A Practitioner’s Guide to Criminal Law

Third Edition

A project of the
NSW Young Lawyers
Criminal Law Committee
http://criminal.younglawyers.com.au
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How to use this book

*A Practitioner’s Guide to Criminal Law* is aimed at junior members of the profession and practitioners who do not regularly practise in criminal law.

The focus of the book is on the practical aspects of criminal procedure, particularly from the defence perspective. This book is not intended to be a comprehensive guide on any topic covered.

The law is stated as at November 2004. Criminal law is always changing. Practitioners must always update the law referred to in this book for themselves.

Cases and legislation are referred to throughout this book. There can never be any substitute to going directly to these original sources when preparing a criminal matter.

Lester Fernandez
Chair
NSW Young Lawyers Criminal Law Committee

22 November 2004
About NSW Young Lawyers and the NSW Young Lawyers Criminal Law Committee

NSW Young Lawyers (http://www.younglawyers.com.au) is a professional organisation and division of the Law Society of New South Wales. It represents lawyers who are under 36 years of age or who have been admitted to practise for less than five years, and law students. All lawyers in New South Wales fitting this description are automatically members of NSW Young Lawyers (NSWYL).

Some of the goals of NSWYL are:

- To further the interests and objectives of lawyers generally, and in particular, young lawyers in New South Wales;
- To stimulate the interest of and promote the participation of young lawyers in the activities of lawyers in general;
- To promote the benefit of the community and disadvantaged groups in general.

This book has been written by members of the NSWYL Criminal Law Committee. The Committee is made up of lawyers and law students who have an interest in criminal law. The Committee is involved in a wide variety of projects, such as writing law reform submissions, speaking to disadvantaged school students about their legal rights, and organising CLE seminars.

New members are always welcome. For further information on the NSWYL Criminal Law Committee, visit our website (http://criminal.younglawyers.com.au) or contact:

Poppy Drekis, NSWYL Executive Officer, on (02) 9926 0269 or at ptd@lawsocnsw.asn.au or
Lester Fernandez, Chair of the NSWYL Criminal Law Committee, at crimlaw.chair@younglawyers.com.au
Introduction and acknowledgements

A Practitioner’s Guide to Criminal Law is a project of the NSW Young Lawyers Criminal Law Committee. I thank the following for their contribution to, or support of, the third edition of A Practitioner’s Guide to Criminal Law.

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- Mr Nicholas Cowdery AM QC, Director of Public Prosecutions for New South Wales and Patron of NSW Young Lawyers.
- The NSW Young Lawyers Office Bearers for 2004—Mary Snell (President), Nathan Laird (Vice President) and Scott Alden (Treasurer).
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Lester Fernandez
Chair
NSW Young Lawyers Criminal Law Committee
20 November 2004
Credits

Managing editor and coordinator
Lester Fernandez

Editors
Annie Taylor and Simon Healy.

Chapter authors

Contributors

Many thanks to all from the editors. Thanks and apologies to anyone who may have been inadvertently omitted.

Illustrations
Andrew Joyner
www.andrewjoyner.com

Cover design
Greg Barlow, graphic designer, Law Society of NSW.

Staff of NSW Young Lawyers
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Foreword

This publication has become an indispensable guide for those first advising or representing suspects or accused persons, for those who do it infrequently and for those who wish to check that recent developments have not overtaken them by stealth. In short—it is a handy reference for every criminal law practitioner.

It provides guidance to all stages of the proceedings – from first attendance at the police station through to final appeal.

The first edition was published in 2002 and the second in June 2003. Criminal law and procedures—legislation, court practices, caselaw—are constantly changing and for this edition all chapters have been updated and some completely rewritten. There are two new chapters: Tips on Local Court Criminal Practice; and Preparing a Local Court Defended Hearing.

The first edition won the 2002 national Australian Young Lawyers Committee Award in the Professional Issues category. The second edition of this work was fully distributed in seven weeks and won the 2003 national Australian Young Lawyers Committee Award in the Professional Issues category. The standard of this edition is even higher.

The New South Wales Young Lawyers are to be congratulated once again for the timely production of a valuable, practical reference book that should be on the shelves of and regularly consulted by all practitioners in the (sometimes bewildering and always exacting) criminal jurisdiction.

N R Cowdery AM QC

Director of Public Prosecutions, NSW

Patron, NSW Young Lawyers, 2004
Part 1
Introduction
Overview and checklist of what to do on charge of a client

Introduction

This Chapter is a basic guide to things you should ensure you do when a client faces criminal charges. It does not set out every step you will need to take between when a client is charged and their case is finished.

The criminal law is complex. The possibilities of what might happen are too numerous to list all options. In particular, this Chapter does not deal with District Court trials or sentences once a person has been committed up to the District Court (see steps 6 and 7 to determine whether your client will be committed).

Checklist

1. Get the Court Attendance Notice (CAN), facts sheet and (if available) criminal record from police, DPP or from client.

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? If so, see chapter 3 on how to prepare and make a bail application.
      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).
   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, in the same way that they apply to applications for bail.

4. Find out—is your client an adult or a child (under 18 years of age when offence was allegedly committed)?
   a) Adult—continue with step 5.
   b) Child—go directly to Part 5 (chapters 13–15) of this book. Different procedures apply to child defendants. This checklist is written for adult defendants.

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1 All defendants are now brought before the Court to face a criminal allegation by Court Attendance Notice (CAN). For simplicity, the term ‘CAN’ is used interchangeably with ‘charge’ in this chapter.
5. Find out—is your client brought before the Court by a warrant (as opposed to a fresh CAN)?
   a) Yes:
      i. Check whether, at the time the warrant was issued, your client was convicted in his/her absence of the alleged offence. 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) to determine whether it is a warrant issued under s 25(2) of the Crimes (Sentencing Procedure) Act 1999.2
      ii. If so, you will need to take instructions on whether to make an application to annul the conviction. See chapter 24.
      iii. If not, you will need to ensure that you obtain a copy of the original charge sheet and facts sheet from when your client was first brought before the court.3
   b) No—continue with step 6.

6. Is the alleged offence against Commonwealth or State law?4
   a) Commonwealth:
      i. Step 7 generally does not apply (it applies to State offences.)
      ii. 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).
      iii. 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(d).
      iv. 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) State:
      i. Go to step 7.

7. Find out—is the client’s most serious charge summary, indictable that can be dealt with summarily, or strictly indictable?
   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.6

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2 An alternative way of checking is to seek access to the original Court bench papers from the Court date when your client did not attend and a warrant was issued. You should not trust that your client’s criminal record (especially if produced by way of a non-fingerprinted ‘bail report’) will accurately reflect whether or not your client was convicted in his or her absence.

3 Only a small minority of warrants are genuine first instance warrants, which are issued where the police have filed a CAN against a defendant who cannot be located (and there is no realistic alternative means of bringing the defendant to court): see s 181(2) of the Criminal Procedure Act 1986 (NSW). Unfortunately, the words ‘first instance warrant’ are frequently written inaccurately on CANs, police bail reports and other documents in relation to cases where no first instance warrant has been issued. Only in the case of a genuine first instance warrant will your client not have had a previous court date.

4 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 and prohibited drug importation.

5 Descending order of seriousness is: strictly indictable; Table 1; Table 2; and summary. The categorisation of where a charge falls in these 4 types of charge, not the maximum penalty for the offence, is what matters for this purpose.

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Chapter 1: Overview and checklist of what to do on charge of a client
ii Take instructions and be in a position to enter a plea on behalf of the client.

iii Go to step 8.

b) Table 2 charge (indictable that can be dealt with summarily unless the prosecution elects to take on indictment):

i Check that police prosecutors are appearing in the matter.\(^7\)

ii If so:

- Take instructions and be in a position to enter a plea on behalf of the client. You have no right to see a brief of evidence before entering your plea.
- Go to step 8.

iii If not, and the prosecution has elected—procedure is as for a strictly indictable charge, so go to step 8(d).

c) Table 1 charge (indictable that can be dealt with summarily unless the prosecution or defendant elects to take on indictment):

i Ask the court to order a brief of evidence—you have a right to see a brief of evidence before the charge proceeds further (unless the client specifically asks you to waive that right and the prosecution and court do not object).

ii Once the brief of evidence has been served—confirm with the prosecution that there is no election (and also no election on behalf of the defence).\(^8\)

iii If there is no election—take instructions on the brief and be in a position to enter a plea on behalf of the client. Go to step 8.

iv If there is an election—procedure is as for a strictly indictable charge, so go to step 7(d).

d) Strictly indictable charge:

i Ask the court to order a brief of evidence—the charge cannot proceed further 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.

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?\(^9\)

i Yes—see chapter 11.

ii No—go to step 8(c).

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\(^6\) 6 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.

\(^7\) Only a very small proportion of Table 2 offences are the subject of election. So 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, that is a clear enough indication that there is no election.

\(^8\) See chapter 4 for more detail on when and how an election is made.

\(^9\) 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.
c) Are there any other intervention programs available that may assist your client?
   i Yes—see chapter 12.
   ii No—go to step 9.

In relation to all diversionary programs, be aware that there are limitations on which defendants are eligible for them (e.g., offences being dealt with on indictment cannot be dismissed under mental health legislation). See the individual chapters for details of all restrictions that apply.

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.
   a) Yes—see chapter 9.
   b) No—go to step 10.

10. Is your client pleading guilty to a charge (or charges) being finalised in the Local Court?
   a) Yes:
      i See Part 7 (chapters 17–20) in relation to sentencing options available and how to prepare for sentence.
      ii See chapters 21 and 22 in relation to ancillary orders the court may make on sentencing. If any of them apply or potentially apply, take instructions and (if necessary) prepare submissions on them.
      iii Go to step 11.
   b) No, because some or all charges are pleas of not guilty:
      i Once the pleas of not guilty are entered, ask the court to order a brief if one has not already been served. 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 16 for some tips on running a Local Court hearing.
   c) No, because some or all charges are being committed up to the District Court (whether for trial or sentence):
      i Once the committal has happened, seek assistance from an experienced practitioner in preparing for the District Court trial or sentence.
      ii If a charge is going to trial, you will usually be briefing counsel. See chapter 25 for a guide on preparing a brief to counsel.

11. After appearing for a client on a Local Court sentence:
   If you are of the view that the sentence was excessive, or your client instructs you to appeal:
   a) Lodge the District Court severity appeal or assist your client to do so (see chapter 25 for details of procedures and time limits); and
   b) See chapter 25 for advice on how to run a severity appeal.

Note that chapter 12 describes some, not all, intervention programs that may be available. Specific programs may be available in your area. Ask more experienced practitioners who practice at your court if you have any doubts.
Part 2
The police station and bail
The role of the lawyer at the police station

Introduction

It is impossible to provide a definitive guide to all the steps that should be taken when going to a police station for a client who has recently been arrested.

Therefore, this chapter will refer to some general principles, but the advice to be given to a client will depend on the particular circumstances of each case.

This chapter only deals with the situation where the client is an adult. Because of the Children (Criminal Proceedings) Act 1987 (NSW) and the Young Offenders Act 1997 (NSW), special considerations apply where juvenile offenders are concerned. These special considerations are referred to elsewhere in this book.

Part 10A Crimes Act 1900 (NSW) - provisions relating to detention after arrest

Before going to a police station or advising a client in custody, you should be thoroughly familiar with Part 10A Crimes Act 1900 (NSW), being the detention after arrest provisions.

In general:

- There is no general power for police to arrest a person for the purpose of questioning. Therefore, unless police are exercising powers under Part 10A Crimes Act 1900, police must either charge your client or release him or her immediately.

- Police have an investigation period of four hours, which is subject to specific ‘time out’ periods and may seek an extension of time from an authorised justice by virtue of a ‘detention warrant’. A ‘time out’ is a period in which the ‘clock’ does not run in determining the ‘maximum investigation period’ as defined in Part 10A.

Initial contact

When the client initially telephones you or a police officer from a police station, you should advise the client not to make any statement to the police until after you have arrived and conferred with him or her.

You should try and speak to the officer in charge (OIC) of the investigation at this time and request that any further attempt to question the client about the offence be suspended until you arrive at the police station. This will probably lead to a ‘time out’ pursuant to Part 10A. If someone else (such as a family member) contacts you, you should telephone the client at the police station and try to speak to the client.

If you are not in a position to get to the police station, the police may allow you to speak to your client on the telephone. You can then discuss the matters set out below, although of necessity in a more limited form.

Arrival at the police station

When you get to the police station, you should try and speak to the OIC. You will want to ask the OIC questions to help you understand your client's situation, such as:

- The nature of the allegation/s;

- What the charge or charges will be;

- The general nature of the evidence that the police have against your client at that particular point in time (for example, was your client caught “red handed” or are the police acting on statements of witnesses which they were previously given, or following an investigation);

- Whether the client has already spoken to police;

- Any relevant documentation (even though there may not be an obligation for the police to provide any documentation at that point in time);
• If arrested by virtue of a warrant, request a copy of the warrant and any associated documentation; and
• What the attitude to bail is likely to be (although the determination as to whether police bail will be granted will usually be made by a more senior officer at the station).

**Initial contact with your client**

You can ask the investigating police or custody officer/s for time with your client to take instructions and give the necessary advice. You should make sure that you are able to speak privately with your client.

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;
• Whether the client has already made any statements to police, including oral questioning;
• Whether there has been any mistreatment by police; and
• Whether the police have made any threats, promises or inducements to your client, in relation to cooperating with police or making admissions.

It will depend on the particular circumstances as to whether you speak to your client about the charges. If you do speak to your client about the allegations, you will also want to consider to what extent you speak about them.

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

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

Any person suspected of a criminal offence has a right to silence.

No suspect can be forced to participate in an identification parade (line-up). If however a suspect refuses to participate in a line-up, that may allow police to then conduct a photographic identification: see ss 114 and 115 *Evidence Act 1995* (NSW).

There are many considerations involved in advising your client to participate in an electronically recorded interview (called an ERISP) or an identification parade.

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

• 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.
• Oral admissions that may have been made before the recorded interview are generally not admissible (s 281 *Criminal Procedure Act*). One of the ways that police seek to make these admissions admissible is by asking suspects to adopt the making of the earlier admissions them in the record of interview. Without this adoption, it may be that the earlier admissions will not be admissible.

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.

Further, 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.

At this early stage of proceedings against your client you will not be fully apprised of the prosecution case. The cautious approach in these circumstances is to advise a client under arrest to remain silent, that is, not to participate in a record of interview and/or identification parade.

**Timing of Identification parade/ ERISP**

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

**Your role in assisting a client in a police interview**

If your client does want to take part in an ERISP, it is important that you know that your role is not to be a passive spectator, but to look after your client's best interests.

This role may in certain cases involve you objecting during the interview to the manner of questioning and the form of questioning. If there has been some impropriety by police, you are able to put it in on record to the senior officer (who is not related to the investigation) who comes in at the end of the record of interview and whose role is to ask the client to adopt the interview.

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

If your client instructs that he or she wants to maintain his or her right to silence and therefore does not wish to participate in a record of interview, there is no requirement for that fact 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, as investigating police frequently go beyond their stated intention and will ask questions about the allegations.

**Forensic procedures**

Forensic Procedures are discussed in detail in chapter 8 of this book. The police may seek an order of the Local Court or purport to exercise their power to take samples, photographs or other procedures pursuant to the *Crimes (Forensic Procedures) Act 2000* (NSW).

**Bail**

If your client is to be charged, you should enquire with the OIC as to his or her attitude to bail. If the OIC indicates that he or she is opposed to bail, you can make submissions to the Bail Sergeant. You do this by asking to speak to the Bail Sergeant at the police station.

When police are determining whether bail is appropriate, they are required to apply the provisions of the *Bail Act 1978* (NSW) in the same way as a Court is.

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

After the formal processes, the client should be warned 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).

**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 Officer in charge of the police station so that you can make an immediate complaint.

**Becoming a witness in your client’s case**

When you go to a police station and being involved in your client’s case at that early stage, you should be mindful that you can potentially become a witness in your client’s case. This might be because what took place before or at the police station may become issues that are relevant to your client’s matter.

You may potentially be a witness to matters that may form the basis of a court’s discretionary exclusion of evidence in a criminal matter.

For these reasons, it is important for you to make detailed notes of what takes place at the police station.

**Follow up**

Whether your client has been granted bail or remains in custody you should contact your client as soon as practicable.
Almost all applications for bail in New South Wales are governed by the provisions of the *Bail Act* 1978 (NSW). The one exception to this is in relation to terrorist offences, pursuant to s 15AA *Crimes Act* 1914 (Cth). Apart from this, the *Bail Act* applies to all proceedings involving bail, regardless of whether the offence for which an accused is charged is pursuant to State or Commonwealth legislation.

This chapter discusses the main considerations that practitioners should be aware of when applying for bail for their clients.

The provisions of the *Bail Act* are detailed. Usually, matters contained in the *Bail Act* relate to both the circumstances of the offence and to the circumstances of the offender. The following summary of the provisions of the *Bail Act* and the commentary in this chapter provides a broad overview of the law. It cannot replace your own thorough reading of the *Bail Act*.

All references to sections in this chapter are references to sections in the *Bail Act*, unless otherwise specified.

**Bail presumptions**

There are five different categories of bail presumption.

The particular presumption that applies will be determined by the type of offence, and certain circumstances of the accused. The table at the end of this chapter summarises the particular offences and circumstances that apply to each category of presumption.

**Offences for which there is a right to release on bail for minor offences — section 8**

This presumption is for relatively minor offences. It does not create a right to unconditional bail. Offences that fall within this category do not often come before a court, as police will usually grant bail.

It should be noted that there is no right to bail if there is a failure to appear before the court, pursuant to s 51.

**Offences for which there is a presumption in favour of bail — section 9**

Where there is a presumption in favour of bail, the accused is entitled to bail unless the person has been convicted of the offence or the court is satisfied that the criteria set out in s 32 justify the refusal of bail.

**Offences for which there is no presumption in favour of bail — sections 9A and 9B**

In the majority of cases before the courts, there is no presumption in favour of bail.

In these situations the court must determine bail according to the criteria set out in s 32, without the starting point being that bail should be granted.

**Offences for which there is a presumption against bail — sections 8A(2), 8B(2) and 8C(2)**

Sections 8A(2), 8B(2) and 8C(2) provide that a person accused of an offence to which this section applies is not to be granted bail unless the accused can satisfy the authorised officer or court that bail should not be refused.

When determining the question of bail for an offence where there is a presumption against bail, a court focuses less on the particular subjective features of the accused and more on the strength of the prosecution case.
Where there is a presumption against bail, the strength of the Crown case is the prime consideration and matters, such as the particular subjective features of an accused, and other matters common to bail applications are accorded less weight: *Kissner* (unreported, Supreme Court, 17 January 1992); *R v Iskander* (2001) 120 A Crim R 302; *R v Khazal* [2004] NSWSC 548.

**Offences for which bail is to be granted in exceptional circumstances only — sections 9C and 9D**

This presumption applies to murder and where there is a prior conviction for serious personal violence offences.

The strength of the Crown case seems to be the major factor bearing on whether or not exceptional circumstances have been established: see *Jukes* (unreported, Supreme Court of New South Wales, 29 September 2003); *Memery v R* [2000] VSC 495.

Other cases which have interpreted exceptional circumstances include: *DPP v Gillies* (unreported, Supreme Court of New South Wales, 3 September 2004); *R v Magrin* [2004] NSWCA 354; *R v Hantis* [2004] NSWSC 153.

**The criteria for granting bail**

**Section 32 criteria**

In considering the question of bail the authorised officer or court must consider the criteria in s 32 *Bail Act*, which are mandatory and exhaustive: *R v Hilton* (1987) 7 NSWLR 745.

The criteria contained in s 32 are:

- The probability of whether or not the accused will appear in court in respect of the offence for which bail is being considered, having regard to certain matters only.
- The interests of the accused, having regard to certain matters only.
- The protection of certain people, including any person against whom it is alleged that the offence concerned was committed and the close relatives of any such person.
- The protection and welfare of the community, having regard to certain matters only.

**Particular matters to address**

These matters, which reflect the criteria contained in s 32 *Bail Act*, should be addressed in a bail application:

**The offence**

- The circumstances of the offence;
- The strength of the evidence;
- The likely penalty upon conviction;

**Protection of the community**

This usually involves considerations of whether or not it is likely that the accused is likely to commit further serious offences whilst on bail. The criminal record of the accused will be crucial in relation to this aspect.

**Background and community ties**

- Where the accused has lived, for how long, and with whom;
- The accused’s employment;
- The accused’s family and community ties;
Failures to appear
If the accused has any previous failures to appear on his/her criminal record, these should be explained if possible. If the accused has a lengthy criminal history with no failures to appear, this should also be highlighted.

The willingness to report to police whilst on bail, and the availability of a surety who can deposit cash or other security, may assist a client who has previously failed to appear.

Availability of surety
The type of surety that an accused can offer the court will be very important in the decision to grant bail. A surety who can enter into an agreement and deposit security will always be more persuasive in the decision to grant bail than a surety who can enter into an agreement without security.

Conditions on which bail may be granted
It is advisable in your submissions on bail to suggest conditions that your client is able to comply with if he/she is granted bail.

Section 36 sets out the conditions which a court may impose when granting bail. These conditions include:

- That the accused agree to observe specified requirements in relation to his/her conduct whilst on bail. (Such requirements can include residing at specified premises, reporting to the police or Community Offender Services (formerly known as the Probation and Parole Service), abiding by a curfew or attending counselling or rehabilitation);
- That the accused agree to reside in accommodation for persons on bail, if such accommodation is available and suitable having regard to the background of the accused (particularly where the accused is an Aboriginal or Torres Strait Islander);
- That an acceptable person (other than the accused) acknowledge that the accused is responsible and likely to comply with his/her bail conditions;
- That the accused agree to forfeit (whether with or without security) a specified amount of money if he/she fails to comply with a bail undertaking;
- That an acceptable person agree to forfeit (whether with or without security) a specified amount of money if the accused fails to comply with a bail undertaking; and/or
- That the accused surrender his/her passport to an authorised officer of the court.

Section 36A states that these additional conditions can be imposed for persons who qualify for drug or alcohol assessment, treatment or rehabilitation (such as the MERIT program):

- That the accused agree to subject himself/herself to assessment for treatment or rehabilitation; and
- That the accused agree to participate in treatment or rehabilitation.

The procedure for bail applications in the Local Court
This following is the general procedure for making a bail application in the Local Court:

- Arrange for your client to be brought into court or on the video link. You arrange this with the court officer.
- Mention your client's matter.
- State that your client is applying for bail.
- Indicate (if it is the case) that you have no objection to the tender of the police facts and your client's criminal record on the question of bail.
- The Prosecutor tenders these documents.
- The Magistrate reads these documents.
• Tender any documents that are relevant to your client’s application for bail. You tender documents by handing them to the court officer, who will hand them to the Magistrate. You should serve copies of these documents on the prosecution before court.
• The Magistrate reads these documents.
• The Magistrate will ask the Prosecutor what the prosecution’s attitude to bail is.
• The Magistrate will then ask you to make your submissions on bail.
• The Magistrate then gives judgment in relation to bail.

Oral evidence is not usually called in bail applications in the Local Court.

If bail is refused

Adjournments
Section 25 provides that when bail is refused by a Justice who is not a Registrar, the maximum adjournment period is 3 clear days and then 48 hours on a second adjournment. The matter must then go before a Magistrate if a Magistrate is reasonably available to deal with the case.

Where a Magistrate or Registrar has refused bail, the maximum adjournment period is 8 clear days except with the consent of the person.

This maximum adjournment of 8 clear days when a Magistrate or Registrar has refused bail does not apply if:
• The accused consents to longer adjournment;
• The accused is already in custody for another offence;
• There are reasonable grounds for a longer adjournment; or
• The accused is likely to be in custody on another offence for longer than the proposed adjournment period.

The course of the proceedings after a bail application
You need to be aware of what is to happen to your client’s matter after a bail application is made.

In part, this will relate to what stage the matter is at. If your client has been brought before the court for the first time on the matter that they are refused bail for, you may:
• Seek an adjournment, to get detailed instructions or for some other purpose.
• Be in a position to plead guilty and proceed to sentence.
• Indicate that your client is pleading not guilty and seek a brief of evidence.
• If the offences are to be dealt with in the District Court or Supreme Court, you may need to seek a brief of evidence.

Limits on the number of bail applications that can be made

There is no limit on the number of applications for bail that can be made in the Local Court. However, if you are making a second or subsequent application for bail, the Magistrate may ask you whether your client’s situation has changed since the previous bail application. If nothing has changed, bail would be expected to be refused for the same reasons as it was originally refused.

The position in relation to bail applications in the Supreme Court is quite different. Pursuant to s 22A, only one application for bail can be made to the Supreme Court. If bail is refused, a subsequent application can only be made if the applicant can establish special facts or circumstances exist, which did not exist at the time of the earlier application.
**Supreme Court bail**

As mentioned above, only one application can be made to the Supreme Court for bail. It is possible to withdraw an application to preserve the right to make a later application, but it is not advisable to withdraw Supreme Court bail applications too many times.

Supreme Court bail application forms are available from the Supreme Court registry and can be lodged by fax to the Supreme Court Bails Registry ((02) 9230 8060).

Applications usually take about 2 weeks until they come before the Supreme Court.

Adults are generally not brought to the Supreme Court, but appear by video link from correctional centres. Children who are applying for bail generally go to the Supreme Court for their bail applications.

The DPP appears for the prosecution in all Supreme Court bail applications.

The bail application itself is more formal than in the Local Court, and information regarding employment, residence and surety needs to be presented in affidavit form or through sworn evidence. The availability of a surety is important, as is the attendance of family/friends at the Court itself.

**Tips on bail**

- You should have full instructions from your client before going ahead with a bail application. You can ask to see your client privately either at the police station or at the courthouse but do so at the earliest opportunity. Speaking with your client should be your first priority.
- Ensure that you have a copy of the charge/s, police facts and a print out of your client’s criminal record. You can usually get these documents from the prosecutor.
- It is always preferable if you can come to some agreement with the prosecution in relation to your client’s bail. Try to speak with the informant or prosecutor to ascertain what his/her attitude is to bail. Bail will not always be opposed. The prosecution may seek stringent conditions, including a surety. Although the prosecution’s consent to bail does not mean that a Magistrate must grant bail, it is an important factor in favour of granting bail.
- Section 32(3) states that in hearing a bail application, the court is not bound by strict rules of evidence, and may take into account any evidence or information which the court considers credible or trustworthy in the circumstances. Be mindful that this means that hearsay evidence and opinion evidence may have greater weight in a bail application than in a substantive hearing, where that evidence may otherwise be inadmissible.
- A close analysis of your client’s criminal record will always be necessary. This is particularly important in relation to the criterion of the likelihood of attendance at court and the protection and welfare of the community having regard to the likelihood of commission of further serious offences on bail.
- If your client has previously applied for bail in the Local Court and wishes to apply for bail again, most Magistrates require that you lodge an ‘application for review of bail’ with the Local Court registry. This is a form that you can obtain from a Local Court registry.
- If your client has previously applied for bail in the Local Court and wishes to apply for bail again, you should give notice to the prosecutor that this is the case.
- Be mindful that the civil standard of proof applies to bail (s 59). It is sufficient if a court, in making a decision in relation to bail, to be satisfied of any matter on the balance of probabilities. The *Bail Act* does not state who bears the onus of proving such matters, but presumably the onus falls on the party attempting to prove the particular fact in issue.
### Table of bail presumptions

<table>
<thead>
<tr>
<th>Bail Act</th>
<th>Presumption</th>
<th>Offences and/or circumstances of the accused to which the presumption applies</th>
</tr>
</thead>
</table>
| **s 8**  | Right to release on bail |  • Offences where there is no penalty of imprisonment.  
  • Offences under the *Summary Offences Act*.  
  • Proceedings for:  
    a. Breach of good behaviour bond  
    b. Revocation of community service order.  
  The right to release does not apply if the person has any prior failure to appear or breach of bail (if this is the case, there is a presumption in favour of bail: s 9(1)(b) & 9(1A)).  
  The right to release does not apply if the person stands convicted of the offence or is incapacitated or in need of physical protection. |
| **s 9**  | Presumption in favour of bail | All offences, unless referred to elsewhere in the *Bail Act*.  
*Bail Act* – s 51 Fail to appear on an offence which does not carry a penalty of imprisonment. |
| **s 9**  **s 9A**  **s 9B**  | Exceptions to the presumption in favour of bail | **Circumstances relating to the accused**  
  • At the time of the offence, the person (for any other offence) is on: bail, parole, good behaviour bond, intervention program order, serving sentence (whether in custody or not)  
  • Prior conviction for s 51 fail to appear  
  • Prior conviction for an indictable offence, whether dealt with summarily or on indictment.  
**Offences where there is an exception to the presumption in favour of bail**  
  • *Bail Act*—s 51 Fail to appear for bail on an offence where there is a penalty of imprisonment.  
  • *Drug Misuse & Trafficking Act*—ss 23(1), 24(1), 25(1)—where more than twice the indictable quantity of the drug  
  • conspiracy to do above (s 26 *Drug Misuse & Trafficking Act*)  
  • aid, abet etc to do above (s 27 *Drug Misuse & Trafficking Act*)  
  • conspire, aid or abet etc to do above for equivalent laws outside NSW.  
  • *Customs Act (Cth)*—ss 231(1), 233A, 233B and where the offence relates to a prohibited drug that is more than twice the indictable quantity.  
  • *Criminal Code (Cth)*—Div 11 of Part 2.4 where offence
relates to s 233B of the *Customs Act* and where the offence relates to a prohibited drug that is more than twice the indictable quantity.

