to exercise their right to silence.

Each case (and client) must be assessed before such a decision is made, and you should get your client's clear instructions about whether he/she wishes to give evidence.

Calling witnesses in the defence case

If you have witnesses that you will be calling in the defence case, you should consider:

- What relevant evidence they will give.
- Whether their evidence will be credible
- What order you will call the witnesses in. Witnesses may be called in logical order of the evidence they may give, or in an order relating to the chronology of a matter.

Closing addresses

The closing is the final opportunity you will have to present your version of events and your position in relation to the facts and the issues in dispute to the magistrate. The closing is a presentation of an argument to the magistrate as to why your client should be acquitted of the offence(s).

Some important parts of a closing address are:

- Addressing how the facts assist your case.
- Weaving your instructions into the argument.
- Using exhibits and visual aids.
- Pointing out the weaknesses in the other side's case.
- Addressing the weaknesses in your own case.

The Advocacy Rules

It is very important to be aware of the Advocacy Rules. These rules apply to all solicitors who appear as advocates in court. There are specific rules related to the prosecution.

[The Advocacy Rules are found in UNIFORM CONDUCT, PRACTICE AND CPD RULES FOR SOLICITORS 2015 ss17 -29).

They refer, among other matters, to:

- The efficient administration of justice.
- The duty to the client.
- Frankness in court.
- The integrity of evidence.
- The duty to the opponent.

Steps following conviction at the hearing

Sentencing

If your client is convicted, the Magistrate will expect to be able to proceed to sentence as soon as possible, so you should be ready to proceed with your matter to sentence immediately after the hearing. Exceptions would be when a pre-sentence report is required, or when you require time to obtain other subjective material on your client's behalf.

In other matters, you should be ready to proceed to sentence immediately. It may be that the Magistrate does not require a pre-sentence report, or that references do not add anything to your client's case. In these circumstances, you should be able to have your client sentenced immediately.

Appealing to the District Court

Appeals to the District Court, against conviction or sentence, are discussed in Chapter 20.

Bail

If your client is likely to be given a sentence of imprisonment after conviction and sentencing, you should have sufficient instructions to be able to apply for bail on your client's behalf, pending any appeal.

If your client is looking at a sentence of imprisonment if convicted and sentenced, you should inform your client of this possibility before the hearing. Discussing possible sentence options upon conviction and obtaining instructions on this issue will allow you to be prepared for an application for appeals bail if your client is in fact convicted and sentenced to full time imprisonment.

[Also refer to the Chapter on Bail.]

Practical matters relating to hearings

The various Practice Notes explain ways in which practitioners can assist the work of the court, including:

- Ready identification of issues genuinely in dispute;
- Ensuring readiness for trial;
- Providing reasonable estimates of the length of hearings; and

- Giving the earliest practicable notice of an adjournment application.

Some of the areas covered in the Practice Note are described below.

Setting matters down for hearing

The Practice Note states that when setting matters down for hearing, parties must be in a position to advise the court of:

- The dates upon which the parties and their witnesses are available
- The estimated length of hearing time
- That all interlocutory matters have been completed
- That the matter is otherwise ready to proceed
- If subpoenas are to be issued, and
- If a date prior to the hearing date is required for return of subpoenas.

Vacating hearing dates

The Practice Note sets out the following:

- When a hearing date has been allocated, it will not be vacated unless the party seeking to vacate shows "cogent and compelling reasons"
- An application to vacate a hearing date must be in writing and in the form prescribed in the Practice Note
- An application to vacate a hearing must be made at least 21 days before the allocated hearing date, or another period (whether longer or shorter) as allowed by the presiding magistrate which will allow time to list other matters for hearing on the date(s) to be vacated
- In the first instance the application is dealt with by a Magistrate in Chambers and is only be listed in court at the direction of the Magistrate
- The party bringing the application must give notice to the opposing party of the application.

Adjournment applications

The Practice Note sets out the following:

- Adjournment applications are a decision for the court in the proper exercise of judicial discretion
- There is no hard and fast rule on the acceptable number of adjournments that should be granted in any matter. As a general rule, practitioners cannot expect the court to consider applications for adjournment in any matter without cogent and compelling reasons
- Tardiness in preparation, the late obtaining of instructions, the making of representations or change of counsel does not, of itself, justify the granting of an adjournment by the court.

TIP ON PREPARING DEFENDED HEARINGS

Prepare your closing address first

It is often said that the preparation of a case should commence with the closing address. The reason for preparing your closing address first is that it highlights the crucial issues in your case, such as:

- Issues of weight in your matter;

- Statutory defences;
- Case law that is relevant and which supports your case.

There is good reason to prepare a closing address first. In a closing address, you will be addressing the court on the law and the facts according to the evidence. Preparing your questioning after first preparing your closing address will alert you to the important issues, and will shape the questions you need to ask and evidence you will need to elicit.

Create a summary of the evidence

Preparing a summary of the evidence of each witness is a useful tool of preparation. It will be helpful in determining which witness' evidence are in dispute and which are not.

Create a chronology

It will often be helpful to prepare a chronology of events, both leading up to an incident and after the incident. The chronology may be a summary of the different statements contained in the brief of evidence.

Use exhibits as much as you can

Exhibits can take the form of diagrams, models, maps, photographs, actual objects, audio and video recordings. Exhibits can also take the form of summary charts of evidence or of other information involved in the case (Section 29 *Evidence Act*).

Exhibits are persuasive and for this reason they are very important. Exhibits enhance the persuasive impact of the oral evidence. The use of exhibits should be considered, provided the evidence is relevant and can be used effectively.

It is often helpful to have a view of the location where the allegation is said to have occurred. This will help you understand the area in a way that photographs (which might be included in the brief of evidence), will not be able to show. You will also gain an appreciation of the surrounding location, which may be important.

ERISPs (Electronic Recording of Interview with Suspected Person)

In order to be admissible, information given by accused people to police during the course of official questioning should usually be tape recorded (s 281 *Criminal Procedure Act*). The tape recording (which is defined in s 281(4) *Criminal Procedure Act*) is an exhibit when it is tendered in court. The transcript of the videotape is called an *aide memoire*. It assists the court but is not the actual exhibit.

It is important to watch the ERISP or listen to audio tapes of records of interview. It will not only help you work out whether the transcript is accurate, but it may also indicate important aspects of the questioning and your client's manner and condition at the time of questioning which may be relevant in your case (for example, being intoxicated or not in a fit mental state).

Subpoena witnesses for the defence

As a matter of caution, it is always preferable to subpoena your own witnesses, even if they tell you that they will be coming to court to give evidence. If one of the defence witnesses is subsequently unable to attend court

on the date of the hearing and you are seeking an adjournment, it will assist you if you have subpoenaed them to give evidence.

Take thorough notes of the evidence

To be able to take useful notes of the evidence, you must be as organised as possible. It might be useful to have your list of areas of questioning on a separate document to the notes you take. The notes of evidence in chief might be divided into two columns. On one side of the page, you can write the actual evidence. On the other side you may be able to make notes on cross-examination or notes for your closing address.

Similarly, during your client or witness' cross-examination, you may write the evidence they have given on one side of a column, and any re-examination points on the other side. You will also need to maintain a list of the exhibits as they are tendered at hearing, and these may be referred to during final addresses.

Chapter 15 - Sentencing and Plea Making in the Local Court

The purpose of this chapter is to outline some fundamental aspects of sentencing. All references in this chapter are to the *Crimes (Sentencing Procedure) Act 1999* (NSW), unless indicated otherwise. These principles cover state matters.

Preparing for sentencing

It is important to be thoroughly aware of the following when appearing in a sentence matter:

1. *Crimes (Sentencing Procedure) Act 1999*
2. The applicable purposes and principles of sentencing; and
3. Cases in relation to the specific types of offences or types of offender.

Court Attendance Notice and facts sheet

When arrested or summoned to court, your client will receive a Court Attendance Notice (CAN) and (usually) a facts sheet. These documents set out, in general terms, the prosecution's case. These are obtained by approaching the police prosecutor on the day of court who will usually have a copy for the defence.

Look at the charges and read the facts sheet closely. You will be advising your client whether the elements of the offence(s) alleged are made out. Obtain full instructions on the matter and on whether your client agrees with what is contained in the facts sheet.

As the facts sheet is a document prepared by a police officer, it may contain material that is detrimental to your client it should not include:

- Prejudicial and unsupported assertions;
- Material that is not relevant; and
- Material that may support a more serious charge being laid against your client [*The Queen v De Simoni* (1981) 147 CLR 383].

Every word should be reviewed against your client's instructions and material of the types mentioned above should be removed with the assistance of the prosecutor so that the correct facts are tendered in court

Disputes over the alleged facts

If your client intends to plead guilty but does not agree with the police facts, then you should discuss an alternative agreed statement of facts with the prosecutor. The facts sheet should only be tendered once the facts are agreed. There is scope for degrees of disagreement with the police facts, without requiring that a disputed facts hearing be held.

If the disagreement with the facts is substantial, and you cannot resolve this disagreement with the prosecutor, then a disputed facts hearing may be required. It is rare for disputed facts hearings to be required.

It is preferable to avoid having a disputed facts hearing. This is because one of the benefits of a plea of guilty to your client is that the witnesses have been saved from having to attend court to give evidence. This benefit is diminished when witnesses are required to attend court and give evidence at a disputed facts hearing.

Section 22 of the *Crimes (Sentencing Procedure) Act 1999* (CSPA) enables the court to take a Guilty Plea into account when sentencing.

Criminal record/ antecedents/ driving history

It is important to get a copy of your client's criminal record and driving history.

RMS can give your client the driving history and criminal record and the criminal record can be obtained from the prosecutor. Do this before you go into court if possible. Sometimes a prosecutor may only have a bail report. A bail report is a record created for bail and it may include matters that your client has not been convicted of. The prosecutor should delete these matters from the bail report if it is to be tendered.

Character References

References can be useful. Whether you use them will depend on your client and the particular circumstances of your client's case. It is good practice to be selective. Two or three references should suffice.

References should be signed and dated and should, among other relevant matters:

- Be addressed to the 'Presiding Magistrate, [place] Local Court'.
- State that the writer of the reference is aware that your client is to be sentenced for criminal charges. The charges should be listed in the reference.
- State how long the writer of the reference has known your client, and in what capacity.

Make sure that the character reference refers to the criteria that the court will assess in the sentencing exercise.

Pre Sentence Reports

If your client has been charged with a serious offence, is a repeat offender, or if there are significant aggravating features surrounding the offence, then there is a risk that your client may receive a custodial sentence. In addition, Community Service Orders cannot be imposed unless a person is assessed as suitable to perform these orders. In the above circumstances you should consider requesting a Pre-Sentence Report (PSR) or the Magistrate may demand one. A PSR is prepared by an officer from Community Corrections.

There are generally two types of PSRs:

1. 'Written' or 'full' PSRs. These are longer reports and discuss your client's matter and background in detail. The Community Corrections Officer may interview members of your client's family and other relevant people.
2. 'Oral' or 'duty PSRs'. These reports are shorter than written PSRs. Their main purpose is to flag issues relating to homelessness or drug dependency and ultimately to assess your client's suitability to perform community service orders.

In the Local Court, the appropriate type of PSR will depend on your client's offence and personal circumstances, as well as the Magistrate's preference. A full report requires an adjournment of approximately six weeks in order

to be prepared. Your client will be directed to attend the nearest Community Corrections office to his/her residence to enable the report to be written. If a full report has been ordered, you can contact the Community Corrections Officer a day or two before the upcoming court date and request a copy of the report. The Community Corrections officer is not obliged to give you a copy of the report, as the report is prepared for the court, but they are generally provided.

If an oral PSR is ordered, your client will generally see the Community Corrections Officer on the day of court, and have the report written then. Sometimes, short adjournments are required to have an oral PSR written. You can get a copy of your client's PSR by asking the court officer for it, as it will usually be placed with the court papers for your client. You can ask the Magistrate to stand your matter in the list while you go through the PSR with your client.

Calling evidence

It is unusual to call oral evidence at a sentence matter in the Local Court (although not in every case). In a rare circumstance in which you think there may be a need to call evidence, it is worth talking with your colleagues who know the Magistrate's preferences to determine whether this would be a suitable course. Sometimes it is better to tender evidence in writing (via an affidavit) rather than call evidence from a witness during a busy court list.

Preparing a plea in mitigation

Your role in a sentence is to address all the relevant matters that will assist your client in mitigating the sentence to be imposed and to assist the Court in determining the relevant sentencing principles that ought to be applied.

A plea in mitigation should always include reference to the following:

1. The facts and objective factors of the offence (see the list of objective factors below);
2. Your client's background and criminal antecedents (see the list of subjective factors below);
3. The likelihood of rehabilitation for your client;
4. The penalty you consider appropriate and why that is appropriate in all the circumstances; and
5. Where your client is being sentenced for multiple offences which are likely to involve sentences of imprisonment, the structure of those sentences (concurrently, partially concurrently, or partially or wholly cumulatively): see Part 4 Div 2.

The following is a useful (but not exhaustive) list of matters to keep in mind when you are preparing a plea in mitigation:

Objective factors

- The objective seriousness of the offence;
- The circumstances of the offence, including the level of impulsiveness/planning involved;
- The relevance of alcohol or drug use in the commission of the offence;
- The maximum (or any minimum mandatory) penalty available;

- prevalence of the offence and consequent need for general deterrence and denunciation;
- Any aggravating factors (such as those set out in s 21A(2)); and
- Any applicable guideline judgments (see chapter 17).

Subjective factors

- Age;
- Remorse and/or restitution;
- Education;
- Employment status at the time of the offence and time of sentencing;
- Criminal History; and
- Prospects of rehabilitation.

The Procedure when appearing in a Plea of Guilty in the Local Court

1. Call on your matter. Your client should be seated behind you when you do this.
2. Formally enter a plea of guilty by saying "A plea of guilty is entered".
3. Indicate that you have no objection to the tender of the police facts and your client's criminal record.
4. Those documents are tendered by the prosecutor and form the prosecution's case on sentence.
5. The Magistrate reads these documents.
6. Tender any relevant documents on behalf of your client such as reports or references. Documents are tendered by handing them to the court officer who will hand
7. The Magistrate reads these documents.
8. If you wish to have a Pre-Sentence Report prepared, then the PSR should be requested at this stage. You would not normally present your plea in mitigation until the PSR has been prepared.
9. If the Magistrate grants the request, the PSR will be ordered and the matter will be adjourned to allow time for it to be prepared.
10. You will make submissions for your client. The prosecution does not usually address on sentence in the Local Court, but they may if they wish.
11. The Magistrate gives reasons on sentence.

After court

You should never let a client leave the court until you have explained the sentence imposed. In particular, you will need to explain the conditions of any bond that has been imposed and the consequences of breaching the bond. You also need to advise your clients of their appeal rights, and the 28 day time limit in which to lodge an appeal to the District Court (see Chapter 20).

General Sentencing Principles

The purposes of sentencing are set out in section 3A as follows:

- a) To ensure that the offender is adequately punished for the offence;
- b) To prevent crime by deterring the offender and other persons from committing similar offences;
- c) To protect the community from the offender;
- d) To promote the rehabilitation of the offender;
- e) To denounce the conduct of the offender;
- f) To recognise the harm done to the victim of the crime and the community.

The sentence imposed will be heavily influenced by the purposes of sentencing and these should always be considered when preparing a plea in mitigation. These purposes will guide the sentence imposed, and so should always be considered when preparing your plea in mitigation.

In addition, the common law principles of proportionality and totality should be considered.

Proportionality requires that a sentence should be proportional to the objective circumstances of the offence: *Veen v The Queen (No 2)* (1988) 164 CLR 465.

Totality requires a court in imposing sentences for a number of offences, to ensure the overall sentence is 'just and appropriate' and adequately reflects the overall criminality of all the offences. This principle seeks to ensure both that the sentence imposed for the offences is not crushing and that the sentences imposed for the offences are not lower than they otherwise would have been: *R v KM* [2004] NSWCCA 65 at [55].

Aggravating and mitigating factors - section 21A

Section 21A sets out the aggravating and mitigating factors that are to be taken into account. These factors should be or addressed in your plea in mitigation where they apply to your matter. You should have a copy of the section with you at Court and check which apply to your sentence. Many of the matters covered in s21A are matters that you should have turned your mind to in terms of the objective seriousness of the offence and subjective factors associated with the offender. An aggravating feature does not apply as such if it is an element of an offence. For example, an assault occasioning actual bodily harm offence cannot have 'actual or threatened use of violence' as an aggravating feature as this is already an element of the offence.

