



# Mock Trial Manual 2019

## Mock Trial Manual 2019

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### 1. Mock Trial Competition Grand Final Winners

- 2018 Saint Ignatius' College Riverview
- 2017 Radford College, Canberra
- 2016 St Gregory's College, Campbelltown
- 2015 Chevalier College, Bowral
- 2014 Barker College, Hornsby
- 2013 Chevalier College, Bowral
- 2012 Bega High School, Bega
- 2011 John Paul College, Coffs Harbour
- 2010 Knox Grammar School, Wahroonga
- 2009 Fort Street High School, Petersham
- 2008 Canberra Girls' Grammar School, Deakin
- 2007 Oxley High School, Tamworth
- 2006 Pymble Ladies' College, Pymble
- 2005 St Andrew's Cathedral School, Sydney
- 2004 Merewether High School, Hamilton
- 2003 Newtown High School of the Performing Arts, Newtown
- 2002 Tangara School for Girls, Cherrybrook
- 2001 Newtown High School of the Performing Arts, Newtown
- 2000 The King's School, Parramatta
- 1999 MLC School, Burwood
- 1998 Warners Bay High School
- 1997 MLC School, Burwood
- 1996 Knox Grammar School, Wahroonga

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- 1995 North Sydney Girls' High School
- 1994 Trinity Senior High School, Wagga Wagga
- 1993 Wenona, North Sydney
- 1992 Trinity Senior High School, Wagga Wagga
- 1991 Newcastle High School, Hamilton
- 1990 Blakehurst High School, Blakehurst
- 1989 The King's School, Parramatta
- 1988 Loreto College, Normanhurst
- 1987 Loreto College, Normanhurst
- 1986 Cheltenham Girls High School, North Sydney
- 1985 St Francis Xavier's College, Newcastle
- 1984 Sydney Grammar School, Sydney
- 1983 Kadina High School, Goonellabah
- 1982 St Leo's College, Wahroonga
- 1981 St Leo's College, Wahroonga

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### 2. Competition Rules

#### Conditions of Entry

The competition is open to students in years 11, 10, and 9. It is suggested that Year 9 students are only involved in non-speaking roles.

Each School may enter only one team of six students. The performance of each of the six students will contribute to the total score of the team, and for this reason it is suggested that teams prepare three reserves so that last minute stand-ins are available.

Schools must pay a registration fee of \$180 to take part in the competition.

Each school will bear all individual costs of participating in the competition, including travel and accommodation expenses.

All registered schools must provide an active email address as all correspondence will be electronic. The Law Society of New South Wales (the Law Society) will not be held responsible for a school missing out on updates due to an invalid email address.

The Law Society reserves the right to alter the roster or competition timetable at any time. Notification will be sent to all schools via email.

Mobile phones, laptops and/or tablets are not to be used by students under any circumstance during a trial.

If a school is unable to comply with any of the conditions and wishes to withdraw from the competition, it must do so in writing to the Law Society. Entry fees are non-refundable.

Any disputes between participants, which are unable to be resolved, will be determined by the Law Society. This decision will be final.

The Law Society may arrange for the Mock Trial to be video or audio recorded and will own the recording in perpetuity for use in all format and media.

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### 3. Competition Structure

The case materials for each round will be available for download from the Law Society website. These are password protected and schools will be emailed the password at the commencement of the round.

The competition consists of 10 rounds. The first round is non-scoring; the next three are scored and held in a Round Robin. The final six rounds are conducted on a knock-out basis.

The first four rounds of the competition are run on a regional basis and schools are teamed up with others in their region so travel time can be kept to a minimum.

After round four the top 64 schools will proceed to contest the first elimination round and the winners proceed to subsequent rounds on a knockout basis.

Each round must be completed by the date nominated by the Law Society and results received at the Law Society on or before that date. Extensions of time will only be granted in extenuating circumstances.

Each round is generally held over four weeks – it is suggested that the first two weeks are used for preparation and the third week is used to hold the trial. Schools should arrange this date with the Magistrate as soon as possible, as *extensions will not be granted*. It is recommended that the trial be organised for the third week, so there is time for a postponement in an emergency.

Effective presentation requires adequate preparation of all facets of your case as a team, including anticipation of the opponent's case, research of any technical matters, identifying likely issues and facts that may be raised in cross-examination of your witnesses.

Any team that cannot complete a round by the due date will forfeit the round. No points will be awarded for a forfeit. If a school must forfeit a round, the school should contact the Law Society and the opposing team as soon as possible.

In the event that a school forfeits a third time, the team will be disqualified. Students on this team will not receive Mock Trial Certificates.

Each trial should take between two to three hours.

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### 4. Trial Organisation

Schools must access the roster and script online. This will inform them of their opposing team and the allocation of Prosecution and Defence for their trial. The Prosecution team will receive an email confirming the details for the allocated magistrate.