- Manslaughter.

**Domestic violence offences**

a  For any domestic violence offence (defined in s 4 *Crimes Act*) or any breach of an ADVO that involves violence, or a s 562AB *Crimes Act* stalking/intimidation offence

and

b  The court is satisfied that accused has a 'history of violence (violence or breach AVO conviction in last 10 years), prior violence to the alleged victim, or breached a bail condition imposed to protect the alleged victim.
<table>
<thead>
<tr>
<th>s 8A</th>
<th>Presumption against bail</th>
<th>Offences</th>
</tr>
</thead>
<tbody>
<tr>
<td>s 8B</td>
<td></td>
<td>• Drug Misuse &amp; Trafficking Act—ss 23(2), 24(2), 25(2)</td>
</tr>
<tr>
<td>s 8C</td>
<td></td>
<td>• conspiracy to do above (s 26 Drug Misuse &amp; Trafficking Act)</td>
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<tr>
<td></td>
<td></td>
<td>• aid, abet etc to do above (s 27 Drug Misuse &amp; Trafficking Act)</td>
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<tr>
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<td></td>
<td>• conspire, aid or abet etc to do above for equivalent laws outside NSW.</td>
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<tr>
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<td>• Customs Act (Cth)—ss 231(1), 233A, 233B where the offence relates to a commercial quantity of a prohibited drug.</td>
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<tr>
<td></td>
<td></td>
<td>• Criminal Code (Cth)—Div 11 of Part 2.4 where offence relates to s 233B of the Customs Act and where the offence relates to a commercial quantity of a prohibited drug</td>
</tr>
<tr>
<td></td>
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<td>• Crimes Act—ss 93G, 93GA, 93H(2), 93I(2) or 154D.</td>
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<tr>
<td></td>
<td></td>
<td>• Firearms Act—ss 51B, 51BB</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Firearms Act offences relating to a prohibited firearm or pistol: ss 7, 36, 50, 50A(2), 51(1A), 51(2A), 51A or 51D(2).</td>
</tr>
</tbody>
</table>

**Serious property offences**

| a | Where accused of two or more serious property offences not arising out of the same circumstances and |
|   | b | Where there is a prior conviction for one or more serious property offences within the last two years. |

**Serious property offences are:**

| • Crimes Act—ss 94, 95, 96, 97, 98, 99, 106, 107, 109, 110, 111, 112, 113, 149, 154AA or 154C, or attempting to commit these |
| • An offence under the Commonwealth, State/Territory or another country that is similar to above. |

| s 9C | Bail not to be granted unless exceptional circumstances justify the grant of bail | • Murder |
| s 9D | | • Repeat offender—serious personal violence offences |

A person is a ‘repeat offender—serious personal violence offences’ where:

| the person is charged with a serious personal violence offence and |
| There is a prior conviction for serious personal violence offence(s). |

**Serious personal violence offence(s) means offences under:**

| • Crimes Act—ss 19A, 24, 26, 27, 28, 29, 30, 33, 33A, |
| | • *Crimes Act*—ss 79, 106, 107, 109, 111, 112, 113, where the offence involves actual or threatened violence against a person.
| | • Attempts to do the above.
| | • An offence under the Commonwealth, State/Territory or another country that is similar to above.
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.

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 and 6).
- The procedure for the progress to finality of summary matters and of indictable matters (see Chapter 4 and Chapter 3 of the CPA respectively).
- The summary disposal of indictable matters (Chapter 5 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 (ss 47, 172 CPA).

The court attendance notice is to be filed with the court within seven days of its service upon the accused (s 177 CPA).

Proceedings are taken to have commenced on the date on which a court attendance notice is filed at the relevant court (s 178 CPA).

In this chapter, the word ‘charge’ is used for convenience to refer to the initiating process for criminal prosecutions.

**Types of offences**

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

- Summary offences;
- Indictable offences that may be dealt with summarily (that is, in the Local Court); or
- Strictly indictable offences (that is, in the 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 (see below). For example:

1. An accused person has a right to be provided with the prosecution’s brief of evidence before being asked to respond to the charge, in a strictly indictable or Table 1 (defined below) offence. An accused has no such right in a summary or Table 2 (defined below) offence.

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 the less serious of offences. A summary offence is to be finalised before a Local Court constituted by a Magistrate sitting alone: s 7 CPA.

Section 6 CPA provides that certain offences must be dealt with summarily, 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 matter arose (s 179 CPA), unless a different period is specified in the Act that creates the offence.

Indictable offences that may be dealt with summarily

Background

Chapter 5 CPA provides for the summary disposal by Local Courts of certain indictable offences. The indictable offences able to be dealt with in this way are specified in Schedule 1 of the CPA. The offences contained in Schedule 1 fall into two categories: Table 1 offences and Table 2 offences.

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

For Table 1 offences either the prosecution or the accused may elect to have 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 does not have to be laid within the six month time limit (s 179(2)(b) CPA).

Service of the brief and making of election

Pursuant to s 265(2), an accused facing a charge for a Table 1 offence must of the CPA be served by the prosecution with:

- A copy of the brief of evidence relating to the offence which complies with s 186 Criminal Procedure Act; and
- A copy of their criminal record (if any) known to the prosecution.

The date for service of the prosecution brief will be fixed by the Court and must be a date before the time fixed by the Court for the making of the election in respect of the offence (s 265(2) CPA).

Under section 265(1) CPA, when an accused charged with a Table 1 offence first appears before a Local Court in respect of the offence the presiding Magistrate must:

- Address the accused in relation to their right to make an election and the consequences of not making an election; and
- Must give the person a written statement to this effect in accordance with Schedule 1 Criminal Procedure Regulation 2000.

The court will fix a date for the defence “reply” to the prosecution brief, which will be the same date that the defence must indicate whether it is making an election (s 263(1) CPA).
If the court is satisfied that special circumstances exist it may permit an election to be made after the
original date fixed by the Court (s 263(2) CPA). An election cannot be made however after the
commencement of the taking of evidence for the prosecution in the summary trial or the presentation of
the facts relied upon by the prosecution in the case of a plea of guilty (s 263(3) CPA).

Under s 264 CPA, once an election to have the charge dealt with on indictment has been made it may be
withdrawn only in certain prescribed circumstances, which are as follows:

- In a case where a plea of not guilty has been entered—before the commencement of the taking of
evidence at the committal hearing.
- In a case where a plea of guilty has been entered—before the offender is committed for sentence
to the District Court.

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) 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.

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 Director of Public Prosecution's Prosecution Guidelines states that (with the exception
of standard non parole period offences which are contained in s 54D CSPA) that 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 offence is 2 years (ss 267 and 268 CPA).
- The limit of consecutive sentences is five years, with some exceptions (s 58 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 must
demonstrate special or exceptional circumstances to justify the grant of bail (s 30AA Bail Act 1978
(NSW)). Such an appellant must effectively demonstrate that their appeal is certain to succeed (R v

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 begin in and remain 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**

Pursuant to Part 3 Division 7 CPA, summary matters that are “back up” or “related” offences 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 Maliciously Inflict Grievous Bodily Harm and the back up charge may be Assault Occasioning Actual Bodily Harm. Back up offences can be summary or indictable offences.

If the substantive charge is proved, the back up charge is usually withdrawn by the prosecution and dismissed. 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, a related offence may be Take and Drive Conveyance Without Consent. A related offence can be a summary or an indictable offence.

If the accused is acquitted of the substantive offence and the related charge is a summary matter then usually the related charges proceed as summary matters in the Local Court. Although the District and Supreme Courts have jurisdiction to deal with these matters they rarely exercise that power.

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. See Chapter 17 for a discussion on the Form 1 procedure.

**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, unless it is impossible or impractical to copy the exhibit (s 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.

**Service of the prosecution brief of evidence in summary matters**

In summary proceedings for a prescribed summary offence (see s 3 CPA and Director of Public Prosecutions Act 1986 (NSW) and clause 3 Director of Public Prosecutions Regulations 2000) the
prosecution must serve the brief of evidence upon an accused at least 14 days before the scheduled date of hearing (s 183(3) CPA).

Local Court Practice Direction 2/2004 states (in summary) that:

- Where a plea of not guilty is entered in the Local Court the Magistrate will make an order for service of the prosecution brief by a specified date.
- The period allowed for service of the brief shall be not less than four weeks from the date of making the order.
- The matter is adjourned to a date 14 days after service of the prosecution brief.
- The defendant and/or legal representatives are to consider the evidence and the prosecution witnesses required for cross-examination.
- A date for hearing is not to be allocated until, on the return date after the period specified, the plea of not guilty is confirmed.
- At the further mention, if a plea of not guilty is maintained by the accused, a hearing date will be fixed.

Evidence not served in accordance with the legislation is inadmissible (s 188 CPA). The court has the power though to order that all or part of the brief not be served (s 187(1) CPA) or to adjourn the proceedings to allow the prosecution to comply with s 183 CPA (see s 187(4) CPA and DPP v West [2000] NSWCA 103).

Commonwealth offences

This chapter only describes procedures for offences against NSW state law. It does not describe procedures for Commonwealth offences.

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.

References and further reading


The purpose of this chapter is to provide some practical tips on working in the Local Court. It is intended to address day-to-day problems that Local Court practitioners will be confronted with, where those problems may not be answered by referring to legislation.

A. Procedures

Matters that are listed in Local Court generally fall into one of three categories: criminal offences against New South Wales state laws; Commonwealth offences and breaches of Court orders.

In both State and Commonwealth matters, the initial process you will follow is the same. You must obtain the charge and facts sheets before taking instructions. If your client has not given them to you, the appropriate prosecutor (police or solicitor from the Office of the DPP) will be able to provide you with a copy.

The charges and facts sheets should be read through with your client so that you are clear that your client understands what is being alleged.

Instructions should be obtained in relation to pleas. Often, your client will require legal advice before instructing you as to an appropriate plea, as they will not be aware of possible legal defences available. To avoid having your client ‘tailor’ his or her instructions to your advice, you should take your client’s instructions on the facts before advising your client what the appropriate plea is after applying the law to those facts.

Pleading guilty and facts sheets

Your client may instruct you that he or she is ‘guilty’ of the offence (or an offence), but that s/he does not agree with all the charges or particulars as set out in the facts sheet.

A guilty plea does no more than admit to the court the essential elements of the charge. For example, in a charge that your client on 5 November 2005 at Yagoona did steal an electric kettle the property of Woolworths Limited, by pleading guilty your client admits that:

a) s/he took and carried an electric kettle belonging to Woolworths on 5 November 2005 at Yagoona
b) at the time of taking and carrying that electric kettle, s/he had the intention to permanently deprive the rightful owner of it; and
c) your client has no lawful excuse for his or her conduct (e.g. acting under a claim of right).

Facts sheets that are prepared by the police (or occasionally the Office of the DPP) will have a large number of allegations of fact that provide background and context to the offence, but which are not essential elements of the offence.

In the hypothetical example, the facts sheet might allege the following:

a) that your client looked around in a suspicious manner upon picking up the kettle
b) that your client tucked the kettle into a greatcoat that s/he was wearing
c) that when security staff approached your client and asked if s/he had anything belonging to the store, your client replied, “Nothing”.

On most occasions, a client who is pleading guilty will instruct you to admit that the allegations in the facts sheet are true. However, in the example given, your client might admit the offence but dispute that one or more of the above alleged facts, is true. You should explain to your client that if a plea of guilty is entered, a facts sheet must be handed up to the Magistrate to read. The question is what the facts sheet should say.

If there are major discrepancies between your client’s version of events and the prosecution’s allegations, they should ideally be addressed prior to entering a plea. See chapter 9 on Negotiating with the
prosecution, for guidance on the steps you should take when you are seeking to negotiate agreed facts on a guilty plea.

If you do not have success in negotiating agreed facts, then your client’s principal choices are either:

• to enter the guilty plea and put the issue of disputed facts before the Magistrate, who may direct that there be a disputed facts hearing at which witnesses are called, or

• to change your instructions and to formally admit to the court that the previously disputed facts are true.

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. That 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. Then, 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 sentencing can proceed regardless of the dispute.

If your client makes the decision to admit the previously disputed facts, you should always get signed instructions on the course you are taking, 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 applied for if, for instance, you or your client need time to obtain character references or medical evidence.

**Breaches of court orders**

**a  Breach of good behaviour bond (all types)**

A breach of a good behaviour bond, whether under section 9, 10 or 12 of the *Crimes (Sentencing Procedure) Act*, occurs when it is alleged a condition of the bond was not abided by. 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 the Probation and Parole Service or follow their reasonable directions.

Breach proceedings can arise in two ways:

a  by Probation and Parole making an application to the Court that the bond be revoked, or

b  on the motion of the court.

The second scenario generally occurs because your client has committed a further offence during the period that the bond was current. If your client pleads guilty to the new offence or is found guilty after a hearing, he or she will usually be called up on the bond. 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 sentenced 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.)

When a person is alleged to have breached a good behaviour bond he or she generally will 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. However, sometimes the Magistrate (or Judge) that imposed the bond has marked the court papers that the person must be brought before them if the bond is breached. Where this has occurred, the breach of bond proceeding will be adjourned to where that Magistrate or Judge is sitting, for determination.

An alleged breach of a term of a bond can be admitted or not admitted by your client. If not admitted, then formally you can (and, depending on the facts of the case, should) demand 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 and will be inclined to accept what is in Probation & Parole Service reports (unless you can bring evidence that contradicts those reports). Section 98(2) of the *Crimes
(Sentencing Procedure) Act 1999 (NSW) (CSPA) blandly 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 proper. If the breach relates to a failure to comply with Probation and Parole requirements, 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: see s 98(2)(b) CSPA. The Magistrate will usually only consider this option if there is concrete evidence (such as a recommendation from Probation and Parole) that the further conditions will reduce the risk of another breach.

If the Magistrate cannot be persuaded to take no action, or alternatively to add further conditions to the bond, the bond will be revoked and your client will need to 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 harsher penalty. This will not always be the case, however, if you can make good arguments about the cause for the breach or the subjective circumstances of your client. See chapter 19 on Plea making in Local Courts—many of the principles in that chapter will be applicable to your submissions on re-sentencing.

b Breach of suspended sentence bond

The above subheading applies to all bonds, with particular focus on bonds imposed under ss 9 and 10 CSPA. This subheading refers to those rules that are unique to bonds entered into as a condition of a suspended sentence under s 12 CSPA.

Sections 98 and 99 CSPA deal with the procedure for breach of a s 12 bond. See also chapter 18 on Sentencing options in the Local Court.

You need to establish that the breach is trivial, or that there are good reasons to excuse the breach, in order to avoid the suspension order being revoked and the sentence taking effect. If satisfied that the breach has occurred, 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. This means that the suspension of the sentence ceases, and your client will be required to serve the sentence in gaol.

Alternatively, if compelling arguments can be made to the Court, the magistrate may consider allowing your client to serve the sentence by way of periodic detention or home detention: see s 99(2) CSPA. If the Magistrate is prepared to consider these options, the matter will need to be adjourned for a pre-sentence report to be prepared stating whether your client is assessed as suitable for either option.

See the previous subheading for details of procedure if your client denies the breach. Given the seriousness of the consequences if the breach is found proved and the bond revoked, you should insist that a formal hearing is held on the topic of whether the breach is made out, if your client denies the alleged breach.

c Applications for revocation of community service orders

Applications for revocation of community service orders (CSOs) also arise in Local Court criminal practice. 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 obliged to perform under the CSO. Sometimes 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.

However, 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 or her Probation and Parole 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 Probation and Parole Service.
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. 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 Probation and Parole officer before the court date, to discuss whether s/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 the Probation and Parole Service is unwilling to allocate any more work, you will need to take instructions from your client as to whether he or she agrees with the breaches of the order alleged in the 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 without 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), and so the focus of any hearing will generally be whether your client has established a reasonable excuse for the failure.

If the failure without reasonable excuse to comply the CSO is admitted or proved, your client will stand to be re-sentenced: 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 Probation and Parole officer on side.

**Adjournments**

Section 40 Criminal Procedure Act states that a court may at any stage of criminal proceedings adjourn the proceedings generally, or to a specified day, if it appears to the court necessary or advisable to do so. In practice, adjournments of matters ‘generally’ are very rare. Matters are almost always adjourned to a specified date.

An adjournment may be required for many reasons, including (but not limited to) the following:

1. To take full instructions (particularly if a brief of evidence has recently been served).
2. For the court to order a pre-sentence report if your client has pleaded guilty (or been convicted) and the court is considering imposing a custodial sentence.
3. For charge negotiation to occur.
4. For your client to participate in MERIT or an intervention program (see chapters 11 and 12 on these programs).

A substantial number of your day-to-day court matters will require adjournments for various reasons. However, never adjourn a matter out of habit or because you have not thought through what to do with the matter—always have a purpose of the adjournment in mind.

**Holding matters in the list**

Holding matters in the list is a useful technique that is not always utilised by new practitioners. During a mention (or possibly a bail application, section 32 Mental Health (Criminal Procedure) Act application or sentence), the Magistrate may ask a question to which you do not know the answer. Or the prosecution may address on a topic, where you need full instructions in order to be able to answer the point.

For example, the Magistrate may be interested in knowing whether there are any hostels in the area that are able to provide accommodation for your previously homeless client, who is seeking bail.

Saying nothing, or saying “I don’t know”, might do your client’s case a disservice; on the other hand, adjourning the matter for two weeks may be completely unnecessary, if you can get the answer today.

In those circumstances, ask the Magistrate if s/he is prepared to hold the matter in the list while you take further instructions, or undertake appropriate inquiries. If the topic is of any importance to the ultimate outcome, s/he will usually be happy to do so. Then, armed with the further information, you can re-mention the matter and complete it on the same day.
Clients in custody

A large part of your practice will involve seeing clients in the Local Court cells who are in custody. Generally, those clients will be bail refused on the matter currently before the court—a few clients will be in custody only in relation to other matters but bail granted in relation to your matter.

You are an officer of the court and so are obliged to follow the order of matters dictated by the presiding Magistrate (if the Magistrate is inclined to determine the order in which matters are heard before him or her). However, within the parameters of your duty to the court, your clients in custody are your highest priority. They are deprived of their liberty while waiting for their matters to be determined; your clients on bail are not. For a client waiting for his or her matter to be heard, time waiting in the cells passes more slowly than time in gaol, due to the absence of any of the recreational and educational facilities that might be available at the gaol.

Running a successful Local Court practice relies to a great extent on a good working relationship with the staff who run the Local Court cells (historically police, but in the modern age usually Department of Corrective Services staff). Having time to take full instructions from your clients in custody (while still providing a proper service to your clients at liberty and meeting court deadlines) will depend upon being able to get prompt access to those clients without substantial delays. Clients in custody should generally be seen by you first thing in the morning, and so far as you are able to influence the order in which the court hears matters, their cases should be heard first. This rule of thumb is particularly important where your client has been bail refused by the police, and is facing his or her first court appearance in the matter.

When meeting a client in custody, you will normally be taking instructions in a divided meeting box with glass separating the two of you. This is a difficult environment in which to establish rapport with a client you are meeting for the first time. It can become particularly difficult if the client has any current drug dependence or psychiatric problems. Even if you are rushed, take time to establish that your client understands the basics:

- that you are his or her lawyer and what s/he tells you is confidential
- the reason why s/he is in the cells, i.e. what the charges are; and
- what will happen to the charges, both today and into the future.

Do not proceed with taking instructions if it becomes clear that your client does not properly understand English. Hold the matter in the list until an interpreter arrives. If you are not able to take full instructions without an interpreter, you risk putting an incomplete or inaccurate case to the court on your client’s behalf. You should usually be notified in advance, either by police or by court cells staff, that an interpreter is required. See the Contacts chapter of this book for details of who to call if you need to arrange an interpreter yourself.

Video links

Video links are commonly used for clients who are bail refused and are attending a second or subsequent mention of their matter. The client remains at his or her gaol, and enters a video link room when his or her matter is being heard. Microphones, cameras and monitors at each end enable the court and the client to see and hear each other.

At most courts, the prevailing view is that it does not matter whether the client consents to appear by video link—unless there is a particular reason why his or her attendance is required, most mentions (including bail applications) will be by video link. However, defended hearings should not be conducted by video link, and a sentencing matter would only ever be conducted by video link if you had clear and unequivocal instructions from your client that s/he wished to be sentenced in this way.

Appearing for a client on video link makes it crucial that your client fully understands what is occurring. If your client is feeling alienated from, or confused by, the proceedings, there is nothing stopping him or her from making an outburst, and if that occurs there is no easy way for you to confidentially placate your client or explain the situation to him or her.

All video link 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 video link (or ‘video bail’) room. You must telephone and speak with your client before court, and explain exactly what is going to happen in the court appearance.
Otherwise, at best your client is likely to be confused about what is going on, and at worst you will be highly embarrassed in court.

B. WHERE TO GET HELP WITH INFORMATION

Depending on which court(s) you frequent, there may be a number of different officers and services available at the Court. What follows is a simple guide to assist you in answering the questions, ‘Where do I get that?’, and ‘How do I get that done?’.

1. Court officers
   • Breach reports
   • Copies of warrants
   • Messages from clients left with the Court (reasons for non-attendance such as illness etc)
   • Checking what pleas have been entered
   • Advice as to the Magistrate’s preference for the way the list is run.

2. Court staff
   • Being told which court number your matters have moved to
   • Finding and viewing court papers (including bail determinations)
   • Getting matters re-listed
   • Listing appeals, bail applications, s 4 Crimes (Local Courts Appeal and Review) Act applications and other applications made on behalf of a client.

3. Prosecutors
   • Charge and facts sheets
   • Criminal histories
   • Copies of warrants
   • Assistance with amending facts sheets
   • Advice on procedure

Remember that in addition to gaining information from the prosecutor, that you should serve all material that you will be relying on in a plea of guilty, s 32 Mental Health (Criminal Procedure) Act application or a s 4 Crimes (Local Courts Appeal and Review) Act application, on the prosecutor.

4. Probation and Parole Service officers
   • Pre-sentence reports
   • Breach reports
   • Advice as to a client’s progress under a bond or CSO
   • Some referrals

5. Court Liaison Service nurses
   • General assistance with clients in and out of custody who appear to have a mental health problem
   • Section 33 Mental Health (Criminal Procedure) Act advices to the Court
   • Referrals and advice regarding mental health issues.
6. Salvation Army officers (if available)
   • Accommodation problems
   • All manner of counselling, including drug and alcohol; anger management; gambling
   • Liaising with families.

7. Women’s Domestic Violence Court Assistance Program
   • Provide assistance (and, in some cases, legal advice) to victims of violent crime (particularly domestic violence). Many courts have a separate room in the court complex from where the Program works.

8. Other practitioners
   • Advice on court procedure
   • Advice on the predilections and preferences of, and procedure adopted by, the presiding Magistrate
   • Assistance on points of law.
Committals

Committal proceedings

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 (s 20 Criminal Procedure Act 1986 NSW (CPA)) where the prosecuting authority or the accused elects for the matter to be tried on indictment; or
- A Table 2 Offence (s 20 CPA) where the prosecuting authority elects for the matter to be tried on indictment.

This chapter focuses 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.

All references in this chapter are references to sections in the CPA unless stated otherwise.

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:

- 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
- 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
- The matter may go to 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.
In *Grassby v The Queen* (1989) 168 CLR 1 at 15, Dawson J (with whom Mason CJ, Brennan, Deane and Toohey JJ concurred) 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:

[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.]

**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**

A matter can be committed for sentence to the District Court following a plea of guilty being entered in the Local Court pursuant to s 99 CPA.

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.

With 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.

If an accused intends to plead guilty and seeks the full benefit of their plea (see the guideline judgment on pleas of guilty: *R v Thomson and Houlton* (2000) 49 NSWLR 383). It can be argued that a plea of guilty entered in the Local Court is a plea entered at the earliest opportunity. See also *R v Newman* [2004] NSWCCA 113 for a 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 of preparing a pre-sentence report under way at the time the plea of guilty is entered in the Local Court. This is done by requesting that a pre-sentence report is ordered by the court. It takes approximately six weeks for a pre-sentence report to be written.

**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".
- You 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.
• The Crown brief is tendered. As a plea of guilty is entered, the accused's criminal record is also usually tendered.
• The Magistrate will read the brief on sentence.
• If it is the case that the statement of facts accurately reflects what is contained in the brief (which it should), you can indicate to the Magistrate that this is the case and the Magistrate may then only need to read the statement of facts.
• The Magistrate will indicate whether the plea(s) of guilty is/are accepted.
• 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.
• 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. It is prudent to check with the DPP solicitor before the committal as to whether they intend to oppose bail being continued.
• You can seek a pre-sentence report for the sentence hearing in the District Court when the matter is committed for sentence.

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 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 either be one with submissions on the brief, or with no submissions on the brief.

**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 s 166 CPA Certificate which will also be tendered (see chapter 4).
• The DPP solicitor tenders the brief of evidence. You should indicate if there is no objection to the tender of the brief.
• 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 will 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.
• 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 continue, by considering s 64 CPA, and 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). This date will usually not be later than one month from the date of committal (s 129 CPA).

• 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” 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. This is because of the amount of time that will have to be spent on the matter. Therefore, on the court date prior to the committal, you should notify the Magistrate that the matter will take some time and that the Magistrate may then to set the matter down for a day other than a list day.

**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.

In every case, though, 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 point in objecting to this.

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.

**Contested committal hearings**

There are significant advantages at trial that can flow from a well-run committal.

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.

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. This is because 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 of the grounds/areas for cross-examination.

If a witness does not attend court as directed for a committal hearing, that witness's statement is not
admissible in the committal proceedings.

**The different tests for the calling of witnesses**

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, before the order will be made.

However, if the offence is one that requires substantial reasons to be established, and the Crown
consents, the Magistrate must direct that witnesses attend court to give evidence (s 91(3) CPA).

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 in
committal hearings.

Section 93 CPA states that where the witness to be called is the victim of an offence involving violence,
the Magistrate must be satisfied that there are special reasons why in the interests of justice the witness
should attend to give oral evidence.

An ‘offence involving violence’ is defined in s 94 CPA. This definition needs to be examined carefully.

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.

**Child victims of sexual assault — section 91(8)**

Section 91(8) CPA states that a direction may not be given under the section to require a complainant in
proceedings for a child sexual assault offence to attend court to give evidence if the complainant was
under 16 at the time of the offence, and is under 18 at the time of the committal proceedings.

**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.

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 paragraphs 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.

• Where the victim has retracted his/her statement or has given an inconsistent version (B v Gould, supra).

Sections 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.

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).

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

If the Magistrate is of that opinion, the Magistrate then considers 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 not 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 each or either of 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 a testing the strength of the prosecution case. It cannot be a condition of a committal hearing being granted that an accused is required to give evidence (DPP v Paterson [2004] NSWSC 693).

It is important also to note that the rule Brown v Dunn 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 16 on defended hearings).

Therefore the defence case is almost always reserved at committal. After the consideration of s 62 CPA before considering the s 64 test, the magistrate will ask 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.

Local Court Practice Note 9 and the procedure for committals

Local Court Practice Note No. 9 sets out the time standards for a committal matter. The Practice Note can be found at: http://www.lawlink.nsw.gov.au/lc.nsf/pages/practice_collections

The Practice Note sets out the time standards for either strictly indictable or Table 1 offences. The time standards, in summary, are:

• On the first appearance in court the court must make a brief order; and

• After that first date the court will adjourn the matter for not less than eight weeks, allowing six weeks for service of the brief and two weeks for reply. The matter will be listed for mention on the reply date.