An aggravating feature does not apply if it is an element of an offence. For example, an assault occasioning actual bodily harm offence cannot have 'actual or threatened use of violence' as an aggravating feature as this is already an element of the offence.

The plea of guilty — s 22 Crimes (Sentencing Procedure) Act 1999 (NSW)

As stated earlier in this chapter, a Plea of Guilty must be taken into account in sentencing: s 22

A plea of guilty may attract a discount on sentence in two respects: for providing a utilitarian benefit and as evidence of remorse.

A discount is given for the utilitarian value of the plea is sparing the need for victim's to give evidence, as well as avoiding the time and expense of a defended hearing. The strength of the Crown case is not taken into account in evaluating the extent of the discount for the plea of guilty.

In addition, the plea of guilty may be evidence of your client's contrition or remorse for committing the offence.

It is always preferable to have evidence to establish your client's contrition, such as Admissions or apologies that your client may have made in interviews with police, and letters of apology for the offence addressed to the Magistrate and/or victim. Letters that your client may write to the Magistrate or the victims of the offence.

The guideline judgment for pleas of guilty

There is a guideline judgment on pleas of guilty, which is *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. The guideline provided by the Court of Criminal Appeal is set out at paragraph 160 and provides that:

- i. *A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.*
- ii. *Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant — contrition, witness vulnerability and utilitarian value — but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, for example, assistance to authorities, a single combined quantification will often be appropriate.*
- iii. *The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.*
- iv. *In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.*

The strength of the Crown case is not to be taken into account in assessing the utilitarian value of the plea of guilty: *R v Thomson and Houlton* at [137] –[138].

Assistance given to the Police

Section 23 of the Act grants the court the power to reduce penalties for assistance provided to law enforcement authorities.

A discount or a reduction in sentence may be given by the court to an accused person who has assisted the police or other law enforcement authorities in the prevention, detection or investigation of the offence or any other offence. S23 (1).

In regards to a reduced penalty the court will consider the following:

- a) The significance and usefulness of the assistance given to the authorities,
- b) The truthfulness, completeness and reliability of any statement or other evidence that the offender provides to the authorities
- c) The extent of the assistance that has been provided,
- d) The time frame of the assistance,
- e) Benefits gained by the offender by providing assistance,
- f) Assess if an offender who has provided assistance will suffer harsher custodial conditions because of the assistance given,
- g) If the offender or a member of their family has suffered an injury or risk of injury or danger due to the assistance provided to authorities,
- h) If the assistance is related to the current offence or an unrelated offence. S23 (2)

Guideline judgments relevant to the Local Court

The Court of Criminal Appeal has delivered a number of guideline judgments. to assist sentencing courts in achieving consistency when sentencing. In relation to the nature of guideline judgments, see *R v Jurisic* (1998) 45 NSWLR 209; *R v Whyte* (2002) 55 NSWLR 252.

In addition to the guideline judgment on pleas of guilty, the following guideline judgments are particularly relevant to practitioners appearing in the Local Court:

Break, enter and steal offences

In the guideline judgment for offences contrary to section 112(1) *Crimes Act 1900* of *R v Ponfield* (1999) 48 NSWLR 327, the Court of Criminal Appeal listed the following factors as enhancing the seriousness of the offence

- i. The offence is committed whilst the offender is at conditional liberty on bail or on parole.
- ii. The offence is the result of professional planning, organisation and execution.
- iii. The offender has a prior record particularly for like offences.
- iv. The offence is committed at premises of the elderly, the sick or the disabled.
- v. The offence is accompanied by vandalism and by any other significant damage to property

- vi. The multiplicity of offences (reflected either in the charges or matters taken into account on a Form 1 pursuant to s 21 of the *Criminal Procedure Act*). In sentencing on multiple counts regard must be had to the criminality involved in each: *Pearce v The Queen* (1998) 72 ALJR 1416..
- vii. The offence is committed in a series of repeat incursions into the same premises.
- viii. The value of the stolen property to the victim, whether that value is measured in terms of money or in terms of sentimental value.
- ix. The offence was committed at a time when, absent specific knowledge on the part of the offender (a defined circumstance of aggravation – *Crimes Acts* 105A (1)(f)), it was likely that the premises would be occupied, particularly at night.
- x. That actual trauma was suffered by the victim (other than as a result of corporal violence, infliction of actual bodily harm or deprivation of liberty - defined circumstances of aggravation: *Crimes Act* s 105A (1) (c) (d) and (e)).
- xi. That force was used or threatened (other than by means of an offensive weapon, or instrument -a defined circumstance of aggravation: *Crimes Act* s 105A (1) (a)).

Taking offences into account on a Form 1

Sometimes accused individuals who have several charges can have some of the charges dealt with on a Form 1. The charges on the Form 1 (which is a form prepared by the police officer in charge of the matter, with the consent of the prosecution) are taken into account at the time of sentencing for the principal offence. Section 32 allows for this procedure to take place.

In Attorney General's Application Under S 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002 (2002) 56 NSWLR 146 Spigelman CJ stated that the proper approach to be taken when offences are dealt with on a Form 1 is to focus on sentencing for the principal offence on the indictment, and would increase the sentence for the principal offence by reason of the Form 1 offences.

High range PCA offences

There is a guideline judgment in relation to high range prescribed concentration of alcohol offences: *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No. 3 of 2002)* [2004] NSWCCA 303.

This guideline is discussed in detail in [Chapter 16](#).

Available Sentences

The sentencing options available to courts dealing with adults are contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW). *The Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2001* also contain a number of provisions relating to sentencing options. The purpose of this chapter is to briefly describe the sentencing options available to a court, with particular reference to the Local Court.

Non-custodial sentences

Dismissal and conditional discharge (section 10 and 10A)

Section 10 allows a court to find a person guilty of an offence without proceeding to conviction and make any one of these following orders:

- (a) an order directing that the relevant charge be dismissed
- (b) an order discharging the person on condition that the person enter into a good behaviour bond for a term not exceeding 2 years,
- (c) an order discharging the person on condition that the person enters into an agreement to participate in an intervention program and to comply with any intervention plan arising out of the program.

Section 10(3) specified factors that the court must have regard to in deciding whether to make an order pursuant to section 10. Those factors are:

- (a) the person's character, antecedents, age, health and mental condition,
- (b) the trivial nature of the offence,
- (c) the extenuating circumstances in which the offence was committed,
- (d) and other matter that the court thinks proper to consider.

The effect of dismissing the charge pursuant to section 10 is that, provided your client complies with any bond or conditions imposed, the matter will appear on their criminal record but they will not have a conviction for the offence.

Section 10A allows the court to impose a conviction with no further penalty. Where your client has been dealt with under section 10(1)(b), 10(1)(c) or 10A, they will still be liable to pay the Victims Support Levy and Court Costs Levy.

Fines (sections 14–17)

A court may impose a fine in addition to a good behaviour bond or a sentence of imprisonment. A court is required to take into account any information available to the court regarding an offender's financial circumstances when determining considering the extent of any fine imposed: section 6 *Fines Act 1996*(NSW). It is therefore important to provide evidence to the court your client's financial situation including income and liabilities.

Section 9 Bonds

See sections 94–100 about sentencing procedures for good behaviour bonds

A court may sentence an offender to enter into a good behaviour bond pursuant to section 9 for a specified term not exceeding 5 years. Bonds can be imposed with or without conditions. Conditions can include accepting the

supervision of Community Corrections NSW (formerly known as the Probation and Parole Service), and attending certain courses or programmes.

If the sentencing Court suspects that the offender has failed to comply with the conditions of a section 9 good behaviour bond the offender may be called up before the Court: s 98(1). If the Court is satisfied that the offender has breached the bond, the Court may decide to take no action on the breach, vary the conditions of the bond or revoke the bond and re-sentence the offender: ss 98(2), 99,

Community Service Orders (CSOs)(section 8)

See section 84–93 about sentencing procedures for CSOs

Instead of imposing a sentence of imprisonment, a court may make a community service order directing a person to perform community service work for a specified number of hours, up to a maximum of 500 hours. Before such an order can be imposed your client has to be assessed as suitable to perform a community service order by an officer from Community Corrections NSW. This assessment takes place when a pre-sentence report is prepared.

There are criteria to determine whether a person is suitable to perform community service. If you have a general enquiry about whether your client will be able to perform the order, you can contact Community Corrections NSW.

A CSO must be completed within 12 months for orders of 300 hours or less, or within 18 months for orders of longer duration. If your client breaches a CSO, an application can be made for the order to be revoked (s 115 *Crimes (Administration of Sentences) Act 1999* (NSW)). Your client can then be brought back before the sentencing Magistrate and re-sentenced for the original offence.

CSOs and good behaviour bonds are alternative penalties only and cannot both be imposed in relation to the same offence: s 13

General Sentencing Principles - When Your Client Is Looking at Gaol

Full time imprisonment (section 5)

A court should not sentence an offender to a period of imprisonment unless it is satisfied that no other possible alternative is appropriate. The maximum sentence of imprisonment that a Local Court can impose for any single offence is two years. However, a Local Court has the power to accumulate sentences to a maximum of five years.

Sentences of imprisonment do not necessarily need to be served by way of full-time custody, but may be served by way of Home Detention Order or Intensive Correction Order.

Special circumstances (section 44(2))

When sentencing a person to imprisonment, a court must set a non-parole period and a balance to be served on parole. This is commonly referred to as the 'bottom' (non-parole period) and 'top' (head sentence). The balance of

the term of imprisonment must not exceed one-third of the non-parole period for the sentence, unless the court decides that there are special circumstances for it being more.

Section 44(2) in substance specifies the sequence in which the sentence is to be set, focusing upon the period which was considered appropriate to be served by way of a minimum period of actual imprisonment, followed by the period for a potential supervised release on parole.

A court may not set a non-parole period for a sentence of imprisonment if the term of the sentence is six months or less (s 46). This means any sentence of six months or less is to be a fixed term of imprisonment.

If your client is looking at a sentence of imprisonment of longer than six months, then you would normally ask the court to find special circumstances

Examples of matters that may comprise special circumstances are:

- Youth – the age of the offender;
- That such a sentence would be the offender's first time in custody;
- Need for the offender to address drug/alcohol issues;
- Need for an extended period of supervision;
- That the sentence is likely to be served in protective custody (see *R v Totten* [2003] NSWCCA 207; *R v Durocher-Yvon* [2003] NSWCCA 299; *R v Mostyn* [2004] NSWCCA 97);
- Cumulative sentences are being imposed.

Multiple sentences of imprisonment (section 58)

When a court imposes multiple sentences of imprisonment, it must do so in accordance with *Pearce v R* (1998) 194 CLR 610, which states at [65] that a

A judge sentencing an offender for more than one offence must fix an appropriate sentence for each offence and then consider questions of cumulation or concurrence, as well, of course, as questions of totality

The approach in determining whether sentences should be served concurrently or cumulatively was set out by Simpson J (Mason P agreeing) in *R v Hammoud* (2000) 118 A Crim R 66 at [7]. The question of whether to accumulate sentences or have them served concurrently is a matter of discretion for the Court having regard to the principal of totality. The Court may consider factors such as the timing of the offences, whether there are multiple victims, or actions of the accused or similar factual matters when determining the appropriateness of accumulating a sentence.

The Local Court can only accumulate sentences to the jurisdictional limit of five years. You should check section 58(3) to see if any of the exceptions to this apply to your matter.

Alternatives to full time gaol

Suspended Sentences (section 12)

A court that imposes a sentence of imprisonment on a person which is not more than 2 years may make an order suspending execution of the whole of the sentence for such period (not exceeding the term of the sentence) as

the court may specify in the order on the condition that a person enters into a good behaviour bond pursuant to section 12 for the term of the sentence.

A sentence cannot be suspended if the person is subject to some other sentence of imprisonment (s 12(2)). Suspended sentences are particularly useful for offenders where a period of imprisonment must be imposed but where there are good prospects of rehabilitation.

Like section 9 Good Behaviour Bonds, where a court has reason to believe that a section 12 bond has been breached the offender may be called upon to appear before the Court. Where the breach is proven the Court may take no action on the breach, alter the conditions of the bond, or revoke the bond and re-sentence the offender.

If a court revokes a suspended sentence, it can then impose a sentence of imprisonment, which is to be served full time or by home detention (s 99). For a discussion of revocation of suspended sentences, see *R v Tolley* [2004] NSWCCA 165.

Intensive corrections orders

From 1 October 2010, periodic detention in NSW was abolished and replaced by Intensive Correction Orders (ICOs). Periodic detention orders made before that date remain valid and in force. Home detention was renumbered in the Act as a result from Section 7 to now, Section 6.

When are ICOs available?

An ICO may be imposed upon suitable offenders who are sentenced to a term of imprisonment of less than 2 years: s 7. The factors that are considered in determining whether an offender is suitable to serve their sentence by way of ICO are set out in section 67.

ICOs are not available where an offender has been convicted of a prescribed sexual offence: s 66.

Process for sentencing an offender to an ICO

The procedure for sentencing an offender to an ICO is as follows:

1. The court must consider all of the alternatives to imprisonment, decide that no other penalty other than imprisonment is appropriate, and that the period of imprisonment is likely to be less than two years;
2. On submissions that it might be appropriate, and before imposing a period of imprisonment, the court refers the offender for assessment for an ICO and the matter is adjourned for that purpose
3. The offender must be assessed as suitable before they can be sentenced to an ICO: s 67(4);
4. The offender must sign an undertaking to comply with an ICO;
5. The matter returns to court, following assessment, for sentence. The court must determine that an ICO is appropriate in all the circumstances, having taken into account the contents of the assessment report and any other evidence from Corrective Services that the court considers necessary: s 67(2);
6. Having determined that an ICO is appropriate the court makes an order that the period of imprisonment is to be served by way of ICO;
7. The ICO itself must include the mandatory orders set out by the regulations, but the sentencing Court can impose additional conditions to reduce the likelihood of reoffending;

8. The court must explain to the offender their obligations under the ICO, and the consequences of breach (generally serving the remainder of the sentence of imprisonment in gaol): s 72(1); and
9. ICOs commence on the day that they are imposed unless they are concurrent or cumulative with another ICO.

Other things to notes about the imposigion of ICOs

- The Court is not obliged to sentence an offender to an ICO, merely because an offender is assessed as suitable, following referral.
- However, if an offender is assessed as suitable for an ICO, but the Court declines to impose such a sentence they must indicate to the offender, their reasons for declining to make the order: s 67(5).
- An offender cannot be sentenced to an ICO in their absence by the Local Court: s 25(1)(b)

Mandatory Conditions

Clause 186 *Crimes (Administration of Sentences) Regulation 2014* sets out the mandatory conditions for ICOs which are as follows:

- a) a condition that requires the offender to be of good behaviour and not commit any offence,
- b) a condition that requires the offender to report, on the date fixed as the date of commencement of the sentence or on such later date as may be advised by the Commissioner, to such local office of Corrective Services NSW or other location as may be advised by the Commissioner
- c) a condition that requires the offender to reside only at premises approved by a supervisor,
- d) a condition that prohibits the offender leaving or remaining out of New South Wales without the permission of the Commissioner,
- e) a condition that prohibits the offender leaving or remaining out of Australia without the permission of the Parole Authority,
- f) a condition that requires the offender to receive visits by a supervisor at the offender's home at any time for any purpose connected with the administration of the order,
- g) a condition that requires the offender to authorise his or her medical practitioner, therapist or counsellor to provide to a supervisor information about the offender that is relevant to the administration of the order,
- h) a condition that requires the offender to submit to searches of places or things under his or her immediate control, as directed by a supervisor,
- i) a condition that prohibits the offender using prohibited drugs, obtaining drugs unlawfully or abusing drugs lawfully obtained,

j) a condition that requires the offender to submit to breath testing, urinalysis or other medically approved test procedures for detecting alcohol or drug use, as directed by a supervisor

k) a condition that prohibits the offender possessing or having in his or her control any firearm or other offensive weapon,

l) a condition that requires the offender to submit to such surveillance or monitoring (including electronic surveillance or monitoring) as a supervisor may direct, and comply with all instructions given by a supervisor in relation to the operation of surveillance or monitoring systems,

m) a condition that prohibits the offender tampering with, damaging or disabling surveillance or monitoring equipment,

n) a condition that requires the offender to comply with any direction given by a supervisor that requires the offender to remain at a specified place during specified hours or that otherwise restricts the movements of the offender during specified hours,

o) a condition that requires the offender to undertake a minimum of 32 hours of community service work per month, as directed by a supervisor from time to time,

p) a condition that requires the offender to engage in activities to address the factors associated with his or her offending as identified in the offender's assessment report or that become apparent during the term of the order, as directed by a supervisor from time to time,

q) a condition that requires the offender to comply with all reasonable directions of a supervisor.