Schools must be prepared to travel. Every effort will be made to match schools with the closest opposing school and halfway venues should be used if the distance is too great. Trials may be held at schools, local Courts or council chambers.

The host school (plaintiff/prosecution) is responsible for organising the venue and coordinating with the Magistrate. However, the plaintiff/prosecution team must consult with the defence team in relation to venue, time and date.

The following procedure should be followed:

1. Upon receipt of the mock trial material, contact the allocated Magistrate in the first week to check on available dates (if communication is via email, please copy the opposing team in on the correspondence);
2. Schools must attempt to organise the trial at a time suitable for the Magistrate. If the schools cannot agree on a time with the Magistrate then the Law Society should be notified immediately;
3. Contact guest (defence) team, give them the Magistrate's available dates and agree on a mutually convenient date;
4. Contact the Magistrate and confirm the date.

Schools must be flexible as to trial dates and times. Volunteer lawyers have busy schedules and students have many school commitments. Flexibility is the key in identifying convenient trial times.

In the event of a Magistrate cancelling the mock trial at the last minute, the Law Society will endeavour to find a replacement Magistrate; however, the trial may need to be postponed. If there is not time for a postponement the two teachers will be required to judge the trial together. The Law Society should be contacted as soon as possible when this is the case so additional materials for the markers can be provided.

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### 5. Roles and Responsibilities

#### 5.1 Schools

One member of staff must remain with the team at all times during the Trial. It can be any member of staff and does not have to be the staff member in charge of the school's mock trial team.

Schools are expected to meet and greet the Magistrate upon arrival at the trial venue. Refreshments are always welcome.

Prior to commencement of the trial, teachers have the opportunity to raise any issues.

Teams must not access the witness statements of the opposing team prior to the trial. This action may lead to disqualification.

Once the trial has commenced, students may not be assisted other than by the instructing solicitor and the other barrister. This includes verbal and non-verbal prompting. When preparing the closing address, there must be no assistance from coaches, teachers, any other team member or members of the audience. The only people allowed at the bar table are the solicitor and the two barristers.

Disputes or arguments with Magistrates are not permitted at any time.

#### 5.2 Magistrates

Take the time to review the manual and case material before each trial. Only refer to the materials provided by the Law Society.

Where possible, Magistrates are encouraged to conduct the trial in the third week of the allocated time. Magistrates are required to score each Mock Trial (please see "Scoring Each Mock Trial" for further information).

Magistrates are reminded that Mock Trials are intended to be educational and to provide positive feedback.



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### 6. Mock Trial Team Participants

The Prosecution/Plaintiff team shall consist of:

- 1st Barrister
- 2nd Barrister
- Instructing Solicitor
- Two witnesses
- Magistrate's Clerk

The Defence team shall consist of:

- 1st Barrister
- 2nd Barrister
- Instructing Solicitor
- Two witnesses (Defendant & Other)
- Court Officer

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### 7. Mock Trial Team Roles

#### 7.1 Magistrate's Clerk

The Clerk is responsible for:

- Meeting and greeting the Magistrate upon arrival at the trial venue;
- Ensuring the score sheet and solicitors' pre-trial notes are provided to the Magistrate before the commencement of proceedings;
- Calling the case;
- Keeping the time sheet and noting the time when each cross-examination and examination-in-chief commenced, ended and its duration. The time-sheet should be handed to the Magistrate during the mid-trial adjournment;
- Indicating to the Magistrate when the time limits have been reached - a bell or similar should be used;
- Keeping the list of objections made by each barrister and noting the objection, the nature of the objection and the Magistrate's ruling. The objection sheet should also be handed to the Magistrate at the mid-trial adjournment;
- Exchange of the statements as each witness is called by the Court Officer.

The Clerk is judged according to his/her performance of these duties.

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### 7.2 Court Officer

This role involves:

- Opening the Court;
- Closing the Court;
- Maintaining order in the Court;
- Calling the witness/s. The Court Officer must give the order of each witness as they appear. There is no choice in the order of being a witness;
- Swearing the witness;
- Showing documents to the witness as required by the barristers;
- Showing documents to the barrister's opponent as required;
- Handing documents to the Magistrate's Clerk for marking as required.

The Court Officer is judged according to his/her performance of these duties.

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### 7.3 Solicitor

The role of the instructing solicitor involves co-ordinating the preparation of the case and assisting the barristers during the hearing of the case. The solicitor should also assist in the preparation of the closing address.

The solicitor's pre-trial notes should be a maximum of two single sided A4 pages, no smaller than size 11 font. Notes that exceed this size will be penalised.