• On the reply date, any application for a direction under s 91 CPA is to be considered either as a contested application or by consent.
• If the s 91 application is contested or if s 93 (special reasons) applies, the application will be set down for hearing at the earliest available opportunity. In such cases, a copy of the brief is to be delivered to the court not less than two days prior to the s 91/s 93 hearing, or as otherwise directed by the court.

• Submissions in support of contested s 91 applications are to be in writing, served on the other parties and filed with the court at least seven days before the application is heard.

• If no application for a direction under s 91 is made, or a direction under s 91 is made by consent, the court will set a date for a committal for trial or sentence on the first available date in the court diary.

The Practice Note also sets out that Audio Visual Link (AVL) facilities are to be used after the initial appearance of the accused in custody, the accused who remains in custody must appear by AVL on the next occasion, unless the court otherwise directs. There is no requirement for the accused or his/her legal representative to consent to this course.

**Committals in children’s matters**

Some of the special considerations that should be borne in mind when appearing in a committal matter for a child include:

• There are specific evidentiary rules that apply to the admissibility of evidence regarding children and doctrines that may raise child-specific defences. These can include:

  • Compliance with s 13 *Children (Criminal Proceedings) Act 1987* (NSW) regarding the admissibility of any admission, confession, statement made by a child.

  • Whether the child had access to legal advice prior to participating in a record of interview or providing a statement to the police and other general Part 10A rights. In this respect, the importance of contacting the Legal Aid Commission’s Under 18’s Hotline was considered in *R v LT and ME* (unreported, Supreme Court, 3 October 2002).

  • Whether any forensic material (DNA, photographs, fingerprints) was taken in compliance with the special protections afforded to children in the *Crimes (Forensic Procedures) Act 2000* (NSW).

The doctrine of *doli incapax*

In many cases it is valuable to explore these issues at the committal stage as it may highlight the weaknesses in the prosecution case. This in turn can assist in further negotiations with the DPP or form the basis of a No Bill application (see chapter 9).

Caution should be exercised, however, as exploration of these issues at committal may serve no purpose other than to put the prosecution on notice of defences and objections that may be raised by the child at trial, and allow the prosecution ample time remedy any deficiency in the prosecution case.

The DPP Prosecution Guidelines outline special considerations that may apply to the prosecution of children. These are set out in Prosecution Guideline 21.

Guideline 21 refers to whether or not the public interest requires that a matter be prosecuted (see Prosecution Guideline 4) and states that the following matters are particularly important:

• The seriousness of the alleged offence;

• The age, apparent maturity and mental capacity of the child;

• The available alternatives to prosecution and their likely efficacy;

• The sentencing options available to the court if the matter were to be prosecuted;

• The family circumstances and, in particular, whether the parents appear willing and able to exercise effective discipline and control of the child;

• The child’s antecedents, including the circumstances of any relevant past behaviour and of any previous cautions or youth justice conferences; and

• Whether a prosecution would be likely to cause emotional or social harm to the child, having regard to such matters as his/her personality and family circumstances.

The unique regime established by s 31(3) *Children (Criminal Proceedings) Act 1987* (NSW) can, in some instances, assist with the negotiations. This section allows a Magistrate to commit a child who is
appearing court on an indictable charge to the District Court in certain circumstances. If a serious children’s indictable offence is negotiated to a charge that can be dealt with in the Children’s Court, the DPP have the ‘fall back’ position that if the court is of the view that the matter cannot be properly dealt with in the Children’s Court, the matter can be committed to the District Court.

In all dealings with child clients, you must be familiar with the Representation Principles for Children that were adopted by the Law Society of New South Wales on behalf of the legal profession. Solicitors are bound by these Principles (see chapter 13).

The sentencing principles as outlined in s 6 Children (Criminal Proceedings) Act 1987 (NSW) apply to all children whether they are before the Children’s Court, District Court or Supreme Court.

The provisions of the United Nations Convention on the Rights of the Child should be considered. They are referred to in Prosecution Guideline 21. Of particular relevance are Articles 3.1 and 40.

**Further reading**

A detailed paper in relation to committal proceedings, their principles and application has been written by Mark Dennis, barrister.
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 pp.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
Subpoenas: practice and procedure

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

Legislation relating to subpoenas

The main legislation relating to subpoenas is ss 220 to 232 of the *Criminal Procedure Act 1986* (NSW). Procedures relating to issuing and setting aside subpoenas are also covered by the court rules in each jurisdiction. In New South Wales, these are:

- In the Local Court, Part 7 (rules 40-49) of the Local Courts (Criminal and Applications Procedure) Rule 2003.
- In the District Court, Pt 29 of the District Court Rules 1973.
- In the Supreme Court, Pt 37 of the Supreme Court Rules 1970.

There is no substitute for going directly to the rules or the legislation.

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

Options to issuing subpoenas

It is important to keep in mind that once a document or 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 this to be the case.

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 3 of the *Freedom of Information Act 1989* (NSW) and Part 3 of the *Freedom of Information Act 1982* (Cth)).

In relation to witnesses, while a subpoena is the primary way to compel a witness to attend court in criminal proceedings, s 36 *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 (called a subpoena to attend court);
- To direct that a person or organisation produces documents (called 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 (called a subpoena to give evidence and to produce documents).
Parties who may 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 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 be served by putting it down in the person’s presence after the person has been told of the nature of the notice. (see rule 44 of the Local Courts (Criminal and Applications Procedure) Rule 2003).

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

In the Local Court 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 for expenses incurred in complying with a subpoena are equivalent to the currently prescribed Scale of Allowances Paid to Witnesses, available at http://www.lawlink.nsw.gov.au/lc.nsf/pages/witness_allowance

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”: (rule 45 of the Local Courts (Criminal and Applications Procedure) Rule 2003).
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 of the Local Court 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 their own rules for shortening service of subpoenas.

Limits on obligations under subpoenas—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 Local Court Magistrate who will decide whether the subpoena should in fact be set aside.

Grounds for setting aside a subpoena include:

a) The subpoena is an abuse of process.

A subpoena may constitute an abuse of process where:

• It has not been served bona fide for the purpose of obtaining relevant evidence (R v Baines [1909] 1 KB 258; Botany Bay Instrumentation & Control Pty Ltd v Stewart [1984] 3 NSWLR 98).

• It is not issued for the purpose of a pending trial, hearing or application (Botany Bay Instrumentation & Control Pty Ltd v Stewart [1984] 3 NSWLR 98; National Employers Mutual General Association Ltd v Waind [1978] 1 NSWLR 372 at 382).

b) The subpoena is oppressive.

For example, a subpoena may be cast in oppressively wide terms or is issued against a non-party in such terms as to place an unfair obligation on that non-party to determine what is relevant to the facts in issue between the parties (Commissioner for Railways v Small (1938) 38 SR (NSW) 564; NSW Commissioner of Police v Tuxford [2002] NSWCA 139).

c) The subpoena seeks impermissible ‘fishing’.

The subpoena may be cast in such broad terms that it breaches the fundamental principle that subpoenas should identify the documents sought with reasonable particularity (Spencer Motor Pty Ltd v LNC Industries Ltd [1982] 2 NSWLR 921; National Employers Mutual General Insurance Association Ltd v Waind [1979] 141 CLR 648).

This requirement for reasonable particularity highlights the fact that recipients of subpoenas should not be subject to ‘fishing’—parties seeking unrestricted access to documents.
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. However, the named party can argue that the documents produced should remain sealed and not be inspected or copied.

If this happens, 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.

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

• There is no legitimate forensic purpose.

  The court must be satisfied that that it is “on the cards” that the documents 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; RTA of NSW v Conolly [2003] NSWSC 327).

• 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 117–26) apply to the adducing of evidence only and do not apply to a pre-trial procedure such as the production of documents on subpoena.

• 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. (Alister v R (1984) 154 CLR 404; Cain v Glass (No 2) (1985) 3 NSWLR 230).

• 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 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.

Practical tips in relation to 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 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.
Appendix: Sample schedules to subpoenas to produce documents

To the Commissioner of Police

Schedule
1. All records relating to the investigation, apprehension, arrest, interrogation, charging and prosecution of [name] (d.o.b.) 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], including but not confined to:
   a) All reports and/or statements received by police;
   b) All reports and statements of witnesses received from [name];
   c) All statements (whether in notebooks or otherwise) taken by police;
   d) All notebooks;
   e) All photographs taken by police or held by police; and
   f) All exhibit book entries.

To a medical doctor

Schedule
a) All medical reports, notes, files, treatment records and all other documents relating to attendances upon or treatment given to [name] (d.o.b.).

To a hospital

Schedule
a) All admission reports, clinical notes, notes, files, medical reports, reports, treatment records, and discharge summaries relating to the examination, diagnosis and treatment of [name] (d.o.b.) across the period [date a]–[date b].
Forensic procedures and DNA sampling

The Crimes (Forensic Procedures) Act 2000 (NSW) (CFPA) establishes the legislative framework for the taking, testing, destruction and storage of forensic samples.

It is important to have a working knowledge of the CFPA:

- When appearing for a client in an application for an order for forensic procedure;
- When considering the admissibility, relevance and the use of forensic material in a hearing or trial; and
- When advising a client both pre and post sentence who has been convicted of a ‘serious indictable offence’.

This chapter aims to provide a detailed discussion on each of the above points.

Any reference to a section of legislation in this chapter is a reference to a section of the CFPA, unless otherwise specified.

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

Application for an order for a forensic procedure

A practitioner may be required to appear for a client who is before the Local Court or Children’s Court for an application for an order for a forensic procedure. This is an order that is sought by a specified police officer (‘the authorised applicant’), authorising the taking of a forensic sample from a person who is referred to as the ‘suspect’.

Unfortunately, in many instances where the client can consent to the taking of the order, a legal practitioner will not be involved in either the provision of legal advice or representation. Legal advice and representation is more commonly utilised where the client cannot consent to the order.

This part discusses the detail of the various orders for forensic procedures that can be sought and granted.

Who is an authorised applicant?

Section 3 defines an authorised applicant as:

- The police officer in charge of a police station;
- A custody manager within the meaning of s 355 Crimes Act 1900;
- The investigating police officer in relation to an offence; or
- The Director of Public Prosecutions.

Types of forensic procedures

Section 3 defines a forensic procedure as:

- An intimate forensic procedure (as further defined in s 3); or
- A non-intimate forensic procedure (as further defined in s 3); or
- A buccal swab, that is, a swab of saliva taken from a person’s mouth.

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 that person (s 3).
Consenting to a forensic procedure

The CFPA does not authorise the carrying out of a forensic procedure on a person under 10 years of age (s 111).

A child between the ages of 10 and 18 (s 3), cannot consent to a forensic procedure (s 8).

An incapable person is an adult who is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she does or does not consent to the forensic procedure being carried out (s 3). Such a person cannot consent to a forensic procedure (s 8).

With the exclusion of a child or incapable person, a forensic procedure may be carried out on a suspect with the informed consent of the suspect (s 7).

There CFPA contains provisions regarding:

• The obtaining of informed consent from an Aboriginal or Torres Strait Islander (s 10);
• The obtaining of informed consent generally (s 9);
• The matters to be considered by a police officer before requesting consent to a forensic procedure (s 12); and
• The matters that the suspect must be informed of before giving consent (s 13).

If a suspect cannot or does not consent to the taking of a forensic procedure, an order may be made by (s 23):

• A senior police officer — in the case of a non-intimate forensic procedure on a person under arrest who is not a child or incapable person.
• An authorised justice — in the case of an interim order.
• A Magistrate — in the case of a final order.

The application for an order for forensic procedure

Interim orders

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 that must be carried out without delay.

An application for an interim order must be made:

• in person; or
• if not practicable, by fax; or
• if not practicable, by some other means.

However, if the application is not made in person, an authorised justice must not issue an interim order unless satisfied that:

• it is required urgently; and
• that 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. Section 36A provides for records of the application for an interim order where not made in person or reduced to writing.

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. However, it is important to note the following:
• An interim order should not stand indefinitely and the status of the order should be determined by an appropriate hearing on the s 25 criteria (which are outlined later in this chapter): Kerr v Commissioner of Police [2001] NSWSC 637.

• A sample taken under an interim order must not be analysed unless:
  – the sample is likely to perish before a final order is made; or
  – a final order is made (s 38).

Final orders
An authorised applicant may apply to a Magistrate for an order authorising the carrying out of a forensic procedure (s 26(1)).

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 25;
• Specify the type of forensic procedure to be carried out; and
• Be made in the presence of a suspect (subject to any contrary order of a Magistrate).

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, if the forensic material collected the first time is insufficient or contaminated, 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 43A).

Who can order the taking of a forensic procedure?

Powers of a senior police officer
A senior police officer has power to order the taking of a non-intimate forensic procedure on a suspect (except for a child or incapable person) who is under arrest and does not consent (s 18) if 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 the suspect committed such an offence; and
• The carrying out of the forensic procedure without consent is justified in all the circumstances.

If a suspect (other than a child or incapable person) has been asked and does not consent to a buccal swab, a senior police officer may order the taking of a sample of hair (other than pubic hair) from a suspect who is under arrest (s 19) if satisfied of the criteria in s 20 (outlined above).

Interim order—authorised justice
If a person does not or cannot consent to a forensic procedure, an authorised justice (as defined in s 3) may make an interim order authorising the carrying out of a forensic procedure (s 32). However, before doing so, the authorised justice must consider the same matters as to be considered before making a final order and must be satisfied:
• That the probative value of the evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure;
• There is sufficient evidence to indicate that an authorised justice is likely to be satisfied of the existence of the matters referred to in s 25 (discussed below) when the application is finally determined; and
• In the case of an intimate forensic procedure, that the suspect is suspected of a prescribed offence.
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 (s 32(3)) by way of the granting of a final order.

Final order – Magistrate

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 that all of the criteria in s 25 have been established, that is:

- That the person is a suspect (s 25(a));
- There are reasonable grounds to believe that the suspect committed a particular type of offence, which is dependant upon the type of forensic procedure sought (ss 25(b), 25(c) and 25(d));
- There are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence (s 25(f)); and that
- The carrying out of the forensic procedure is justified in all of the circumstances (s 25(g)).

The burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds or suspicion on reasonable grounds (s 103).

At the time of writing, there is little New South Wales case law regarding the interpretation and application of the s 25 criteria. Additionally, there is no legislative specification of the factors to be taken into account by a Magistrate when considering each of the criteria.

In Orban v Bayliss [2004] NSWSC 428, Simpson J analysed the legislation and noted the following:

- The extent to which an intrusive procedure may be so authorised is dependent upon the seriousness of the crime suspected, balanced against the intrusiveness of the procedure for which an order is sought.
- A forensic procedure necessarily involves some degree of invasion of personal privacy. The degree to which that balance will warrant the making of an order will depend upon the interaction of two things — the seriousness of the crime of which the person is suspected, and the degree of invasion of personal privacy or integrity.
- The purpose of the legislation is not to enable investigators to identify a person as a suspect. It is to facilitate the procurement of evidence against a person who is already a suspect.

Further assistance may be given to the interpretation of ‘reasonable grounds’ to ‘suspect’ and ‘believe’ by the case law examining s 357E Crimes Act 1900 (NSW), and in particular, the decision of Smart AJ in R v Rondo (2001) 126 A Crim R 562 where these propositions emerge:

- A reasonable suspicion involves less than a reasonable belief but more than a mere possibility. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.
- Reasonable suspicion is not arbitrary. Some factual basis must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.

Given the limited case law regarding the interpretation and application of the CFPA, a suspect’s lawyer should argue that any doubt about the construction of the CFPA should be resolved in favour of the suspect: see Stefanopoulos v Police (2000) 115 A Crim R 450.

The hearing of an application for a final order

The nature of the proceedings

In L v Lyons & Anor; B and S v Lyons & Anor [2002] NSWSC 1199, Sully J stated that a hearing of an application for an order for a forensic procedure is not a criminal proceeding. Sully J stated at paragraph 27:

The distinct requirements, earlier herein referred to, of s 25 of the Forensic Procedures Act [CFPA] contemplates clearly, in my opinion, an ultimate outcome which does not correspond
at all to what would be contemplated ordinarily as the outcome of ‘criminal proceedings’ in
the sense in which that expression is conventionally employed by the law.

Hearsay evidence is admissible in a forensic procedure hearing, not as hearsay evidence to prove the
truth of what was asserted, but as a composite body of evidence to assist in establishing the s 25 criteria.
In *L v Lyons & Anor; B and S v Lyons & Anor* [2002] NSWSC 1199 Sully J stated at paragraph 34:

That did not entail, however, that Constable Lyons had to prove, by reference to whatever
standard of proof might be thought appropriate to such an application, that the plaintiffs, or
any of them, were guilty in fact of the crimes which they were respectively suspected by her
of having committed. Constable Lyons was entitled to put before the Magistrate the
composite body of material which she had collected and collated in connection for her
application for orders under the *Forensic Procedures Act*; and she was entitled to argue,
upon the basis of that composite body of material, that the Magistrate ought to be satisfied
of, relevantly, the matters to which reference is made in paragraphs (a), (c), (f) and (g), all
quoted herein, of s 25 of the *Forensic Procedures Act*.

Accordingly, a COPS event entry and an alleged admission by a co-accused (during ERISP or otherwise)
can be admissible in a forensic procedure hearing.

**Interview friend and legal representation**

The following categories of suspected persons must have an ‘interview friend’ (s 3) present during the
hearing and may also be represented by a legal practitioner (s 30(2)):

- a child;
- an incapable person;
- an Aboriginal person; and
- a Torres Strait Islander.

An ‘interview friend’ may be excluded if the interview friend unreasonably interferes with or obstructs the
hearing of the application (s 30(8)).

An Aboriginal person or Torres Strait Islander may expressly and voluntarily waive the right to have an
interview friend present (s 30(4)).

Any other suspect may be represented by a legal practitioner (s 30(5)).

**Conduct of the proceedings**

The suspect or legal representative is entitled to cross examine the applicant for the order and may
address the court (s 30(6)(a) and (c)).

Additionally, with the leave of the Magistrate, the suspect or legal representative may call or cross
examine any other witness (s 30(6)(2)) if the Magistrate is 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)).

At the time of writing there is no case law outlining or indicating what would satisfy the s 30(7) test of
‘substantial reasons’ and ‘interests of justice’. However, the case law on ‘substantial reasons’ in relation
to s 91 *Criminal Procedure Act 1986* (NSW) may be of some assistance: see *DPP v Losurdo* (1998) 44
NSWLR 618; *Hanna v Kearney* (unreported, Supreme Court of NSW, 28 May 1998). See also chapter 5
on committals on this point.

**The making of a final order**

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

- Specify the forensic procedure authorised to be carried out;
- Give reasons;
- Ensure that a written record of the order is kept;
- Order 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.

The Magistrate may give directions for the carrying out of the forensic procedure (s 31(2)).

**General provisions relating to the taking of a forensic procedure**

**Time limits**

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

<table>
<thead>
<tr>
<th>Circumstance</th>
<th>Time limits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suspect not under arrest</td>
<td>Quickly as reasonably possible within 2 hours of suspect presenting to the police officer (excluding time out) (s 40).</td>
</tr>
<tr>
<td>Suspect under arrest</td>
<td>Not later than 2 hours after the end of the investigation period (excluding time out) (s 42).</td>
</tr>
</tbody>
</table>

**Procedure for taking the forensic sample**

- Section 44 outlines general rules for carrying out forensic procedures, such as that the suspect must be afforded reasonable privacy and must not involve more visual inspection than is required.
- Generally, the procedure should not be carried out in the presence of a person of the opposite sex, unless it is a self-administered buccal swab (s 44A and 49A).
- 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 the forensic procedure is conducted (s 46).
- 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). However, the CFPA does not authorise the carrying out of a forensic procedure in a cruel, inhuman or degrading way (s 48).

A table in s 50 outlines who may take a forensic procedure.

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).

An interview friend who is not a legal representative may be excluded if:

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

In such a case, the suspect may choose another interview friend (ss 54(3) and 55(4)).

An Aboriginal or Torres Strait Islander may expressly and voluntarily waive the right to an interview friend (s 55(3)).

**The sample—sufficient material to share**

If, after taking a forensic procedure from a suspect, there is sufficient material to be analysed in the investigation of the offence and on behalf of the suspect, the investigating police officer must ensure:

- That a part of the material sufficient for analysis is given to the suspect;
- That reasonable care is taken to protect and preserve the sample until it is given to the suspect; and
That the suspect is reasonably assisted to protect and preserve the sample until it is analysed (s 58).

Results of analysis
The result of the analysis of any forensic sample must be made available to the suspect unless to do so would prejudice the investigation of any offence. However, the results must be made available to the suspect in reasonable time before the evidence is adduced in any prosecution of the offence (s 60).

Practical application and considerations
Prior to appearing for a client in a hearing for an application for an order for 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?
- Do I need to seek leave to call any evidence?
- Is my client able to consent and if so, should he/she consent?
- Has ‘suspect’ been established?
- Have ‘reasonable grounds’ been established?
- If there is to be forensic material obtained will it confirm or disprove the suspicion? That is, is there something to compare the forensic material with?
- Do the circumstances require such a procedure?
- Should I ask the Magistrate to give reasons in relation to his/her decision?

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

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

Part 9 of the CFPA deals with the inadmissibility of evidence that arises from improper 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 recording or use of information on the DNA database system (s 82(1)).

The section applies to (s 82(3)):

- Evidence of forensic material, or evidence consisting 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, evidence is not to be admitted in any proceedings against the person in a court unless (s 82(4)):

- The person 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 that was not obtained in compliance with the provisions of the CFPA; or
• In the opinion of the court, the breach of, or failure to comply with, the provisions of the CFPA arose out of a mistaken but reasonable belief as to the age of a child.

In considering whether the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, s 82(5) says that the court may consider the following matters:

• The probative value of the evidence;
• The reasons given for failure to comply with the CFPA;
• The gravity of the failure to comply with the Act, and whether the failure deprived the person of a significant protection under the CFPA;
• Whether the failure to comply was intentional or reckless;
• The nature of the provision of the CFPA that was not complied with;
• The nature of the offence concerned and the subject matter of the proceedings;
• Whether admitting the evidence would seriously undermine the protection given to suspects by the CFPA;
• Whether the breach of or failure to comply with the provisions of the CFPA was contrary to or inconsistent with a right of a person recognised by the International Convention on Civil and Political Rights;
• Whether any other proceedings (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply;
• The difficulty of obtaining evidence without contravention of an Australian law;
• Any other matters the court considers relevant.

The CFPA specifically states that the probative value of the evidence does not by itself justify the admission of the evidence (s 82(6)).

There is little case law considering section 82, although the section was considered in R v Kane [2004] NSWCCA 78. There, Sully J held that the legislation applies to procedures actually carried out on the person of an individual. Justice Sully held that the chance circumstance of throwing away a cigarette butt, which is retrieved and analysed without any interference to the person is not a “procedure” within the terms of the CFPA.

The terms of s 82 are similar to, but arguably go beyond, the provisions of s 138 Evidence Act 1995 (NSW). Consequently the case law considering s 138 Evidence Act may be useful.

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 consequent upon a forensic procedure;
• There has been a failure to comply with a provision of the Act;
• They should support the argument for admission or rejection of the evidence by reasoned argument, as per the s 82 criteria.

The following is a brief checklist of matters a practitioner should examine when considering a failure to comply with the Act:

• Have any time limits been breached?
• Was the person able to consent?
• Has there been informed consent?
• Has the procedure been carried out appropriately?
• Has the forensic procedure been recorded?
• Has there been compliance with the provisions for the taking of samples from serious indictable offenders?
• Does the CFPA require certain forensic material to be destroyed?
• Has the appropriate person carried out the procedure?
Has there been an interpreter present where appropriate?

Has there been proof provided by the prosecution/applicant of any assertion that certain rights have been waived by the person?

**DNA sampling of a serious indictable offender**

The CFPA authorises the taking of a forensic procedure (a DNA sample) from some persons who are convicted of a serious indictable offence. A lawyer may be asked to advise of the circumstances when this is applicable and the consequence of the taking, testing and storing of the sample.

Part 7 of the CFPA deals with the carrying out of certain forensic procedures after conviction on a serious indictable offence. This Part only applies to a person who is serving a sentence of imprisonment (in a correctional centre or other place of detention) for a serious indictable offence whether or not the offender was convicted before or after commencement of the section (s 61).

**Who is a serious indictable offender?**

A serious indictable offender is a person convicted of a serious indictable offence.

A serious indictable offence is defined as (s 3):

- An indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of five or more years of imprisonment; or
- An indictable offence under a law of the State that is punishable by a maximum penalty of less than five years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of five or more years imprisonment.

**Non-intimate forensic procedure on a serious indictable offender**

A person is authorised to carry out a non-intimate forensic procedure on a person:

- Other than a child or incapable person, to which Part 7 applies with the informed consent (the provisions of which are outlined in s 67 and 69) of the serious indictable offender or by order of a police officer (s 62(1));
- On a child or incapable person, by order of a court under s 74 (s 62(2)).

A non-intimate forensic procedure for the purpose of Part 7 of the CFPA is the taking of a sample of hair (other than pubic hair), or the taking of a hand print, finger print, or toe print (s 61(2)).

**Intimate forensic procedure on a serious indictable offender**

A person is authorised to carry out an intimate forensic procedure to which Part 7 applies with the informed consent of the serious indictable offender or by order of a court (s 63).

An intimate forensic procedure for the purpose of Part 7 is the taking of a sample of blood (s 61(1)).

**Buccal swab on a serious indictable offender**

A person is authorised to take a sample by buccal swab from a person to which Part 7 applies with the informed consent of the serious indictable offender or by order of the court under s 74 (s 64).

**Court order authorising a forensic procedure on a serious indictable offender**

A police officer may apply to any court for an order regarding a serious indictable offender to which Part 7 applies:

- To permit an intimate forensic procedure to which the Part applies to be carried out (s 74(1));
- In the case of a child or incapable person, for an order for the carrying out of a non-intimate procedure (s 74(2)); or
For an order for the taking of a buccal swab or any other forensic procedure on a serious indicable offender (s 74(3)).

A police officer can make the application to the sentencing court, or to any court at a later time (s 74(4)). The court must be satisfied that the carrying out of the forensic procedure is justified in all of the circumstances (s 74(5)) and must take into account whether the CFPA would authorise the forensic procedure to be carried out in the absence of an order (s 74(6)).

The DNA database system

Part 11 of the CFPA establishes the regime for the DNA database system. A person is only permitted access to information stored on the DNA database system if accessed in accordance with the CFPA (s 92(1)).

Section 92(2) outlines the purposes for which a person (who is authorised by the responsible person for the DNA database system) may access information stored on the database as follows:

- The purpose of forensic matching as permitted under s 93;
- The purpose of making the information available to the person whom the information relates (in accordance with the regulation);
- The purpose of administering the DNA database system;
- The purpose of any arrangements entered into between the State and another State or Territory or the Commonwealth for the provision of access to information contained in the DNA database system by law enforcement officers or by any other person prescribed by regulations;
- The purposes of and in accordance with the Mutual Assistance in Criminal Matters Act 1987 (Cth), or the Extradition Act 1988 (Cth);
- The purpose of a review of, or inquiry into, a conviction or sentence under Part 13A of the Crimes Act 1900 (NSW);
- The investigation of complaints about the conduct of police officers under Part 8A of the Police Service Act 1990 (NSW);
- The purpose of a coronial inquest or inquiry;
- The purpose of the investigation of a complaint by the Privacy Commissioner; and
- Any other purpose prescribed by the Regulations.

Section 93 of the CFPA contains a detailed table outlining when it is permissible to match DNA profiles.

Destruction of forensic material

Part 10 of the CFPA outlines the provisions regarding the destruction of forensic material. The Part provides for the destruction of forensic samples if:

- Taken pursuant to an interim order if the order is disallowed by the Magistrate;
- A conviction is quashed;
- 12 months have elapsed and proceedings against the suspect have not been instituted or have been discontinued (the 12 month period may be extended by a Magistrate if satisfied that there are special reasons to do so);
- The forensic material was given voluntarily for elimination purposes;
- No conviction has been recorded; or
- The person is acquitted (and there is no appeal lodged regarding the acquittal or the appeal was unsuccessful or withdrawn).

Practical tips in relation to forensic procedures

- Read the CFPA.
• The subject of an application for an order for forensic procedure is referred to as the ‘suspect’.
• Appeal is to the Supreme Court and can be brought on a question of law only.
• Be conscious that any forensic material obtained from a forensic procedure may not be used just for that particular matter in which you appear, but is kept on the database for future use subject to a requirement for destruction in certain cases: ss 91–94.
• Do not hesitate to seek a short adjournment (or stand the matter in the court list) if you need to research or consider the legislation.
Part 4
Special cases and diversionary programs
Negotiating with the prosecution

A Negotiating with the prosecution: principles

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.