Clause 187 sets out additional conditions that may be imposed by a sentencing Court (note that the Court can impose other conditions, provided they relate to reducing the risk of reoffending) which are as follows:

a) a condition that requires the offender to accept any direction of a supervisor in relation to the maintenance of or obtaining of employment,

b) a condition that requires the offender to authorise contact between any employer of the offender and a supervisor,

c) a condition that requires the offender to comply with any direction of a supervisor as to the kinds of occupation or employment in which the offender may or may not engage,

d) a condition that requires the offender to comply with any direction of a supervisor that the offender not

associate with specified persons or persons of a specified description,

e) a condition that prohibits the offender consuming alcohol,

f) a condition that requires the offender to comply with any direction of a supervisor that the offender must not go to specified places or districts or places or districts of a specified kind.

Home Detention (section 6)d 74–83)

See sections 74-83 for sentencing procedures for home detention.

A court that has sentenced a person to imprisonment for not more than 18 months may make an order that the sentence be served by way of home detention: s 6.

Home detention is not available for certain offences set out in section 76 including:

(b) sexual assault of adults or children or sexual offences involving children

(d) any offence involving the use of a firearm, or an imitation firearm

(e) assault occasioning actual bodily harm (or any more serious assault, such as malicious wounding or assault with intent to do grievous bodily harm)

(f) an offence under s 13 of the *Crimes (Domestic and Personal Violence) Act 2007* or section 545AB or 562AB of the *Crimes Act 1900* of stalking or intimidating a personal with the intention of causing that person fear to personal injury

(g) a domestic violence offence against any person with whom it is likely the offender would reside or continue or resume a relationship, if a home detention order were made And certain drug offences contrary to the *Drug Misuse and Trafficking Act 1985*.

Home detention orders are also not available where offenders have certain types of matters on their criminal record which are set out in section 77.

The Magistrate or Judge needs to be considering a full time sentence of imprisonment of 18 months or less in order to refer the offender for a Home Detention assessment. The assessment takes a number of weeks and is conducted by an officer from Community Corrections NSW. Your client will sometimes be granted bail during this time. You should let your client know that the conditions of a home detention order are onerous. Home detention is strictly supervised by Community Corrections NSW and includes random phone checks, regular urinalysis, and unannounced visits. People on home detention are not allowed to drink alcohol and are obviously not allowed to use illegal drugs.

Deferral of sentence to assess rehabilitation and for other purposes (section 11)

A court that finds a person guilty of an offence (whether or not it proceeds to conviction) may make an order adjourning the proceedings to a specified date, and grant bail to the person, for the purposes of:

(a) assessing the offender's capacity and prospects for rehabilitation, or

(b) allowing the offender to demonstrate that rehabilitation has taken place, or

(b1) assessing the offender's capacity and prospects for participation in an intervention program, or

(b2) allowing the offender to participate in an intervention program, or

(c) For any other purpose the court considers appropriate in the circumstances.

The maximum period for which proceedings may be adjourned under this section is 12 months from the date of the finding of guilt (s 11(2)).

In practice, a deferral of sentence would not be sought for a first offender or someone with a minor record. The procedure is particularly applicable to clients with long records, serious matters on their record, or records comprising repeat/identical/similar offences.

If you are asking for your client's sentencing to be deferred pursuant to s 11, it is useful to have reports confirming acceptance to a rehabilitation program or facility, or a course of counselling/supervision if applicable.

Non-association and place restriction orders (sections 17A)

See also sections 100A – 100H

For any offence that is punishable by imprisonment for 6 months or more, a Court when sentencing a person may make either or both of these orders in respect of that person:

- A non-association order, prohibiting the person from associating with a specified person for a specified term.
- A place restriction order, prohibiting the person from frequenting or visiting a specified place or district for a specified term.

These orders can be made if a Court is satisfied that it is reasonably necessary to make these orders to ensure that the person does not commit any further offences punishable by imprisonment for 6 months or more.

Orders under s 17A can be made in addition to (and not instead of) any other penalty for the offence, but may not be made if the only other penalty for the offence is an order under s 10 or s 11: s 17A(4). The term of an order under this section is not limited by any term of imprisonment imposed for the offence, but must not exceed 12 months (s 17A(5)).

Chapter 16 – Drink and Drug Driving Offences

This chapter discusses aspects of plea making in driving offences and particularly in relation to Prescribed Concentration of Alcohol (PCA), Driving Under the Influence (DUI) and drug driving offences. Unless stated otherwise, any legislative reference in this chapter relates to the *Road Transport Act (2013) NSW* (RTA).

Overview

Drink and drug driving offences fall within four general categories:

- Driving with the prescribed concentration of alcohol in breath or blood (PCA): s 110;
- Offences relating to testing and sample taking: Schedule 3, Division 6;
- Driving whilst under the influence of alcohol or other drug (DUI): s 112; and
- Driving with illicit drug present in system: s 111.

Penalties for drink and drug driving offences depend on: the offence charged and your client's traffic and criminal records (if any).

The first step is to determine from your client's criminal record whether they have a major offence within the period of 5 years. This should be done before the date your client is likely to be sentenced (and therefore convicted of the major offence). Major offence is defined in section 4 of the RTA and include all PCA, DUI and drug driving charges.

This process of categorisation is discussed in more detail below, under the heading "First or Second and Subsequent?". The penalties for a first offence are significantly different from those legislated for a second and subsequent offence.

Upon conviction for a major offence, a period of automatic licence disqualification applies without specific order of a Court: section 205, RTA.

In any drink or drug driving matter, where your client is convicted, the Court's starting point is to impose the automatic period of disqualification. The Court has the power to reduce the period of disqualification, but it cannot reduce the period that would be less than the 'minimum period' of disqualification for a particular offence.

Where a person is convicted of an offence that is not a major offence, and an automatic disqualification period is not legislated, the Court has the power to order a licence disqualification for such period as is specified by the Court: section 204(1) RTA.

You may find the following checklist useful:

1. Is this offence a major offence?
2. If yes, is there a prior major offence in the last 5 years?

3. What are the automatic and minimum disqualification periods for this offence, either first or second and subsequent?
4. Will mandatory interlock be relevant?
5. Will this offence generate a Habitual Traffic Offender Declaration from the RMS?

This chapter discusses each of these topics in turn.

PCA Offences

A PCA offence is an offence under section 110 of the Act. These offences relate to the 'prescribed concentration of alcohol' present in your client's blood at the time they were driving.

Some clients refer to these offences by the American vernacular 'DUI'. However, in Australia a DUI offence is a different offence. A DUI offence is charged where the police did not obtain a sample of your client's breath or blood or there is some difficulty with the sample, or when the drug is a drug other than alcohol. This offence can be more difficult to prove and is discussed later in this chapter.

The majority of offences that come before Courts are PCA offences where a precise blood-alcohol reading is lawfully obtained. There are five categories of PCA offences:

- Novice Range PCA means a concentration of more than zero grams but less than 0.02 grams of alcohol in 100 millilitres of blood – this range only applies to holders of learner or provisional licences. The legal limit for learner and provisional licences is 0.00.
- Special Range PCA means a concentration of 0.02 grams or more, but less than 0.05 grams of alcohol in 100 millilitres of blood – this range only applies to a Special category of driver as defined in s 107 of the Act, and includes holders of learner, provisional or interlock licences, persons whose licences are suspended, cancelled or disqualified and persons who are driving a vehicle for hire or reward.
- Low Range PCA means a concentration of 0.05 grams or more but less than 0.08 grams of alcohol in 100 millilitres of blood.
- Middle Range PCA means a concentration of 0.08 grams or more but less than 0.15 grams of alcohol in 100 millilitres of blood.
- High Range PCA means a concentration of 0.15 grams or more of alcohol in 100 millilitres of blood

Major Offences Relating to Testing and Sample Taking

- Refusing Breath Analysis – Schedule 3, clause 16(1)(b)
- Refusing to Submit to a Blood/Urine Sample – Schedule 3, clause 17(1)
- Wilfully Altering Alcohol/Drug Concentration – Schedule 3, clause 18(a), (b), (e)-(g)
- Wilfully Altering Prescribed Illicit Drug Concentration – Schedule 3, clause 18(c), (d)

Other Drug/Alcohol Driving Offences

- Driving Under Influence Drug/Alcohol – s112(1)(a), (b)

- Driving with Illicit Drug Present in System – s111(1)

First or Second and Subsequent Offence?

Section 9(2) of the RTA defines a second or subsequent “major” offence. For an offence to be classed as “second or subsequent” it must have been within a 5-year period to the current offence and it must have been either an offence against the same provision, against a former corresponding provision, or an equivalent offence.

There are a few important factors for practitioners to be aware of in this area of law:

1. The 5 year period spans from conviction to conviction. Should the sentence date of the second offence be outside of the 5 year period, then first offence penalties will apply. The date of the offence is immaterial.
2. Both offences must be “major offences” for the second and subsequent legislation to be relevant. Major offences are defined in section 4 of the RTA and include, but are not limited to, the following:
 - a. All PCA offences
 - b. Some offences relating to testing and sample taking
 - c. All drug driving offences
 - d. Driving in a manner dangerous (s 117 RTA)
 - e. Driving negligently or recklessly causing death or grievous bodily harm (s 117 RTA)
 - f. Predatory driving (s51A – Crimes Act 1900)
 - g. Police pursuits (s51B – Crimes Act 1900)
 - h. Failing to stop and assist after collision causing death or grievous bodily harm (s52AB – Crimes Act 1900)

It is worthwhile noting – Driving while Disqualified/Suspended or Cancelled is NOT a major offence. In addition, Refuse Breath Test/Oral Fluid/Sobriety Test under Schedule 3, clause 16 (1)(a), (c) or (d) are not major offences.

Mandatory Interlock Scheme

Interlock program

From 1 February 2015, the Courts must order offenders convicted of High Range PCA, Repeat and other serious drink/drug driving offences to:

- (a) Complete a minimum driver licence disqualification period and
- (b) Participate in the Interlock program for a minimum of 12 months.

Interlock program participation can range from 12 months for Low Range PCA repeat offenders to 48 months for second and subsequent High Range PCA offenders. The Courts can still exercise their discretion when exempting offenders from the interlock program however it is only in the most exceptional of circumstances.

What is an interlock device?

The interlock program involves the fitting of an alcohol interlock device to all vehicles a driver uses; this includes cars, trucks and motorbikes. The devices are fitted to the vehicle's ignition system and require the driver to breathe into a mouthpiece attachment which samples breath. If the device registers a breath sample containing 0.00% alcohol then it will allow the vehicle to be started, however, if it registers any alcohol in the breath of the driver then the vehicle will not start. All attempts are recorded on the interlock device and can be used to confirm the offender is complying with the program.

The interlock devices are installed by approved installers and cost about \$2,200 per year to install and operate at cost to the offender. There are concessions available to those who are recipients of Centrelink benefits or are experiencing hardship.

What does the program involve?

Following conviction, the Court will order a licence disqualification period to be followed by a period on the mandatory interlock program. Prior to commencing the program the driver will need to visit their GP for a health assessment relating to their fitness to drive. Your client may need to see their GP to reassess their fitness to drive if they attempt to drive after drinking alcohol while on the interlock program.

If the interlock program rules are disobeyed the Court has the discretion to either extend the driving disqualification period, or extend the period of participation in the interlock program. If the driver completes the interlock program successfully, he or she may be granted their unrestricted licence.

It should be remembered that the Court may require a driver to complete other driver awareness programs such as the "Sober Driver" program which aim to increase awareness and responsibility of drink-driving and the consequences to the individual and the community.

Be mindful, if a driver does not complete the interlock program or fails to re-enter it when ordered by the Court, he or she will receive a mandatory disqualification from driving for at least 5 years. It is important you advise your client of the risks associated with failing to renew their licence or failing to have an interlock device installed.

For drivers from outside NSW who move to NSW, their interlock program obligations can be transferred to NSW as a condition of their driving as can it be transferred to other states and territories within Australia.

Is there an alternate to the interlock program?

The Courts have the discretion to issue an "interlock exemption order" which exempts the driver from the interlock program but requires completion of a disqualification period as well as participation in the "Sober Driver" program. The cost of this program is paid by the offender.

Further information

See the Roads and Maritime Services website : www.rms.nsw.gov.au

Mandatory Alcohol Interlock Program fact sheet

<http://www.rms.nsw.gov.au/documents/roads/safety-rules/mandatory-alcohol-interlock-program-fact-sheet.pdf>

Mandatory Alcohol Interlock Program participant guide

<http://www.rms.nsw.gov.au/documents/roads/safety-rules/mandatory-alcohol-interlock-program-participant-guide.pdf>

Penalties

The Road Transport legislation is complex. Each separate offence requires an analysis of the legislation, including the associated Rules and Schedules. Offences related to testing and sample taking in Schedule 3 of the RTA are particular to certain circumstances and thorough research should be undertaken prior to giving advice.

The RTA website - <http://www.rms.nsw.gov.au/roads/safety-rules/offences-penalties/drug-alcohol/index.html>, has a useful guide to offences and penalties. However, it should be noted that it is a guide only.

The High Range Drink Driving - Guideline Judgment

There is a guideline Judgment in relation to High Range PCA (HRPCA) offences, it is titled Application by the Attorney General under *Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303. Justice Howie gave the leading judgment, with which the four other members of the Court agreed.

This case ('the HRPCA guideline') refers to matters that are specific to HRPCA offences, as well as matters generally relevant to PCA offences. It constitutes important guidance from the Court of Criminal Appeal as to how people are to be sentenced for PCA offences. All practitioners should be thoroughly familiar with this judgment when representing clients in any PCA case.

The Nature of PCA Offences

At paragraph 102, the court states that a person who commences to consume alcohol outside his or her home, must appreciate that he or she runs the risk of reaching a level of intoxication at which it is a criminal offence to drive a motor vehicle. As alcohol is continuously consumed, not only does that risk increase but also the potential seriousness of the offence increases. This consideration is relevant to the level of criminality involved in all PCA offences.

For lower range PCA offences, it is possible that a Court will accept that a person was not aware that they were over the prescribed limit. As the HRPCA guideline indicates (at paragraph 102), at the high range, it could rarely, if ever, be suggested that the person lacked the appreciation that he or she would run the risk of reaching a level of intoxication at which it is a criminal offence to drive a motor vehicle, at some point of time before the decision was made to get behind the wheel of motor vehicle.

The Absence of Aggravating Factors

At paragraph 120, the court states that aspects of an offender's driving can increase the moral culpability of the offender and aggravate the offence.

The HRPCA guideline indicates that the absence of aggravating matters is not a mitigating matter.

The HRPCA guideline gives these examples of matters which, when absent, do not operate in mitigation:

- There was no accident resulting from the driving.
- There was no observable sign of the effect of the intoxication on the manner of driving.
- That the offender was detected at a random breath test.

Prior Good Character and PCA offences

Good character is of less relevance than it might be in sentencing for certain types of offences. This is because there are certain offences that are committed by people of good character and general deterrence plays an important role.

At paragraph 119, the Court states that this principle applies to sentencing for PCA offences in general and high range PCA offences.

This means that, while character references and evidence of good standing in the community will be relevant, they may be given lesser weight in sentencing for PCA offences, and particularly HRPCA offences.

Subjective Matters and PCA offences

At paragraph 143, the Court sets out the following matters in relation to the relevance of subjective matters in sentencing for a HRPCA offence:

1. While the subjective features of an offender are clearly relevant to a determination of the penalty for any offence, including HRPCA offences, general sentencing principles require that the penalty reflect the objective seriousness of the offence.
2. Too much allowance cannot be given to subjective features, particularly where deterrence and denunciation are important factors in sentencing.
3. There are offences that are so serious that a penalty of some form must generally be imposed regardless of the personal circumstances of the offender. HRPCA is such an offence.