As preparation for the case, the solicitor should show that they are well prepared by identifying the:

- Key facts;
- Relevant issues;
- Areas for cross-examination;
- Possible objections and responses (in brief); and
- Relevant legal principles.

The solicitor should assist the barristers during the trial by recording the evidence given and pointing out important matters for cross-examination and the closing address.

Solicitors are judged on:

- The quality of the pre-trial notes; and
- Their active participation in the proceedings.

The solicitor's notes must be prepared by the student/s.

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### 7.4 Barrister

The first barrister for each team will announce their appearance and give the opening address. S/he will then examine-in-chief the first witness. The first barrister for the opposing team will then cross-examine.

Similarly, the second barrister will examine the second witness with the opposing second barrister cross-examining.

Once an objection has been made, and points awarded, if the objection is made correctly, the remainder of the evidence upon which the party relies is allowed to continue to completion. However, under the rule of *Browne v Dunn* it should be disallowed.

Barristers may make an objection if the opposing barrister is harassing or arguing with the witness. This usually occurs during cross-examination. Only the barrister responsible for examining-in-chief or cross-examining the witness may object to questions put to the witness or evidence given by the witness.

The Magistrate will assess their performance on many aspects of their role, including:

- Clear and concise introduction to the case, including overview of the charge(s)/claim and the evidence to be given;
- Clarity of expression and voice, poise, confidence etc;
- Proper introduction of evidence;
- Questioning in accordance with rules of evidence during 'examination-in-chief';
- Cross-examination directed at relevant parts of evidence in chief;
- Avoidance of unnecessary repetition of evidence in chief;
- Cross-examination on relevant points of own case;
- Appropriate objections/making considered responses to objections;
- Summarising evidence and issues of fact accurately in the closing address;
- Making appropriate submissions on issues of law in the closing address; and
- Persuasion.

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### 7.5 Witness

A witness must appear in the order in which they appear in the script. There is no choice in the order of witness. They may act in character, but must stay in usual school attire.

Three copies of each witness statement should be prepared and available to be given to the opposing side so that each team has a copy in Court.

The witness gives sworn evidence for the parties to the action (plaintiff/prosecution or defence) and the role of the witness is to give evidence on what they have seen or heard, relevant to the case.

The witness statements are included amongst the material prepared by the Law Society and must be adhered to strictly. There must be no deletions and no additional material used such as maps, diagrams, plans, or exhibits etc. Only the material provided by the Law Society is permitted.

In examination-in-chief the witness must strictly adhere to their statements however during cross-examination scope is given for the witness to expand the script.

The witness/es provide most of the information to be used in the trial and their accurate recall is important. During examination-in-chief the witness gives his or her evidence orally.

All witnesses, except for the Defendant in a criminal trial, must remain outside the court room until they are called to give evidence. Once the witness has been given his/her evidence s/he must not talk to or approach a witness who has not given evidence. The witness may remain in the court room in the visitors' gallery.

The performance of the witness is marked on several areas, including:

- Full and accurate recital of evidence-in-chief;
- Presentation; clarity of expression, voice, poise etc;
- Apparent preparation for cross-examination; and
- Ability to cope with cross-examination.

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### 7.6 Scripts

The Scripts are the copyright of the Law Society.

No amendments to any material can be made by either side, unless instructed by the Law Society.

Teams which excel in arguing the law, examining the witnesses competently, and who present a very persuasive case, may appear unequal. However, the team that wins the case is not necessarily the winner of the Mock Trial.

The law to be applied in the Mock Trial is included within the script. The aim is to give the participants experience in the operation of the justice system, not to provide technical training in law.

If schools or volunteers find errors in the script, please contact the Law Society.

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### 8. Scoring

#### 8.1 Scoring each mock trial

At the conclusion of the trial, teachers from both teams must check and initial the additions of the Magistrate. Any discrepancy must be brought to the attention of the Magistrate immediately. If the Magistrate agrees to amend the score sheet it must be done before the Mock Trial decision is delivered.

Once the decision is delivered, there will not be any opportunity for any school team to object or seek alteration to the scoresheet. The decision of the Magistrate is final and no correspondence will be entered into.

The scale for the awarding of points is set out in the scoresheet below:

Not Effective		Fair		Good		Very Good		Excellent	
1	2	3	4	5	6	7	8	9	10

Points will be deducted if a:

- Witness adds, deletes or changes material in the witness statement;
- Team/barrister goes beyond the time limits;
- Team member is prompted by another person;
- Team member argues with the Magistrate; and
- Teacher/coach/parent offers assistance at any time during the trial or while preparing for the closing address.

It is the responsibility of the winning team to return *the front page* of the score sheet by email to the Law Society by the given date.