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.

Lester Fernandez
Chair
NSW Young Lawyers Criminal Law Committee
Negotiating with the Director of Public Prosecutions

Nicholas Cowdery AM QC
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; and, therefore, the prosecution can prove) in return for a plea to a less serious charge.

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 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, 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.
B Negotiating with the prosecution: practice

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

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.

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1 Referred to together as ‘the prosecution’.
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 23).

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 (discussed in chapter 4) when analysed, will frequently show that:

a) An element of the charge cannot be proved; or
b) There is insufficient evidence to support a crucial assertion in the facts sheet; or

c) 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 ore 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 that the victim suffered ‘grievous bodily harm’ — the alternative charge would be assault occasioning actual bodily harm.
- 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 Act, 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:

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2 Section 94 Crimes Act 1900 (NSW).
• 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

Practice Note 10/2003 sets out the time standards for representations for withdrawal for matters being 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 Guidelines. 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.

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Appendix: Examples of written representations

1. 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 robber 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.

2. 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.
Applications for intellectually disabled and mentally ill clients in the Local Court

Scope of this chapter

People who have some kind of mental disability or disorder may be able to be diverted from trial and punishment under the normal rules of the criminal justice system.

This is achieved through a successful application under s 32 Mental Health (Criminal Procedure) Act 1990 (NSW) (referred to in this chapter as MHCPA). The effect of a successful application under s 32 MHCPA is that the defendant will not have a conviction recorded against his or her name, and will not be liable to any further punishment (provided the defendant complies with the terms of the order that are made).

This chapter deals with offences that are sought to be finalised under s 32(3) MHCPA. Although this chapter deals specifically with matters dealt with in the Local Court, the same principles apply (with some slight variations) to s 32 applications made in the Children's Court.

This chapter does not deal with:

- Adjournments of the proceedings, granting of bail or making of orders as allowed by s 32(2) MHCPA
- Applications under s 33 MHCPA
- Fitness to be tried.
- Applications relating to Commonwealth offences (see s 20BQ Crimes Act 1914 (Cth)).

All references in this chapter to sections are references to sections in the MHCPA, unless indicated otherwise.

Background to section 32

The purpose of section 32

The following passages from Perry v Forbes (unreported, Supreme Court, 21 May 1993) per Smart J at 10 describe the purpose and operation of s 32:

Section 32 and s 33 contain provisions allowing a person to be dealt with in special ways appropriate to their condition and obviates the need for a court to embark upon a full hearing on the merits and to proceed to a conviction.

By s 31(2), s 32 and s 33 apply to the condition of the defendant as at the time when a magistrate considers whether to apply the relevant section to the defendant. This provision and the scheme of the Act suggest that it is incumbent upon a magistrate where there is material pointing to a mental disorder to consider whether to apply either s 32 or s 33 as the case may be.

The advantages to an accused of having a matter dealt with under section 32

The following are the advantages to an accused of having a matter dealt with under s 32 as opposed to being dealt with according to law:

- A plea of guilty is not entered. In considering the s 32 application, the Magistrate may inform her/himself as the Magistrate thinks fit, but not so as to require an accused to incriminate himself/herself (s 36).
• No conviction is entered. A decision to dismiss charge(s) under s 32(3) does not constitute a finding that the charge(s) are proven or otherwise (s 32(4)).

Orders that a Magistrate can make
If a Magistrate is satisfied that s 32 should be applied, the Magistrate can, under s 32(3), make an order dismissing the charge and discharging the accused:
• Into the care of a responsible person, unconditionally or subject to conditions; or
• On the condition that the accused attends on a person or at a place specified by the Magistrate for assessment of the accused’s mental condition or treatment or both; or
• Unconditionally.

While a charge may be dismissed, it will still appear on the accused’s criminal record (even though there has been no finding of guilt) with a notation that the matter was dealt with under s 32.

The criteria for the application of section 32

Offences to which section 32 applies
Offences to which s 32 applies (see s 31):
• Offences that can be dealt with summarily in the Local Court;
• Indictable Offences that can be dealt with summarily in the Local Court.

Section 32 applications cannot be made for:
• Committal proceedings (s 31(1)).
• Offences that must be finalised in the District Court or Supreme Court.

The criteria for section 32
The criteria for the application of s 32 are contained in s 32(1), which are that an accused:
• Is developmentally disabled (a term that is not defined in the MHCPA); or
• Is suffering from mental illness (but is not a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990 (NSW)); or
• Is suffering from a mental condition for which treatment is available in a hospital (but is not a mentally ill person within the meaning of Chapter 3 of the Mental Health Act 1990 (NSW)).

It is possible for an accused to suffer from both a mental condition or mental illness (as defined in s 32(1)) and a developmental disability. If this is the case it is possible to base the s 32 application on both grounds.

If an accused can establish that he/she comes within the criteria set out in s 32(1), the second step is to address the discretionary aspect of s 32.

This discretionary aspect is that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate considers relevant, it would be more appropriate to deal with the accused in accordance with the provisions of Part 3 of the MHCPA rather than according to law: s 32(1)(b).

Being dealt with according to law means the law (such as the Criminal Procedure Act 1986 (NSW) and Crimes (Sentencing Procedure) Act 1999 (NSW)) that normally applies to defendants appearing on criminal matters.

Indications that section 32 may apply
The following may indicate that an accused may come within the criteria for the application of s 32:
• They were in a special class at school or went to a special school;
• They have or are currently taking certain types of medication;
• They have had, or are currently having, psychological/psychiatric treatment, including being under the supervision of a community mental health team;
• They may have been or are currently in some form of supported accommodation, or are getting paid a disability support pension.

You might also be assisted in assessing whether s 32 applies to a client of yours through using the Court Liaison Service.

The Court liaison Service:
• Provides specially trained health professionals who are attached to courts.
• Provides early intervention mental health services at certain Local Courts.
• Provides psychiatric expertise and advice to Magistrates when people with a mental illness first appear in court (usually in custody).

The aim of the Court Liaison Service is to divert mentally ill offenders to appropriate treatment programs and to prevent inappropriate incarceration. Mental health nurses make an immediate assessment and provide a report to the court on options for further assessment and treatment.

You should check whether there is a Court Liaison Service attached to the court at which your client is appearing. They are a valuable aid in acting for clients who might be mentally ill. The Court Liaison Service is not involved in clients who have developmental disabilities.

Making a section 32 application in court

Evidence required
The main evidence that will support a s 32 application will come from psychological or psychiatric reports on your client, indicating that your client falls within the categories set out in the section.

Other evidence in support of a s 32 application can come from:
• Reports from treating doctors/support workers/mental health workers;
• Hospital clinical notes and discharge summaries;
• The police facts, in some cases.

A report from a psychiatrist (rather than a psychologist) will be more convincing to a Court in establishing that your client has a mental illness. An assessment of intellectual disability will usually be made by a psychologist, who would usually conduct a number of tests. A diagnosis of intellectual disability will generally be preferred coming from a psychologist than from a psychiatrist.

Any reports or other evidence you propose to tender should be served on the prosecution prior to the hearing of the application.

The section 32 application
The s 32 application may be made at the commencement of, or at any time during the course of the hearing of proceedings before a Magistrate (s 32 (1)).

These are the general steps in making a s 32 application in court:
• You indicate that there is an application to deal with the charge(s) under s 32.
• The prosecutor tenders the police facts and your client's criminal record.
• You tender reports and other relevant material to support your submission that your client falls within s 32 and to indicate that there is a case plan, if one is available.
• Make submissions in relation to s 32. Sworn evidence is not usually given.
• The Magistrate may ask for the prosecutor's view in relation to the s 32 application.
• The Magistrate considers whether the matter should be dealt with under s 32.
Matters to address in the section 32 application

When making a s 32 application you must address:

Why your client falls within section 32

You will have to present reports and other evidence if available, indicating that your client falls within the criteria for the application of s 32.

Your client will have to be assessed as coming within the criteria for s 32 at the time that the application is made (s 31(2)). The assessment will usually be by a psychologist or by the Court Liaison Service nurse).

The appropriateness of dealing with the matter under section 32

The s 32 application must directly address the appropriateness of the Magistrate exercising his/her discretion to deal with the matter under s 32.

The following matters should be addressed:

• The seriousness of the offence.
• The type of offence. For an example, an offence against property is different to an offence of violence.
• The link between the offence and your clients’ illness or condition, if any.
• Your client’s prior criminal record, if any (including whether your client has previously been dealt with under s 32).
• Whether there may be any specific reasons that dealing with your client according to law would be ineffective. It may be useful to contrast what would happen if your client is dealt with according to law. For example, your client may have no capacity to pay a fine, comply with a bond, or perform a community service order.

A treatment plan/case plan for your client

The following matters should be addressed:

• Supervision (family, psychological, psychiatric, nursing, medical and other support) available to your client within the home and in the community, particularly with a view to having your client being discharged into the care of a responsible person.
• A treatment plan that is available to your client in the community, which your client would comply with.

Enforceability of section 32 orders

Sections 32(3A)–(3D) allow:

• A Magistrate to call up an accused who is subject to an order under s 32 within 6 months of the order being made, if the Magistrate suspects that the accused has failed to comply with a condition of that order (s 32(3A));
• Allow a Magistrate to issue a warrant for the accused’s arrest, or authorise the issue a warrant for the accused’s arrest (ss 32(3B) and (3C)).
• Allow a Magistrate to deal with the original offence(s) as if the accused had not been discharged under s 32(3), if the accused has failed to comply with a condition of the s 32 order within 6 months of the discharge (s 32(3D)).

In an application under s 32 it will usually be appropriate for a service provider to acknowledge to the Court that they will advise the Community Offender Service or Department of Juvenile Justice of non-compliance with treatment. The Community Offender Service has prepared documents that service providers can complete in the event of a breach of a s 32 condition.

A Magistrate may require an accused who is going to be discharged under s 32 to sign an authorisation to the service provider authorising the service provider to report non-compliance with a treatment plan.
A Magistrate may also require an accused who is going to be discharged under s 32 to sign an undertaking to comply with a treatment plan.

Issues to consider in relation to section 32

If your client has already been convicted

Some Magistrates take the view that, if a defendant has already been convicted of the charge(s), that a s 32 application cannot be made in relation to the charge(s), because the defendant, by the conviction, has already been dealt with according to law.

There is no case law on this point. It can be argued that, because s 32(1) provides that an application may be made at “any time” during the course of the hearing of proceedings, that a s 32 application can be made even if your client has been convicted.

If the Magistrate does hold the view described in the paragraph above, and your client was convicted, you can make an application to annul the conviction before the s 32 application. See chapter 24.

If your client instructs that he/she is not guilty

If your client denies the offence, this does not necessarily stop you making a s 32 application. This is because a decision to dismiss charge(s) under s 32(3) does not constitute a finding that the charge(s) against your client are proven or otherwise (s 32(4)).

If the matter goes to a defended hearing, the s 32 application may be made at the commencement or at any time during the course of the hearing (s 32 (1)). The s 32 application should preferably be made at the outset of the hearing. If the s 32 application is unsuccessful at that time and the hearing proceeds, the s 32 application can be made again at any time during the course of the hearing (see the analogous case of R v Mailes (2001) 53 NSWLR 251).

Steps to take following an unsuccessful section 32 application

In practice, a s 32 application would only be made a maximum of two times - once before one Magistrate, and once before another Magistrate if the first Magistrate hearing the matter disqualifies himself or herself.

Before making a s 32 application, you should get your client’s instructions as to what to do if the s 32 application is unsuccessful.

Applying for the Magistrate hearing the case to disqualify himself/herself

Following an unsuccessful s 32 application you can apply for the Magistrate hearing the application to disqualify himself/herself from hearing the matter any further (s 34(2)).

A Magistrate who has refused to grant a s 32 application must, on the application of the accused, disqualify him/herself from further hearing the proceedings if:

- That was the first time that a s 32 application was made in the current proceedings; or
- Even if a previous application under s 32 has been refused in the same proceedings, the subsequent Magistrate who hears a fresh s 32 application may also disqualify him/herself if the Magistrate considers it appropriate to do so in the particular circumstances of the case.

You should consider seriously whether to take the step of asking a Magistrate to disqualify him/herself following an unsuccessful s 32 application if you do not intend to make a subsequent s 32 application before another Magistrate.

It may be appropriate to require the Magistrate to disqualify him or herself in many cases where your instructions are to enter a plea of not guilty.
Pleading guilty/not guilty

If a plea of not guilty is to be entered, your client's condition or illness may be relevant to a defence to the charge, or proof of an element of the offence.

If a plea of guilty is to be entered, the matter will proceed to sentence according to law. The illness or condition suffered by your client may remain relevant as a mitigating factor on sentence (see s 21A(3)(j) Crimes (Sentencing Procedure) Act 1999 (NSW)).

In addition, there are specifically sentencing principles that may apply. For example, general deterrence has less weight as a sentencing principle in the case of an offender suffering a mental disorder or severe intellectual disability (see R v Scognamiglio (1991) 56 A Crim R 81; R v Letteri (unreported, New South Wales Court of Criminal Appeal, 18 March 1992); R v Champion (1992) 64 A Crim R 244; R v Israel [2002] NSWCCA 255; R v Hemsley [2004] NSWCCA 228).

Appealing, following being sentenced, to the District Court

If your client's s 32 application is unsuccessful in the Local Court, your client has the right to appeal to the District Court following sentence. The appeal is an appeal against conviction (also called an all grounds appeal).

It is beyond the scope of this paper to go into detail as to what happens in an appeal against conviction in the District Court. If your client's appeal is successful, the Judge will quash the conviction and dismiss the matter under s 32.

The main cases dealing with section 32

- Perry v Forbes (unreported, Supreme Court of New South Wales, 21 May 1993).

Further reading


Diversionary schemes for drug dependent offenders

A 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 liberty if they comply with a court-supervised treatment program.

The Drug Court sits at Parramatta 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 s/he can seek to enter the Drug Court program.

Mandatory tests

Read ss 5, 6 and 7 of the *Drug Court Act 1998* (NSW) and clause 5 of the Drug Court Regulation carefully 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. Be before a Local or District Court in western Sydney, namely: Bankstown; Blacktown; Burwood; Campbelltown; Fairfield; Liverpool; Parramatta; Penrith; Richmond; Ryde; and Windsor courts.

2. Have a “usual place of residence” in western Sydney, defined as being within one of the following local government areas: Auburn; Bankstown; Baulkham Hills; Blacktown; Campbelltown; Fairfield; Hawkesbury; Holroyd; Liverpool; Parramatta; or Penrith24.

3. Be “highly likely” to receive a full-time custodial sentence in relation to the charge(s) faced.

4. Be pleading guilty or having indicated that he/she intends to plead guilty to the charge(s) to be referred (see below).

5. Appear to be dependent on prohibited drugs25.

6. Not be facing a charge involving a strictly indictable supply of prohibited drugs.

7. Not be facing a charge involving “violent conduct or sexual assault” (see below).

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24 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] NSWDRG5.

25 As ‘prohibited drugs’ is defined in the *Drug Misuse and Trafficking Act*. Note that alcohol dependency does not qualify, nor does dependency on prescribed medication such as benzodiacepinies (except rohypnon). Of course, if the client has a multiple-drug dependency, it is enough that at least one of the drugs of dependency is prohibited.
8. Not be suffering from any mental condition that could prevent or restrict the person's active participation in a Drug Court program.

9. 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, it 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 s/he 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 7), 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 touching.

In *DPP v Allan Ebsworth* [2001] NSWCA 318, 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.

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.

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26 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 wins 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 programme.
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. Their telephone numbers are contained in the Contacts chapter of this book.

**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.

As there are usually insufficient places on the program to service the number of referrals to the Drug Court, a referred person is placed in a computerised ballot.

You may not simply adjourn your client's matters to the Drug Court. 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. If you have a client who wishes to enter the Drug Court program, then that client's matters should be adjourned to the applicable Local or District Court on a Thursday. Your client's matter should be mentioned as close to 10:00am as possible, as once your client is referred to the ballot, the referring Court registry will have to contact the Drug Court to have your client included in the ballot. After the ballot is conducted, the various referring Courts will be advised (through the Court registry) which people have been successful.

Drug Court ballot timing and procedures can change from time to time, and so contact the Drug Court registry or the Legal Aid solicitors at the Drug Court before placing a client in the ballot, to confirm the procedures remain the same (all telephone numbers are in the Contacts chapter of this book).

**After the ballot**

Successful applicants will be given a date (generally within a week) for their first appearance at the Drug Court.

Presuming that no issues are raised that your client might not be suitable 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 a specific part of the MRRC Silverwater (for males) or Mulawa (for females) designed for Drug Court clients.

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 an (approximately) 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 a few weeks in gaol.

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 7(2) argument”**

Simply because a person is eligible and has gained a place through the ballot does not necessarily mean that he or she will commence the program. The Drug Court may exercise a discretion (conferred by s 7(2) *Drug Court Act*) not to allow a person to enter into a Drug Court program.

Following a person’s first appearance at the Drug Court, the prosecution (or, occasionally, the Judge) may list a person’s matters for a “section 7(2) argument”.

A section 7(2) argument may be conducted for any rational reason that the Court may not wish a particular person to enter into a Drug Court program. The most usual reasons are the following:

- Even though the referred charges do not involve violent conduct, the person’s prior record of violent offences is so poor that the court could not have confidence that the person would not behave violently whilst on the program.
• The person’s mental illness or developmental disability is such that the person would either be incapable of participating in the program, or the person would present an unacceptable risk of violent or antisocial behaviour on the program\textsuperscript{27}.

• Despite being otherwise eligible, the person is incapable of participating in a Drug Court program because he/she is in custody and will remain in custody for the foreseeable future, either serving a sentence or bail refused.

• The person’s prior behaviour (whether criminal or not) is such that the court could have no confidence that the person would comply with the rules of a Drug Court program\textsuperscript{28}.

Senior Drug Court Judge Murrell, said in \textit{R v Sloane} [1999] NSWDRGCRT 3:

\begin{quote}
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.
\end{quote}

There is no appeal from the Drug Court exercising its discretion not to convict and sentence a person under the \textit{Drug Court Act}: s 7(5) of the Act.

### Suspended sentences

Many drug-dependent clients get suspended sentences (s 12 \textit{Crimes (Sentencing Procedure) Act}), and then breach them by committing further offences.

In the decision of \textit{R v Riquelme} [2001] NSWDRGC 8 the Drug Court decided that as the law then stood it did not have the power to further suspend (pursuant to the \textit{Drug Court Act}) gaol sentences which had already been suspended (pursuant to the \textit{Crimes (Sentencing Procedure) Act}) where the suspension order had already been (or was due to be) revoked.

As a result of that decision, sections 8AA–8AD \textit{Drug Court Act} were added to the Act effective August 2003. Those provisions provide a scheme for suspended sentence bonds to be referred to the Drug Court, and for the Drug Court to sentence offenders under the \textit{Drug Court Act} and enter them into a Drug Court program, in the same way as if the suspended sentence had never been entered. In practice, proceedings for breaches of good behaviour bonds under sections 9 and 10 of the \textit{Crimes (Sentencing Procedure) Act} may also be referred to the Drug Court under this scheme.

Section 8AA(2) imposes a duty upon a referring court before whom an offender appears under s 98 of the \textit{Crimes (Sentencing Procedure) Act}\textsuperscript{29} to:

\begin{itemize}
  \item[a)] ascertain if the person is an ‘eligible person’ under the \textit{Drug Court Act} (see above in this chapter)
  \item[b)] if so, ascertain if the person is willing to be referred to the Drug Court to be dealt with for the breach of bond, and
  \item[c)] if so, refer the person to the Drug Court to be dealt with for the breach of the bond.
\end{itemize}

Note that the power conferred by s 8AA must be exercised “as soon as practicable after the person’s first appearance at court” on the breach of bond: s 8AC(3) of the Act.

However, be aware that the referring courts under s 8AA are the same as the referring courts in all other matters—see mandatory criterion 1 at the start of this chapter. (All other mandatory criteria also apply.) Therefore, even if your client meets all other criteria and has other eligible charges before a referring court, if the breach of suspended sentence bond proceedings are before a non-referring court (i.e. a court outside western Sydney), there is no power for that court to refer those matters to the Drug Court.

\textsuperscript{27} See footnote 3 above. The Court employs a consultant psychiatrist, and will never exclude a person on psychiatric grounds without considering a psychiatric report commenting on the person’s history, compliance with medication and perceived risk factors.

\textsuperscript{28} See \textit{R v Ali} [2001] NSWDRGC 1.

\textsuperscript{29} The provision of the \textit{Crimes (Sentencing Procedure) Act} that deals with calling offenders up for breaches of good behaviour bonds.
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 should not apply to enter the Drug Court program, as entering a Drug Court program involves an acceptance that a full-time custodial sentence is inevitable.

- If your client is not ready (either mentally or in terms of having appropriate support in the community) to fully rehabilitate at this stage of his/her life, he/she will often be facing the possibility of serving a lengthier term of imprisonment than if he/she had never entered the program. This is because a participant who relapses presents a high risk of re-offending. Offences committed whilst on the program attract harsh sentences because of the serious breach of conditional liberty, and cumulative sentences are almost always imposed. The client may well have been able to secure a concurrent or partially cumulative sentence if sentenced for the same string of offending at a Local Court or District Court.

- For clients facing short gaol sentences, there is often good sense in doing the sentence and attending to rehabilitation after release, rather than entering into a highly intrusive and lengthy Drug Court program (for a minimum duration of 1 year and frequently longer) with no guarantee of avoiding a custodial sentence at the end of it. What should a client consider before applying to participate in a Drug Court program?

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 reform their drug dependency before agreeing to enter the program.

Not everybody is able to graduate from the program. Graduation requirements include that the participant has a period of some months free from all illicit drug use (as confirmed by regular monitored urine tests), be well established in employment or education and be integrated into the community.

A participant may dramatically reduce his or her drug use and criminal activity, stabilise in the community, and yet still not meet the graduation requirements. This is generally due to the fact that occasional drug use, minor breaches of program requirements, or lack of employment or education will stop a participant from graduating. 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/her initial sentence, but 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 taken into account in setting the term of the initial sentence.

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 revolves around stabilisation.
- Phase Two is concerned with consolidation and early reintegration.
- Phase Three is concerned with reintegration.

Graduation from the program takes a minimum of 12 months from commencement on the program. During the program the participant attends a number of report-backs. 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 to discuss the progress of every participant appearing 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 7(2) arguments’ (see above), initial sentences and final sentences.

There is intensive supervision and monitoring of participants on the program. If the Court 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.

Sections 10 and 11 of the Drug Court Act deal with proceedings for terminations and non-compliance with the program. Apart from termination of the program where a client completes it (‘graduation’), a Drug Court program may be terminated in 3 ways:

a) If a participant requests it (‘self-termination’)

b) If the court finds that the participant is unlikely to make any further progress in the program, or

c) If the court finds that the participant’s ongoing participation in the program poses an unacceptable risk of re-offending.

Where the Office of the DPP (or the Court of its own volition) contends that categories (b) or (c) may apply, the participant will be listed for an argument before the Drug Court as to whether his or her program should be terminated.

Section 12 of the Drug Court Act deals with the imposition of final sentences after the program has been terminated.

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. Their telephone numbers are listed in the Contacts chapter of this book.
B 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 does not depend on a plea of guilty. A client who has a problem with illicit drugs has 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.

Referrals to the program can 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
To enter the MERIT program your client must:

- Be an adult.
- Have an illicit drug problem—alcohol cannot be the primary drug.
- 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.
- Have a treatable problem.
- Be approved by the Magistrate to participate in the program.

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, that is 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.
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.
There are a variety of programs intended to divert people away from crime, the criminal justice system or incarceration.

**Current diversionary programs**

**The Cannabis cautioning scheme**

The Cannabis cautioning scheme is a pre-charge program where a person found with a small amount of cannabis may be given a caution on up to 2 occasions. The person is referred by police to a help line and are given information about the harms of cannabis use.

**Pre-sentence programs**

- The MERIT program, which is intended to temporarily divert individuals away from the criminal justice system while they deal with their drug problem (discussed in detail in chapter 11(b)).
- The Youth Drug and Alcohol Court (in which children are referred on the basis that they will participate in a rehabilitation program prior to sentence at the Children’s Court; the program is discussed in detail in chapter 15).
- Traffic offender programs (discussed in detail in chapter 20).
- The Rural alcohol diversion scheme, which is a pre-sentence option currently being trialled at Bathurst and Orange Local Courts. The Scheme is based on the MERIT program, but is aimed at alcohol rather than drugs.
- Community Aid Panels (CAPs).

CAPs assist in the punishment of generally young and first time offenders. The CAP usually consists of a police officer and other people involved in the community.

If there is a CAP attached to the court at which your client is appearing, when you enter your client’s plea of guilty you can suggest that your client’s matter may be suitable for referral to a CAP. Matters are adjourned with a bail condition added that the accused contacts the local area CAP, usually through reporting to the local area police station.

The CAP will set an amount of unpaid hours of work to be performed by the accused. The number of hours worked is usually less than that imposed for a community service order made pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW), and is usually in the vicinity of 10–20 hours. The CAP will prepare a report to the court when the work is completed satisfactorily.

Involvement in the above pre-sentence programs can lead to more lenient sentences, because they often indicate a level of self-motivation on the part of an accused, as well as a degree of rehabilitation.

**Post sentence programs**

Examples of post-sentence programs are:

- The Drug Court (used with suspended sentence, and discussed in detail in chapter 11(a)).
- The sober driver program (discussed in detail in chapter 20).
- Home detention (discussed in chapter 18).

Other post sentence options which are intended to divert an accused from future offending are courses run by Community Offender Services (COS) (formerly known as the Probation and Parole Service).

These programs include:

- anger management courses;
domestic violence perpetrators course;
• relapse prevention programs;
• responsible behaviours programs; and
• drug and alcohol abuse programs.

These are generally courses for treatment and management and may be ordered as conditions of a good
behaviour bond or arranged as a result of an order for supervision by COS.

It is advisable to check with the local COS Office as to the types of programs they offer.

The Criminal Procedure Act and intervention programs

The “intervention programs” referred to in the Criminal Procedure Act 1986 (NSW) (CPA) are those that
have been prescribed by the Criminal Procedure Regulation.

At present, circle sentencing is the only intervention program prescribed by the Regulations (regulation
11D). Traffic offender programs and CAPs are expected to be prescribed by the Regulations.

Chapter 7 Part 4 CPA sets out the provisions in the CPA that relate to intervention programs, and
provides for the recognition and operation of intervention programs.

Section 345 CPA sets out the objects of the Part, which are:
• to provide a framework for the recognition and operation of programs of certain alternative
measures for dealing with persons who have committed an offence or are alleged to have
committed an offence,
• to ensure that such programs apply fairly to all persons who are eligible to participate in them, and
that such programs are properly managed and administered, and
• to reduce the likelihood of future offending behaviour by facilitating participation in such programs.

What is an intervention program?

An intervention program is defined in s 347 CPA and is a program of measures for dealing with offenders
or accused persons that may include any of the following:
• Promoting the treatment or rehabilitation of offenders or accused persons,
• Promoting respect for the law and the maintenance of a just and safe community,
• Encouraging and facilitating the provision by offenders of appropriate forms of remedial actions to
victims and the community,
• Promoting the acceptance by offenders of accountability and responsibility for their behaviour,
• Promoting the reintegration of offenders into the community.

When can a person be referred to an intervention program?

An accused person may be referred to participate in an intervention program at these different points in
criminal proceedings:
• When a court grants bail to a person—it may impose a condition of bail under s 36A(2)(a) Bail Act
1978 (NSW) that the person enter into an agreement to subject himself/herself to an assessment of
his/her capacity and prospects for participation in an intervention program or other program for
treatment or rehabilitation.
• When a court grants bail to a person—it may impose a condition of bail under s 36A(2)(b) Bail Act
that the person actually participate in an intervention program (and comply with any plan arising out
of the program) or other program for treatment or rehabilitation.
• When a court adjourns sentencing proceedings against a person, it may impose a condition of the
person’s ongoing bail that the person have assessed his or her capacity and prospects for
participation in an intervention program, or to allow the person to participate in an intervention
program (and to comply with any plan arising out of the program) under the *Criminal Procedure Act*.