The Guideline Judgment on Section 10 Non-Conviction Orders

Section 10 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* allows a Court to find a person guilty of an offence, but discharge the person without recording a conviction.

In relation to PCA and other serious traffic offences, the substantial benefit of an order pursuant to s 10 is that the mandatory licence disqualification periods set by the traffic legislation do not apply. The mandatory licence disqualification periods only apply following conviction.

An order under s 10 may be granted either unconditionally or on condition that a person abides by a good behaviour bond for a specified period.

An order under s 10 is not available for certain serious offences (including all PCA offences — see s 203 for the full list) if a person has had the benefit of a s 10 dismissal for another serious offence in the five years immediately before the Court's determination on the current matter(s) that the person is facing.

At paragraphs 130 - 132 of the Judgment the Court sets out certain principals in relation to s 10 and its use in relation to HRPCA offences, including:

- Section 10 Crimes (Sentencing Procedure) Act must apply to the offence of HRPCA.
- There may be cases where, notwithstanding the objective seriousness of the offence committed, it is appropriate in all the circumstances to dismiss the charge or to discharge an offender. Those cases must be rare, and be exceedingly rare for a second or subsequent offence.
- There may be cases where the offending is technical (rather than trivial), there being no real risk of damage or injury arising from the driving, so that the highly exceptional course in making an order under s 10 would be justified.
- The Court must have regard to all the criteria in s 10(3) in determining whether a dismissal of the offence or a discharge of the offender is appropriate.
- There can be cases where there are such extenuating circumstances that a dismissal or a discharge under s 10 might be justified. It is impossible and inappropriate to delineate situations in which an order under s 10 might be warranted, notwithstanding the objective seriousness of the offence. An example might be where the driver becomes compelled by an urgent and unforeseen circumstance to drive a motor vehicle, such as to take a person to hospital.
- Where the offence committed is objectively serious and where general deterrence and denunciation are important factors in sentencing for that offence, the scope for the operation of s 10 decreases.

The Guideline Judgment on Licence Disqualification

The Nature of Licence Disqualifications

At paragraph 116 of the judgment, the Court makes it clear that it can take into account the period of licence disqualification that is to be imposed at the same time as determining the appropriate sentence for a PCA offence.

The Court states that licence disqualification is such a significant matter and can have such a devastating effect upon a person's ability to earn an income and to function appropriately within the community that it is a matter which must be taken into account by a Court when determining what the consequences should be, both penal and otherwise, for a particular offence committed by a particular offender.

A person's need for a licence, or the consequences to that person of being disqualified for a significant period, can be taken into account by a Court in deciding the sentence to be imposed. A Court's sentencing discretion will not be controlled by this single factor of disqualification alone.

Matters Relevant to the Reduction of the Automatic Disqualification Period

At paragraphs 126–128 of the Judgment, the Court sets out these principles in relation to the automatic disqualification period:

- The automatic period of disqualification prescribed for a particular offence is not to be considered as if it were the maximum period of disqualification for that offence. Rather, it is merely the default period that operates on conviction unless some other order is made. In the usual case, there is no need to vary the period one way or the other.
- There must be cases where the automatic disqualification period should be increased
- There should be sufficient and appropriate reasons for reducing the automatic period that are capable of being expressed by the Court before such a step is taken
- There will almost invariably be hardship, or at least inconvenience, caused to a person offender deprived of his or her licence for such a lengthy period as Parliament has prescribed.

The Judgment itself states that in an ordinary case of HRPCA the automatic disqualification period will be appropriate unless there is a good reason to reduce the period of disqualification. Good reasons may include:

- The nature of the offender's employment.
- The absence of any viable alternative transport.
- Sickness or infirmity of the person or another person.

You should note that often your client's licence may have been suspended by police on commission of an offence. The period of suspension served before sentence can go towards satisfying the whole or part of the period of disqualification imposed by the Court: s 34(6)(b) RTGA.

Always make sure, if the penalty imposed requires disqualification, that the Magistrate backdates the disqualification period to commence on the date when your client's licence was suspended.

The Guideline Judgment on Traffic Offender Programs

At paragraphs 121–122, the Court sets out these principals in relation to involvement in driver education programmes:

- Notwithstanding the undoubted beneficial effect upon a driver after participating in a driver education program, that fact can have little impact upon the appropriate sentence to be imposed for an offence of HRPDA.
- Involvement in such programs is usually relevant to the length of disqualification imposed or the amount of a fine.
- HRPDA in general is so serious and the criminality involved in even a typical case of HRPDA so high that the participation of the offender in a pre-sentence program cannot be seen as an alternative to punishment for an offence of this nature.
- There is no warrant at all for making an order under s 10 simply because a person has participated in such a program or is to do so as part of the conditions of a bond.
- Punishment for the offence of HRPDA is concerned principally with denunciation of the conduct and general deterrence. For the typical HRPDA offender, recidivism is not a concern of the Court.
- In an offence of HRPDA the possible benefits arising from attendance at a program are outweighed by the need for appropriate punishment.

Habitual Traffic Offender Declarations

The RMS is required to impose a disqualification period in addition to any Court imposed penalty if your client has had three or more relevant offences (defined in s 216 of the RTA) within five years. The three or more relevant offences will include the matter/s for which you are representing.

If your client falls into this category, he or she is declared (without any order of the Court) to be a habitual traffic offender. The declaration is made administratively regardless of whether the Magistrate addresses this issue when the most recent offence was finalised in Court. The automatic period of disqualification is five years in addition to any disqualification period that may have been imposed by the Court for the current offence.

The Court has the power under section 220 of the RTA to:

- Quash the habitual traffic offender declaration completely, if adding a further five years to the person's existing disqualification would be a disproportionate and unjust consequence in the circumstances, having regard to the total driving record of the person and the special circumstances of the case; or
- Allow the declaration to be made but reduce the period of disqualification under the declaration (but no less than 2 years), or
- Order a longer period of disqualification (including a disqualification for life).

An application to quash a habitual traffic offender declaration may be made during sentencing submissions.

Alternatively, an application can be filed in Court at any time before or during the disqualification period declared by the RMS.

Under section 218 of the RTA, a warning should be given to persons liable to be declared habitual traffic offenders.

The Authority is required to give written warnings to the holders of driver licences who are liable to be declared to

be habitual traffic offenders, if they are convicted of another relevant offence.

However, the declaration of a habitual traffic offender is not invalid merely because of a failure to give the warning, but any such failure may be taken into account by a Court when determining whether a declaration should be quashed.

Preparing and Delivering Pleas in Mitigation in Driving Offences

You would generally be aware of and address on the following matters in a plea of guilty for a driving offence.

Matters Relevant to the Offence

- The precise offence with which your client is charged.
- The maximum penalty that may be imposed.
- The automatic and minimum disqualification periods that apply.
- Your client's traffic record, particularly as to whether he or she has any other major offences within the terms of the RTA on his/her record.
- The possible application of the habitual traffic offender provisions of the RTGA.

The Manner and Reasons for Driving

- Whether there were any passengers.
- Whether the matter resulted in a motor vehicle accident.
- The distance and period over which your client was driving.
- Where your client was driving.
- Why your client drove while over the prescribed range.
- Whether your client made other arrangements in relation to driving the vehicle, and what happened to those plans.
- What occurred before the offence took place.

How your client came to be apprehended?

For offences involving drugs or alcohol, you must have specific instructions in relation to consumption and use by your client before driving.

Police will usually ask a person who has breath-tested positively about the quantity of alcohol consumed and the period of time over which it was consumed. You should make sure that you are aware of what (if anything) your client said to police at the time of being apprehended. This will be noted in the police facts that are given to your client.

Driver History

- When your client obtained a driver's licence.
- How many years your client has been driving (both of which will be clear from your client's RMS driving record).

- Whether your client may have been required to drive extensively as part of his or her employment and has therefore driven much more than the average driver.

The above matters may be particularly relevant in persuading the Court that your client's driving offence was an isolated incident, if that argument is open to you to make.

The Need for a Licence

Essential instructions in relation to traffic matters include the detriment your client would suffer upon being disqualified from holding a driver's licence. The need for a licence can include being required for travel for employment, or family commitments, such as family members who depend on your client for transport.

Subjective Instructions

In addition to the matters listed above, the following matters may be relevant:

- Your client's age.
- Your client's health — such as whether your client has an illness or disability which will make the loss of his/her licence even more onerous than it would be to the average citizen.
- Remoteness of residence — in particular, whether your client lives in a remote country location, which would result in your client becoming completely isolated if he/she was unable to drive.
- History of community service or volunteer work.
- Employment history.
- Marital status and children.
- Economic considerations — such as whether your client is the sole or primary provider for his/her family, and the effect loss of licence will have on other members of the household.

Traffic Offender Programs

There are a number of Traffic Offender Programs (TOPs) in operation.

Referral to one of these programs is initiated by a request to the Court by an accused's lawyer, or by the Court itself. People are generally referred to the programs before sentencing. When referred to a TOP, a person is required to enter an attendance agreement.

There are a variety of different TOPs that operate out of different local areas. Local TOP information is widely available online, including program dates, times, costs and contact details for the convenors. TOPs typically run for six to eight weeks and may include lectures, assignments, experiential learning (such as attending hospital wards) and group therapy.

The group running the TOP usually provides an attendance record/achievement report to the Court at the end of the program.

Where a person's licence has been suspended by police before sentencing, this period of suspension may be extended while the offender participates in a TOP. This period of suspension before sentencing can go towards satisfying whole or part of any disqualification period imposed by the Court (s 225(3)(b)).

References

References are letters written by friends, family or colleagues of your client who provide written evidence as to your client's character, work ethic, community involvement and achievements, provided by persons who know or have an association with your client.

Delivering your plea

In *R v Naresh Khatter* [2000] NSWCCA 32, Justice Simpson, who was in the minority in the judgment, made these observations:

These Courts deal with human beings, with all their human weaknesses, and while the Courts cannot condone any act of driving whilst there is present in the blood more than the prescribed concentration of alcohol, it is not necessary to characterise every instance of the offence as an abandonment of personal responsibility.

There are shades and gradations of moral culpability in different instances of the offence and it is proper for the Courts to recognise a continuum, rather than a dichotomy, when assessing moral culpability.

These observations are relevant to sentencing for PCA offences generally.

Chapter 17 - Apprehended Violence Orders (AVOs)

This chapter outlines some of the basic considerations involved when acting for a complainant or a defendant in Apprehended Violence Order (AVO) proceedings.

Provisions regarding AVOs are found in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ("**the Act**"). All references are to this Act unless otherwise specified.

Plain English AVOs came into force on 3 December 2016.

Key facts

- The proceedings to make AVO's are not criminal proceedings. They operate at the **civil** standard (on the balance of probabilities) and have different rules to criminal proceedings. Only breaches of AVOs are treated as criminal proceedings. Having an AVO made against you does not mean that you have a criminal record.
- There are two types of AVOs - Apprehended Domestic Violence Order (**ADVO**) and Apprehended Personal Violence Order (**APVO**), as explained below.
- AVOs can be sought by a police applicant or by a lay applicant for a person in need of protection (PINOP). If you are acting for the defendant to an AVO, it is important to establish who is seeking the AVO from the outset which is the case.
- AVOs still have a wide ranging impact of those accused of them and it is therefore important to consider the impact an AVO will have on a person before consenting to making an order.

Important definitions

It is important to understand some of the common terms used when discussing AVO proceedings.

Applicant: The person who seeks (or has sort) an AVO. This may either be the PINOP or a police officer.

Cross-Applicant: When a defendant to an AVO applies for an AVO against the original PINOP.

Defendant: The person against whom an AVO is made or is sought to be made.

Interim order: An order made by the court to protect the PINOP from the defendant prior to the hearing.

Protected person(s)/Person in Need of Protection (PINOP): This is the person(s) for whom an AVO is made.

Note that many AVO conditions also apply to persons with whom the PINOP share a domestic relationship.

Provisional Order: An order made under Part 7 of the Act for an interim AVO, often by telephone or facsimile where an AVO is urgently required. It is made to an authorised officer and is taken to be an application for an AVO. The provisional order remains in force up until the date the AVO is heard in court, which must be within 28 days of the application.

The categories of AVOs

An AVO can be either Domestic (ADVO) or Personal (APVO):

- Apprehended Domestic Violence Orders (ADVOs) are for circumstances where a domestic relationship exists between the PINOP and defendant. these applications are made under Part 4 of the Act.
- Apprehended Personal Violence Orders (APVOs) are for circumstances where there is no domestic relationship between the PINOP and defendant. These applications are made under Part 5 of the Act.

What is a domestic relationship?

Section 5 of the Act provides that a domestic relationship includes:

- is or has been married, de facto partner, has or had an intimate relationship whether sexual or not, is living with or has lived with the person, as well as extending the definition to circumstances of dependence, being a relative, kinship ties or being joint long term residence of a residential facility (not a correctional centre for Juvenile and new partner of a PINOP(see s5(2)).

As a result, the definition of what constitutes a domestic relationship is very broad.

Mandatory Orders (also called Statutory Orders)

All AVOs contain Mandatory Orders which are orders that compliment AVOs and must be included in the application.

The mandatory orders are usually set out in Condition 1 and usually read as follows:

1(a) The defendant must not assault, molest, harass, threaten or otherwise interfere with the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship;

1(b) The defendant must not engage in any other conduct that intimidates the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship;

1(c) The defendant must not stalk the protected person(s) or a person with whom the protected person(s) has/have a domestic relationship.

These orders are often said to not extend a PINOP's protection beyond the protection that the criminal law offers every person, in that it requires the PINOP is not assaulted, harassed, molested, intimidated, interfered with or stalked.

Additional Orders

The standard additional orders that the court may make are usually set out as follows:

1. The defendant must not reside at the premises at which the protected person(s) may from time to time reside, or other specified premises;
2. The defendant must not enter the premises at which the protected person(s) may from time to time reside or work, or other premises;
3. the defendant must not go within 100 metres of the premises at which the protected person(s) may from time to time reside or work or other specified premises;
4. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as agreed in writing or as permitted by an order or directions under Family Law Act 1975 for the purpose of counselling, conciliation or mediation.
5. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as authorised by a parenting order under Family Law Act 1975 unless the parenting order has been varied, suspended or discharged under section 68R of the Family Law Act 1975.
6. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative.
7. The defendant must surrender all firearms and related licences to police.
8. The defendant must not approach the school or other premises at which the protected person(s) may from time to time attend for the purpose of education or child care or other specified purposes.
9. The defendant must not approach the protected person(s) or any such premises or place at which the protected person(s) from time to time reside or work within (12) hours of consuming intoxicating liquor or illicit drugs.
10. The defendant must not destroy or deliberately damage or interfere with the property of the protected person(s).
11. Other orders.

PRACTICAL TIP: Whilst these orders are fairly standard, some courts use different additional orders altogether. Other courts frequently add other specified premises, or vary the distance or amount of time permissible with respects to different orders. If you are not familiar with the matter or were not there when the orders are made, do not assume that the conditions are the Standard Additional Orders. Sometimes the only way to confirm the exact orders are to obtain the courts papers.

How to apply for an AVO

Section 48 of the Act provides that an application for an AVO can be made by:

- A person for whom the order would protect
- The guardian of the person for whom the order would protect
- A police officer

If police commence AVO proceedings, they issue and file an application in court pursuant to section 51 of the Act.

If a PINOP makes an application, they need to complete an application and file it with the court registry (ss 50&52).

A registrar or authorised officer may refuse to issue an AVO to an applicant who is not a police officer if it is believed that the application for the order is frivolous, vexatious, without substance, has no reasonable prospect of success, or could be dealt with more appropriately by mediation or other alternative dispute resolution (see section 53(4)).

An application for an AVO will generally contain the following:

- A summary of the incident(s) of violence or abuse which led the PINOP or police officer to apply for an AVO;
- An outline of the specific restrictions or prohibitions which the PINOP asks the court to place on the defendant, ordinarily with reference to the above conditions;
- A summons to the defendant to appear at Court at a specific time and date so that the Court can hear the complaint. A copy of the application is given to the PINOP and a copy is served on the defendant either by the Clerk of the Court or the police at the address provided by the protected person. An AVO has no legal force until it is served on the defendant unless the defendant is present at court when the order is made (see s 14(2)).