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### 8.2 Scoring the overall competition

During the Round Robin, teams will be awarded the following scores:

- 3 points for a win
- 1 point for a loss
- 2 points for a bye
- 0 points for a forfeit (if not disqualified)

No draws are allowed – Magistrates must use the “Team” box to give an extra whole point, no half points allowed

When a school is allocated a bye in the scoring rounds, 2 points will be allocated.

When a school forfeits it will receive 0 points and no score. The opposing team will be given 3 points for a win.

After the Round Robin – trials continue to be scored and schools move forward through to the elimination rounds.

Only the 64 highest scoring teams will move into the Elimination Rounds. In the instance that the 64<sup>th</sup> and 65<sup>th</sup> schools end the Round Robin with the same overall scores, only one team may progress determined by how many trials are completed and won. Unfortunately, forfeits will not be considered a ‘completed’ trial.

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### 9. Rules of Evidence and Grounds for Objection

#### 9.1 Relevance

- 9.1.1 Only relevant evidence is admissible. "Relevant" means the evidence proves or tends to prove a fact that is in dispute. For example, in a case involving a collision of two motor vehicles, the speed that the vehicles were travelling would probably be relevant, but what the drivers ate for breakfast would probably be irrelevant.
- 9.1.2 All irrelevant material is inadmissible.
- 9.1.3 The mere fact that evidence is relevant does not make it automatically admissible. The application of the other rules of evidence may result in the evidence being ruled inadmissible.

#### 9.2 Opinion

- 9.2.1 This rule relates to conclusions or views formed by witnesses based on facts that they have observed. Opinions may not be given in evidence. For example, the observation by a witness that another person was red in the face and shaking his fists would be admissible, but the conclusion or opinion that the person was very upset or was angry with him would not be admissible.
- 9.2.2 Where an objection is based on opinion, the witness may give evidence about the facts, which lead to the opinion, if the witness is qualified to give the evidence.

#### 9.3 Hearsay

- 9.3.1 Hearsay evidence is indirect evidence and generally inadmissible, Hearsay refers to what a witness heard someone else say. The purpose is to examine the evidence and to try and prove or disprove what the person said was in fact true. For example: "I heard Mrs Hall say, 'I saw Jo Burns driving the car.'" There are three reasons for the hearsay rule: Hearsay is not the best evidence - Mrs Hall should give her own account to the court on oath where she can be cross-examined; it is "second-hand" evidence, so it may have changed in the re-telling; and Hearsay evidence is easy to concoct and very difficult to disprove.

#### 9.4 Bad Character

- 9.4.1 Evidence of bad character by a defendant may not be led by the prosecution/plaintiff. Evidence of good character may be led by either party, but only if it is relevant. If the defendant raises his/her good character, or attacks the character of a prosecution/plaintiff witness, the prosecution/plaintiff may cross-examine the defendant on his/her bad character.

#### 9.5 Direct Speech

- 9.5.1 Conversation should be recited as it occurred in direct speech and not summarised by the witness. For example: Brian said to me, "Could you please drive? I think I have had too much to drink". This is the correct way to give evidence. Not by stating; "Brian asked me to drive because he had had too much to drink".

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- 9.5.2 Where an objection is based on indirect speech, the witness may convert the evidence to direct speech, but only after the objection is made.

### 9.6 Leading questions

- 9.6.1 A leading question is one in which the form of the question suggests the answer. For example: "Was the car blue?"
- 9.6.2 Leading questions are only objectionable in examination-in-chief, for the purposes of the Mock Trial. They are permissible in cross-examination.

### 9.8 Double questions

- 9.8.1 Double or multiple questions are objectionable because they cannot necessarily be answered with a single answer. For example: The answer to the first part of the question might be 'yes', while the answer to the second part of the question might be 'no'.

### 9.9 Failure to comply with the rule in *Browne v Dunn*

- 9.9.1 The rule in *Browne v Dunn* requires that unless prior notice has been given as to the intention of the cross-examiner to rely on evidence which is contradictory to that given by the witness being cross-examined, the cross-examiner must first put to the witness the nature of the contradictory evidence.

### 9.10 Harassment of the witness

- 9.10.1 Barristers may make an objection if the opposing barrister is harassing or arguing with a witness. This usually occurs during cross-examination.

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### 10. Hints

#### 10.1 Opening Address

Before any evidence is taken each first barrister will make an opening address to provide the Magistrate with a general idea of the case. This is established by identifying the issues between the parties (by reference to the charge sheet in criminal cases or the pleadings in civil cases). In the opening address it is usual to present the matters to be proved and how they are going to be proved by briefly summarising the nature and extent of the evidence to be called. The address should refer to any important facts and relevant background information that will assist the Magistrate to understand the evidence as it is presented. The opening address should not include reference to any case law precedents, and marks may be deducted if caselaw is quoted in the Opening Address.