- When a court finds a person guilty of an offence it may make an order requiring the person to participate in an intervention program (and to comply with any plan arising out of the program) under s 10 *Crimes (Sentencing Procedure) Act 1999 (NSW)*.
- When participation in an intervention program (and compliance with any plan arising out of the program) is made a condition of a good behaviour bond under s 9 *Crimes (Sentencing Procedure) Act*, or of a suspended sentence under s 12 of that Act.

### Eligibility for intervention programs

#### Offences for which intervention programs may be conducted

Section 348 CPA sets out the offences that an intervention program may be conducted in relation to, which are:

- summary offences; and
- indictable offences that may be dealt with summarily.

#### Offences for which intervention programs may not be conducted

A person facing the following offences cannot undertake an intervention program:

- An offence under s 35 *Crimes Act 1900 (NSW)* (malicious wounding or maliciously inflict grievous bodily harm);
- An offence under s 35A (1) *Crimes Act* (maliciously cause dog to inflict grievous bodily harm);
- Offences in the nature of rape, offences relating to other acts of sexual assault, or child prostitution and pornography;
- An offence under section 562AB *Crimes Act* (stalking or intimidation with intent to cause fear of physical or mental harm);
- An offence involving the use of a firearm;
- Offences under s 23 (1)(b) or (2)(b) (relating to prohibited plants), s 25 (supply of prohibited drugs) or s 25A (supplying prohibited drugs on an ongoing basis) of the *Drug Misuse and Trafficking Act 1985 (NSW)*;
- Any other offence prescribed by the Regulations.

### Eligibility of certain persons to participate in intervention programs

Section 349 CPA states that a person is not eligible to participate in an intervention program in respect of an offence while the person is being dealt with for the offence:

- By the Children's Court
- By any other court when it is dealing with a child in accordance with Division 4 of Part 3 of the *Children (Criminal Proceedings) Act 1987 (NSW)*. For example, a District Court can sentence a child according to the *Children (Criminal Proceedings) Act* (see chapter 13).
Part 5
Children in the criminal justice system
The criminal jurisdiction of the Children’s Court

This chapter discusses the criminal jurisdiction of the Children’s Court.

All references to legislation in this chapter are references to the Children (Criminal Proceedings) Act 1987 (NSW) ("CCPA") unless stated otherwise.

A child is defined as a person under the age of 18 years (s 3). In this chapter, a reference to a ‘young person’ is a reference to a child.

Representing children and young people

On 19 October 2001, the Law Society of New South Wales adopted the ‘Representation Principles for Children’s Lawyers’ on behalf of the profession. A legal practitioner appearing for young people should be aware of the Principles. A copy can be obtained from the Law Society.

A lawyer acting for a child acts as a ‘direct representative’ which is defined in the Principles as follows:

A direct representative, regardless of how he or she is appointed, receives and acts on instructions from the child client irrespective of what the representative considers to be the best interests of the child client. A direct representative owes the same duties of undivided loyalty, confidentiality and competent representation to the child as is due to an adult.

The direct representative must act upon the instructions of the child, and not of the parent or carer. The person who pays the legal fees has no authority to direct the legal practitioner in his/her undertaking of the representative role (Principle A1) unless the child has provided an express authority to this effect. A practitioner should be cautious in obtaining such an express authority.

When criminal proceedings are brought against a child, the child has a right to have the following explained to him/her:

- The nature of the allegations;
- The elements of the offence(s);
- The facts that must be established before he/she could be found guilty of the offence(s).

Until those matters have been explained to the child, the court before which the proceedings are brought shall not proceed further (s 12 CCPA). Children’s Court Practice Direction 10 is also relevant to this point.

In communicating with the child, a practitioner:

[S]hould use language appropriate to the age, maturity, level of education, cultural context and degree of language proficiency of the child. Preference should be given to face-to-face communication with the child rather than communication by telephone or in writing (Principle D6).

It may be useful to obtain instructions from your client in the absence of the parent or carer. Often the child will give a more complete description of the offence or their involvement in the offence if the parent or carer is not present during your interview.

The Children’s Court

Commencement of proceedings

Section 8 CCPA states that criminal proceedings against a child should be commenced by way of summons or court attendance notice (CAN) unless:

- The offence consists of:
  - A serious children’s indictable offence;
• Certain offences under the *Drug Misuse and Trafficking Act 1985* (NSW); or
• Any other offence prescribed by the Regulations; OR
• In the opinion of the person commencing proceedings there are reasonable grounds for believing that:
  • The child is unlikely to comply with a summons or court attendance notice; or
  • The child is likely to commit further offences; OR
• If in the opinion of the person commencing proceedings the child should not be allowed to remain at liberty due to:
  • The violent behaviour of the child; or
  • The violent nature of the offence;

Additionally, the case law regarding arrest and the commencement of criminal proceedings make clear that arrest:
• Is inappropriate for minor offences where the defendant’s name and address are known, where there is no risk of him/her departing and there is no reason to believe that the summons will not be effective;
• Is reserved for cases where it is clearly necessary;
• Is inappropriate where a summons will suffice.

It is recognised that ‘these principles apply all the more when any person suspected of having committed an offence is a child’: *DPP v CAD & Ors* [2003] NSWCCA 196).

A recent case relevant on this issue is *DPP v Lance Carr* (2002) 127 A Crim R 151. While this case does not directly deal with s 8 CCPA, it is relevant in the following ways:
• The interpretation of s 8 should be strictly applied:
  This court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant’s name and address are known, there is no risk of him/her departing and there is no reason to believe that a summons will not be effective … it is time that the statements of this Court were heeded (per Smart AJ at paragraph 35).
• Where arrest is inappropriate, evidence of further offences that follow (for example, resist police, assault police) should be rejected under s 138 *Evidence Act 1995* (NSW).
• The fact that a child was arrested when it was appropriate to summons him/her is relevant to penalty. The appropriate submissions should be made relate to these statements by Smart J in *DPP v Lance Carr*:
  Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear.
  A suspect suffers a greater penalty by being deprived of his liberty than he could possibly get by going to court and being found guilty.
• *DPP v Lance Carr* can be used as the basis for submitting that bail should be dispensed with in matters when they should have been initiated by CAN or summons rather than arrest.

**The jurisdiction of the Children’s Court**

The Children’s Court has a much wider jurisdiction to hear and determine matters than the Local Court.

Section 28 CCPA outlines the jurisdiction of the Children’s Court. Jurisdiction depends on the age of the person at the time of the alleged offence and at the time of being charged, and whether the offence is a serious children’s indictable offence or a traffic offence.

The Children’s Court has jurisdiction to hear and determine proceedings in respect of any offence, other than serious children’s indictable offences and certain traffic offences. The Children’s Court hears committal proceedings in respect of any indictable offence (including a serious children’s indictable offence), if the offence is alleged to have been committed by a person who:
• Was a child when the offence was committed; and
• Was under the age of 21 years when charged before the Children's Court.

The ‘Table One’ and ‘Table Two’ classification of offences outlined in Division 3 of the *Criminal Procedure Act 1986* (NSW) (and discussed in chapter 4) is not relevant to the Children’s Court’s jurisdiction. The classification is relevant however to the *Young Offenders Act 1997* (NSW) (YOA) (see chapter 14).

**Serious children’s indictable offences**

The Children’s Court does not have jurisdiction to hear and determine proceedings, other than committal proceedings in respect of serious children’s indictable offences. Section 3 CCPA and Reg 4 Children (Criminal Proceedings) Regulation define serious children’s indictable offence. A serious children’s indictable offence is dealt with according to law in the District or Supreme Court, as opposed to being dealt with under the CCPA.

Examples of serious children’s indictable offences are:

• Murder;
• An offence punishable by imprisonment for life or for 25 years, such as Armed Robbery with a Dangerous Weapon.

**Traffic offences**

The Children’s Court does not have jurisdiction to hear and determine a traffic offence that is alleged to have been committed by a person unless:

• The traffic offence arose out of the same circumstances as another offence that is alleged to have been committed by the person which is being dealt with by the Children’s Court (s 28(2) CCPA); or
• The person was not of licensable age when the offence is alleged to have been committed (s 28(2) CCPA). A person must be at least 16 years of age or 16 years and 9 months before they can obtain a learners licence for a motor vehicle or motor cycle respectively (rules 6 and 10 Road Transport (Driver Licensing) Regulation 1999 (NSW)).

A child not of licensable age will be dealt with by the Children’s Court for a traffic offence. All children falling within this category will be under the age of 16 years and consequently the court cannot record a conviction against the child. Ordinarily, the power to disqualify a person from driving only arises where a person has been convicted of the offence (ss 24 and 25 *Road Transport General Act 1999* (NSW)).

However, it has been held that s 33(5)(a) CCPA provides a power to disqualify a child from driving who has been found guilty of an offence, even though a conviction cannot or has not been recorded (*HA & SB v DPP [2003] NSWSC 347*). Importantly, the power to disqualify a child from driving in these circumstances is an exercise of discretion rather than an automatic consequence of disqualification.

Any child who is of licensable age, and does not have another Children’s Court offence arising from the same circumstances, will be dealt with in the Local Court for a traffic offence.

In these circumstances, the Local Court is not a closed court (s 10(2) CCPA) and generally utilises the sentencing options available for sentencing adults. However, the Local Court may exercise the sentencing options outlined in s 33 CCPA when dealing with a child convicted of a traffic offence (s 210 *Criminal Procedure Act 1986* (NSW)). When addressing a court on sentencing options in these circumstances, you should consider submitting that the matter be finalised under s 33 CCPA.

The Local Court cannot impose a sentence of imprisonment on a child found guilty of a traffic offence (s 210(3) *Criminal Procedure Act 1986* (NSW)) but can impose a control order (s 33(1)(g) CCPA).

**Dealing with matters in the Children’s Court and dealing with matters according to law**

A child shall be dealt with according to law, as opposed to under the CCPA, for a serious children’s indictable offence (s 17 CCPA).

Section 31 CCPA states that if a person is charged before the Children’s Court with an offence (whether indictable or otherwise) other than a serious children’s indictable offence, the proceedings for the offence shall be dealt with summarily.

The exceptions to this are:
• If the person charged wishes to take his/her matter to trial (s 31 (2) CCPA); or
• If the person is charged with an indictable offence and the Children’s Court is of the opinion, after all the evidence for the prosecution has been taken (s 31 (3) CCPA):
  • Having regard to the evidence, the evidence is capable of satisfying a jury beyond reasonable doubt that the person committed an indictable offence; and
  • The charge may not be properly disposed of in a summary manner,

the proceedings for the offence shall not be dealt with summarily but shall be dealt with in accordance with s 65 Criminal Procedures Act 1986 (NSW).

This mans the matters are dealt with as if they are committal proceedings. See chapter 6 for a discussion of the procedure relating to committals.

The matters that the court must take into account these matters when considering whether a child should be dealt with according to law (s 18(1A)):
• The seriousness of the indictable offence concerned;
• The nature of the indictable offence concerned;
• The age and maturity of the person at the time of the offence and at the time of sentencing;
• The seriousness, nature and number of any prior offences committed by the person;
• Such other matters as the court considers relevant.

These matters seem to codify the matters set out in R v WKR (1993) 32 NSWLR 447.

A higher court that determines to deal with a child under the CCPA may remit the child to the Children’s Court to be sentenced (s 20 CCPA).

### Sentencing principles in relation to children

The sentencing principles that apply in the Children's Court are vastly different to the sentencing principles applicable in the adult jurisdiction.

Section 6 CCPA states that a court that exercises criminal jurisdiction in respect of a child shall have regard to the following principles:
• That whilst children bear responsibility for their actions, they require guidance and assistance because of their state of dependency and lack of maturity;
• It is desirable to allow the education or employment of the child to proceed uninterrupted;
• It is desirable to allow a child to reside in his/her home;
• The penalty imposed on a child should be no more than that imposed on an adult for an offence of the same kind.

Generally, when sentencing a child, these principles apply:
• Considerations of punishment and general deterrence may be given less weight in favour of individual treatment aimed at the rehabilitation of the child (R v GDP (1991) 53 A Crim R 112).
• There is a qualification to the principle that considerations of punishment and general deterrence are subordinate to that of rehabilitation, which is when children conduct themselves in ways that adults do (R v Tran [1999] NSWCCA 109 at paragraph 10).
• Considerations of punishment and general deterrence will not be subordinate to that of rehabilitation for offences regularly committed by children (R v McIntyre (1998) 38 A Crim R 135).
• The extent of the regard to be paid to general deterrence depends on the particular circumstances of each case (R v FQ (unreported, Court of Criminal Appeal, 17 June 1998)).
• The proximity of the offender to 18 years of age is relevant (R v Tran [1999] NSWCCA 109).
• The weight to be given to the element of youth does not vary according to the seriousness of the offence (R v Hearne [2001] NSWCCA 37).
The Children's Court must take into account that the child has pleaded guilty, when the child pleaded guilty or indicated an intention to plead and accordingly reduce any order it would otherwise have made. If the Children's Court does not reduce an order, it must state that fact and the reason(s) for not reducing the order (s 33B CCPA).

**Sentencing penalties under the CCPA**

The Children's Court can utilise the penalties available in the CCPA and the YOA (discussed in chapter 14).

Following is an outline of the penalties available in the CCPA:

- **Section 33(1)(a) — Dismissal of the charge, with or without a caution.**
- **Section 33(1)(b) — Good behaviour bond with the conditions that the court sees fit for a period not exceeding two years.**
- **Section 33(1)(c) — A fine not exceeding the maximum fine (prescribed by the law) or ten (10) penalty units, whichever is lesser.** Section 17 *Crimes (Sentencing Procedure) Act 1999* (NSW) contains the definition of a penalty unit.
- **Section 33(1)(c1) — An order conditional upon compliance with an outcome plan determined at a Youth Justice Conference under the *Young Offenders Act*.**
- **Section 33(1)(c2) — The court may make an order adjourning proceedings for a maximum period of 12 months (from the date of the finding of guilt) for:**
  - The purpose of assessing the child’s capacity and prospect of rehabilitation; or
  - The purpose of allowing the child to demonstrate that rehabilitation has taken place; or
  - Any other purpose the Children's Court considers appropriate in the circumstances.
- **Section 33(1)(d) of the CCPA—Both (b) and (c) above.**
- **Section 33(1)(e) of the CCPA—A probation order with conditions as the court sees fit for a period not exceeding 2 years.**
- **Section 33(1)(f) of the CCPA—A community service order (CSO).**

Pursuant to s 13 *Children (Community Service Orders) Act 1987* (NSW) the number of hours that a CSO cannot exceed:

- If the child is under 16 years old—100 hours;
- If the child is 16 years or older:
  - 100 hours if the maximum period of imprisonment for the offence does not exceed 6 months;
  - 200 hours if the maximum period of imprisonment for the offence is greater than 6 months but less than 1 year;
  - 250 hours if the maximum period of imprisonment for the offence is greater than 1 year;

The Children’s Court may make more than one CSO run concurrent (s 10 *Children (Community Service Orders) Act 1987* (NSW)).

- **Section 33(1)(g) — Control order for a period not exceeding 2 years.**
  - A control order may be cumulative or concurrent (s 33A).
  - The Children's Court cannot accumulate more than 2 periods specified in control orders (s 33A(4)(b)).
  - The Children's Court cannot make a control order or direction that would have the effect of detaining a child for more than 3 years (s 33A).
  - When a child is sentenced to a control order, the Children's Court must record the reason why the matter has been dealt with by way of control and the reason that it would be wholly inappropriate to deal with the child under s 33(1)(a)–(f) (s 35 CCPA). The imposition of a
control order is clearly a last resort. This notion is reinforced by Article 37 of the UN Convention on the Rights of the Child.

- The Children's Court must obtain a background report from the Department of Juvenile Justice (DJJ) before sentencing a child to a control order (s 25(2) CCPA).

- Section 33(1B) — Suspended sentence. The Children's Court may make an order suspending the execution of an order under s 33(1)(g) for a specified period (not exceeding the term of that order) and release the person on condition that the person enters into a good behaviour bond under s 33(1)(b).

A breach of a s 33(1B) suspended sentence is dealt with under s 41A CCPA. Section 41A(2) states that the bond is to be terminated unless the court is satisfied that:

- The breach was trivial (s 41A(2)(a)); or
- There are good reasons for excusing the failure to comply with the bond (s 41A(2)(b)).

If the bond is terminated, the suspension of the control order ceases to have effect and Part 4 of the Crimes (Sentencing Procedure) Act 1999 (NSW) applies to that order (that is, a parole and non-parole period may need to be set): s 41A(3) CCPA.

- The Children's Court may make an order for compensation. The Children's Court must have regard to the child's means and income if any (not the income of the parent/carer). The maximum compensation that may be awarded is $1000 (ss 24 and 36 CCPA).

### Programs available to children on court mandate

Following is an outline of some of the programs/courses that are available to children who have been directed by the court to accept the supervision and/or obey the reasonable directions of the Department of Juvenile Justice (DJJ):

- **Drug and Alcohol Counselling** — this service assists the child to address his/her drug and alcohol use in relation to the offending behaviour. Alcohol and Drug programs aim at reducing the child's level of substance abuse and therefore reduce subsequent offending behaviour. Services may involve diversionary counselling, group work programs or education services.

- **Violent Offenders Program** — this program assists a violent offender to address his/her behaviour and specific mental health needs.

- **Sex Offenders Program** — this program offers comprehensive individualised assessment of the child and is aimed at breaking the offending cycle and identifying the origin of the offending behaviour. Individual, group and family case-work/program plans are formulated to the specific needs of the child.

- **Forensic Program** — this service provides for the preparation of pre-sentence mental health assessments of the child.

- **The Mentor Scheme** — this scheme provides a one-on-one support person for the child. Mentors are recruited and appointed from local communities and act as a positive role model for the child. A mentor is assigned to a child and will help in the reintegration of the child into the community.

- **Graffiti Clean-Up Community Service Order Scheme** — under this scheme, children participate in the removal of graffiti as part of their Community Service Order. This scheme operates as a partnership with Local Councils. The sites requiring a clean-up are identified by Council, and the children are conveyed to the site and supervised by the DJJ.

### Specific aspects of the criminal law relating to young people

**Criminal responsibility and *doli incapax***

Section 5 CCPA provides that a child under the age of 10 years cannot be guilty of an offence.

The common law doctrine of *doli incapax* provides a rebuttable presumption that from 10 years of age to 13 years of age (inclusive) a child cannot possess the requisite knowledge to form or possess a criminal intent (*mens rea*).
The following are some important points when considering *doli incapax*:

- The prosecution must rebut the presumption of *doli incapax* as an element of the prosecution case. If the presumption is not rebutted, the prosecution’s case is not made out at the prima facie level. (see chapter 16)

- The child must know that the act was seriously wrong as opposed to naughty or childish mischief: *R v CRH* (unreported, NSW Court of Criminal Appeal, 18 December 1996); *C (A Minor) v DPP* (1996) 1 AC 1; *JM v Runeckles* (1984) 79 Crim App R 255.

- The prosecution evidence must be strong and clear beyond all doubt and contradiction.

- The act/offence itself is not sufficient to rebut the presumption however horrifying or obviously wrong the act may be: *R v CRH* (unreported, NSW Court of Criminal Appeal, 18 December 1996); *DK v Rooney* (unreported, Supreme Court of NSW, 3 July 1996).

- The older the child, the easier for the prosecution to prove guilty knowledge.


- Prior criminal history and the court alternatives history may be tendered to rebut the presumption: *Ivers v Griffiths* (unreported, NSW Supreme Court, 22 May 1998). However, where prior matters have no bearing on the case, ss 135 and 137 of the *Evidence Act 1995* (NSW) may serve to exclude the record/history.

- Where the prior matters are of a completely different nature, it is arguable that *doli incapax* has not been rebutted.

- If the prosecution seek to rely upon the delivery of a caution to rebut *doli incapax*, a transcript of the caution or a statement from the person who delivered the caution should be available.

- If the prosecution seek to call evidence from a parent to rebut the presumption, the court must be satisfied that the parent is aware of their right to object to giving evidence: s 18 *Evidence Act 1995* (NSW).

- Section 188 of the *Criminal Procedures Act 1986* (NSW) prevents the prosecution calling the parent or relevant person that accompanies the child to court on the day from giving evidence unless all the other requirements relating to service of the brief of evidence have been complied with (see chapter 4).

- The prosecution could obtain evidence from a teacher who knows the child well, and/or use an internal school disciplinary hearing to rebut the presumption: *Graham v DPP* (unreported, Queen’s Bench, 10 October 1997); *C (A Minor) v DPP* [1996] 1 AC 1.

- Flight alone does not rebut the presumption: *C (A Minor) v DPP* [1996] 1 AC 1; *A v DPP* [1992] Crim LR 34.


- Surrounding circumstances may be used by the prosecution to rebut the presumption: *R v M* (1977) 16 SASR 589; *R v Folling* (unreported, Queensland Court of Criminal Appeal, 19 May 1998); *LMS* (1996) 2 Cr App R 50.

It is essential to be aware of whether the prosecution have the requisite evidence to rebut the presumption and be ready to make the appropriate submissions/application.

**Admissibility of statements to the police: s13 CCPA**

Specific rules apply to the admissibility of statements, admissions or confessions of a child. These are outlined in s 13 CCPA.

Statements, admissions and/or confessions shall not be admitted into evidence unless the person responsible for the child (or an adult appointed by the person responsible for the child) or an adult/legal representative selected by the child (if the child is over 16 years old) was present at the place and throughout the period of time that the admission, statement or confession was made.
The exception is where the court is satisfied that there was proper and sufficient reason for the absence of such an adult/person and considers that in the circumstances of the case that the statement, admission or confession should be admitted in evidence in the proceedings. This exception does not effect the court’s general discretion to exclude any statement if its prejudicial effect would outweigh its probative value (ss 135 and 137 Evidence Act 1995 (NSW)) despite compliance with CCPA.

The role of the support person has been outlined as follows:

To act as a check upon possible unfair and oppressive behaviour; to assist a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement, who appear to be out of his or her depth, or in need of advice; and also to provide comfort that accompanies knowledge that there is an independent person present during the interview. That role cannot be satisfactorily fulfilled if the support person is himself or herself immature, inexperienced, unfamiliar with the English language, or otherwise unsuitable for the task expected, that is, to intervene if any situation of apparent unfairness or oppression arises, and to give the appropriate advice if it appears the child needs assistance in understanding his or her rights (R v Phung and Huynh [2001] NSWSC 115).

The support person must be informed of their role and responsibility and be suitably able to perform the task. Regulation 26 Crimes (Detention After Arrest) Regulation 1998 requires the custody manager to explain to a support person that his/her role is not confined to acting merely as an observer, but also extends to doing the other things specified. The requirement for an informed and appropriate support person to be present should be strictly applied:

The provisions need to be faithfully implemented and not merely given lip service or imperfectly observed. The consequences of any failure to give proper regard to them is to risk the exclusion of any ERISP, or the product of an investigative procedure, which is undertaken in circumstances where there has not been proper compliance with the law (R v Phung and Huynh [2001] NSWSC 115).

Furthermore, the custody manager has a positive obligation to assist a vulnerable person or child to exercise their rights (regulation 20). This obligation includes the services offered by the Legal Aid Commission’s Youth Hotline being made known to the child, as indicated in R v ME, R v LT and R v CE (unreported, Supreme Court of New South Wales, 3 October 2002):

The whole intention of the hotline is that young people would know that it is free, that it is available, and would be able to obtain advice there and then. Failure to make it available is a clear breach of the Act and regulations but, more importantly, in clear breach of the requirement of fairness to the child

See also:

• Part 10A of the Crimes Act 1900 (NSW) and in particular ss 356C, 356D, 356G, 356M, 356N and 356P.
• The Crimes (Detention After Arrest) Regulation 1998 and particular regulations 4, 20, 21, 22, 25, 26, 27 and 29.

Recording convictions and the admissibility of prior offences

Section 14 CCPA states that the court shall not record a conviction for a child who is under the age of 16 and has discretion to refuse to record a conviction for a child above the age of 16 years (provided that the matter is disposed of summarily).

In any court other than the Children’s Court, the fact that a person has pleaded guilty to an offence, or been found guilty is not to be admitted in any criminal proceedings (including an application for bail) subsequently taken against the person in respect of any other offence if (s 15 CCPA):

• A conviction was not recorded in respect of the first mentioned offence; and
• The person has not, within the period of 2 years prior to the commencement of the proceedings for the other offence, been the subject of any judgment, sentence or order whereby the person has been punished for any other offence.
Evidence that a child has been dealt with under the Young Offenders Act 1997 (YOA) is not to be admitted into evidence in any criminal proceedings subsequently taken against the person in any court other than the Children's Court (s 15(3) CCPA and s 67 YOA).

For the purpose of the Criminal Records Act 1991 (NSW), any order made under s 33 CCPA (other than an order dismissing a charge pursuant to s 33(1)(a)) is treated as a conviction. This is even if the court cannot, or decides not to, record a conviction (s 5 Criminal Records Act 1991 (NSW)).

The conviction remains a conviction until it is spent. A conviction is considered spent under s 8 Criminal Records Act 1991 (NSW):

- On completion of the relevant crime-free period, which in the case of an order of the Children's Court under s 33 CCPA, is any period not less than three consecutive years after the date of the order during which:
  - The person has not been subject to a control order; and
  - The person has not been convicted of an offence punishable by imprisonment; and
  - The person has not been in prison because of a conviction for any offence and has not been unlawfully at large (s 10 Criminal Records Act 1991 (NSW)).

When a court finds that an offence proved, or that a person is guilty of an offence, but does not proceed to conviction, the conviction is spent immediately after the finding is made (s 8(2) Criminal Records Act 1991 (NSW)).

Most convictions are capable of becoming spent. However, some offences are specifically excluded from this provision. For example sexual offences, defined in s 7 (4) Criminal Records Act 1991 (NSW) are not capable of becoming spent. These offences remain as convictions for the purpose of that Act despite the fact that under the CCPA a magistrate cannot record a conviction or may determine to refuse to record a conviction. See also the Criminal Records Regulation 2004.

Early release pursuant to the Children (Detention Centres) Act 1987 (NSW)

A child who is serving a control order in a detention centre may be released from the detention centre before control order expires. This release is pursuant to s 24(1)(c) Children (Detention Centres) Act 1987 (NSW).and is commonly referred to as ‘early release’ or ‘conditional release’.

The Director-General of the Department of Juvenile Justice may by order in writing discharge a person who is subject to control from detention if the Director-General has made arrangements for the person to serve the period of detention by way of periodic detention or made suitable arrangements for the supervision of the person during the period. (Facilities for periodic detention for children do not currently exist in New South Wales).

Supervision under early release is usually provided by the Intensive Programs Unit (IPU) of the Department of Juvenile Justice.

If the conditions of early release are breached, a warrant will be issued and the child returned direct to the custody of the Detention Centre.

Early or conditional release is available to children serving a control order. It is not available to children serving a sentence of imprisonment for a serious children’s indictable offence.

Early or conditional release is a discretionary and administrative function of the Director-General. A sentencing court cannot direct or authorise the Director-General to permit a child to early release.

However, the Children’s Court will occasionally make a recommendation that the Director-General consider early release after a specified period of time.

While a recommendation may be expedient in a particular case, as a general rule it is undesirable: R v Sherbon (unreported, NSW Court of Criminal Appeal, 5 December 1991).

A recommendation may be considered appropriate when a sentencing court does not find special circumstances to vary the usual ratio between the parole and non-parole period.
Serving a sentence in a juvenile detention centre rather than an adult correctional centre

A child will serve a control order or term of imprisonment in a juvenile detention centre until the child turns 18 years old.

If a court sentences a person under 21 years of age to imprisonment in respect of an indictable offence, the court may make an order directing that the whole or any part of the term of the sentence of imprisonment be served in a detention centre (s 19(1) CCPA).

A person is not eligible to serve a sentence in a detention centre after the person has attained the age of 21 years unless the non-parole period or term of the sentence of imprisonment will expire within 6 months of attaining the age of 21 (s 19(2) CCPA).

A person sentenced to imprisonment for a serious children’s indictable offence is not eligible to serve a sentence of imprisonment in a Detention Centre after the person has attained the age of 18 years unless (s 19(3)):

- The sentencing court is satisfied that there are special circumstances justifying detention of the person in a detention centre; or
- The non-parole period or term of the sentence of imprisonment will expire within 6 months of the person attaining the age of 18.

In determining special circumstances justifying detention of the person in a detention centre the court is to have regard to the following matters (s 19(4) CCPA):

- The degree of vulnerability of the person;
- The availability of appropriate services or programs at the place the person will serve the sentence of imprisonment;
- Any other matter that the court thinks fit.