The different types of AVOs

There are three types of AVOS:

- A provisional order is most commonly made by a senior police officer and protects the PINOP before the AVO matter comes before a court
- An interim order is made by a court to protect the PINOP until the matter is finalised
- A final order is made at the completion of a hearing or by consent, and finalises the proceeding.

Provisional Orders

The process for a provisional order is set out in Part 7 of the Act. An officer is obligated to apply for a provisional order if the officer suspects or believes that a domestic violence offence has been committed, or there is child abuse committed or imminent as per section 27 of the Act.

Whilst any officer can make the application, only a Senior Police Officer (of or above the rank of Sergeant) or Authorised Officer can make the order. Where it is an authorised officer they will make the provisional order where they are satisfied that there are reasonable grounds for doing so (s 28).

An application can be made if an incident occurs and the police have good reason to believe an order needs to be made immediately to ensure the safety and protection of the PINOP or to prevent substantial damage to any property of the PINOP (s 26).

The application can be made by telephone, facsimile or other communication device (s 25).

The provisional order must then be served personally by a police officer on the defendant as soon as practicable (s 31(1)). The order must be served personally on the PINOP unless it is impractical to do so (s 31(2))

A provisional order remains in force until it is revoked, or until it ceases to have effect because an interim order has full effect, or until the final order is either withdrawn, dismissed or a final order is made (s 32).

Interim Orders

Part 6 of the Act deals with interim orders. An interim order is designed to put in place protections between the time the matter first comes to court and the determination of the AVO, either at the final hearing or following criminal proceedings against a defendant.

An interim order can be made when the matter first comes before a court. As a general practice, these orders are then continued up until the court determines the matter.

Section 24 provides that an interim AVO ceases to be in force when:

1. It is revoked,
2. It ceases to have effect because of a final order (s 24(2)), or
3. The final AVO application is withdrawn or dismissed

The test for whether an interim order should be made is whether the court feels that it is "**necessary or appropriate** to do so in the circumstances" (s 22(1)).

If interim orders are opposed, the court will normally determine whether orders are necessary and appropriate either via the tender of the victim's signed statement or via the calling of evidence as per section 22(4).

The interim orders are not utilised as admission of any facts in the proceedings. Nevertheless, a breach an interim order has the same effect as a breach of a final order. A defendant who breaches the conditions of an interim order is liable to be charged with Contravene AVO.

Final Orders

Sections 15 to 17 govern the making of a final ADVO.

Sections 18 to 20 govern the making of a final APVO. The process is similar to a final ADVO; however, it exempts the provision of demonstrating a domestic relationship (step 2 below).

The test to be applied in making a Final ADVO is:

1. The court must be satisfied on the balance of probabilities;
2. That a person who has or has had a domestic relationship;
3. Has reasonable grounds to fear (an objective test);
4. And in fact fears (a subjective test);
 - a. The commission of a personal violence offence;
 - b. The engagement of the person in conduct that intimidates the person; or
 - i. A person with whom the person has a domestic relationship;

c. Stalks the person; and

5. That conduct is sufficient to warrant the making of the order.

Section 17 sets out a number of factors that a court must consider, mostly geared towards the interest of the protected persons. These include the effects and consequences limiting or restricting access to the defendant that will have to the safety and protection of the persons living at the residence, any hardship that will be suffered, the accommodation of all relevant parties and any other relevant matters.

It is worth noting that section 17(3) makes it evident that the court is to ensure that the order imposes only those prohibitions and restrictions necessary for the safety and protection of the protected persons, and children involved.

The **Subjective Test** stated above - **that** the protected person 'in fact fears' the defendant and is not required to be established by the prosecution if:

- The protected person is a child, or
- The protected person suffers from appreciably below average general intelligence function, or
- In the opinion of the court:
 - The person has been subjected on more than one occasion to conduct by the defendant amounting to a personal violence offence, and
 - there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and
 - The making of the order is necessary in the circumstances to protect the person from further violence (see section 16(2) and section 19(2)).

The lower test

The court can also disregard step 4 (subjective test) above in any ADVO matter, but in doing so can only impose the mandatory orders set out in section 36 (see section 16(2A)).

Mandatory making of orders following certain offences

Unless the court is satisfied that it is not required, AVOs are mandatory required by section 39, which states:

'When a person pleads guilty before a court or is found guilty of an offence of stalking or intimidation (s 13 of the Act) or a domestic violence offence, other than murder or manslaughter.'

In the case of any such serious offence, the court must make an interim order against the defendant for the protection of the PINOP irrespective if an application has been made (section 40). A serious offence includes a domestic violence offence, as well as attempted murder, stalking or intimidation, or any offence under sections 33, 35, 61I, 61J, 61JA, 61K, 61L, 61M, 63, 65, 66A, 66B, 66C, 66D, 66EA or 66F of the Crimes Act 1900 (NSW), or any offence under the law of any domestic or overseas jurisdiction similar to the previous mentioned offences.

Common Ways to Finalise AVO proceedings

Mediation

In APVO matters, the court can order that the matter is referred to Community Justice Mediation. Section 21 of the Act documents the process. It is important for counsel to refer to this section if appearing in an APVO matter and to consider if mediation is appropriate for the client.

The advantages of Community Justice Mediation are:

- They allow the parties to talk out their differences
- They allow a way in which the matter can be resolved without final orders
- They prevent any costs consequences for either party
- They avoid one winner and one loser (or two parties losing if there are cross-APVO's) on foot
- The cost is covered by the system.

If the court orders Community Justice Mediation:

- The court adjourns the matter
- Both parties provide their contact details to the court registry
- The Community Justice Centre arranges a mediation session at a mutually beneficial time
- The matter returns to court to see if the mediation session has resolved matters. If matters are resolved, the AVO is ordinarily dismissed. If matters are not resolved, the matter can still proceed for determination of the court.

Withdrawal of complaint and the giving of undertakings

In some cases, a PINOP may agree to withdraw the application for an AVO on the basis that the defendant gives an undertaking to the court (either written or verbally) in terms similar to the AVO sought. An undertaking is a promise to the court and is not legally enforceable. The undertaking is recorded on the court file. If possible, you should ensure that all undertakings are put in writing, signed by both parties, and the original copy is provided to the court.

The NSW Police Service ordinarily will not consent to the giving of undertakings.

AVOs made by consent and without admissions — section 78

An AVO can be granted by a court if both the PINOP and the defendant consent to the order being made. In addition, a defendant does not have to make any admissions regarding the contents of the complaint.

This is commonly referred to as a final order on a 'by consent without admissions' basis. The advantage of having orders made by consent is that there is no hearing – thus reducing costs, time, and inconvenience of giving evidence.

It is imperative that the client understands all the conditions of the AVO and its subsequent ramifications will have on them before they agree to an AVO by consent without admissions.

AVOs can now be made in this way by the District Court (s78(4)).

Following a contested hearing

If a defendant does not consent to an AVO and its application is sought by the protected person, the matter will be listed for a 'show cause hearing.' The PINOP is required to 'show cause' as to why an AVO should be granted.

The major disadvantages of securing AVOs by hearing are that the costs will be greater where the parties have lawyer and a hearing can strain the continuing relationship of the parties.

It is worth noting that the other disadvantage is that at the time of publication, both the Legal Aid Commission and Aboriginal Legal Service do not as a matter of course provide representation for defendants to AVO proceedings if there is no related criminal charge. As a result, in matters where the applicant is a police officer, setting a matter down for hearing will mean that a Police Prosecutor will prosecute the matter, and the defendant will not be legally represented unless they pay privately for legal representation.

Furthermore, it is very unlikely that a defendant will successfully recover costs from the NSW Police on an AVO matter (see discussion of section 99).

In running an AVO hearing, there are a few things for counsel note:

- Some courts consider such hearings to be civil hearings and order service of statements as to the evidence both the prosecutor and the defendant mean to rely upon. Scrutinise carefully the practice of the court you are appearing in.
- AVOs are conducted in a courtroom, in accordance with ordinary rules, including swearing of evidence and recording of witnesses. As such, prepare the accused for how the proceeding is likely to occur.
- Note that the proceedings are determined on the balance of probabilities.
- It can be difficult to get the balance of 'relevant' evidence right in an AVO hearing. Often the parties will have had a long and hostile history but the Magistrate will not be happy if you intend to bring up every incident over the last 15 years. Explain to your client what is relevant and what is not. Limit your submissions and evidence to matters of relevance.

Revocation or variation of AVOs

An AVO remains in force for the period of time specified by the court. If the period is not specified, the duration of the order is 12 months as per section 79 of the Act.

An application can be made to the court at any time to vary or revoke the AVO. The court may vary or revoke the order if it is satisfied that it is proper to do so in all the circumstances (ss 72-75). Variation or revocation of orders may be necessary where, for example, the parties have reconciled and they want non-contact and different residence orders removed.

The application can be made by the PINOP, the defendant or a police officer on behalf of the PINOP. A police officer must make the application if the PINOP was less than 16 years of age at the time of the application.

An AVO can be varied in several ways, such as having its duration extended or reduced, or adding, deleting or amending prohibitions or restrictions. It cannot be varied or revoked unless notice of the application to vary or revoke has been served on the corresponding party.

A court may refuse to hear an application to vary or revoke an order if it is satisfied that the circumstances have not changed, and must refuse to grant the application to revoke or vary an order unless it is satisfied that a child under the age of 16 years no longer needs either protection (in the case of revocation) or greater protection (in the case of variation).

An AVO can even be revoked after its duration is completed – see sections 73-74. This is often valuable when, after an order is completed, the defendant wants to apply for a Firearms Licence. Ordinarily a final order prevents any application for a firearms licence for 10 years (see section 11 *Firearms Act 1996* (NSW)).

Contacting complainants in ADVO proceedings

Practitioners should be aware of the Law Society's Guidelines for Contact with the Complainant in Apprehended Violence Matters and Criminal Matters. The Guidelines serve to assist practitioners when acting for clients involving apprehended domestic violence matters and criminal matters.

At the time of publication, the guidelines could be found here:

<http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/008726.pdf>

In summary, the Guidelines state that:

- Practitioners have a duty not to influence witnesses in any way, particularly about the evidence they intend to give
- Practitioners must not conference any two potential witnesses at the same time (to prevent the possibility of collusion)
- Practitioners must not suggest to any witness the content of any evidence they may give
- Practitioners should not initiate contact with a complainant unless it is necessary – solicitors should advise them to obtain independent legal advice or make an appointment to see a Chamber Magistrate – if they do not get legal advice there should be an independent person present at the conference – it could be appropriate for the prosecutor to be present – the practitioner should advise their name, firm, who they act for and the full reason for contact beforehand.
- Where the complainant initiates contact to seek to rescind a complaint, the practitioner should advise:
 - The practitioner acts for another party to the proceedings

- The complainant should get independent legal advice about the consequences of their intended course of action
- The complainant should contact the informant or police prosecutor
- Practitioners should make detailed file notes of all contact from complainants
- Practitioners should be aware that by contacting a complainant there is a prospect that they become material witnesses to the proceedings, which is something the Advocacy Rules state we must avoid except in exceptional circumstances.

Costs in AVO proceedings

The court has the power to award costs to the applicant or the defendant in proceedings.

Section 99A provides:

- A court is not to award costs against an applicant unless the application was frivolous and vexatious (s 99A(1))
- A court is not to award costs against a police officer who makes an application unless satisfied that the police officer made the application knowing it contained matter that was false or misleading in a material particular or the applicant has deviated from the reasonable case management of the proceedings so significantly as to be inexcusable (s 99A(2)).

Subsection 3 says that the mere fact that a protected person does any one or more of the following in relation to ADVO proceedings does not give rise to a ground to award costs against an applicant who is a police officer and who made the application in good faith:

- (a) indicating that he or she will give unfavourable evidence,
- (b) indicating that he or she does not want an apprehended domestic violence order or that he or she has no fears,
- (c) giving unfavourable evidence or failing to attend to give evidence.

Practitioners who appear for defendants in AVO matters should make their clients aware that they are very unlikely to recover costs, even if they are ultimately successful in the proceedings.

Procedure in AVO matters

In 2002, Practice Note 2 imposed an entirely new regime for dealing with AVO matters that are not related to a criminal charge.

The major changes are as follows:

- The applicant is ordered to serve written statements on the defendant, including a statement from every witness the applicant intends to call.
- The defendant is required to then respond by serving written statements from every witness they intend to call.
- Failing to serve applicant statements can result in the application being dismissed.

- Failing to serve defendant statements or appear at court can cause the AVO to be made in the defendant's absence.
- The hearing begins with the evidence in chief being given by way of those written statements.
- Leading additional evidence requires the leave of the court.
- The court may order that any or all witnesses give their evidence orally.
- The court can limit the amount of time taken by each party in chief, cross-examination or re-examination.

Any practitioner who is involved in an AVO proceeding should thoroughly read Practice Note 2 of 2012 and comply strictly with the timetable annexed.

Appeals to the District Court

The District Court can now make Apprehended Violence Orders in matters that are before it.

Section 84(2) of the Act provides that the following proceedings can be raised in the District Court:

- Annulment – if the defendant is not present at Court when an AVO is made, that can be annulled in the same way as a section 4 Application for a Court Attendance Notice offence (see the annulments chapter).
- Appeal – the following matters can be appealed, in the same way a conviction appeal is lodged against a court attendance notice matter, but they require the leave of the court:
 - Appeal by defendant against the making of an AVO in the Local or Children's Court
 - Appeal by applicant for AVO against the dismissal of an AVO in the Local or Children's Court
 - Appeal by the Applicant for an order or the defendant against a finding of costs under section 99
 - By a party to an order against the variation or revocation of an order by the Local or Children's Court
 - By a party to an order against the refusal of the court to vary or revoke the order.

The lodging of a section 84 notice of appeal does not stay the order (section 85(1)). The Local Court has the power to stay the order but only where it feels it is safe to do so (section 85(2)).

Contravene AVO offences

The offence of Contravene AVO pursuant to section 14 of the Act is an often encountered offence and there are some practical considerations for practitioners in providing advice in relation to such offences.

The need for service

As a practitioner it is important that you take instructions from your client as to whether or not your client was aware of the AVO, what terms they thought existed and whether they received a copy of the Apprehended Violence Order.

There are two reasons for this:

- vi. Section 14 (2) says that a person is not guilty of the offence unless they were served with a copy of the order or present in court when the order was made
- vii. The offence requires the defendant to 'knowingly contravene' the AVO. When you receive a brief of evidence in such matters, always ensure there is evidence as to the service of the AVO

'Approach'

Take careful instructions from your client about any circumstance in which the breach alleged contained an "approach." Approach is not a term defined in the Act, and it can be argued involves the deliberate act of the defendant moving towards the PINOP. Often such breaches are unintentional, or it is the PINOP who approaches the accused.

Consequences of AVO orders

It is important to notify your client of certain effects that an AVO order may have, including family law impacts, licences and tenancy agreements.

Family law impacts

Refer your client for advice from a Family Lawyer about the effect that an AVO could have if raised in the context of a relationship breakdown or custody battle.

Licences

- Section 23(1) of the *Firearms Act 1996* (NSW) provides for the automatic suspension of a licence under that Act on the making of an interim apprehended violence order against the licence holder and section 24(1) of the *Firearms Act* provides for the automatic revocation of a licence on the making of a final apprehended violence order against the licence holder.
- Section 17(1) of the *Weapons Prohibition Act 1998* (NSW) provides for the automatic suspension of a permit under that Act on the making of an interim apprehended violence order against the permit holder. Section 18(1) provides for the automatic revocation of a permit on the making of a final apprehended violence order against the permit holder. Section 19(1) provides that on the suspension or revocation of such licences or permits, the relevant firearms or weapons must be surrendered to the police and may be seized by the police.
- Section 11(5)(c) of the *Firearms Act 1996* (NSW) provides that a firearms licence must not be issued to a person who is subject to a final apprehended violence order or who at any time in the previous 10 years has been subject to such an order (other than an order that has been revoked) – [NOTE: This is often a reason to seek an order to be revoked after it is completed under section 73-74 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)].

Tenancy Agreements

Section 79(1) of the *Residential Tenancies Act 2010* (NSW) terminates the tenancy of a tenant or co-tenant under a residential tenancy agreement if a final apprehended violence order is made that prohibits the tenant or co-tenant from having access to the residential premises under the agreement.