#### 10.2 Examination-in-Chief

The first step in the taking of evidence is called examination-in-chief. This is often quite challenging, as the purpose is to get the witness to tell his/her story. This is done by bringing out everything the witness can tell to prove the case, without suggesting to the witness what to say. A way to get the witness to tell his/her story without leading him/her, is to start your questions with words such as 'who, what, when, where and how'.

Leading questions may be asked about matters, which are not really in dispute. For example, in a collision case, the time and place of the collision may not be in dispute. Such preliminary leading questions enable the witness to be taken quickly to the real matters in dispute.

#### 10.3 Cross-examination

After a witness has been examined-in-chief by his/her barrister, the opposing barrister then cross-examines this witness.

The aim of the cross-examination is to test the accuracy of the evidence first given or to establish facts, which support the party's case. The barrister can also test the credibility of the witness, that is, whether he or she should be believed. Testing credibility covers every aspect. In cross-examination, leading questions may, and in fact should, be asked.

To be a successful cross-examiner, the barrister must have an objective. He or she must know why particular questions are to be asked. Merely to go on a 'fishing expedition' is time wasting and damaging to your case.

In seeking to disprove the other party's case, the cross-examiner usually attacks two areas of witness evidence, namely:

- The competence of the witness to give the evidence, or the quality of such evidence. For example:
  - o Lack of perception to give the evidence of what was seen, such as capacity to see, opportunity to see;
  - o Lack of accurate recall - whether s/he was affected by alcohol or drugs and could not be expected to be thinking clearly; and
  - o Lack of narrative ability - whether s/he is from a culturally and linguistically diverse group.

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- The credibility of the witness, because of:
  - o Bias, interest, prejudice - whether he or she is a close friend of the plaintiff/defendant;
  - o Prior convictions; moral character - whether s/he has a reputation for lying or has a number of convictions for dishonesty; and
  - o Prior inconsistent statements such as evidence given in a written statement which is different from the evidence now given at the trial.

It is not easy to get a witness to admit he or she is exaggerating, lying or could not see a certain event. A deduction that the witness statement is not so damaging comes from leading him or her to this conclusion by a step-by-step process of specific questions.

An example may involve 'driving in a manner dangerous' case. The witness has said that the driver was driving very fast - about 100 km per hour. By asking a series of questions about weather conditions, traffic on the road, lack of curves in the road, presence of stop signs, etc., the effect of the evidence of speeding might be minimised. Because 100km per hour at 3.00pm near a school is very different than 100km per hour at 3.00am on a freeway.

In cross-examination, the barrister should avoid:

- Quarrelling with the witness;
- Bullying the witness to admit that s/he is wrong; and
- Asking the witness a number of questions at the same time, without allowing the witness to answer each question, one at a time.

### 10.4 Closing Address

The purpose of a closing address is to summarise your case, highlight the evidence that supports your case, and make submissions on the principles of law that are relevant to the case.

A systematic way to do this is:

- Identify the relevant issues - a plaintiff or prosecutor will limit the issues to the bare minimum to be proven and then show how the evidence brought before the Court proves their case. A defendant's barrister might take the opposite position, and create as many issues as possible and therefore cast doubt as to whether the plaintiff or the prosecution has proven their case.
- Make submissions on the relevant law - highlight prior decisions that favour your case, and show how prior decisions apply to the proven facts of your case. Discuss the prior decisions that favour your opponent's case and distinguish those decisions that show why those case/s should not apply to the facts of your case.

It is not necessary to quote case citations unless the Magistrate requests you to do so.

If there is conflicting evidence on a particular point from both sides which cannot be reconciled, the barrister must persuade the Magistrate as to why his/her witness/es should be believed in preference to the witness/s of the other party.

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### 10.5 The art of persuasion

Persuasion in a court or tribunal depends on good communication. If you want to communicate you have to convince a person to listen to you. Remember that first impressions are valuable - so start confidently - make sure your voice is well modulated and able to be heard - and do not speak too quickly.

Try to maintain good eye contact with the witness and the Magistrate when addressing both.

- Argue succinctly;
- Keep closely to what you are trying to prove or disprove;
- Do not indulge in repetition so that you become boring;
- Do not argue with a witness; and
- Try not to develop irritating habits; For example: Saying, 'I see' every time a witness answers a question, or saying 'I put it to you'.

Show courtesy to the Magistrate, witnesses and the lawyers of the other side.

### 10.6 Proving your case

Giving careful and close attention to the elements in opening and closing addresses will significantly improve their quality.

The strength of the evidence to prove or disprove a case is called the 'the burden of proof'.

In a civil case the plaintiff is required to prove the case *on the balance of probabilities*, that is, by satisfying the court that their version of the facts is more probable than not.