With the leave of the court, a person who is subject to an order that ceases or ceased to apply on the person attaining the age of 18 years may apply to the sentencing court for a further order (s 19(5) CCPAADA). This provision gives a child, whose application was unsuccessful at first instance, a second opportunity to make the application at the time of transfer from a juvenile detention centre to an adult correctional centre.

The Children’s Court parole jurisdiction

Section 29 Children (Detention Centres) Act 1987 (NSW) states that the Children’s Court exercises the parole jurisdiction under Parts 6 and 7 Crimes (Administration of Sentences) Act 1999 (NSW) that is otherwise exercised by the Parole Board with respect to adult offenders.

Upon arrest for a warrant for breach of parole, the child is detained in a detention centre until the matter is listed before the Children’s Court in its parole jurisdiction. This is generally 4 weeks after arrest. Following execution of the warrant the DJJ will prepare a background report for the court.

At the parole hearing the Children’s Court will confirm the revocation of parole. This can be defended if the child believes that they have not breached any condition of their parole.

If the revocation of parole is confirmed, the Court will order that the balance of the sentence be served in custody (plus any street time, that is, the period between the date of revocation of parole and date of arrest on the warrant).

The Court cannot order a child to be released to fresh parole if the child cannot be released from custody within 7 days (such as when a child is serving a further sentence or is bail refused on other matters). The hearing of the application for fresh parole may be adjourned in these circumstances.

Practical tips on appearing in the Children’s Court

- The Magistrate is referred to as Your Honour.
- The Children’s Court is a closed court. This means that any person not directly interested in the proceedings is excluded from the proceedings. The child’s family/support person(s) are usually
present during proceedings. The media are entitled to be present during proceedings (unless the court directs otherwise). Any family victim is also entitled to be present (see s 10 CCPA).

- While the media are entitled to be present, the publication and broadcasting of the names of both child offenders and child victim/witnesses are subject to s 11 CCPA.
- All practitioners and the police prosecutor remain seated at the bar table. You do not stand up when you address the Magistrate.
- Your client is referred to as the ‘child’ or ‘young person’ as opposed to the ‘defendant’ or ‘prisoner’.
- When appearing in the Children’s Court for a child who is over 16 years old and under 18 years old, always address the court on exercising the discretion set out in s 14 CCPA to refuse to record a conviction.
- A report regarding the sentencing options for a child is called a background report and not a Pre-Sentence Report (PSR). The background report is prepared by the Department of Juvenile Justice.
- The prosecutor usually tenders the child’s Criminal History and Court Alternatives History. The Court Alternatives History is not referred to as a ‘record’.
- Section 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) does not apply to children (unless the child is being dealt with according to law). The corresponding provision for children to s 10 is s 33(1)(a) CCPA.
- A child is sentenced to a control order, not a term of imprisonment (unless the child is being sentenced according to law).
- When a child is dealt with in the Local Court for a traffic offence, the court does not need to be a closed court (s 10(2) CCPA).
- Be aware of the maximum penalties and compensation that can be awarded and advise the child accordingly. Whilst the maximum compensation that a court can award against a child is $1,000, the child is potentially open to civil proceedings or a Victims Compensation Claim for an amount greater than $1,000. Note that any admission made in accordance with a matter being finalised under the YOA is not admissible in other proceedings (s 67 YOA).
- If a child is being sentenced for an offence of escape custody, the Children’s Court does not have to accumulate the sentence (as is the case with adults – see s 58 Crimes (Sentencing Procedure) Act 1999 (NSW)). The sentence (if by way of a control order) may be concurrent. The maximum penalty for escape is three months (s 33(1) Children (Detention Centres) Act 1987 (NSW)).
- When appearing for a child, who a court has convicted of an offence, an application should be made to the court to direct that the child be exempt from paying a compensation levy. The court has power to make this direction under s 79 Victim Support and Rehabilitation Act 1996 (NSW).
- When the Children’s Court deals with a matter under s 33(1)(a) or finds a child not guilty of an offence the Children’s Court is to order the child’s fingerprints to be destroyed. When the Children’s Court exercises the powers conferred on it by s 33(1)(b)-(g) and is of the opinion that the circumstances of the case justify doing so, the Children’s Court may order that the fingerprints etc be destroyed (s 38 CCPA). You should make submissions regarding this issue if applicable.
- When appearing for a child on a traffic offence in the Children’s Court, Local Court or on a District Court appeal, consider the age of the child, whether any conviction can be recorded, whether the child is to be, or has been, disqualified from driving for the traffic offence (especially if a further period of disqualification would accumulate).
- When appearing for a child who committed or is alleged to have committed a sexual offence against another child, be aware of the operation of the Child Protection (Offender Registration) Act 2000 (NSW) applies. This is because the (CP(OR)A) applies to children. The Intensive Programs Unit of the Department of Juvenile Justice conducts a specific program, the Sex Offender Program, to assist such offenders. The CP(OR)A is discussed in detail in Chapter 22(c).
- Be familiar with how the Crimes (Forensic Procedures) Act 2000 (NSW) (C(FP)A) applies to your child client. The C(FP)A is particularly significant in the Children’s Court because a child (or adult on behalf of the child) cannot consent to the taking of a forensic sample. All forensic procedures taken from a child must be by way of order from the Court. The C(FP)A is discussed in detail in Chapter 8.
- When appearing for a child charged with a Commonwealth offence under the *Crimes Act (1914)* (Cth) note that s 26 of the Act provides that the State sentencing options apply.

- The Legal Aid Commission’s Youth Hotline (1800 10 18 10) is a legal advice telephone service available for children under 18 years old. The Hotline is open each weekday from 9.00am to midnight and 24 hours public holidays and from Friday 9.00am through to midnight on Sunday. Practitioners can find out the details of the advice given to their client (with their client’s consent) from the Legal Aid Commission’s Children’s Legal Service.
The *Young Offenders Act 1997* (NSW) (YOA) establishes an alternate regime for dealing with young people who commit certain offences, by diverting them from the Children’s Court.

The YOA provides the legislative framework for warnings, cautions and Youth Justice Conferences (YJC).

All sections referred to in this chapter are references to the YOA unless otherwise specified. The YOA defines child as a person who is of or over the age of ten years and under the age of 18 years.

**Overview of the *Young Offenders Act 1997***

**Objectives of the YOA**

The objectives of the YOA are outlined in s 3 as follows:

- To establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of YJCs, cautions and warnings; and
- To establish a scheme for the purpose of providing an efficient and direct response to the commission of certain offences by children; and
- To establish and use YJCs to deal with alleged offenders in a way that:
  - Enables a community-based, negotiated response to offences involving all affected parties; and
  - Emphasises restitution by the offender and acceptance of responsibility by the offender for his or her behaviour; and
  - Meets the needs of victims and offenders.

The principles of this diversionary scheme, contained in s 7, include:

- The least restrictive form of sanction is to be applied against a young person who is alleged to have committed an offence;
- The young person is to be informed about the right to obtain legal advice;
- Criminal proceedings are not to be instituted against a young person if an alternate (and appropriate) way of dealing with the young person is available;
- Criminal proceedings are not to be instituted solely to advance the welfare of the young person or family;
- If appropriate, young persons should be dealt with in their communities to assist reintegration and to sustain family and community ties;
- Parents are to be recognised as primarily responsible for the development of the young person;
- Victims are entitled to receive information regarding potential involvement in any action in accordance with the YOA.

**Offences covered by the YOA**

The offences covered by the YOA are summary offences and indictable offences that may be dealt with summarily (s 8(1)).

Specific offences *not* covered by the YOA include (s 8(2)):

- Those where the principal person investigating the offence is not an ‘investigating official’ within the definition in s 4;
• Traffic offences committed by a young person of licensable age (16 years of age for a motor vehicle and 16 years and 9 months of age for a motor cycle);
• Offences that result in the death of any person;
• 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);
• An offence under Part 15A (apprehended violence offences) of the Crimes Act 1900 (NSW);
• An offence under Division 1 of Part 2 of the Drug Misuse and Trafficking Act 1985 (NSW) that, in the opinion of the investigation official or prosecuting authority, is more than a small quantity within the meaning of the Act;
• An offence under Division 2 of Part 2 of the Drug Misuse and Trafficking Act 1985 (NSW) other than:
  An offence under ss 23(1)(a) or (c) that involves not more than half the small quantity as defined in the Act, or, in exceptional circumstances, where the quantity is more than half the small quantity but less than the total small quantity, and it would be in the interests of rehabilitation and appropriate in all the circumstances to deal with it under the YOA; or
  An offence under ss 27 or 28 of aiding, abetting, counselling, procuring, soliciting or inciting the commission of an offence under ss 23(1)(a) or (c) that involves not more than half the small quantity as defined in the Act, or, in exceptional circumstances, where the quantity is more than half the small quantity but less than the total small quantity, and it would be in the interests of rehabilitation and appropriate in all the circumstances to deal with it under the YOA.

Eligibility for a YOA option

To be dealt with under the YOA by way of caution or YJC, the young person must admit the offence (this is distinct from a plea of ‘guilty’), consent to the caution or YJC and be entitled to be given the same (ss 19 and 36).

Any ‘admission’ must be made in the presence of (s 10):
• A person responsible for the young person (or a person nominated by the person responsible); or,
• If the young person is 16 years of age or over - an adult chosen by the young person; or
• A legal practitioner chosen by the young person.

The relevant considerations as to whether a matter should be cautioned or referred to a YJC are as follows (ss 20(3) and 37(3)):
• Seriousness of the offence;
• Degree of violence involved in the offence;
• The harm caused to any victim;
• The number and nature of any offences committed by the child and the number of times the child has been dealt with under the YOA;
• Any other matter the official thinks appropriate in the circumstances.

If a caution is given to a child, or the child satisfactorily completes an outcome plan in accordance with a YJC referral, no further proceedings may be taken against the child:
• For any offence in respect of which the caution or YJC was given; or
• For any other offence in respect of which proceedings could not be commenced, if the child had been convicted of the offence for which the caution or conference was given (ss 32 and 58).

The investigating official must keep a record of any warning, caution or YJC (ss 17, 33, and 59). This is usually by way of a Court Alternatives History.
YOA sentence options

Warnings
An ‘on-the-spot’ warning may be given 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);

A warning cannot have any conditions attached or impose any sanction (s 15);

A warning may be given at any place, including the place where the child is found (s 15(1)). A young person should not be arrested for the purpose of giving a warning.

Cautions
A young person is entitled to be dealt with by way of caution if the investigating official determines that a warning is not appropriate or a warning may not be given. The exception is where the investigating official is of the view that a caution is not appropriate because it is contrary to the ‘interests of justice’ to deal with the matter by way of caution (ss 20(1) and (2));

Notwithstanding the above, a young person is not entitled to be dealt with by caution in relation to an offence if the young person has been dealt with by caution on three or more occasions. This exemption applies whether it is the police officer, youth liaison officer or court that is considering the caution and whether the caution is sought for offences of the same or of a different kind to the previously administered cautions (s 20(7));

The matter may be referred to a specialist youth officer to make this decision (s 20);

The young person is to receive written notice prior to receiving the caution (s 24). If practicable, a caution must be given not less than 10 days and not more than more 21 days after notice of the caution is given (s 26).

A caution must be given at a police station (s 26 (2)) but may be given at another place if the person giving the caution is of the opinion that it is appropriate to do so (s 26(3));

At any time before the caution is given, the young person may decide not to proceed and to have the matter dealt with by a court (s 25(1));

The investigating official may determine that it is not in the interests of justice to deal with the matter by way of caution and refer the matter to a specialist youth officer to consider whether action should be taken in regard to a YJC referral (s 25(2));

The Children’s Court may give a caution under the YOA if the offence is one for which a caution may be given. If the Court exercises this option, the Local Area Commander of the police station (closest to where the offence occurred) is given written notice of this decision and the reasons for the decision (s 31). The Children’s Court regularly disposes of matters by way of YOA caution in instances where a young person has exercised a ‘right to silence’ at the police station and/or does not make the required ‘admission’ to the offence.

Youth Justice Conferencing
The principles and purpose of conferencing are outlined in s 34. Any legal practitioner appearing in the Children’s Court should be familiar with this section;

A young person is entitled to be dealt with by way of referral to a YJC if the investigating official determines that the matter could not appropriately be cautioned (s 37). The matter may be referred to a specialist youth officer to make this decision;

The Director of Public Prosecutions (DPP) or court may refer a matter to a YJC (s 40).

At any time before a YJC is held:

• The young person may decide not to proceed and elect to have the matter dealt with by a court (s 44(1));

• A specialist youth officer who refers a matter to a YJC may determine that it is not in the interests of justice for a matter to be dealt with by way of YJC and refer the matter for the commencement of proceedings or for a caution (s 44(2));
• The ODPP or court (if either was the referring body) may determine that the matter should not be dealt with by way of conference (s 44(3));

• A child referred to a YJC is entitled to be advised (but not represented) by a legal practitioner (s 50(1)) unless the conference convenor permits the child to be represented either generally or subject to conditions (s 50(2)).

The following people are entitled to attend a YJC:

• The young person;
• The conference convenor;
• A person responsible for the young person;
• A member of the child’s family or extended family;
• An adult chosen by the child;
• A legal practitioner advising the child;
• The investigating official;
• A specialist youth officer;
• Any victim or person chosen by the victim as a representative;
• A support person (s 47(1));
• Other persons (such as a respected member of the community, interpreter, social worker) may be ‘invited’ to attend the conference (s 47(2)).

The aim of the conference is to reach agreement on an outcome plan that the young person can complete.

The following principles apply to outcome plans:

• The outcome plan may provide for an oral or written apology, reparation to the victim, participation by the child in a program or action towards the reintegration of the child into the community (s 52(2));
• The outcome plan must contain outcomes that are realistic and appropriate and sanctions that are not more severe than those that a court may impose;
• The outcome plan must set a timeframe for implementation and cannot impose an obligation to do community service work that exceeds the maximum amount that may be imposed according to the Children (Community Service Orders) Act 1987 (NSW) (previously outlined in the Children’s Court chapter) (s 52, r 19 Young Offenders Regulations);
• The Act and Regulations may make provision regarding what must be included in an outcome plan for a particular type of offence. Examples of such provisions are those that relate to arson and bushfire offences.

Practical tips on the YOA

• If a legal representative is seeking to have a matter finalised under the YOA by way of a caution or YJC, an ‘admission’ (not a plea of guilty) to the offence is indicated to the court. If the Magistrate does not accede to the request to deal with the matter under the YOA, the young person may then enter a plea of ‘guilty’ and the matter will be dealt with under the Children (Criminal Proceedings) Act 1987 (NSW).

• 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 their criminal record.

• Note that any statement, confession, admission or information made or given by a child during the giving of a caution or conference is not to be admitted in evidence in any subsequent criminal or civil proceedings (s 67 YOA).
• 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 Part 15A Crimes Act 1900 (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 Offenders Regulation (r 20) makes particular provision for the referral of juvenile arson and bushfire offenders to a YJC. Regulation 20 applies to a child who commits an offence that consists of the lighting of a bushfire or the destruction or damage of property by means of fire. An outcome plan for one of these offences must include:
  • Attendance by the child at a burns unit or ward of hospital that agree to participate in the YJC scheme;
  • The making of reparation for the offence, such as:
    Assistance in clean-up operations and in treatment of injured animals; and
    The payment of compensation (not exceeding the amount that a court may impose on conviction for the offence).

In addition, the Department of Juvenile Justice released a Supplementary Guideline for dealing with these offences that makes provision for the psychological assessment of a child prior to participating in the required outcome plan and for the involvement of various Rural Fire Services and Bushfire Squads.

Regulation 20 is a particularly useful tool for dealing with the more serious arson and bushfire offences as the onerous nature of the requirements of the outcome plan rebut any notion that a referral to a YJC is a ‘soft option’.
Youth Drug and Alcohol Court

The Youth Drug and Alcohol Court (YDAC) commenced in Western Sydney in July 2000. It has recently expanded its catchment area to include Central and Eastern Sydney. The YDAC currently sits at Campbelltown Children’s Court, Cobham Children’s Court (Werrington), Bidura Children’s Court (Glebe), and such other court as directed by the Senior Children’s Magistrate. The YDAC Registry is located at Campbelltown Court Complex.

The YDAC has a Court Team comprising:
- A Children’s Court Magistrate;
- YDAC Registrar;
- Police Prosecutor;
- Solicitor, Children’s Legal Service, Legal Aid Commission; and
- A representative from the Joint Assessment and Review Team (JART).

The JART is comprised of representatives from:
- Department of Juvenile Justice;
- Department of Community Services;
- Department of Education and Training; and
- Justice Health, Department of Health.

Aims of the Youth Drug and Alcohol Court

The aims of the YDAC are:
- To reduce drug and alcohol misuse by young offenders;
- To reduce the level of criminal activity that results from the misuse of drugs and alcohol;
- To reduce other problematic behaviour, including violence, by young offenders as a result of their misuse of drugs and alcohol; and
- To achieve these aims through judicial and therapeutic interventions.

The YDAC is not governed by separate legislation of its own. It sits and operates within the Children’s Court system and is governed by the following:
- Bail Act 1978 (NSW);
- Children (Criminal Proceedings) Act 1987 (NSW) (CCPA);
- Children’s Court Practice Direction No 23: Youth Drug and Alcohol Court.

Sections 33(1)(c2) and 50B were inserted into the CCPA to facilitate the operation of the YDAC.

It should be noted that Children’s Court Practice Directions 18 and 19 were withdrawn from 1 August 2004, and replaced by Children’s Court Practice Direction 23.

Eligibility for the Youth Drug and Alcohol Court program

Geographical area covered by the Youth Drug and Alcohol Court

Eligibility for the YDAC program is limited to young people who live in or otherwise identify with Western, Eastern or Central Sydney area. The YDAC Registry or YDAC Solicitor can be contacted for further information about the geographical area.
Who can be referred to the Youth Drug and Alcohol Court?

The YDAC accepts referrals of young people who come within the Children’s Court jurisdiction. The YDAC is not able to accept referrals where the offence is a serious children’s indictable offence, a sexual offence, or is one of certain traffic offences – see s 28(2) CCPA.

An application for referral to the YDAC must be made in accordance with paragraphs 5, 6 and 7 of Practice Direction No 23.

Paragraph 6 lists the criteria to be considered when determining program eligibility, which are:

- The offence(s) can be dealt with to finality in the Children’s Court;
- The child has a demonstrable drug and/or alcohol problem;
- The child resides in or otherwise identifies with the current YDAC boundaries;
- The child is ineligible for a caution or youth justice conferencing pursuant to the Young Offenders Act 1997 (NSW);
- The child pleads guilty/admits the offence(s);
- The referring Magistrate and YDAC Magistrate exercise discretion to refer/accept a child despite pleas of not guilty to some offences where the overall penalty will not alter significantly if the child is found guilty of those defended matters; and
- The child is aged between 14–18, although a child under 14 may also be referred.

It is important to note that Practice Direction 23 paragraph 5 (b) states that the court of its own motion, may refer a young person for assessment of their suitability for the YDAC program without their consent.

The Youth Drug and Alcohol Court program

First appearance in the Youth Drug and Alcohol Court

At the first appearance, the young person’s ‘eligibility’ for the YDAC program is determined. Before the formal court appearance, the JART undertakes an “Initial Assessment” of the young person. This assessment involves:

- Confirmation of the young person’s drug/alcohol problem; and a
- Preliminary assessment of the young person’s immediate needs.

JART recommend to the YDAC whether or not the young person is eligible for the YDAC program. If the YDAC Magistrate determines the young person is “eligible” to participate in the YDAC program, the matter is adjourned for a period of 14 days for a Comprehensive Assessment of the young person’s ‘suitability’ for the YDAC program. This assessment is undertaken by JART.

A Comprehensive Assessment can be conducted either in custody or whilst the child is in the community on bail.

If the young person is found to be “ineligible” for the program, the YDAC Magistrate will generally remit the matter to the referring court for finalisation.

Even if a young person is found to be eligible, the YDAC Magistrate may exercise his or her discretion and exclude the young person from the YDAC program. Circumstances in which such discretion, may be exercised include:

- The monthly quota has been reached;
- The young person is eligible to receive a caution;
- The young person is eligible to be referred to a youth justice conference;
- There is no likelihood of a control order being imposed; and
- The young person’s offence/s and/or their history of offending is such that a control order/s will be imposed despite satisfactory completion of the YDAC program.
Second appearance in the Youth Drug and Alcohol Court

At the young person’s second appearance at the YDAC, JART will provide the YDAC with a Comprehensive Assessment. The Comprehensive Assessment provides the YDAC with a recommendation as to the young persons suitability for the YDAC program.

If JART recommends that a young person is “suitable” for the program, the Comprehensive Assessment includes a proposed Program Plan for the young person. The YDAC Magistrate may then determine whether the young person is to be accepted into the YDAC program.

If JART recommend that a young person is “not suitable” for the YDAC program, the YDAC Magistrate returns the matter to the referring court for finalisation.

Once a young person is accepted into the YDAC program, the matter is adjourned for a period of not less than six months. The young person’s matters are adjourned pursuant to s 33(1)(c2) CCPA. The young person is placed on bail with conditions that facilitate participation in the program.

A Program Plan will ordinarily be completed within six months but may be extended for a period up to 12 months from the date of entering the plea of guilty.

Youth Drug and Alcohol Court Program Plan

During the YDAC program, the young person will be required to attend Report Back sessions with the YDAC Court Team (see Practice Direction 23 paragraph 11). These sessions provide a process of continuing monitoring and supervision. Report Back sessions are conducted on YDAC sitting days. Generally they are conducted fortnightly but can be more frequent or less frequent as determined by the YDAC team.

Before the commencement of a Report Back, the YDAC Magistrate is provided with a written report by JART. The report outlines the young person’s progress and compliance with their Program Plan.

Report Backs are not formal court proceedings. They are not recorded or conducted in open court.

Withdrawal from the Youth Drug and Alcohol Court program

A young person may at any time withdraw consent to continue to participate in the YDAC program.

If a young person withdraws consent the YDAC Magistrate will generally adjourn the matters for two weeks for sentence. JART will be requested to provide a Juvenile Justice Background Report.

Non compliance with the Youth Drug and Alcohol Court program

Non-compliance with YDAC program arises when the child is in breach of their YDAC program.

Breaches of YDAC program will be assessed by the Manager of JART, who will determine whether the nature of the breach is serious or minor.

Serious breaches

If the young person is alleged to have been in breach of their program plan, and that breach is assessed by the Manager of JART to be a serious breach, the Manager of JART will advise the YDAC Police Prosecutor. The YDAC Police Prosecutor may then make an application to the YDAC Registrar for a warrant of apprehension be issued.

Upon execution of the arrest warrant, the arresting police or custody manager will notify the YDAC Police Prosecutor.

When the young person is brought before the YDAC, the breach will either be admitted or denied. If the breach is admitted or proved, the matter will be adjourned for two weeks for a review by JART to take place.

JART will provide the YDAC Court Team with a treatment review report and recommendations. The YDAC Magistrate will, after hearing any submissions, determine if the young person is to be discharged from the program and sentenced or if they are to be allowed to continue with the YDAC program. The YDAC Magistrate will also consider if:
• The current program plan needs to be altered; or
• The current program plan needs to be extended.

Minor breaches

If the young person is alleged to have been in breach of their program plan, and that breach is assessed by the Manager of JART to be a minor breach, the Manager will direct the young person to attend the YDAC on its next sitting day.

If the young person does not attend as directed, the Manager of JART may proceed as if the breach was a serious breach, unless there is good reason for non-attendance.

For a minor breach, if the breach is admitted or proved, the YDAC Magistrate may, after hearing any submissions, determine that the young person remain on the YDAC program:

• On the current Program Plan; or
• On an adjusted Program Plan; or
• That the time for completion of the current Program Plan is to be extended; or
• That a discharge hearing be conducted.

In the case of a second or subsequent breach the Manager of JART may recommend that proceedings be commenced as if it were a serious breach.

Sentencing

Sentencing occurs in accordance with s 33(1) CCPA. The YDAC Magistrate will take the young person’s participation in the program and, where appropriate, the young person’s successful completion of the program, into account in determining the sentence (Practice Direction 23 paragraph 19).

Absence from the Youth Drug and Alcohol Program

If a child is absent from the YDAC program for a period of more than six months, the child will be automatically discharged from the program. The YDAC will return the young person’s court papers to the court registry from which the matters were referred. The young person’s record on the NSW Police COPS system will contain an entry stating that the young person has been discharged from the YDAC, and that upon execution of the arrest warrant, the young person is to be taken to the court holding the papers.
Part 6
Local Court defended hearings
The offence

What is your client charged with?

It is important as part of your preparation to be aware of the precise offence that your client is charged with and to thoroughly research the law in relation to that offence.

A number of offences have specific legal principles. For example:

- In relation to offences of receiving or disposing of stolen property (ss 188 and 189 Crimes Act) there is an element of “knowing that an item was stolen”. “Knowing” has a specific meaning at law.
- In relation to malicious wounding (s 35 Crimes Act) the intention that has to be proved is the intention to cause some physical injury and not the particular injury that may have been caused (R v Stokes and Difford (1990) 51 A Crim R 25).

You will find commentaries on the law relating to specific offences in a good loose-leaf service on criminal law.

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 on one side of the column, and on the other side, the evidence that the prosecution brief indicates they will use to try to prove each element.

An offence may include a number of different types of 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 a person:

- Having any thing in his or her custody,
- Having any thing in the custody of another person,
- Having any thing in or on premises, whether belonging to or occupied by him or her, or whether that thing is there for his/her own use or the use of another, or
- Giving custody of any thing to a person who is not lawfully entitled to possession of the thing, and that thing may be reasonably suspected of being stolen or otherwise unlawfully obtained.
After you have examined the elements, you should re-examine the wording of the charge for possible defects. For example, the offence might be duplicitous or might be ambiguous.

The date of the offence

The date of the offence will be found on the police facts and Court Attendance Notice.

The date of the offence is important for these reasons:

- For some offences, a charge must be laid within a certain period of time. A strictly summary offence (one that can only be dealt with in the Local Court) must be laid within six months of the date of the offence (s 179 Criminal Procedure Act). Note however that there are some exceptions.
- Police officers can read their statements in court or can 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 offence, the police officer will not be able to read it onto the record.

Where Crimes Act provisions have been amended, repealed or substituted, the correct section to lay an offence under depends on the date of offence.

Can the matter be heard in the Local Court?

Chapter 4 on ‘Criminal Procedure’ describes the different types of offence. Table One and Table Two offences can be dealt with in the Local Court, unless there is an election for them to be dealt with in the District Court.

You should always check what type of offence your client is charged with and whether it is an offence that can be dealt with in the Local Court.

To find out whether an indictable matter can be dealt with in the Local Court, look at the Tables in the Criminal Procedure Act 1986 (NSW) (located towards the end of the Act). See also chapter 4 on Criminal Procedure.

The maximum penalty for the offence

As a matter of thorough preparation for the hearing, you will need to know the maximum penalty for each offence with which your client is charged.

You will find out the maximum penalty by looking at the legislation defining the offence. Almost all offences in the Crimes Act state the maximum penalty. For other offences, such as in the Drug (Misuse and Trafficking) Act, the maximum penalty will be found within the Act but not 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. Two of the most common offences where this occurs are:

- 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.
- Steal from person, which carries a maximum penalty of 14 years of dealt with in the District Court, but a maximum penalty of 12 months if dealt with in the Local Court.

The brief of evidence

The brief of evidence

The brief of evidence contains the statements and other evidence that the prosecution will rely on to prove its case.

The prosecution is required to serve the brief of evidence on the defence: see Part 2 Division 2 Criminal Procedure Act and Local Court Practice Direction 2/2004. See also chapter 4 on Criminal Procedure.

The brief of evidence will usually include:

- Police statements.
• The statement of the victim.
• Statements of civilian witnesses, if any
• Statements of expert witnesses, if any.
• Results of forensic tests, such as blood alcohol tests.
• Photographs, plans, sketches and other similar documents, if any.

Always check that the statements in the brief have been signed.

Note that the prosecution 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).

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 that you require that is not contained in the brief of evidence.

The way to get this information is to make requisitions or to seek particulars from the prosecution. This is done by writing to the officer in charge of the matter and sending a copy of that letter to the Senior Police Prosecutor at the police station closest to 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 victim or other relevant witnesses.
• Original medical and other records.
• 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. 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 on 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, such as duress, necessity, claim of right and self defence. Not all of these are strictly speaking "defences" but are matters that, once raised, the prosecution generally has to prove beyond reasonable doubt were not present in the case.

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 type of criminal record, you should consider leading evidence of good character.