AVO clauses (sorted by clause number)

(Pre and post introduction of plain English language versions)

No. Pre 03/12/16 order clauses

Post 03/12/16 order clauses

Standard Orders

Mandatory orders/Orders about behaviour

- 1** a. Assaulting, molesting, harassing, threatening or otherwise interfering with the protected person or a person with whom the protected person has a domestic relationship,
b. Engaging in any other conduct that intimidates the protected person or a person with whom the protected person has a domestic relationship,
c. Stalking the protected person or a person with whom the protected person has a domestic relationship.

- assault or threaten the protected person or any other person having a domestic relationship with the protected person
- stalk, harass or intimidate the protected person or any other person having a domestic relationship with the protected person
- intentionally or recklessly destroy or damage any property that belongs to or is in the possession of the protected person or any other person having a domestic relationship with the protected person.

Additional Orders

Orders about conduct

- 2.** The defendant must not reside at the premises at which the protected person(s) may from time to time reside, or other specified premises.

You must not approach the protected person or contact them in any way, unless the contact is through a lawyer.

- 3.** The defendant must not enter the premises at which the protected person(s) may from time to time reside or work, or other specified premises.

You must not approach:

1. the school or any other place the protected person might go to for study,

2. any place they might go to for childcare, or

3. any other place listed here ____.

4. The defendant must not go within _____ of the premises where the protected person may from time to time reside or work, or other specified premises.

You must not approach or be in the company of the protected person for at least 12 hours after drinking alcohol or taking illicit drugs.

5. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as agreed in writing or permitted by an order or directions under the Family Law Act 1975, for the purpose of counselling, conciliation or mediation.

You must not try to find the protected person except as ordered by a court.

6. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as authorised by a parenting order under the Family Law Act 1975 unless the parenting order has been varied, suspended or discharged under s68R of the Family Law Act 1975.

Orders about family law and parenting

You must not approach the protected person or contact them in any way, unless the contact is:

- A) through a lawyer, or
- B) to attend accredited or court-approved counselling, mediation and/or conciliation, or
- C) as ordered by this or another court about contact with child(ren), or
- D) as agreed in writing between you and the parent(s) about contact with child(ren)

7. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative

Orders about where you cannot go

You must not live at:

- 1. the same address as the protected person, or
- 2. any place listed here ____.

8. The defendant must surrender all firearms and related licences to Police.

You must not go into:

- 1. any place where the protected person lives, or

2. any place where they work, or
3. any place listed here____.

9. The defendant must not approach the school or other premises at which the protected person(s) may from time to time attend for the purposes of education or child care or other specified premises:

You must not go within ____ metres of:

1. any place where the protected person lives, or
2. any place where they work or
3. any place listed here____.

10. The defendant must not approach the protected person(s) or any such premises or place at which the protected person(s) from time to time reside or work within 12 hours of consuming intoxicating liquor or illicit drugs.

Orders about weapons
You must not possess any firearms or prohibited weapons

11. The defendant must not destroy or deliberately damage or interfere with the property of the protected person's.

- now incorporated in order
1: *orders about contact*(see point 3 of order)

Source:

http://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_avo/lawassist_defendingavo_home/lawassist_responding_avo/lawassist_mandatory_additional_def.aspx#Mandatoryorders/Ordersaboutbehaviour

AVO clauses (number and topic - old v new)

(Pre and post introduction of plain English language versions)

Old No.Pre 03/12/16 order clauses

New No. Post 03/12/16 order clauses

Standard Orders

Mandatory orders/Orders about behaviour

1 a. Assaulting, molesting, harassing, threatening or otherwise interfering with the protected person or a person with whom the

1. • assault or threaten the protected person or any other person having a domestic

protected person has a domestic relationship,
b. Engaging in any other conduct that intimidates the protected person or a person with whom the protected person has a domestic relationship,
c. Stalking the protected person or a person with whom the protected person has a domestic relationship.

relationship with the protected person

- stalk, harass or intimidate the protected person or any other person having a domestic relationship with the protected person
- intentionally or recklessly destroy or damage any property that belongs to or is in the possession of the protected person or any other person having a domestic relationship with the protected person.

Additional Orders

2. The defendant must not reside at the premises at which the protected person(s) may from time to time reside, or other specified premises.

3. The defendant must not enter the premises at which the protected person(s) may from time to time reside or work, or other specified premises.

4. The defendant must not go within _____ of the premises where the protected person may from time to time reside or work, or other specified premises.

5. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative or as agreed in writing or permitted by an order or directions under the Family Law Act 1975, for the purpose of counselling, conciliation or mediation.

6. The defendant must not approach or contact the protected person(s) by any means

Orders about conduct

2. You must not live at:

1. the same address as the protected person, or
2. any place listed here ____.

3. You must not go into:

1. any place where the protected person lives, or
2. any place where they work, or
3. any place listed here ____.

4. You must not go within ____ metres of:

1. any place where the protected person lives, or
2. any place where they work or
3. any place listed here ____.

5. You must not try to find the protected person except as ordered by a court

6. You must not approach the protected person or contact

whatsoever, except through the defendant's legal representative or as authorised by a parenting order under the Family Law Act 1975 unless the parenting order has been varied, suspended or discharged under s68R of the Family Law Act 1975.

them in any way, unless the contact is:

- A) through a lawyer, or
- B) to attend accredited or court-approved counselling, mediation and/or conciliation, or
- C) as ordered by this or another court about contact with child(ren), or
- D) as agreed in writing between you and the parent(s) about contact with child(ren).

7. The defendant must not approach or contact the protected person(s) by any means whatsoever, except through the defendant's legal representative

7. You must not approach the protected person or contact them in any way, unless the contact is through a lawyer.

8. The defendant must surrender all firearms and related licences to Police.

8. You must not possess any firearms or prohibited weapons

9. The defendant must not approach the school or other premises at which the protected person(s) may from time to time attend for the purposes of education or child care or other specified premises:

- 9.** You must not approach:
- 1. the school or any other place the protected person might go to for study,
 - 2. any place they might go to for childcare, or
 - 3. any other place listed here ____.

10. The defendant must not approach the protected person(s) or any such premises or place at which the protected person(s) from time to time reside or work within 12 hours of consuming intoxicating liquor or illicit drugs.

10. You must not approach or be in the company of the protected person for at least 12 hours after drinking alcohol or taking illicit drugs.

11. The defendant must not destroy or deliberately damage or interfere with the property of the protected person's.

- now incorporated in order
1: *orders about contact*(see point 3 of order)

Source

http://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_avo/lawassist_defendingavo_home/lawassist_responding_avo/lawassist_mandatory_additional_def.aspx#Mandatoryorders/Ordersaboutbehaviour

Chapter 18 - Costs in Criminal Law

Practitioners should be familiar with the following legislation regarding costs:

- *Criminal Procedure Act 1986* (NSW);
- *Costs in Criminal Cases Act 1967* (NSW); and
- *Suitors Fund Act 1951* (NSW).

Some general guidance for practitioners appearing for defendants in summary matters in the Local Court is set out below.

Can I seek costs if a matter is adjourned?

Yes, but only if the defendant has incurred additional costs because of the unreasonable conduct or delays of the prosecution (see s. 216 *Criminal Procedure Act 1986*).

If the application is successful, the Magistrate will order the prosecution to pay costs to the defendant in a specific amount or may provide for the determination of the amount at the end of the proceedings.

Can I seek costs if a matter is withdrawn or dismissed?

Yes, only if :

1. The costs sought are professional expenses and disbursements (including witnesses' expenses); and
2. The amount sought is just and reasonable; and
3. you can establish at least one of the following:
 - The investigation into the alleged offence was conducted in an unreasonable or improper manner;
 - The proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner;
 - The prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought; or
 - because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs (see ss. 213 and 214 *Criminal Procedure Act 1986*).

If the application is successful, the Magistrate will order the prosecution to pay costs to the defendant in a specific amount.

Can I seek costs if, after the commencement of the trial, the defendant is acquitted or discharged or the DPP gives a direction that no further proceedings be issued?

No. You can instead seek a costs certificate, but only if:

- the offence is a NSW offence (not a Commonwealth offence);
- the trial has commenced; and
- you can establish that if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
- you can establish that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances (see s. 2(1)(a) Costs in *Criminal Cases Act 1967*).

If the application is successful, the Magistrate will grant a certificate so that you can then apply to the Director-General of the Attorney General's Department of Justice who determines whether the payment is justified and, if so, whether the amount is appropriate.

Can I seek costs if a hearing is discontinued?

No. You can instead seek a costs certificate, but only if:

- the hearing has commenced;
- the defendant has incurred costs in preparation for and during the hearing;
- a new hearing is ordered;
- the reason for the new hearing is not attributable in any way to disagreement on the part of the jury or the act, neglect or default of the defendant or the defendant's legal representatives;
- there is a new hearing;
- the defendant incurred additional costs in preparation for and during the new hearing; AND
- the amount of costs sought is no more than \$10,000 or as prescribed at the time the proceedings were aborted or the new trial ordered (see s. 6A(1B)(a) and (b) *Suitors' Fund Act 1951* respectively).

If the application is successful, the Magistrate will grant a certificate so that you can then apply to the Director-General who determines whether the payment is justified and, if so, whether the amount is appropriate.

Can I seek costs if a hearing is aborted?

No. You are also unable to seek a costs certificate. You can instead make a written application to the Director-General, but only if:

- the hearing has commenced;
- the defendant has incurred costs in preparation for and during the hearing;
- the hearing was aborted because of the death or protracted illness of the Magistrate;
- there is then a new hearing;
- the defendant incurred additional costs in preparation for and during the new hearing; and

- the amount of costs sought is no more than \$10,000 or as prescribed at the time the proceedings were aborted or the new trial ordered (see s. 6A(1B)(a) and (b) *Suitors' Fund Act 1951* respectively).

The Director-General determines whether the payment is justified and, if so, whether the amount is appropriate.

How do I make a costs application?

- In some situations, the defendant will have the option of seeking costs under the *Criminal Procedure Act 1986* OR seeking a costs certificate under the Costs in *Criminal Cases Act 1967*. The latter is generally more favourable to the defendant but involves more time and is subject to the discretion of the Director-General. Explain the options to the defendant and obtain instructions to make a costs application if it is appropriate to do so. The fact that the defendant is legally aided does not prevent the Magistrate making a costs order or granting a costs certificate if it is otherwise appropriate.
- Prepare an itemised schedule of costs (including times, dates, hourly rates and disbursements).
- Speak to the prosecution to foreshadow your costs application. If the amount of costs sought is reasonable and within the maximum rates set by the Attorney-General, it may be that the prosecution will not oppose quantum. As at August 2016 2010, the maximum rates are \$280 per hour plus GST for solicitors and junior counsel and \$460 per hour plus GST for senior counsel. The rates include all overheads, secretarial, legal and administrative assistance but not out of pocket disbursements. Maximum daily limits also apply.
- As soon as the matter is withdrawn/dismissed/adjourned, tell the Magistrate that the defendant seeks costs. As a matter of caution, a costs application must be made prior to the formal discharge of the defendant. It CANNOT be made on a later date.
- Inform the court of the basis of the costs application, explain the grounds and tender any evidence in support (such as representations to withdraw the offence prior to the hearing). The defendant bears the onus of establishing the criteria for the costs application on the balance of probabilities.
- If necessary, tender a copy of the relevant legislation and case law.
- If the Magistrate is inclined to make an order for costs, tender your schedule of costs and indicate whether or not quantum is opposed. It is best to avoid advising the magistrate of the amount of costs sought during your costs application. The amount only becomes relevant once the Magistrate decides that costs will be awarded.
- Inform the defendant that the prosecution will ordinarily pay the costs directly to the defendant. If the defendant instead prefers the costs to be paid to your firm, you should provide the prosecution with an Authority to Pay signed by the defendant shortly after the costs order is made.
- If the Magistrate grants a costs certificate, see the following websites regarding the procedures for making the application to the Director-General:

<http://www.justice.nsw.gov.au/lrb/Pages/statutory-costs-ex-gratia-payments/costs-in-crim-cases-act-1967.aspx>

- ex-gratia payments

<http://www.justice.nsw.gov.au/lrb/Pages/statutory-costs-ex-gratia-payments/ex-gratia-pay.aspx>

- suitors fund

<http://www.justice.nsw.gov.au/lrb/Pages/statutory-costs-ex-gratia-payments/suitors-fund-act-1951.aspx>

Can the prosecutor seek costs?

Yes, if:

- the defendant is convicted or receives an order under s. 10 *Crimes (Sentencing Procedure) Act 1999*;
- the defendant has not submitted a written plea of guilty; and
- the amount sought is just and reasonable (see s. 215 *Criminal Procedure Act 1986*).

Prosecutors may also seek costs if the matter is adjourned and the prosecution has incurred additional costs because of the unreasonable conduct or delays of the defendant (see s. 216 *Criminal Procedure Act 1986*).

Practitioners should be aware that although police prosecutors and DPP prosecutors rarely seek costs, other prosecutors regularly do so.

PRACTICAL TIP: If your client has a grant of legal aid and you are successful in seeking costs let the Grants section know and you will be eligible to a higher rate of payment than the standard Legal Aid NSW rates.

Chapter 19 - Annulment Applications

OVERVIEW

This chapter deals with a defendant's application to the Local Court and District Court to annul (that is, take away) convictions and/or sentences recorded against him or her.

Any person who has been convicted, or convicted and sentenced, *in his or her absence* in the Local Court can apply to the Local Court to have their conviction and/or sentence annulled. A person who is aggrieved by the decision of the Local Court (refusing to grant the annulment) may appeal to the District Court against the Local Court refusal. This right of appeal should be distinguished from the general right of appeal to the District Court available to any person (present at the Local Court hearing), who is convicted or sentenced by the Local Court.

PRACTICAL TIP: There is a significant difference between Annulments and Appeals.

Put simply, an annulment is the remedy when your client was not before the court and they are convicted in their absence for not being at court. An appeal is usually the remedy when your client was at court but wishes to challenge a finding that they are guilty, or wish to challenge the penalty that was imposed in their presence.

The Relevant Legislation

All references to legislation in this Chapter are to the *Crimes (Appeal and Review) Act 2001* (NSW) unless otherwise stated.

Application To The Local Court to Annul Conviction

Section 4 provides:

(1) An application for annulment of a conviction or sentence made or imposed by the Local Court may be made to the Local Court sitting at the place at which the original Local Court Proceedings were held:

(a) by the defendant,

but may be made by the defendant only if the defendant was not in appearance before the Local Court when the conviction or sentence was made or imposed.

(2) An application under this section must be made:

(a) within 2 years after the relevant conviction or sentence is made or imposed

(4) An application must be in writing, and must be lodged with a registrar of the Local Court.

As soon as practicable after the Local Court receives the application for annulment, notice is given to the interested parties by the registrar of the Local Court, informing all interested parties of the date, time and place fixed for dealing with the application (section 6).

When dealing with an application for annulment, the Local Court may stay the execution of the sentence concerned (section 7(2)).

Circumstances In Which Section 4 Applications Are To Be Granted

Section 8(2) provides:

The Local Court must grant an application for annulment made by the defendant if it is satisfied:

- a) that the defendant was not aware of the original Local Court proceedings until after the proceedings were completed, or
- b) that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or
- c) that, having regard to the circumstances of the case, it is in the interests of justice to do so.

Steps In Making A Section 4 Application

1. Complete the s.4 Application for Annulment as thoroughly as possible, containing all grounds for the application. The form can be accessed on:

http://www.localcourt.justice.nsw.gov.au/Pages/forms_fees/forms.aspx

In Word format

<http://www.localcourt.justice.nsw.gov.au/Documents/Local%20Court%20Forms/Annulment%20Application.doc>

In PDF format

<http://www.localcourt.justice.nsw.gov.au/Documents/Local%20Court%20Forms/Annulment%20Application.pdf>

2. Complete the form as soon as possible setting out your grounds in sufficient detail and annexing any and all evidence relied upon as the basis for your application (For example: doctor's certificates, Local Court affidavits, international airfare tickets, hospital records etc).
3. It is important to note that you will need to file the document with the relevant Local Court.
4. If you receive instructions to annul prior to the matter being listed at the Local Court, forward a copy of the Application to the relevant NSW Police Prosecutor's Office noting your intention to make the application AND ask for them to inform you if there is any objection to your application. It is important that you provide sufficient notice.
5. Speak with the NSW Police Prosecutor to see whether they oppose the application.
6. Address the Court on the relevant section 8(2) grounds relied upon as the basis for the section 4 application. This may include the tendering of documents, in an admissible form, indicating that your client was abroad at the time of the hearing; had moved addresses with no mail diversion; or any other reason that could satisfy a Local Court magistrate that a grant of an application for annulment is in the interest of justice.