In a criminal case the prosecution has to convince the Magistrate that the defendant is guilty *beyond reasonable doubt*. The prosecution bears a heavier burden of proof than a plaintiff in a civil case. The defendant sometimes has the burden of proving things.

For example:

If a witness says they were somewhere else at the time the offence was committed they have to prove this alibi; or if a statutory defence is provided for a breach of statute law.

If the defendant only has to prove an alibi or statutory defence, they must do so on the balance of probabilities. It is only the prosecution in a criminal case, which must prove the case 'beyond reasonable doubt'.

What the prosecution (in a criminal case) and the plaintiff (in a civil case) have to prove are called the "elements". These elements are derived from the particular Acts of Parliament or case law. As far as possible these matters for proof will be drawn to the attention of both sides in the case material for each round of the Mock Trial Competition.

## Mock Trial Manual 2019

### 11. Court Layout

Magistrate's Clerk

Magistrate

Court Officer

Witness

Defence

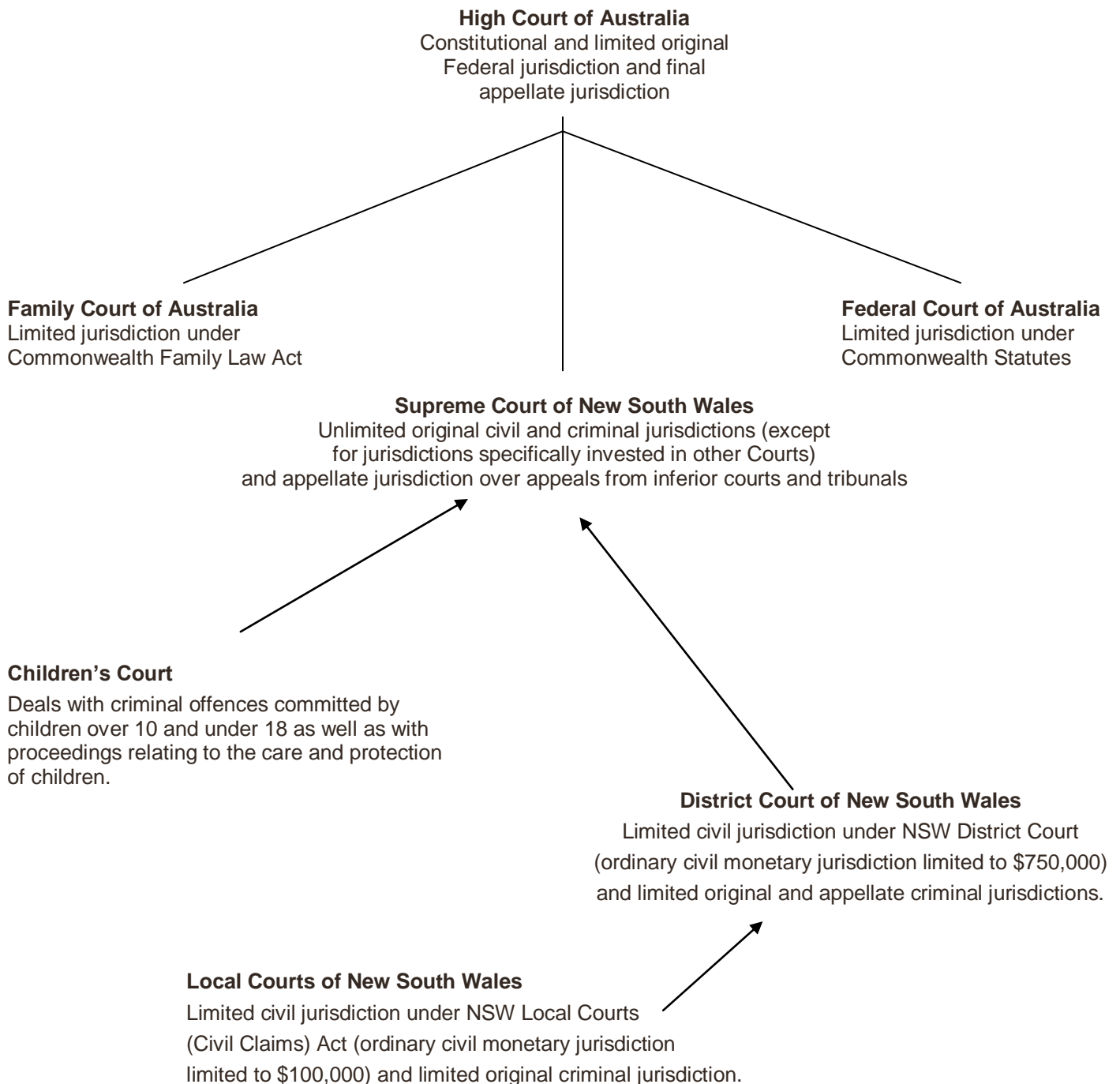
Barrister   Solicitor   Barrister

Plaintiff/Prosecution

Barrister   Solicitor   Barrister

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### 12. Court Hierarchy





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### 13. General Precedents

The following extracts of precedents and those provided in the case material for each trial may be used. Only these extracts are used for the Mock Trial.