Corroboration from defence witnesses

In the same way as you take a statement from your own client you can also take a statement from your own witnesses if you have any. Defence witnesses may support your client's case in important respects.

You need to 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

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 make enquiries about the evidence to be led; or
• To make sure that prejudicial or clearly inadmissible evidence is not led.

Although in practice a Police Prosecutor is likely to be reading the brief of evidence on the date of the hearing, you can ring the Police Prosecutors at the police station closest to where the court is that you are appearing in, and ask to speak to either the Senior Police Prosecutor or another police prosecutor to discuss your matter.

This problem does not occur when the DPP has carriage of a matter, as a solicitor is allocated to each individual matter.

Speaking to prosecution witnesses

There is no property in witnesses. Therefore, you are able to speak to the prosecution witnesses.

Although it will be unlikely that you will want to speak to prosecution witnesses in all cases in which you appear.

You should be prudent when speaking to prosecution witnesses. It is preferable, before speaking to a witness, to speak to the officer in charge of the case as well as the solicitor with carriage or the police prosecutor, to let them know that is what you would like to do. You should also note that the Law Society has issued Guidelines in relation to contact with complainants in apprehended violence orders and family violence matters (see chapter 21 on AVOs).

You should always consider speaking to expert witnesses called by the prosecution. Most experts pride themselves on their impartiality. You will benefit from speaking to the prosecution's expert by talking to them about their evidence and how they arrived at their opinions. As a general rule, you will always attempt to speak to expert witnesses.

Subpoenaing documents

Subpoenas are often issued to obtain material that might not have been provided by the prosecution. See chapter 7.
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 taking 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, cross-examination of a witness is not to take place before the examination in chief of the witness, and re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

**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.

- **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 the question or give such a direction, including the extent to which evidence that has been given by the 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 unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

For the purposes of the section, the court can take into account, certain matters including any relevant condition or characteristic of the witness, as well as age, personality and education, and any mental, intellectual or physical disability to which the witness is or appears to be subject.

**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, and the order in which parties may question a witness, and the presence and behaviour of any person in connection with the questioning of witnesses.

**The prosecution case**

The prosecution will present their case first. In the Local Court the prosecution generally calls witnesses in this order:
• Police witnesses
• The alleged victim
• Other witnesses, if any.

Exclusion of evidence

Admissibility of evidence

You should rigorously apply the Evidence Act to what is contained in the brief of evidence to determine what the admissible evidence is. 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

If the evidence sounds or seems objectionable to you, it probably is objectionable. In these circumstances, it is generally preferable to make an objection and then formulate the grounds for objection.

You object to evidence by standing and stating “I object”.

It is useful to start off your objection by saying, for example, “This is hearsay evidence, because …” or “This is not relevant evidence, because …”.

Similarly, the answer to an objection to evidence you are calling will be effective when it commences with a direct explanation of the answer 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 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:

• 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 Police 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 police 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 stated in evidence they
saw, for example because the lighting was poor, their eyesight was poor or they were not present.

• You may also be aware of a 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
defendant or the defendant’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
testimony 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.

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. The question is not whether on the
evidence as it stands the accused ought to be convicted, 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 is not satisfied beyond reasonable doubt that the defendant 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 not making either of these submissions, you then have to decide whether you go into the defence case. This section of this chapter discusses the 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.

Although s 159 refers specifically to addresses to the jury, opening addresses in the Local Court can also be used effectively. Your opening address will be the first opportunity to tell the Magistrate what the case is about. The Magistrate might be assisted with being given a general indication of the matters in issue.

In your opening address you want to 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.

**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. The advantage is, that the magistrate will hear your client’s sworn evidence.

There are a number of disadvantages. 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 your conference with your client). 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 though if you do not call evidence in the Local Court, you are precluded from calling fresh evidence at an appeal against conviction to the District Court. The exception is if you have the leave of the District Court and only if it is in the interests of justice (s 18 Crimes (Local Courts 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.

**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.
Calling witnesses in the defence case

If you have witnesses that you will be calling in the defence case, you have to decide on:

• What relevant evidence they will give.
• What the credibility of their evidence will be.
• What order you will call them 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 last opportunity where you will have to present your version of the events and your position in relation to the facts and the issues 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.

Some of the 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. They apply to all solicitors who appear as advocates in court. There are specific rules related to the prosecution.

The Advocacy Rules are found in Rules A15 to A72 of the Revised Professional Conduct Rules. 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, and 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 references to be obtained on your client’s behalf.

In all 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

You can lodge an appeal against the conviction. This appeal is lodged after sentencing.

The appeal is heard in the District Court. It is a re-hearing on the Local Court transcript. The defence will make submissions on whether the transcript of the Local Court proceedings provides sufficient evidence to establish the offence at law.
Witnesses are not usually called to give evidence once again in the District Court. This is unless the court grants leave for such witnesses to appear, should it be necessary to do so, in order to bring fresh evidence before the court.

**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.

If your client is looking at a sentence of imprisonment if convicted and sentenced, you would need to 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 appeals bail application if your client is in fact convicted and sentenced to full time imprisonment.

**Practical matters relating to hearings**

Amended Local Court Practice Note 1/2001 sets out a number of practical matters in relation to defended hearings.


The Practice Note sets out 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.

Tips 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 and 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 by preparing your closing address first will alert you to the important issues, and will alert you to the questions you need to ask and evidence you will need to elicit, and from which witnesses you will be seeking this evidence from.

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 of the matter
It will often be helpful in your preparation to write down a chronology of the 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 states that evidence may 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.

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.

Have a view of the area where an offence is alleged to have been committed
It is often invaluable 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.

View 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 usually has to 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 the 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. In the case that one of the defence witnesses is not able to attend court on the date of the hearing and you are seeking an adjournment, it will usually assist you that you have made formal arrangements to have that witness attend court through having 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.

**Learning about advocacy**

You can learn about advocacy. A number of CLE providers run seminars with speakers dealing with advocacy.

It is important to always evaluate your performance after court. Advocacy may be taught. Someone can tell you what you are doing well and what you can improve. Courses are run by the Australian Advocacy Institute, and are invaluable.

The following are comprehensive sources of information on advocacy and preparing and acting in defended hearings:

Part 7
Sentencing
Sentencing overview

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.

The general approach to sentencing

An instinctive synthesis of all the relevant matters

There are two main approaches by which a court can arrive at a sentence.

The first approach is the ‘two-tiered’ approach to sentencing. If following this process, a Court will begin with an objectively determined sentence, and then arithmetically adjust the sentence to take into account various subjective factors.

The second approach is the ‘instinctive synthesis approach’ to sentencing. This approach was described in R v Williscroft [1975] VR 292 at 300 by the Full Court of the Supreme Court of Victoria in the following way:

Ultimately every sentence imposed represents the sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process. Moreover, in our view, it is profitless ... to attempt to allot to the various considerations their proper part in the assessment of the particular punishments presently under examination.

The proper approach to sentencing in this State is the instinctive synthesis approach (R v Thompson; R v Houlton (2000) 49 NSWLR 383 at paragraph 57 per Spigelman CJ).

It is useful to discuss some of the recent cases on sentencing to explain the differences in these approaches to sentencing.

In his dissenting judgment in AB v R (1999) 198 CLR 111 at 121-122, McHugh J said of the two-tiered approach to sentencing that:

First, it assumes that sentencing an offender is some mechanical or mathematical process. It is not. Nobody can identify, let alone define, some precise relationship between the complex and infinitely various elements that bear upon what sentence is to be imposed on an offender ... No calculus will reveal some mathematical relationship between this appellant's remorse, the harm he has inflicted on his victims and society's denunciation of what he did to them. A sentencing judge can do no more than weigh these and the many other factors (such as retribution and deterrence) that bear upon the question and express the result as several terms of imprisonment to be served, wholly or partly concurrently or consecutively. Remorse, harm, denunciation, retribution and deterrence—in the end, all these and more must be expressed by a sentencing judge in units of time. That is a discretionary judgment. It is not a task that is to be performed by calculation. Resort to metaphors such as "discount" or "allowance" must not be taken as suggesting that it can be.

Therefore, a court in fixing an appropriate sentence will have regard to all the considerations relating to the objective seriousness of offences before it, the subjective backgrounds of the people who commit those offences, and the differing purposes of punishment (see Dinsdale v R (2000) 202 CLR 321; R v JCE (2000) 120 A Crim R 18; R v Zamagias [2002] NSWCCA 17).

The High Court in a pending decision of Markarian v R is expected to resolve what the proper approach to sentencing is — that is, whether it is by a process of instinctive synthesis or whether it is a staged approach.

It is beyond the scope of this chapter to go into any greater detail about these different approaches to sentencing, but reference is made to the analysis of these issues by Spigelman CJ in R v Thomson; R v Houlton at paragraphs 54–113 and to R v McGourty [2002] NSWCCA 335 at paragraphs 42–45.
The relationship between the objective aspects of an offence and the subjective background of the offender

It is important to consider the relationship between the objective aspects of an offence and the subjective aspects of the offence. The relationship between these two aspects can be seen in the following passage from Dodd (1991) 57 A Crim R 349 at 354 where the Court of Criminal Appeal said:

As Jordan CJ pointed out in R v Geddes (36 SR at 556), making due allowance for all relevant considerations, there ought to be a reasonable proportionality between a sentence and the circumstances of the crime, and we consider that it is always important in seeking to determine the sentence appropriate to a particular crime to have regard to the gravity of the offence viewed objectively, for without this assessment the other factors requiring consideration in order to arrive at the proper sentence to be imposed cannot properly be given their place.

Each crime, as Veen v R (No 2) (1987-88) 164 CLR 465 at 472 stresses, has its own objective gravity meriting at the most a sentence proportionate to that gravity, the maximum sentence fixed by the legislature defining the limits of sentence for cases in the most grave category. The relative importance of the objective facts and subjective features of a case will vary. (See, for example, the passage from the judgment of Street CJ in R v Todd [1982] 2 NSWLR 517 quoted in Mill v The Queen (1988) 166 CLR 59 at 64). Even so, there is sometimes a risk that attention to persuasive subjective considerations may cause inadequate weight to be given to the objective circumstances of the case (R v Rushby [1977] 1 NSWLR 594). We consider that to have happened here. In our view the requirement of a reasonable proportionality with the circumstances of the crime called for a significant full-time custodial sentence.

The purposes of sentencing – section 3A

The purposes of sentencing are set out in section 3A, and are:

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 make the offender accountable for his or her actions,
f) To denounce the conduct of the offender,
g) To recognise the harm done to the victim of the crime and the community.

These purposes will guide the sentence imposed, and so should always be considered when preparing your plea in mitigation.

The principles of sentencing

In addition to the purposes of sentencing, there are a number of principles of sentencing. Two of the more important of the principles of sentencing are:

The principle of proportionality

A sentence should be proportional to the facts of the crime in question: Veen v R (No 2) (1987-88) 164 CLR 465. Proportionality will be determined by reference to the objective seriousness of the offence and the subjective features of the case. This principle has been discussed in detail earlier in this chapter.

The principle of totality

Where a number of sentences are being imposed, the principle of totality requires the court to determine an appropriate sentence for each offence and then to consider whether these should be ordered
concurrently or cumulatively in order to reflect the total criminality before the court: *Pearce v R* (1998) 194 CLR 610.

Generally, totality is achieved by making sentences wholly or partially concurrent (*Pearce v R* (1998) 194 CLR 610). In an appropriate case the court may lower individual sentences to take into account the fact that they are to be served cumulatively (*Johnson v R* [2004] HCA 15 at paragraph 26).

**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 referred to or addressed in your plea in mitigation.

**Aggravating factors**

The list of aggravating factors which are to be taken into account in determining the appropriate sentence for an offence are as follows:

a) The victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim’s occupation,

b) The offence involved the actual or threatened use of violence,

c) The offence involved the actual or threatened use of a weapon,

d) The offender has a record of previous convictions,

e) The offence was committed in company,

f) The offence involved gratuitous cruelty,

g) The injury, emotional harm, loss or damage caused by the offence was substantial,

h) The offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability),

i) The offence was committed without regard for public safety,

j) The offence was committed while the offender was on conditional liberty in relation to an offence or alleged offence,

k) The offender abused a position of trust or authority in relation to the victim,

l) The victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim’s occupation (such as a taxi driver, bank teller or service station attendant),

m) The offence involved multiple victims or a series of criminal acts,

n) The offence was part of a planned or organised criminal activity.

**Mitigating factors**

The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:

a) The injury, emotional harm, loss or damage caused by the offence was not substantial,

b) The offence was not part of a planned or organised criminal activity,

c) The offender was provoked by the victim,

d) The offender was acting under duress,

e) The offender does not have any record (or any significant record) of previous convictions,

f) The offender was a person of good character,

g) The offender is unlikely to re-offend,
h) The offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise,

i) The offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner,

j) The offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability,

k) A plea of guilty by the offender (as provided by section 22),

l) The degree of pre-trial disclosure by the defence (as provided by section 22A),

m) Assistance by the offender to law enforcement authorities (as provided by section 23).

**The plea of guilty — section 22**

The plea of guilty must be taken into account in sentencing: s 22.

**The separate bases for the discount for a plea of guilty**

A plea of guilty attracts a discount on sentence in two respects:

1. The utilitarian aspect, which means that victims do not have to give evidence and the time and expense of a defence hearing has been avoided.

   The strength of the Crown case is not taken into account in evaluating the extent of the discount for the plea of guilty.

2. The plea of guilty may be evidence of your client's contrition or remorse for committing the offence. If this is the case, your client will be entitled to an additional discount, over and above the discount for the utilitarian aspect of the plea.

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.
- 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 is set out at paragraph 160 and is:

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 paragraphs 137 –[138; *R v Parkinson* (2001) 125 A Crim R 1; *R v Sutton* [2004] NSWCCA 225).
Guideline judgments relevant to the Local Court

The Court of Criminal Appeal has delivered a number of guideline judgments. The purpose of these guideline judgments is to assist sentencers in 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**

*The Matter of the Attorney General’s Application (No 1) Under s 26 of the Criminal Appeal Act; R v Ponfield; R v Scott; R v Ryan; R v Johnson* (1999) 48 NSWLR 327 listed the following factors as enhancing the seriousness of offences of break enter and steal:

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 offence reflected either in the charges or matters taken into account on a Form 1 pursuant to s 21.

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 — s 105A (1)(f) *Crimes Act*, 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 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 other offences.

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.

The Court said that the rationale for the Form 1 procedure is that it:

- Promotes the objective of rehabilitation by ensuring a clean slate in relation to the Form 1 offences;
- Has a utilitarian value — the admission of guilt to offences saves resources for law enforcement agencies.

Other aspects of this guidelines judgment are:

- It is wrong to suggest that the additional penalty will be small - sometimes it will be substantial. However, the overall penalty imposed cannot be greater than that allowed for the principal offence.
In taking matters into account, the sentencing court gives greater weight to the following 2 elements than it would if sentencing only for the primary offence: (i) personal deterrence, and (ii) the community's entitlement to extract retribution for serious offences for which no punishment has been imposed.

An offence taken into account is not to be regarded as a conviction. However, ancillary orders such as restitution, compensation, costs, and disqualification/loss of licence may be imposed in relation to Form 1 offences as if they had been convictions.

The court has discretion to refuse to take matters into account on a Form 1 in spite of the wishes of the offender and prosecution. The court only needs to take into account further offences if, in all the circumstances, the court considers it appropriate to do so (s 33(2)(b)).

The Court also indicated that, whilst the court has a wide discretion, generally the Form 1 procedure will not be appropriate:

- For offences which are punishable by life imprisonment. These offences cannot be included on a Form 1 — s 33(4)).
- The maximum sentence allowed in relation to the principal offence is not great enough to allow the total criminality of Form 1 offences to be reflected in the sentence.

**High range PCA offences**

There is a guideline judgment in relation to High Range PCA 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 20.
Sentencing options in the Local Court

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.

All references are to the sections in the Crimes (Sentencing Procedure) Act 1999. (NSW) unless stated otherwise.

Non-custodial sentences

Dismissal and conditional discharge (section 10)

Section 10 allows a court, without proceeding to conviction, to find a person guilty of an offence 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) sets out the matters that a court must have regard to, which are:

(3) In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:

(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) any other matter that the court thinks proper to consider.

These matters are a checklist of what needs to be addressed if you are seeking to have a matter dealt with under s 10.

There is a guideline judgment in relation to High Range PCA 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 judgment discusses the appropriateness of s 10 being used for High Range PCA offences. The guideline is discussed in chapters 17 and 19.

Fines (sections 14–17)

A court may impose a fine in addition to a good behaviour bond or a sentence of imprisonment.

A court can take into account a defendant’s financial circumstances when considering the extent of the fine. It is therefore important to tell the court your client’s financial situation including income, and liabilities.
Bonds (sections 9 and 94–100)

Instead of imposing a sentence of imprisonment, a court may make an order directing that a person enter into a good behaviour bond for a specified term not exceeding 5 years.

Bonds can be imposed with or without conditions. Conditions can include accepting the supervision of the Community Offender Service (formerly known as the Probation and Parole Service), and attending certain courses or programmes.

Community Service Orders (sections 8 and 84–93)

Instead of imposing a sentence of imprisonment, a court may make a community service order (CSO) directing a person to perform community service work for a specified number of hours, up to a maximum of 500 hours.

Your client has to be assessed as suitable to perform a community service order by an officer from the Community Offender Service. This assessment takes place when a pre sentence report is prepared (see chapter 19).

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 the Community Offender Service.

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.

A CSO and a good behaviour bond are alternative penalties only - s 13 states that they cannot both be imposed in relation to the same offence.

Custodial sentences

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 bond for the term of the sentence.

When suspending a sentence of imprisonment, a court may direct that the person be released from custody on condition that the offender enters into a good behaviour bond for a term that is not longer than the term of the sentence.

In setting the sentence, a court sets a non-parole period and the balance of the term of the sentence (s 12(3)).

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 custodial sentence must be imposed but where there are prospects of rehabilitation.

Suspended sentences are sentences of imprisonment, and that they do provide for punishment and deterrence (see, for example, R v JCE (2000) 120 A Crim R 18; R v Zamagias [2002] NSWCCA 17).

If a court revokes a suspended sentence, it can then impose a sentence of imprisonment, which is to be served full time, by periodic detention, or by home detention (s 99). For a discussion of revocation of suspended sentences, see R v Tolley [2004] NSWCCA 165.

Periodic Detention (sections 6 and 64–73)

A court that has sentenced a person to imprisonment for not more than 3 years may make a periodic detention order, directing that the sentence be served by way of periodic detention.
In order to be eligible for periodic detention, your client must be assessed as suitable to perform this order (see s 66). This means that a pre sentence report written by an officer from the Community Offender Service. The pre sentence report will have an assessment of whether your client is suitable to perform periodic detention.

Periodic detention cannot be imposed for:

- An offender who has previously served imprisonment for more than 6 months by way of full-time detention in relation to any one sentence of imprisonment, whether in New South Wales or elsewhere (s 65A).
- People who are to be sentenced for certain sexual offences (s 65B).

The Parole Board deals with all breaches of periodic detention. If the Parole Board revokes a person’s periodic detention order, the Parole Board can direct that a warrant be issued for the person’s apprehension and return to custody.

Once arrested on the warrant, your client will be kept in custody until such time as they appear before the Parole Board. Bail cannot be granted before your client goes before the Parole Board.

**Full time imprisonment (section 5)**

A court should not sentence an offender to 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. For the effect and nature of this jurisdictional maximum, see *R v Doan* (2000) 50 NSWLR 115.

**Special circumstances (section 44(2))**

When sentencing a person to imprisonment, a court:

- Is first required to set a non-parole period for the sentence (that is, the minimum period for which the offender must be kept in detention in relation to the offence).
- Then set a balance of the term of the 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.

In *R v Way* [2004] NSWCCA 131, the Court of Criminal Appeal stated at paragraphs 111 - 113 that if a court finds special circumstances, that it is not required to first determine a minimum term, which was thereafter immutable. 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.

The meaning of special circumstances was discussed in *R v Moffitt* (1990) 20 NSWLR 114 and in *R v Simpson* (2001) 53 NSWLR 704.

Examples of matters that may comprise special circumstances are:

- Youth.
- First time in custody.
- Need to address drug/alcohol issues.
- Need for an extended period of supervision.
- 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).
- When cumulative sentences are 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 that a court:

- Fixes an appropriate sentence for each offence.
- Then considers questions of cumulation or concurrence.
- Finally, considers the totality of the sentences.

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 67 as follows:

> Whether or not to accumulate sentences imposed in relation to multiple offences is, in the end, an exercise of discretion to be made in accordance with established principle. Features common to two or more offences are all matters relevant to be taken into account (pointing towards concurrence) as are features indicating the disparate nature of the offences (pointing the other way). There will be many cases in which sentencing judges might take differing views but neither view could be said to be wrong.

As a result of the decision of the High Court in *Pearce*, the question of whether to accumulate sentences for multiple offences has taken on a new dimension. Following *Pearce*, a judge is required to fix 'an appropriate sentence' for each offence, before considering questions of accumulation, concurrence or totality. I take this to mean that, except perhaps in cases of multiple offences committed as part of a single, discrete, episode of criminality, the sentence for an individual offence is to reflect the criminality involved in the offence untainted by reference to the other offences for which that offender is to be sentenced.

Accumulation of sentences in the Local Court

Section 58 *Crimes (Sentencing Procedure) Act* states that the restrictions on a Magistrate when imposing cumulative or partially concurrent and partially cumulative sentences of imprisonment.

The Local Court may accumulate sentences to a maximum period of five years: s 58(1). There is no restriction on the power to accumulate sentences. However, the maximum penalties for table offences where there is no election has not changed: ss 267 and 268 *Criminal Procedure Act*.

Section 58(3) states that the restriction on the power to accumulate sentences does not apply if:

- (a) the new sentence relates to:
  - (i) an offence involving an escape from lawful custody, or
  - (ii) an offence involving an assault or other offence against the person, being an offence committed (while the offender was a convicted inmate) against a correctional officer or (while the offender was a person subject to control) against a juvenile justice officer, and
- (b) either:
  - (i) the existing sentence (or, if more than one, any of them) was imposed by a court other than a Local Court or the Children’s Court, or
  - (ii) the existing sentence (or, if more than one, each of them) was imposed by a Local Court or the Children’s Court and the date on which the new sentence would end is not more than 5 years and 6 months after the date on which the existing sentence (or, if more than one, the first of them) began.

Home Detention (sections 7 and 74–83)

A court that has sentenced a person to imprisonment for not more than 18 months may make a home detention order, directing that the sentence be served by way of home detention.

Home detention is not available:

- To people to be sentenced for with certain types of offences, including sexual assault of adults or children or sexual offences involving children, any offence involving the use of a firearm, assault occasioning actual bodily harm (or any more serious assault, such as malicious wounding or assault with intent to do grievous bodily harm), stalking or intimidating a person with the intention of
causing the person to fear personal injury, and a domestic violence offence against any person
with whom it is likely the person would live, or continue or resume a relationship, if a home
detention order were made (s 76).

- To people with certain offences on their criminal records, including sexual assault of adults or
children or sexual offences involving children, or who has at any time been convicted of an offence
of stalking or intimidating a person with the intention of causing the person to fear personal injury,
or who has at any time within the last 5 years been convicted of a domestic violence offence
against any person with whom it is likely the person would live, or continue or resume a
relationship, if a home detention order were made, or who is (or has at any time within the last 5
years been) subject to an apprehended violence order made for the protection of a person with
whom it is likely the person would live, or continue or resume a relationship, if a home detention
order was made (s 77).

You should apply for your client to be assessed for home detention straight after your client has been
sentenced to full time imprisonment.

The assessment takes a number of weeks and is conducted by an officer from the Community Offender
Service. 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 the Community Offender Service 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 proceedings against the person to a specified date, and grant bail to the person, for
these purposes:

- To assess the person's capacity and prospects for rehabilitation, or
- To allow the person to demonstrate that rehabilitation has taken place, or
- To assess the person's capacity and prospects for participation in an intervention program, or
- To allow the person to participate in an intervention program, or
- 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)).

The nature of this sentencing option was discussed in detail in *R v Trindall* [2002] NSWCCA 364 and *R v
Williams* [2004] NSWCCA 64.

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 records, 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 and 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, which is an order prohibiting the person from associating with a specified
  person for a specified term.
- A place restriction order, which is an 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 (being 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.

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)).
Plea making in the Local Court

This chapter looks at important aspects of plea making, with particular emphasis on plea making in the Local Court.

It is important to be thoroughly aware of the following when appearing in a sentence matter:

- The Crimes (Sentencing Procedure) Act 1999 (NSW) (CSPA);
- The applicable purposes and principles of sentencing (see chapter 17); and
- Cases in relation to specific types of offences or types of offender.

Background matters

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.

You must consider the offence 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 it should not, such as:

- Prejudicial and unsupported assertions;
- Material that is not relevant; and
- Material that may support a more serious charge being laid against your client. You should consider the principles in De Simoni (1981) 147 CLR 383. A court cannot take into account any matter of aggravation that could warrant a conviction for a more serious offence.

All material of the types mentioned above should be removed from or blackened out of the facts before the agreed facts are tendered in court. You will need to speak to the prosecutor to discuss amendments to the facts sheet.

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 however 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.

Criminal record/ antecedents

It is important to get a copy of your client’s fingerprint criminal record. You can get this from the prosecutor, and you should 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.

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 will usually be sufficient.

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.

Pre Sentence Reports

If your client has been charged with a serious offence, or 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 and sentences of imprisonment to be served by way of periodic detention 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). A PSR is prepared by an officer from Community Offender Services (COS) (formerly known as the Probation and Parole Service).

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 COS 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 and are ordered. Their main purpose is to assess suitability to perform community service orders and periodic detention.

In sentencing in the District Court, written PSRs are usually the type of PSRs that are prepared. 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 COS office to his/her residence to enable the report to be written.

If a full report has been ordered, you can contact the COS Officer a day or two before the adjourned court date and ask for a copy of the report. The COS 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 COS 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. If there is material that you want the Magistrate to consider, it is preferable to tender an affidavit or statutory declaration.
Preparing a plea in mitigation

A court arrives at a sentence through a process of "instinctive synthesis". This means taking all the relevant matters into account before arriving at a proper sentence (see chapter 17).

Your submissions should address all the relevant matters that will assist your client in mitigating the sentence to be imposed.

The following is a useful list for matters to keep in mind when you are preparing a plea in mitigation:

**Objective factors**
- Seriousness of the offence.
- Circumstances of the offence, including the level of impulsiveness/planning involved.
- The maximum (or any minimum mandatory) penalty available.
- The prevalence of the offence and consequent need for general deterrence.
- Any aggravating factors (such as those set out in s 21A(2) CSPA).
- Any applicable guideline judgments (see chapter 17).

**Subjective factors**
- Age.
- Remorse and/or restitution.
- Education.
- Employment.
- Criminal History.
- Prospects for the future/likelihood of rehabilitation.

**The plea of guilty**

A plea of guilty is to be taken into account in sentencing (s 22 CSPA; *R v Thomson and Houlton* (2000) 49 NSWLR 383). See chapter 17 for a discussion in relation to pleas of guilty.

**Guideline judgments**

The Court of Criminal Appeal has delivered a number of guideline judgments. The purpose of these guideline judgments is to assist courts in achieving consistency when sentencing.

The guideline judgments which are particularly relevant to practitioners appearing in the Local Court are discussed in chapter 17.

**Structuring a plea in mitigation**

A plea in mitigation should at least include reference to at least the following:

**The facts**

The relevant considerations are referred to above, under objective factors. The facts should be examined in detail in the plea, as any penalty imposed must be proportionate to the objective seriousness of the offence.

**Your client's background (antecedents)**

The relevant considerations are referred to above, under subjective factors. This includes addressing your client's criminal record.
Your client's prognosis

Your client's prognosis is your client's plans for the future. It especially focuses on why your client will not commit any offences in the future.

Penalty

You should generally address on the penalty you consider appropriate for the court to impose. You should explain why the penalty you are asking for is appropriate.

The structure of sentences

If your client is to be sentenced for a number of offences and is likely to be given full time imprisonment, you should consider how the sentences should be structured — that is, concurrently, partially concurrently and partially cumulatively, or wholly cumulatively (see Part 4 Division 2 CSPA).