7. It may be necessary even to call your client, or supporting witnesses, to give sworn evidence.

PRACTICAL TIP Filing fees regularly change and are usually linked with CPI. See the relevant court's website to check the filing fee if you are unsure.

If Your Application Is Successful:

It is important to note that you have instructions on how to proceed. You ought to be prepared to commence your case once your application is granted, as it is not a guarantee that you will receive an adjournment on a successful annulment application.

The Local Court must notify each of the interested parties of its decision as to an application for annulment (s. 9(1)).

As a contingency, you must have ascertained:

If indictable offence(s)

- a) Whether a brief has been served? If so, ensure you have a Local Court Listing Advice ready to tender to the Police Prosecutor and the Presiding Magistrate; or
- b) If a brief has not been ordered, seek brief orders.

In all cases

Following a successful section 4 application against conviction or sentence, the Local Court must deal with the original matter afresh either immediately or at a later date (section 9(2)(a)).

If the Local Court deals with the matter at a later date, it must notify both the Defence and the Prosecution of the date, time and place fixed for dealing with the original matter (section 9(2)(b)).

The Local Court is required to deal with the original matter as if no conviction or sentence had been previously made or imposed (section 9(3)).

The original matter does not have to be dealt with by the Magistrate who ordered the annulment of the conviction or sentence, but may be dealt with by any Magistrate (section 9(4)).

Effect Of Annulment Of Conviction Or Sentence

Section 10 provides:

1. On being annulled, a conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed.
2. The annulment of a conviction for an offence that has been heard together with another offence for which a conviction has been made does not prejudice the conviction for the other offence.
3. If a fine is annulled, any amount paid towards the fine is repayable to the person by whom it was paid.
4. The Consolidated Fund is appropriated to the extent necessary to give effect to subsection (3).

Scope For Appeal To The District Court Of Remittance For Redetermination:

There is scope, pursuant to section 11A, for an appeal to the District Court against the refusal of a section 4 application by the Local Court. The appeal must comply with sections 11A, 13, 14 and 15 in that it must:

- be brought within 28 days after the Local Court notifies the defendant of its refusal of the section 4 application for annulment of conviction (section 11A(2));
- be made by lodging a written notice of appeal with a registrar of the Local Court (if lodged within 28 days after the Local Court's determination with respect to the section 4 application) (section 14(1)(a));
- or by lodging a written application for leave to appeal (if lodged after 28 days after the Local Court's determination with respect to the section 4 application) together with a written notice of appeal with a registrar of the Local Court (section 14(3)(a)). An application for leave to appeal must be made within 3 months after the relevant conviction or sentence is made or imposed, or the relevant application under section 4 is refused (section 13(2));
- state the grounds of the appeal (section 14(2));
- be served on the Prosecution and relevant court registrars (section 15).

Upon lodgement of the written application for leave to appeal or a written notice of appeal, the District Court may stay the execution of any sentence relating to the conviction concerned subject to such terms and conditions as it thinks fit, pending the determination of the application on appeal (section 16A (2)).

Determination Of Appeals Against Local Courts Refusal Of Application For Annulment Of Conviction

Section 16A(1) provides:

(1) The District Court may determine an application under section 11A by dismissing the application or by granting it.

In the event that the District Court grants the application, the Court must, under section 16A(3), remit the matter to the Local Court, which is to deal with any matter so remitted under section 9 as if the section 4 application had been granted by the Local Court (section 16A(4)).

PRACTICAL TIP If successful in gaining the annulment of conviction, be prepared to run your matter as a hearing immediately as an adjournment may not be granted.

Chapter 20 - Appeals From Local Court to District Court

PRACTICAL TIP: This section applies when your client was present at court when sentenced or found guilty and wishes to appeal that decision. If your client was convicted in their absence for not attending court, read Chapter 19 relating to Annulment applications.

This chapter discusses appeals to the District Court on the ground of severity of sentence. The chapter specifically refers to appeals from the Local Court, but the principles are the same (with some minor differences) in relation to appeals from the Children's Court.

All references to sections in legislation are references to the *Crimes (Appeal and Review) Act 2001*(NSW) unless indicated otherwise.

Appealing to the District Court

Appeals to the District Court are heard by a single Judge. A solicitor from the Office of the Director of Public Prosecutions usually appears for the Crown, and a solicitor or barrister can represent the appellant.

The nature of severity appeals to the District Court

An appeal against the severity of a sentence is by way of a rehearing of the evidence given on sentence in the original Local Court proceedings. In other words, the matter is essentially reheard by the judge, fresh evidence (including additional references or reports) may be given in the appeal proceedings (s 17) although you should remember that any documents tendered in the Local Court will be tendered to the Judge by the solicitor for the DPP.

Commencing an appeal to the District Court

Any person who has been sentenced by a Local Court may appeal to the District Court against the sentence (s 11(1)).

An appeal is made by lodging a written Notice of Appeal or an Application for Leave to Appeal with either:

- The Registrar of any Local Court (ss 14(1)(a) and (3)(a)); or
- The person in charge of the place where the appellant is in custody (ss 14(1)(b) and (3)(b)).

The Notice of Appeal or Application for Leave to Appeal can be obtained from any Local Court Registry.

An appeal must be made within 28 days after sentence is imposed (s 11(2)(a)). If the 28 day period has passed, you can still file the appeal, but you must also file an Application for Leave to Appeal. This must be done within three months of the date of the conviction or sentence imposed (s 13(2)). The granting of leave is at the discretion of the Court in which you are seeking to appeal.

The effect of lodging a Notice of Appeal

When a Notice of Appeal is lodged any sentence, penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of the conviction, is stayed (s 63(2)(a)). A stay means that, until the appeal is finally determined, the sentence or order does not take effect.

This means that, for example, fines do not need to be paid, demerit points will not accrue on a licence and compensation does not need to be paid.

However, there are a number of exceptions to this general rule. The most important exceptions are:

- If the appellant is in custody, and has not been granted bail, the sentence of imprisonment continues to have effect (s 63(2)(c)).
- A person who is serving periodic detention or home detention is taken to be in custody (s 63(5)).

Bail can be applied for before a Local Court Magistrate immediately after the filing of an appeal. If this bail is refused, bail can also be sought in the District Court prior to the hearing of the appeal.

If a person is required to have leave to appeal, the stay only takes effect when leave to appeal is actually granted (s 63(2)(b)). The District Court will usually hear argument as to why leave should be granted immediately before it hears the substantive appeal.

EXAMPLE:

A licence disqualification is not automatically stayed where the person was serving a police-imposed suspension for that offence immediately before the sentence was handed down (s 63(2B)).

However, an appeal court may order that a suspension or disqualification referred to in subsection (2A) be stayed if the court considers a stay to be appropriate in the circumstances.

If a licence disqualification is not stayed or a term of imprisonment is not bailed, the District Court can and should take that into account when hearing the matter.

EXAMPLE:

If the person was not disqualified pending the hearing of the appeal, or was disqualified and the disqualification was stayed, the court cannot take that time into account, even if the person has not reapplied for a licence and has not been driving (*RTA v Higginson* [2011] NSWCA 151).

The powers of the District Court when dealing with appeals

Sections 21 and 22 of the Act deal with the circumstances when an appellant fails to appear to argue their appeal. When an appellant does appear and the appeal against severity of sentence is heard, the District Court may, pursuant to s 20(2):-

- Set aside the sentence;
- Vary the sentence; or
- Dismiss the appeal.

If the District Court is considering increasing the sentence which was imposed in the Local Court, the Court must warn the appellant that it is considering doing so (*Parker v DPP* (1992) 28 NSWLR 282). This is commonly called a '*Parker* warning'. This warning can be given at any stage in proceedings.

If a Judge gives you a '*Parker* warning', you will be given the opportunity to seek your client's instructions as to whether they wish to continue with the appeal. If they do not wish to continue, you can seek leave to withdraw the appeal. This leave is almost always granted. If your client wishes to continue notwithstanding the warning, it may be prudent to seek written instructions.

HEARING AN APPEAL IN THE DISTRICT COURT

Getting the crown tender bundle before the hearing of the appeal

The crown tender bundle that is tendered by the DPP at the hearing of a severity appeal contains the following documents:

- The Bench papers. These are papers that were written on and used by the sentencing Magistrate; and
- The facts, criminal record, and all reports and references tendered in the Local Court.

You can get the crown tender bundle by applying in writing to the following:

- The Senior Solicitor of the DPP office that will be dealing with your client's appeal.

You should check the bundle to make sure that all the relevant papers have been included. The Crown will only tender those papers that have been passed along to them by the Local Court Registry. It is therefore important to get instructions from your client on all the documents that were tendered in the Local Court, and to have your own copies of them when you go to court.

If the documents you wish to tender in support of your client's appeal are voluminous, you should serve them on the DPP several days before the appeal to ensure that they have an opportunity to consider them.

The general procedure for a severity appeal in the District Court

- The DPP solicitor tenders the crown tender bundle from the Local Court.
- The DPP solicitor indicates the penalties imposed in the Local Court, and the applicable maximum penalties.
- You tender any additional reports, references or other material that you rely on.
- You call the appellant and/or any relevant witnesses give evidence (if you see fit to do so).
- You make your submissions, followed by the DPP solicitor making submissions.

The Judge gives his or her decision

Factors for consideration regarding appeals

- Keep in mind what result you are aiming for. For example, your appeal may be limited to the length of a disqualification period imposed, the structure of sentences, or a failure to find special circumstances when a sentence of imprisonment was imposed.
- It may be helpful to let the Judge know at the outset of the appeal what sentence or orders you are seeking.
- Some Judges prefer sworn evidence, while other Judges prefer appeals to proceed by way of submissions. If you do not know the preference of the Judge you are appearing before, find out by asking other lawyers who have appeared before the same Judge.
- Often there is no need to call evidence, and the matter can be run in much the same way as a local court sentence.
- Before court you should tell your client what a Parker warning is, so that your client knows of the risk. This will also assist you in getting instructions if a Parker warning is given.

Chapter 21 - Appeals to NSWCCA

The Court of Criminal Appeal (CCA) is a division of the Supreme Court of NSW and is the highest criminal court in this State. Most appeals to the CCA come from the District and Supreme Courts.

The CCA is a court of review; matters are not heard de novo. This means that the CCA deals with errors of law. It does not hear evidence itself, and in most cases fresh evidence is not admissible. The CCA reviews the proceedings that occurred in the lower court, and the judgment of the lower court Judge, and decides whether an error of law has been demonstrated.

Appeals to the CCA are usually:

- appeals by defendants against severity of sentence
- appeals by defendants against conviction
- appeals by defendants against conviction and (if unsuccessful) appeals against severity of sentence (also known as 'all grounds appeals'); or
- Crown appeals against leniency of sentence.

Other types of appeal to the CCA—such as appeals by the Crown against a decision by a trial Judge to exclude evidence, where the exclusion destroys or substantially weakens the Crown case—are not dealt with in this chapter.

The phrase 'court of trial' is used by the CCA (and in this chapter) to refer generically to the lower court whose decision is being appealed to the CCA. It is used even if the appellant pleaded guilty at the lower court.

Notifying the CCA of the intention to appeal

All relevant forms can be obtained online at:

http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_formsfees/SCO2_forms/SCO2_forms_subject/criminal_appeal_forms.aspx.

The Notice of Intention to Appeal and the Notice of Appeal

A person who wishes to appeal to the CCA has to file a Notice of Intention to Appeal (NIA) (Form IVA in the Criminal Appeal Rules).

This may be:

- Hand delivered to the CCA Registry (on level 5 Law Courts Building Queens Square Sydney 2000),
- Emailed to courtocriminalappeal@courts.nsw.gov.au,
- Mailed to: Supreme Court of NSW, GPO Box 3, Sydney NSW 2001, Australia; or
- Sent via the Document Exchange (DX) to Supreme Court of NSW, DX 829, Sydney.

The NIA must be filed within 28 days of the conviction or sentence. It is possible to lodge an NIA against conviction before sentence is passed, although this will not affect the progression of the sentence in the lower

court. Filing an NIA against conviction on the date of the verdict has the advantage of allowing the often lengthy process of transcript gathering to commence.

The time limit for lodging a NIA is 28 days from sentence.

However, late applications can be made. These require a further application form called a 'Notice of application for extension of time for notice of intention to appeal' (NAET) to be completed (Form VE under the *Criminal Appeal Rules*). The NAET has to be forwarded with a late NIA.

There is space on the NAET to explain why the NIA was not lodged earlier. The explanation should be accurate, carefully drafted and should be able to be supported by affidavit evidence if required.

An NIA should state the legal representation for the appellant and their address. The Registrar will acknowledge receipt of the NIA. If legal representation changes or a solicitor ceases to act for a party, the CCA Registry should be notified in writing.

For most appellants, the lodging of a NIA is a necessary preliminary step in appealing to the CCA. The applicant has 6 months from the time the NIA is lodged to file a Notice of Appeal. The Notice of Appeal can only be filed with the grounds of appeal. If this is not done within the 6 months, then either the NIA will lapse, or the applicant must seek an extension from the Registrar of the CCA to lodge the Notice of Appeal using Form VF.

A legal representative can sign the NIA on behalf of a client only if the client cannot sign because of illness or other sufficient cause (*Criminal Appeal Rules*, r 5(1)). Generally, the fact that the client is in custody is considered a sufficient cause.

Late lodgement of NIA

Preparing to lodge the Notice of Appeal

Almost all of the preparation for the appeal must be done before the Notice of Appeal is lodged. All documentation from the lower court should be obtained, counsel briefed, grounds of appeal settled and, if necessary, fresh evidence obtained.

Requesting documentation

As soon as the NIA is lodged, the applicant must request the transcripts of proceedings and exhibits from the court in which the matter was originally heard. Such a request should be made in writing to the relevant registry of the Court in which the matter was originally heard. This should be done when the NIA is lodged with the CCA.

The primary material that is required in order to prepare an appeal to the CCA is:

- the transcript of the proceedings before the District or Supreme Court (including any judgments, submissions by counsel, the summing-up by the Judge, and the remarks on sentence); and
- the exhibits that were tendered at the District Court or Supreme Court.

Because the CCA will generally not hear fresh evidence, the success of an appeal in the CCA is heavily reliant on the way the matter is run in the original court.

A significant part of the 6 month period in which a NIA is current is often spent awaiting exhibits and/or transcripts. If there are significant delays in receiving the requested documents, you must regularly contact the trial court to discuss the progress of your application.

The following is a list of Registries to source the above material from (taken from SC CCA 1 (v. 3) Court of Criminal Appeal – General):

Supreme Court

For copies of exhibits, Remarks on Sentence, Judgments, and any Summing Up to the Jury:

The Registrar
Supreme Court Criminal of Criminal Appeal Registry
Level 5 Law Courts Building
Queens Square
SYDNEY NSW 2000
(DX 829 SYDNEY)

For copies of transcripts:

Reporting Services Branch, Department of Attorney General and Justice
Client Services, NIA Section
Reporting Services Branch,
Department of Attorney General and Justice
Level 6 Downing Centre
143-147 Liverpool Street
SYDNEY NSW 2000

GPO Box 6, Sydney NSW 2000 (DX 1227 Sydney)
Email: RSB.Client.Services@justice.nsw.gov.au

Land and Environment Court

For copies of transcripts and exhibits:

The Registrar
Land and Environment Court
225 Macquarie Street
SYDNEY NSW 2000
(DX 264 SYDNEY)

District Court

For copies of exhibits:

The Registrar
District Court Criminal Registry
Level 3 Downing Centre
143-147 Liverpool Street
SYDNEY NSW 2000
(DX 11518 SYDNEY DOWNTOWN)

For copies of transcripts, Remarks on Sentence, Judgments, and any Summing Up to the Jury:

The Manager
Reporting Services Branch, Department of Attorney General and Justice
Client Services, NIA Section

Level 6 Downing Centre
143-147 Liverpool Street
SYDNEY NSW 2000

GPO Box 6, Sydney NSW 2000
(DX 1227 Sydney)

Email: RSB.Client.Services@justice.nsw.gov.au

Drug Court

For copies of transcripts and exhibits:

The Registrar
Drug Court of New South Wales
Ground Floor, Parramatta Court House
12 George Street
PARRAMATTA NSW 2150 (PO Box 92 PARRAMATTA NSW 2124)

Email: Drug.Court.Registry@justice.nsw.gov.au

If your appeal is not ready to proceed by the end of the 6 month NIA period, you will need to make an application for extension of the period in which the NIA has effect (Form VF under the *Criminal Appeal Rules*). In that application, you will need to establish that you have taken all steps in your power to progress your client's intended appeal and any difficulties faced in obtaining documentation.