*Browne v Dunne* (1894) 6 R 67 is the leading case in relation to cross-examination and the requirement of giving witnesses an opportunity to respond to an allegation made against them.

Lord Chancellor Herschell said at page 70 – 71.

... I cannot help saying that it seems to be absolutely essential to the proper conduct of a case, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, And then, where it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making an explanation which is open to him; and, as it seems to be, that is not only a rule of professional practice in the conduct of a case, but it is essential to fair play and fair dealing with witnesses.

On the application of the rule in *Browne v Dunn*, the following extract may be used: *Allied Pastoral Holding Pty Ltd v Commissioner of Taxation* (1983) 1NSWLR 1.

Hunt J said at page 16.

It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross-examiner's intention to rely upon such matters, it is necessary to put to an opponent's witness in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences to be drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explanation or to contradict the inference sought to be drawn. That rule of practice follows from what I have always believed to be rules of conduct which are essential to fair play at the trial and which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67.

On the issue of the failure of a party in civil proceedings to call witnesses whose evidence is relevant or to produce material documents, the following extract may be used: *Allied Pastoral Holding Pty Ltd v Commissioner of Taxation* (1983) 1 NSWLR 1.

Hunt J said at page 13:

The inference available from such failure (where that failure is unexplained) is... that the evidence of such witnesses or the contents of such documents would not have helped that party's case: *Jones v Dunkel* (1959) 101 CLR 298 at page 321. That unexplained failure may also be taken into account in determining whether the tribunal of fact should draw any other inference which is otherwise open upon the evidence and which may have been contradicted by that witness or document; *ibid*, at pp 308, 312, 319. In either case, the result of such unexplained failure may well be fatal to that party's case. Particularly might this be so where ... the facts are usually peculiarly within the knowledge of that party. But the tribunal of fact is not bound to draw either inference.

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On the issue of the burden of proof in criminal cases, the following extract may be used: *Woolmington v Director of Public Prosecutions* (1935) AC 462.

Lord Chancellor Sankey said at page 481:

Throughout the web of English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case there is reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

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### 14. A Basic Guide to Professional Ethics, Courtesy and Conduct

Barristers and solicitors abide by standards of conduct, courtesy and ethics that must be observed for the proper administration of the legal system in New South Wales. Some of the more important ones are listed below.

Barristers are required to assist the Magistrate honestly and must not mislead the Court by presenting evidence that they know to be untrue.

A barrister should not argue with the Magistrate. S/he is allowed to make submissions firmly but must do so courteously. A common phrase used is 'with respect...I submit ...'

A Magistrate in the Local Court is referred to as 'Your Honour'. It is common to use this method of address fairly frequently, for example, when beginning any statement to the Magistrate or when replying to a question.

Whenever a barrister is speaking to the Magistrate he or she must stand. When the opposing barrister is speaking the former barrister must sit. This is important but can be a little tricky when making objections in examination-in-chief or cross-examination.

In New South Wales courts, barristers should remain behind the bar table and not wander around the court room (as is often seen on some television programs). Should a barrister wish to approach the witness in the witness box, permission should be asked of the Magistrate to do so.

Barristers must accept the Magistrate's ruling even though they may disagree with it. If a reply is called for it is usual to say, 'If your Honour pleases'.

If you are quoting reports in cases, do not use abbreviations. If, for example you want to quote a case of *Smith v Jones* reported as (1942) 65 CLR 473 say, 'volume 65 of the Commonwealth Law Reports at page 473'. If barristers are referring to what a particular judge said in a case, they should refer to the judge by his/her full name, for example, 'Justice Williams', not 'Williams J'.

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### 15. Glossary of Legal Terms

#### 15.1 Adjournment

When a case is not ready to proceed on the day that it is listed, it might be postponed ("adjourned") to another day. Also if court proceedings have to be stopped for any reason they are "adjourned". If a criminal matter is adjourned and the defendant has not been granted bail he or she is "remanded" to appear on the adjourned day.

#### 15.2 Bail

When a person is charged with a criminal offence he or she will usually remain in custody until the hearing of the case unless a Magistrate grants bail. This requires a formal promise that he or she will appear at the hearing. As a guarantee that he or she will appear, a sum of money may have to be paid to the court that is refunded if the defendant appears at the hearing but is forfeited if he or she does not.

#### 15.3 Barrister

In New South Wales, a barrister is a member of the Bar Association and who has a practicing certificate to advocate. A barrister specialises in the preparation and presentation of cases at court.