If the NIA has expired, an application for an extension of time to appeal (Form V in the *Criminal Appeal Rules*) will need to be lodged with the Notice of Appeal or Notice of Application for Leave to Appeal (see below).

Briefing counsel

Counsel experienced in criminal appellate work should be briefed to advise on the merits of appealing to the CCA, and, where the appeal does proceed, to draft written submissions and appear at the hearing of the appeal. Counsel will usually draft and settle the grounds of appeal and any submissions. An outline of what the submissions should address for the various types of appeal to the CCA is outlined in the CCA Practice Note SC CCA 1 (v. 3).

The quality of the advice or submissions that you get from counsel will be heavily dependent on the quality of the brief sent to counsel. See the chapter on Briefing Counsel in this book. In appeals where a grant of legal aid is sought, Legal Aid NSW requires that an advice on the merits of the appeal is obtained before a grant of legal aid is made. Legal Aid NSW will not fund an appeal to the CCA if the appeal does not have reasonable prospects of success. In any event, the practice of getting an advice on the merits of the appeal that should be adopted in most appeals.

Filing the Notice of Appeal

When filing the Notice of Appeal (Form V under the *Criminal Appeal Rules*), the following documents must be filed with it:

- a) Grounds of appeal
- b) Submissions on appeal
- c) Certificate under Rule 23C of the *Criminal Appeal Rules*.

The grounds and submissions will generally be provided by counsel. When filing the above documents, file the original Notice of Appeal and at least 4 copies. The rule 23C certificate is a signed certification that the transcripts and exhibits are available from the court of trial. The CCA Registry relies on this certification when it prepares appeal books for the hearing of the matter. If certain documents are either not available (but counsel has advised you to file the Notice of Appeal anyway), or the court of trial no longer has them and you have obtained them from elsewhere, you must specify the following on the rule 23C certificate:

- The identity of the documents that are not available from the court of trial (usually by exhibit number or by reference to a particular date of transcript); and
- Either where the documents can be obtained from, or that following reasonable inquiries they have not been found.
- In urgent appeals the Registrar may exercise discretion to waive or relax the requirements of Rule 23C.

Call-overs

The Registrar of the CCA holds fortnightly call-overs. A matter will not be listed unless the Notice of Appeal has been filed, or unless the party has requested that the matter be listed. Where a sentence appealed against is a short one, the Registry and the CCA Unit of the Office of the DPP should be advised immediately so that the appeal may be expedited. If the appeal cannot be expedited, an application for Supreme Court bail should be considered (see below for a discussion of bail issues pending a CCA appeal).

Once the grounds of appeal have been filed with the Notice to Appeal, at the call-over the Registrar sets:

- a timetable for filing of any evidence on which the appellant relies;
- a timetable for filing the respondent's evidence/submissions in reply; and
- the hearing date.

It is only in exceptional circumstances that an application to vacate a hearing date should be made. Affidavit material will need to be filed and a strong case put to the Registrar—and possibly the CCA itself — particularly if such an application is not made a substantial time before the hearing.

Hearing of appeals in the CCA

Hearing of appeals generally

Appeals are heard by a three-Judge bench, although only two judges are strictly necessary for a sentence appeal not involving any question of legal principle. In cases of particular legal importance, a five-Judge bench may be convened to hear the appeal.

The Judges hearing the appeal will have read and be fully familiar with both the submissions and the evidence relied upon by the appellant and the respondent. The Judges will request counsel to speak to the submissions or make further submissions on specific points raised in the appeal papers. At the conclusion of the hearing the Judges may immediately deliver their judgment (called an *ex tempore* judgment) or they may reserve their judgment to another date.

In sentencing appeals, even where the CCA determines that there is an error in sentencing principle, it may decline to re-sentence if the Court is of opinion that no lesser sentence is warranted (s 6(3) *Criminal Appeal Act 1912*).

In conviction appeals, the CCA may:

- dismiss the appeal;
- find that the grounds are made out, but nevertheless dismiss the appeal on the basis that no actual miscarriage of justice has occurred (s 6(1) *Criminal Appeal Act*);
- quash the conviction and order an acquittal (s 6(2) *Criminal Appeal Act*); or
- quash the conviction and order a retrial (s 8 *Criminal Appeal Act*).

Evidence

As a general rule, the CCA will not admit any fresh material into evidence that the appellant, or his or her legal representative, was aware of at the time of the sentencing or trial.

The CCA may, in exceptional circumstances, admit evidence that has become known since the original proceedings. It will do so essentially where it would be a miscarriage of justice not to admit the new evidence. For example:

- In sentencing matters—the diagnosis of an extremely serious illness that an appellant would have been suffering from at the time of sentencing, but which at that time was undiagnosed; or
- In conviction matters—an admission of fabrication from a complainant.

The CCA is predominantly a 'paper' jurisdiction. Before the hearing of the appeal, the CCA Registry prepares an appeal book containing all relevant transcript and exhibits from the court of trial. The Judges of the CCA will have read this material, and the written submissions for both parties, by the time the appeal is heard.

In sentence and Crown appeals, the CCA will often make a determination on the day of the hearing, and if the appeal is allowed, will move immediately to re-sentence the appellant. It is important, therefore, to anticipate this and have already filed evidence which the appellant can rely on for the purpose of re-sentencing. This evidence is usually confined to things the appellant has been doing (e.g. to advance his or her rehabilitation) since the time of the original sentence. This material must be filed in affidavit form—your client will not have the opportunity to speak to the CCA directly.

An appellant can abandon his or her appeal at any stage before to the hearing by forwarding a Notice of Abandonment (Form III) to the Registrar (r 27 *Criminal Appeal Rules*). The effect of abandoning an appeal is that the appeal is deemed to be dismissed or refused, and therefore the original sentence is confirmed. An appellant may also withdraw an appeal during the course of the hearing of the appeal, although this is rarely done.

Issues that may arise

Interlocutory Appeals

Interlocutory appeals, (otherwise known as 5F applications as they are outlined in section 5F of the *Criminal Appeal Rules*) are appeals to the CCA against an interlocutory order by a trial judge. They are often urgent appeals as they may affect the sitting of a jury on a trial, or have an impact on a pending trial. If the interlocutory appeal is urgent (for example the appeal is such that the trial cannot proceed until a party has made the appeal to the CCA) the party bringing the application the application should contact Registrar as soon as possible. Parties should provide the Registrar with a realistic estimate of the length of time the appeal is expected to take, the nature of the appeal and why the appeal is urgent. The Registrar will consider the urgency of the application in making suitable listing arrangements.

If the appeal concerns the discharge of a jury at trial level, a party must request a Trial Judge to delay making the order pending the application for leave to appeal. The CCA is able to hear such an application on an urgent basis. The CCA will hear the matter as quickly as possible to minimise inconvenience to jurors, with the goal that the jury will not be delayed for more than 7 days and usually not beyond the Monday following the Trial Judge's decision. As with general interlocutory applications above, parties making the application should notify the Registrar as quickly as possible with a realistic estimate of the length of the appeal, The Registrar will make appropriate listing arrangements and will provide an indication of when the appeal can take place to the Trial Judge. In determining a hearing date for such appeals, counsel's availability will not be a factor in arranging the listing of the appeal.

Bail pending the hearing of an appeal in the CCA Pursuant to s 22(1)(a) *Bail Act 2013* (NSW), the CCA must be satisfied that special or exceptional circumstances exist justifying the grant of bail before bail will be granted pending an appeal to the CCA. It is therefore unusual for the CCA to grant bail pending an appeal. However, in particularly meritorious cases, or where the sentence is going to expire or nearly expire before the appeal is ultimately heard, bail is sometimes granted.

Unless an appellant is on bail, the appellant does not have to attend the CCA. The Notice of Appeal (Form IV) requires you to specify whether the appellant wishes to be present at the appeal. A client in a remote gaol may prefer not to attend court. Attendance by an inmate is generally by AVL. The CCA is reluctant to order the attendance of an appellant in person. This issue would need to be ventilated at the call-over before the Registrar when listing the matter.

Bail pending retrial (after a successful conviction appeal)

Where a conviction appeal is successful and the CCA orders a retrial, bail is often (but not always) granted on conditions similar to those imposed before the original trial pursuant to s67 *Bail Act 2013*(NSW) (presuming your client was on bail before the original trial).

Before the appeal hearing, it is advisable to speak with the Office of the DPP solicitor with carriage to see if an agreement can be reached in relation to bail in the event of a retrial being ordered.

Risk of sentences being increased on hearing of severity appeals

Appellants are often concerned that the CCA will increase their sentence if they appeal.

While the CCA does have the statutory power to increase sentences on appeal (s 6(3) *Criminal Appeal Act 1912*), there is no recorded case of this occurring.

In almost all cases, lodging an appeal against severity of sentence does not make it more likely that the Crown will lodge an appeal against inadequacy of sentence. Crown appeals should only be lodged in cases where the sentencing Judge has made a clear error of principle which must be corrected for the general guidance of sentencing Judges.

Clients should not, therefore, be discouraged from lodging NIAs against sentence with the CCA.

Researching CCA decisions

All decisions from 1999 onwards are available on:

- The NSW Caselaw Website: <https://www.caselaw.nsw.gov.au/>
- The Austlii website, at <http://www.austlii.edu.au/au/cases/nsw/NSWCCA/>
- Practitioners should also check the latest version of the CCA Practice Note - currently SC CCA 1 (v. 3) Court of Criminal Appeal – General (dated 30 September 2013) to ensure they comply with current CCA practice.

Note: Only authorities likely to be needed in the hearing of the appeal should be filed in a list of authorities. Lists of Authority should be submitted no later than 10:00am the day before the hearing and can be submitted by email to cca@courts.nsw.gov.au. At least 4 copies of the list should be provided to the CCA registry. Copies of unreported authorities should be provided with the list of authorities.

Chapter 22 - Briefing counsel - a practical guide

The purpose of this chapter is to provide a practical guide on how to brief counsel in criminal matters.

You will most commonly brief counsel to appear at trial, and some of the recommendations in this chapter presume you are preparing a matter for trial. You may however brief counsel at any stage of proceedings, including to advise on a particular point of law or procedure. The general principles in this chapter should assist with briefing counsel in criminal cases.

Briefing counsel is a continuing process. It is not completed simply by delivering the brief to counsel which has a back sheet around a selection of correspondence and original documents. A poorly put together brief is unfair to both counsel and your client.

Obtaining the prosecution brief

This should be obtained as soon as possible. You will receive the brief from the police officer in charge of the matter, the police prosecutor, or the DPP solicitor with carriage of the matter. You should ensure that you have everything that the prosecution has, and not merely everything the prosecution will build their case upon. Quite often there are statements and documents that the police have in their possession but will not be relying on. These documents may contain important information, and so are essential for the defence to obtain.

District Court and Supreme Court matters

You should compile a list of every statement that you have and send it to the DPP solicitor who is instructing the Crown Prosecutor, accompanied by a request for the DPP solicitor to provide you with copies of any prosecution material not contained in your brief.

Local Court matters

If you are briefing in a Local Court matter, you should generally contact the informant (usually a police officer) with a copy of a list of documents in your brief and ask for any documents that you are missing to be sent to you.

Often, the material from the prosecution will be provided to you in parts, so it is essential that you are organised and able to determine which documents are still outstanding.

Compiling the brief

You should not presume that the prosecution will provide you with all the material that you need to prepare the defence case.

You must actively consider what additional evidence is necessary to put together a thorough brief to counsel, and seek out that evidence. Some suggestions as to how you can go about the task are set out below.

Ask to receive and view material

There is no need to issue a subpoena for material if you can get it simply by asking for it. A reasonable request to the responsible DPP solicitor (for example, for good-quality colour copies of the photographs used in a photo identification parade) will be faster and easier than issuing a subpoena.

In a trial it is likely that the jury will see the video of the ERISP (Electronically Recorded Interview with a Suspected Person). Copies of your client's ERISP will not usually be included in the prosecution brief. You will generally be served only with a transcript of what was said in the ERISP. You should get a copy of your client's ERISP.

You will want to note the accuracy of the transcript, as well as your client's demeanour and appearance, which may be just as important as his/her answers to questions. You will want to go through the ERISP with your client, as well as with counsel.

Issue subpoenas and GIPA/FOI requests

You should consider issuing subpoenas to assist you in examining the prosecution brief. In particular, issuing some subpoenas may be the only way of obtaining significant contemporaneous records. These records may include VKG (police radio) tapes, street surveillance videos, COPS (police computer system) entries, copies of police notebooks and material produced in making application for search warrants.

Many contemporaneous records such as VKG tapes and surveillance videotapes, if not subpoenaed soon after the incident, will be destroyed in the usual course of business within weeks of the alleged event. See generally chapter 7 on Subpoenas.

If your client has been or is currently in custody, it may also be helpful to make a request to the Department of Corrective Services and Justice Health (formerly the Corrections Health Service) for your client's records. Corrective Services records will usually be sought pursuant to a *Freedom of Information Act* request or subpoena, whereas Justice Health will usually release your client's medical records (with your client's written consent) on payment of their prescribed fee.

Meet with your client

Once you have received and read the prosecution brief, you should have a conference with your client.

You should obtain your client's version of events and compare it with the material contained in the prosecution brief. You should ask your client to read the prosecution brief and you should note inconsistencies between your case and the statements of prosecution witnesses. It may be useful for you to jot down in point form a summary

of the crucial points of evidence against your client. This can serve as a reminder for matters you need to raise with your client in the interview.

Your client may be able to identify people who could be called as witnesses. You should contact these witnesses and take detailed statements from them. Where appropriate, subpoenas should be issued to these witnesses to give evidence at the hearing/trial. Subpoenas should be served on all defence witnesses, even if the witness assures you that he or she will attend.

Putting the brief together

Your brief to counsel should be arranged in an order that will assist counsel to study it as easily as possible.

Ideally a brief should also contain a summary of the Crown case in the observations. Do not be afraid to express your opinion on issues of fact or law or to highlight unusual difficulties or unusual aspects of law or the case in general.

If you are aware of authorities that you want to bring to counsel's attention which are not well known, they should be provided in the brief.

If the brief is relatively large, arrange the brief in a folder with dividers separating each enclosed document. If the observations are lengthy and deal with complex matters, a table of contents, numbered paragraphs and sub-headings will make the brief easier to read and refer to. Also, ensure that you provide copies of documents to counsel and that you maintain the originals.

At a minimum the brief should contain:

- An index;
- Your observations about the significant issues in the case;
- Instructions from the accused, both about the substance of the charge(s) and about subjective matters in case there is a guilty verdict;
- Copies of all statements, exhibits and potential defence evidence;
- A copy of the Local Court transcript, if one exists;
- Subpoenas you have issued and any significant documents you have received in response; and
- Any relevant cases and legislation.

Preparing for and assisting counsel at the trial

Your role at the trial is multifunctional. The exact role you are to play will to some extent depend upon the preferences and needs of counsel.

Counsel should utilise their instructing solicitors as an important team player who they will look to for support, guidance and information throughout the trial. You should discuss with counsel how they want you to assist them during the trial.

As you will be supporting counsel, it is important that you carefully monitor the progress of the trial. Ensure that you know where everything is in the brief and that you are able to retrieve it quickly. You should also keep a list of all exhibits as they are tendered.

Keep your mind focused on the issues arising in the trial. In this way you will be able to assist counsel in his/her evidence in chief, cross-examination, and on points of law. Ensure that you take notes of the evidence and other events particularly when counsel is conducting cross-examination. Take notes of not only the witnesses, but also of what the Judge and other counsel say during the trial.

Most importantly, you are the link between your client and counsel. You should be in a position to take instructions from the client in the dock during trial.

Solicitors obtain the respect of counsel by working hard with them to ensure that the matter is prepared properly. If counsel respects your legal ability, and you have a good working relationship, you will provide a formidable legal team for your client.

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