#### 15.4 Civil Proceedings

Proceedings brought by the Crown or a private person to redress a wrong that has been suffered and is not covered by a law that imposes a penalty. The most common civil proceedings involve recovery of debts, claims for damages for injury to a person or property and claims relating to breach of contract.

#### 15.5 Common Law

Law is made in two ways. The Parliament passes laws (which are known as statute law or legislation), and the law is interpreted and developed by judges based on previous cases (known as the Common Law).

#### 15.6 Committal Proceedings

When a person is charged with a serious criminal offence a Magistrate considers all the evidence presented by the prosecution. The defendant does not usually present his or her side of the story at these committal proceedings, reserving his or her defence until the trial.

#### 15.7 Contract

A contract is an agreement between two or more parties that is enforceable. Generally, to be enforceable, there must be an offer by one party, an acceptance of that offer by the other party and "valuable consideration". Valuable consideration is what is given or done in return for the promise. The usual consideration given is money, goods or some promise to do something or refrain from doing something. A contract may be oral or in writing.

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### 15.8 Criminal Proceedings

Proceedings usually brought by the Crown (often the police) where there has been a breach of the law; a penalty is imposed under an Act for that breach. The *Crimes Act 1900* (NSW) covers many crimes including murder, manslaughter, robbery, stealing and assault. However, proceedings may be brought for a statutory offence (that is, breach of statute law).

### 15.9 Defendant

A defendant is a party against whom an action or charge has been brought. Once a defendant in criminal proceedings is committed for trial before a judge and jury, he or she is referred to as "the accused".

### 15.10 Equity

Historically, the common law (made by judges) became entrenched in formal rules that could give rise to injustice. A system of equity made by judges came into being which provides remedies where it would be unjust or unfair to enforce the common law. Cases now dealt with in the Equity Division of the Supreme Court include claims against a person holding property for others (trustees), claims to stop a person invading another's legal rights (injunctions), and claims requiring a person to carry out their contract (specific performance).

### 15.11 Evidence

The information put before the judge or Magistrate, that supports the truth or existence of a fact, for the court to consider when making a decision. Evidence may be oral (from the witness) or contained in documents or objects.

### 15.12 Exhibits

Things (documents, articles of clothing, equipment, etc) that are tendered to the Court and admitted as evidence by the Judge or Magistrate.

### 15.13 Judge

A person appointed to determine disputes between parties. In New South Wales judges determine disputes in most courts, which include the District Court, certain Tribunals and boards. Judges are addressed as "Your Honour".

### 15.14 Jury

Members of the community who determine questions as to what happened (fact). There are twelve jurors in a criminal trial and usually four in civil proceedings.

### 15.15 Magistrate

A person who presides over the Local Court. Local Courts deal with small debts, less serious crimes, inquests into violent and unexplained deaths and hearings as to whether a person may have committed a serious crime (see Committal Proceedings). Magistrates are addressed as "Your Honour".

### 15.16 Mens Rea

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An intent to commit a crime. (A crime is an offence for which a penalty is prescribed). Mens rea is an essential element of all common law offences, but not always of statutory offences.

### 15.17 Negligence

Negligence involves the failure of one party to exercise proper care towards another party; resulting in the other party suffering an injury or loss. The monetary compensation for the injury or loss is referred to as "damages". Contributory Negligence refers to a situation where even though the first party has been negligent, the other has not shown sufficient care to protect him/herself and by these actions contributed to his/her own injury or loss.

### 15.18 Plaintiff

A person who commences a civil action.

### 15.19 Precedent

A principle established in a past case. A Judge or Magistrate is bound to follow a decision in a previous case (in which the facts are similar) where the court handing down the decision is higher in the court system. A hierarchy of courts is set out in Part 12. In some cases NSW courts follow English decisions or decisions of superior courts outside the New South Wales court system. Sometimes a precedent of another court that is not binding will be followed by the court on the basis that it is persuasive because of the status of the court or the similarity of the law.

### 15.20 Prosecutor

A person who presents evidence and conducts the case against an accused person in criminal proceedings. In the Local Court, s/he is often a specially trained member of the police force. In criminal trials s/he is called a 'crown prosecutor' appointed from the ranks of practising barristers and solicitors.

### 15.21 Solicitor

A person who is legally qualified and holds a practising certificate, and trained to handle legal matters or instruct barristers. Some solicitors specialise in court appearances, however, some solicitors handle other matters that usually do not require appearance in superior courts (for example, at the Supreme Court, Federal Court and High Court).

### 15.22 Trial

This word is commonly used to cover all legal proceedings. However, it generally refers to a criminal case, which is heard by a judge and jury.

### 15.23 Witness

A person who can give evidence in relation to the facts in issue during legal proceedings.