The procedure in court when appearing in a plea of guilty

This following is the general procedure for a plea of guilty in the Local Court:

- You call on your matter. Your client should be seated behind you in court when you do this.
- You formally enter plea of guilty by saying "A plea of guilty is entered" or using similar words.
- You indicate (if it is the case) that you have no objection to the tender of the police facts and your client's criminal record,
- The prosecutor tenders these documents. These documents form the prosecution’s case on sentence.
- The Magistrate reads these documents.
- You tender any relevant documents such as reports or references. You tender documents by handing them to the court officer, who will then hand them to the Magistrate. You should serve copies of these documents on the prosecution before court.
- The Magistrate reads these documents.
- If you are asking for a PSR, it is usual to do so at this stage. You would not normally present your plea in mitigation until the PSR has been prepared.
- If the Magistrate agrees that a PSR is required the Magistrate will adjourn the matter so that the report can be prepared.
- If the matter is to proceed, you make your submissions.
- The prosecution does not usually address on sentence in the Local Court.
- 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 25).

You should also take some time yourself to reflect on your performance in court, to help you improve in the future.
Plea making in PCA offences

This chapter discusses aspects of plea making in driving offences and particularly in relation to PCA offences.

There is a guideline judgement in relation to High Range PCA 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. 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 PCA offences.

An overview of drink driving offences

Introduction

Penalties for PCA offences depend on the type of offence and the prior traffic history.

A major offence is an offence referred to in s 25(1) Road Transport (General) Act 1999 (NSW)(RTGA): s 3. All PCA offences are major offences: s 25(1)(c)(iv) RTGA.

Upon conviction for a major offence a period of automatic licence disqualification applies without specific order of a court: s 25 RTGA.

Sections 25(2) and 25(3) RTGA give a court power to reduce or extend the automatic disqualification period as it thinks fit, subject to the minimum periods outlined in those sections.

If at the time of conviction for a major offence an offender is convicted of another major offence (whether the same offence or a different one) or has been convicted of a major offence within the previous five years, the automatic and minimum periods of disqualification are longer: s 25(3) RTGA.

Section 25(4) RTGA sets out the criteria for calculating appropriate disqualification periods where 2 or more convictions are made for offences arising out of a single incident.

Maximum penalties for offences under the Road Transport (Safety and Traffic Management) Act 1999 (NSW) (RTSTMA) are greater for second or subsequent offences within a five year period.

Pursuant to ss 24(3) and 25(5) RTGA, disqualification is in addition to any penalty imposed for the offence. However, the HRPCA guideline indicates that the court may take into account the effects of licence disqualification when determining what the consequences should be, both penal and otherwise, for an offender. This is discussed further below.

Where a person is convicted of an offence that is not a major offence, the court has power to order licence disqualification for such period as is specified by the court: s 24 RTGA.

Categories of drink driving offences

Drink driving offences fall within two distinct categories:

- Driving whilst under the influence of alcohol or other drug (DUI): s 12 RTSTMA, and
- Driving with the prescribed concentration of alcohol (PCA): s 9 RTSTMA.

The majority of offences that come before courts are PCA offences where a precise blood-alcohol reading is obtained.

DUI offences generally arise in two circumstances:
Where your client is (or is alleged to be) under the influence of a drug other than alcohol. The presence of a drug other than alcohol in your client’s system would usually be proved by blood analysis.

Where your client is alleged to be under the influence of alcohol but police are unable to take a blood-alcohol reading, whether due to your client’s refusal to provide a sample, technical failure or other cause (such as due to injury sustained in a motor vehicle accident).

The different types of PCA offences
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.

- **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 8 RTSTMA, and includes holders of learner or provisional licences, persons whose licences are suspended, cancelled or disqualified and persons who are driving a vehicle for hire or reward in the course of trade or business or as a public passenger vehicle within the *Passenger Transport Act 1990*.

- **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.

The penalties for these offences are set out the end of this chapter.

Habitual traffic offender declarations
Your client’s previous traffic history will always be an important matter in respect of which you should obtain instructions.

The RTA is required to impose disqualification periods additional to any court imposed penalty if your client has had three or more relevant offences (defined in s 27 RTGA) (which includes the present offence) within five years. The three or more relevant offences which includes the present offence(s) that your client is before the court on.

If your client falls into this category, your client 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.

The automatic period of disqualification is five years in addition to any disqualification period that may be imposed by the court.

The court can make two orders for a person who is liable to be declared a habitual traffic offender. It can:

- 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 (s 31 RTGA); or

- Allow the declaration to be made, but reduce the period of disqualification under the declaration to at least two years, or alternatively increase it (with no maximum—life disqualification may be imposed) (s 30 RTGA).

You can ask the court to quash the habitual traffic offender declaration at the time you make your sentencing submissions. If the court does not do this, you can apply to the court in the future, asking the court to quash the declaration.
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 (and specifically for a PCA 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, in particular whether he or she has any other major offences within the terms of the RTSTMA 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 RTA 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.

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.
References are discussed in chapter 19.

Delivering your plea
*R v Naresh Khatte* [2000] NSWCCA 32 was an appeal to the Court of Criminal Appeal by the DPP against the inadequacy of sentence imposed for an offence of Dangerous Driving Occasioning Death pursuant to s 52A *Crimes Act*. 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.

Sentencing principles relating to HRPCA offences
Whilst the recent HRPCA guideline refers specifically to HRPCA offences, practitioners should note that Magistrates may refer to the guideline when sentencing an accused for a low or mid-range PCA offence.

The nature of PCA offences
The HRPCA guideline explains at paragraph 102 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.

At lower range PCA offences, it may be that a court may 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 runs 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 does not operate in mitigation in HRPCA matters

The HRPCA guideline indicates at paragraph 120 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,

The relevance of 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.

The HRPCA guideline states at paragraph 119 that this principle applies to sentencing for PCA offences in general and high range PCA offences in particular.

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.

The relevance of subjective matters and HRPCA offences

The HRPCA guideline sets out the following matters at paragraph 143 in relation to the relevance of subjective matters in sentencing for a HRPCA offence:

- 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.
- Too much allowance cannot be given to subjective features, particularly where deterrence and denunciation are important factors in sentencing.
- 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.

Section 10 Crimes (Sentencing Procedure) Act and HRPCA offences

Section 10 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 (see chapter 18).

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 enters into and 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 24(6) RTGA 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 faces.

The HRPCA guideline sets out a number of principles at paragraphs 130 - 132 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 of 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.

Licence disqualification

The nature of licence disqualification

The HRPCA guideline makes it clear at paragraph 116 that a court 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 HRPCA guideline 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.

Therefore 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 fixing 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

The HRPCA guideline sets out (at paragraphs 126–128) 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 guideline 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.

Traffic offender programs

Pre-sentence 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. If you are not sure whether a TOP is available in the area of the Local Court where your client will be appearing, ask a practitioner who appears at that court or enquire at that court registry.

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 34(6)(b) RTGA).

Attending a TOP may not necessarily secure your client a s 10 dismissal (see above).

HRPCA offences and involvement in driver education programmes

The HRPCA guideline states the following at paragraphs 121–122 in relation to involvement in driver education programmes:

- Notwithstanding the undoubted beneficial effect upon a driver of participation in a driver education program, that fact can have little impact upon the appropriate sentence to be imposed for an offence of HRPCA.
- Involvement in such programmes is usually relevant to the length of disqualification imposed or the amount of a fine.
- HRPCA in general is so serious and the criminality involved in even a typical case of HRPCA 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.
- In particular, 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 HRPCA is concerned principally with denunciation of the conduct and general deterrence. For the typical HRPCA offender, recidivism is not a concern of the court.
- In an offence of HRPCA the possible benefits arising from attendance at a program are outweighed by the need for appropriate punishment.

Post sentence traffic offender programs: the Sober Driver Program

The Sober Driver Program is a nine-week post sentence program delivered by the Community Offender Service (formerly known as the Probation and Parole Service) for offenders who are convicted of more than one drink driving offence within a five year period.

Offenders may be placed by the court on these orders pursuant to the Crimes (Sentencing Procedure) Act 1999 (NSW) on supervised good behaviour bonds under ss 9 and 10, s 11, s 12 (suspended sentence), or s 8 (community service orders) with a requirement to complete the sober driver program.

Successful completion may enable the Community Offender Service to terminate supervision of the person early if the sentence that is imposed allows this to happen.
The interlock program

Introduction

The interlock program uses an electronic interlock device (breath-alcohol analyser), which is wired to the ignition of a person's vehicle to restrict driving when a person has a blood alcohol concentration above a certain level. It incorporates a significant rehabilitation component.

The benefit of participating in an interlock program is that, if your client accepts the conditions of the program and complies with it, he or she will serve a shorter licence disqualification period than if he or she was sentenced under standard traffic law.

The interlock program is voluntary and is available as a sentencing option for those who have committed an alcohol-related major offence (essentially all PCA and driving under influence of alcohol offences—see the definition in s 25A RTGA). It is not available for habitual offenders: s 25B RTGA.

People who wish to be on this program must pay for the cost of the installation of the device (there is a subsidy through the RTA for concession card holders) and discuss their drink-driving behaviour with a medical practitioner trained to deliver the "Drink-less brief medical intervention".

A person may participate in an interlock program where, at the time of sentencing, the court makes a Disqualification Suspension Order (DSO).

The court will impose a disqualification period and then allow an eligible person to serve a reduced period of disqualification (the disqualification compliance period) which is followed by a period on an interlock driver licence (the interlock participation period). The minimum interlock participation and disqualification compliance periods for different offences are set out below. The court has the discretion to impose any maximum period.

Towards the end of the disqualification compliance period, the person may apply for a class C licence with interlock conditions. The interlock participation period and the DSO begin to run only when the licence is issued.

A DSO cannot be made after sentencing. If your client is eligible for the interlock program, you must seek a DSO at the time of sentencing. Your client can decide later whether they wish to apply for the interlock licence, or to serve out the full disqualification period instead.

A person ceases to participate in an interlock program before the end of the interlock participation period if and when:

- They are convicted of a major offence during the period and the court does not order the DSO to continue in effect; or
- They cease to hold an interlock driver licence before the end of the period.

If a DSO ceases to have effect during the interlock participation period the person will have to serve out the difference between the full disqualification period and the disqualification compliance period already served before the operation of the DSO.

If your client comes before a court for a major offence before the end of the interlock participation period, you will need to ask the court to allow the DSO to continue.

For more information about the interlock program go to www.rta.gov.au and see ss 25A–25H RTGA, and see the table setting out the disqualification and participation periods, which is at the end of this chapter.

Interlock participation and disqualification compliance periods

Road Transport (General) Act 1999, Schedule 1A

1. A person convicted of an offence under section 9 (3) (a) or (b), (4) (a) or (b), 12 (1) (a) or (b) or 15 (4) of the Road Transport (Safety and Traffic Management) Act 1999 who, at the time of the conviction or during the period of 5 years before the conviction, is not or has not been convicted of any other alcohol-related major offence (whether of the same or a different kind).

Minimum interlock participation period—24 months
Disqualification compliance period—6 months

2. A person convicted of an offence under section 9 (4) (a) or (b), 12 (1) (a) or (b) or 15 (4) of the RTSTMA who, at the time of the conviction or during the period of 5 years before the conviction, is or has been convicted of any other alcohol-related major offence (whether of the same or a different kind).

   Minimum interlock participation period—48 months

   Disqualification compliance period—12 months

3. A person convicted of an offence under section 9 (3)(a) or (b) of the RTSMA who, at the time of the conviction or during the period of 5 years before the conviction, is or has been convicted of any other alcohol-related major offence (whether of the same or a different kind).

   Minimum interlock participation period—24 months

   Disqualification compliance period—6 months

4. A person convicted of an offence under section 9 (1A), (1)(a) or (b) or (2)(a) or (b) of the RTSTMA who, at the time of the conviction or during the period of 5 years before the conviction, is or has been convicted of any other alcohol-related major offence (whether of the same or a different kind).

   Minimum interlock participation period — 12 months

   Disqualification compliance period — 3 months

**The guideline for HRPCA offences**

The guideline for HRPCA offences sets out this guideline at paragraph 146:

(1) An ordinary case of the offence of high range PCA is one where:

   i) the offender drove to avoid personal inconvenience or because the offender did not believe that he or she was sufficiently affected by alcohol;
   
   ii) the offender was detected by a random breath test;
   
   iii) the offender has prior good character;
   
   iv) the offender has nil, or a minor, traffic record;
   
   v) the offender's licence was suspended on detection;
   
   vi) the offender pleaded guilty;
   
   vii) there is little or no risk of re-offending;
   
   viii) the offender would be significantly inconvenienced by loss of licence.

(2) In an ordinary case of an offence of high range PCA:

   i) an order under s 10 of the *Sentencing Act* will rarely be appropriate;
   
   ii) a conviction cannot be avoided only because the offender has attended, or will attend, a driver's education or awareness course;
   
   iii) the automatic disqualification period will be appropriate unless there is a good reason to reduce the period of disqualification:
   
   iv) a good reason under (iii) may include:

   (a) the nature of the offender's employment;
   
   (b) the absence of any viable alternative transport;
   
   (c) sickness or infirmity of the offender or another person.
(3) In an ordinary case of a second or subsequent high range PCA offence:
  i) an order under s 9 of the *Sentencing Act* will rarely be appropriate;
  ii) an order under s 10 of the Sentencing Act would very rarely be appropriate;
  iii) where the prior offence was a high range PCA, any sentence of less severity than a community service order would generally be inappropriate.

(4) The moral culpability of a high range PCA offender is increased by:
  i) the degree of intoxication above 0.15;
  ii) erratic or aggressive driving;
  iii) a collision between the vehicle and any other object;
  iv) competitive driving or showing off;
  v) the length of the journey at which others are exposed to risk;
  vi) the number of persons actually put at risk by the driving.

(5) In a case where the moral culpability of a high range PCA offender is increased:
  i) an order under s 9 or s 10 of the *Crimes (Sentencing Procedure) Act* would very rarely be appropriate;
  ii) where a number of factors of aggravation are present to a significant degree, a sentence of any less severity than imprisonment of some kind, including a suspended sentence, would generally be inappropriate.

(6) In a case where the moral culpability of the offender of a second or subsequent high range PCA offence is increased:
  i) a sentence of any less severity than imprisonment of some kind would generally be inappropriate;
  ii) where any number of aggravating factors are present to a significant degree or where the prior offence is a high range PCA offence, a sentence of less severity than full-time imprisonment would generally be inappropriate.
Penalties under the Road Transport legislation

Current road transport legislation commenced 1st December 1999

All references and sections below are to the Road Transport (Safety and Traffic Management) Act 1999 unless otherwise indicated.

<table>
<thead>
<tr>
<th>M</th>
<th>FIRST OFFENCE</th>
<th>SECOND OFFENCE</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(within 5 years)</td>
<td>(Previously convicted of this offence or any Major offence within 5 Years)</td>
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<table>
<thead>
<tr>
<th>PCA offences and other alcohol-related offences:</th>
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<tr>
<th>M</th>
<th>HIGH RANGE PCA 0.15 or more</th>
<th>MID RANGE PCA 0.08–0.15</th>
<th>LOW RANGE PCA 0.05–0.08</th>
<th>SPECIAL RANGE 0.02–0.05</th>
<th>NOVICE RANGE 0.00–0.02</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FINE IMPRISONMENT $3300 18 MTHS Section 9(4)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(2)(d) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $5500 2 YEARS Section 9(4)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 5 YEARS 2 YEARS Section 25(3)(d) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 5 YEARS 2 YEARS Section 25(3)(d) Road Transport (General) Act</td>
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<tr>
<td></td>
<td>FINE IMPRISONMENT $2200 9 MTHS Section 9(3)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(2)(b) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $3300 12 MTHS Section 9(3)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(3)(b) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(3)(b) Road Transport (General) Act</td>
</tr>
<tr>
<td></td>
<td>FINE IMPRISONMENT $1100 NIL Section 9(2)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 6 MTHS 3 MTHS Section 25(2)(a) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $2200 NIL Section 9(2)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
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<tr>
<td></td>
<td>FINE IMPRISONMENT $1100 NIL Section 9(1)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 6 MTHS 3 MTHS Section 25(2)(a) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $2200 NIL Section 9(1)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
</tr>
<tr>
<td></td>
<td>FINE IMPRISONMENT $1100 NIL Section 9(1A)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 6 MONTHS 3 MONTHS Section 25(2)(a) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $2200 NIL Section 9(1A)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(a) Road Transport (General) Act</td>
</tr>
<tr>
<td></td>
<td>FINE IMPRISONMENT $1100 NIL Section 13(2)</td>
<td>DISQUALIFICATION No minimum: section 24(1) Road Transport (General) Act applies</td>
<td>FINE IMPRISONMENT $2200 NIL Section 13(2)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(d) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(3)(d) Road Transport (General) Act</td>
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<tr>
<td></td>
<td>FINE IMPRISONMENT $3300 18 MTHS Section 15(4)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(2)(d) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $5500 12 MTHS Section 15(4)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 5 YEARS 2 YEARS Section 25(3)(d) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 5 YEARS 2 YEARS Section 25(3)(d) Road Transport (General) Act</td>
</tr>
<tr>
<td></td>
<td>FINE IMPRISONMENT $2200 NIL Section 13(2)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 12 MTHS 6 MTHS Section 25(2)(b) Road Transport (General) Act</td>
<td>FINE IMPRISONMENT $3300 12 MTHS Section 12(1)</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(3)(b) Road Transport (General) Act</td>
<td>DISQUALIFICATION AUTOMATIC MINIMUM 3 YEARS 12 MTHS Section 25(3)(b) Road Transport (General) Act</td>
</tr>
</tbody>
</table>

NB: The same penalties apply for “Failure to stop” (s 13(5)) and for “Refusing to submit to a sobriety assessment” (s 29(1))
Note also that the offences of wilfully alter blood alcohol concentration (s 16); and prevent taking a blood sample (s 22) carry the same penalties as refuse breath analysis.
<table>
<thead>
<tr>
<th>M denotes Major offence</th>
<th>FIRST OFFENCE</th>
<th>SECOND OFFENCE</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>(within 5 years)</td>
<td>(Previously convicted of this offence or any Major offence within 5 Years)</td>
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<td></td>
<td>[Section 4 – see Dictionary clause 2]</td>
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</table>

**Other serious driving offences**

<table>
<thead>
<tr>
<th>M MENACING DRIVING WITH INTENT</th>
<th><strong>FINE</strong> IMPRISONMENT $3300 18 MTHS</th>
<th><strong>DISQUALIFICATION</strong> AUTOMATIC MINIMUM 3 YEARS 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT $5500 2 YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 43(4)</td>
<td>Section 25(2)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>M MENACING DRIVING POSSIBILITY OF MENACE</th>
<th><strong>FINE</strong> IMPRISONMENT $2200 12 MTHS</th>
<th><strong>DISQUALIFICATION</strong> AUTOMATIC MINIMUM 3 YEARS 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT $3300 18 MTHS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 43(2)</td>
<td>Section 25(2)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
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<thead>
<tr>
<th>M DRIVING FURIOUSLY, RECKLESSLY OR IN A MANNER DANGEROUS</th>
<th><strong>FINE</strong> IMPRISONMENT $2200 9 MTHS</th>
<th><strong>DISQUALIFICATION</strong> AUTOMATIC MINIMUM 3 YEARS 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT $3300 12 MTHS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 42(2)</td>
<td>Section 25(2)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
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<table>
<thead>
<tr>
<th>M FAILURE TO STOP AND RENDER ASSISTANCE</th>
<th><strong>FINE</strong> IMPRISONMENT $3300 18 MTHS</th>
<th><strong>DISQUALIFICATION</strong> AUTOMATIC MINIMUM 3 YEARS 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT $5500 2 YEARS</th>
</tr>
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<tr>
<td>Section 70</td>
<td>Section 25(2)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
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<thead>
<tr>
<th>M AID. ABET OR ACCESSORY BEFORE THE FACT TO MAJOR OFFENCE</th>
<th><strong>FINE</strong> IMPRISONMENT LIABLE TO SAME PENALTY AS PRINCIPAL OFFENDER</th>
<th><strong>DISQUALIFICATION</strong> AUTOMATIC MINIMUM 3 YEARS 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT LIABLE TO SAME PENALTY AS PRINCIPAL OFFENDER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25(2)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
<td>Section 25(1)(d) Road Transport (General) Act</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>M (Not a Major Offence) DRIVING DISQUALIFIED, SUSPENDED OR CANCELLED</th>
<th><strong>FINE</strong> IMPRISONMENT $3300 18 MTHS</th>
<th><strong>MANDATORY MINIMUM</strong> DISQUALIFICATION 12 MTHS</th>
<th><strong>FINE</strong> IMPRISONMENT $5500 2 YEARS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 25A(1) Road Transport (Driver Licensing) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
<td>Section 25A(1) Road Transport (Driver Licensing) Act</td>
<td>Section 25A(10) Road Transport (Driver Licensing) Act</td>
</tr>
<tr>
<td><strong>M</strong> denotes Major offence</td>
<td><strong>FIRST OFFENCE</strong></td>
<td><strong>SECOND OFFENCE</strong></td>
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<tr>
<td><strong>(within 5 years)</strong></td>
<td><strong>(Previously convicted of this offence or any Major offence within 5 Years)</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>FIRST OFFENCE</strong></td>
<td><strong>SECOND OFFENCE</strong></td>
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</tbody>
</table>

**Other non-major offences**

<table>
<thead>
<tr>
<th>DRIVE UNLICENSED</th>
<th>FINE IMPRISONMENT $2200 NIL</th>
<th>DISQUALIFICATION No minimum: s.24(1) Road Transport (Driver Licensing) Act</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 25A(1)</td>
<td>Road Transport (Driver Licensing) Act</td>
<td></td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>NEGLIGENT DRIVING</th>
<th>FINE IMPRISONMENT $1100 NIL</th>
<th>DISQUALIFICATION No minimum: s.24(1) Road Transport (General) Act applies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 42(1)(c)</td>
<td>Road Transport (Driver Licensing) Act</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SPEEDING (where speed 130km/h or less)</th>
<th>FINE IMPRISONMENT $3300 NIL</th>
<th>DISQUALIFICATION MANDATORY DISQUALIFICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offences and disqualifications are provided for in the Road Transport (Safety and Traffic Management) (Road Rules) Regulation 1999</td>
<td>MORE THAN 45KMS Over $2200 NIL MORE THAN 30KMS Over $2200 NIL LESS THAN 30KMS Over</td>
<td>6 MTHS MINIMUM: MORE THAN 45KMS Over 3 MTH MINIMUM: MORE THAN 30KMS Over</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SPEEDING (where speed more than 130km/h)</th>
<th>FINE IMPRISONMENT $3300 NIL</th>
<th>MANDATORY DISQUALIFICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legislative source as specified above</td>
<td>For large vehicles $2200 NIL For other vehicles</td>
<td>6 MTHS MINIMUM: MORE THAN 45KMS Over 3 MTHS MINIMUM: MORE THAN 30KMS Over 1 MTH MINIMUM: LESS THAN 30KMS Over</td>
</tr>
</tbody>
</table>

NB: Negligent driving causing death carries the same penalties as high range PCA: s 42(1)(a)
Part 8
Ancillary and related orders and powers
This chapter outlines some of the basic considerations involved when acting for a complainant or a defendant in Apprehended Violence Order (AVO) proceedings.

The provisions relating to AVOs are contained in Part 15A Crimes Act 1900 (NSW). These provisions must be considered in detail when appearing for a person in AVO proceedings.

All references to sections in this chapter are references to the Crimes Act unless specified otherwise.

**Important definitions**

*Protected person/Person in need of protection (PINOP):* This is the person for whose protection an AVO is made: s 562A.

*Defendant:* The person against whom an AVO is made or is sought to be made: s 562A.

*Complainant:* The person who seeks (or has sought) an AVO. This may either be the PINOP or a police officer.

*Cross-application:* When a defendant to an AVO, applies for an AVO against the complainant.

*Interim order:* An order made by the Court in order to protect the PINOP from the defendant prior to the hearing: ss 562BB and 562BBA.

*Telephone Interim Order:* An interim AVO order made by an authorised justice in accordance with s 562H: s 562A.

*Order:* An AVO (including a telephone interim order or an interim order made by the court) in force under Part 15A of the Crimes Act: s 562A.

**The two categories of AVOs**

There are two categories of AVOs:

- Apprehended Domestic Violence Orders (ADVOs), for circumstances where there is a domestic relationship (defined in s 562A(3)) between the PINOP and defendant.
- Apprehended Personal Violence Orders (APVOs), for circumstances where there is no domestic relationship between the PINOP and defendant.

**The types of behaviour AVOs can restrict**

AVOs can be used to restrict or prohibit a person from engaging in certain activities and behaviour - for example: intimidation, assault, threats, stalking, harassment, and molestation. AVOs can also restrict or prohibit access to premises where the PINOP resides or works and prohibit or restrict possession of firearms: s 562D.

A court has a wide discretion to impose restrictions or prohibitions that it may consider to be necessary or desirable: ss 562AE(4) and AI(4).

A breach of an AVO is a criminal offence: s 562I.

**How to apply for an AVO**

A PINOP can apply for an AVO in one of two ways:

- By attending a Local Court registry personally (or with the assistance of a solicitor) and, following discussion with the Chamber Magistrate, swearing an application for an AVO; or
As a consequence of either the police being called to an incident or an individual attending a police station, a police officer may swear an application for an AVO on behalf of the PINOP.

Only a police officer can make a complaint for an order on a child's behalf: s 562C(2A).

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; and
- 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: s 562I(2).

**Commencing proceedings for an AVO**

AVO proceedings can be initiated in two ways (ss 562AF and 562AJ):

- By issuing a summons for the defendant to appear in court on a specified day; or
- By issuing a warrant for the arrest of the defendant.

The Magistrate can only issue a warrant for the arrest of the defendant if the Magistrate believes that the personal safety of the PINOP will be put at risk unless the defendant is arrested for the purpose of being brought before the court.

**The different types of AVOs**

**Telephone interim orders (TIO): s 562H**

An application can be made by telephone by a police officer only to a Magistrate or authorised justice in the following circumstances set out at s 562H(2):

- Where an incident has occurred involving the defendant and PINOP; and
- The police officer attending the incident has good reason to believe that an order is necessary to ensure the safety of the PINOP or to prevent substantial damage to any property of the PINOP; and
- It is not practicable (due to the time and location of the incident) to apply personally for an interim order by a court.

A TIO:

- Will contain a summons for the defendant to appear at court for the complaint to be heard by an authorised justice, as well as information regarding the terms of the order: s 562H(4), (5) and (5A).
- Remains in force until midnight on the fourteenth day after the order is made, unless it is revoked before that day, or it otherwise ceases to have effect: s 562H(9).
- Stops having effect if a court order is made against the defendant in favour of the protected person: s 562H(10).
- Can be revoked by a justice or court: s 562H(11).
- Cannot be renewed, nor can a further TIO be made for the same incident: s 562H(15A).
**Interim orders: ss 562BB and 562BBA**

An interim AVO will be granted by a Magistrate only if it is necessary or appropriate to do so in the circumstances: s 562BB(1).

A Registrar of a Local Court or of a Children’s Court may make an interim order if both parties consent: s 562BBA(1).

A Magistrate may grant an interim order without the defendant being at court even if there is no evidence of the summons having been served on the defendant: s 562BB(2). This usually occurs if the written complaint alleges that there has been severe violence or abuse.

A defendant who is before the court when an application for an interim order is made should be allowed to cross-examine a PINOP as a matter of procedural fairness: Smart v Johnson (unreported, Supreme Court, 8 October 1998).

A person cannot lodge an appeal against the making of or failure to make an interim order.

An interim order operates until it is revoked, a final order is made, or the complaint is withdrawn/dismissed: ss 562BB(4) and (5).

**Final orders**

Only a Magistrate can make a final order for an AVO (s 562AE for ADVOs) and s 562AI for APVOs).

A court must be satisfied on the balance of probabilities that the PINOP has reasonable grounds to fear and in fact fears:

- The defendant committing a personal violence offence against him/her; or
- Conduct amounting to harassment or molestation, being conduct that, in the opinion of the court, is sufficient to warrant the making of the AVO; or
- Conduct amounting to intimidation or stalking, being conduct that, in the opinion of the court, is sufficient to warrant the making of the order:

The test as to whether a PINOP is fearful is a subjective test.

The test as to whether a PINOP has reasonable grounds to fear the defendant is an objective test.

A court has the power to extend the order to protect a person or a child under the age of 16 years with whom the protected person has a domestic relationship.

If a PINOP is under 16 or is suffering from an appreciably below average general intelligence function, a Magistrate does not need to be satisfied that the person does in fact fear that such an offence will be committed, or that such conduct will be engaged in.

**Mandatory making of orders following certain offences**

Unless the court is satisfied that it is not required, AVOs are mandatory:

- When a person is charged before a court with an offence of stalking or intimidation (s 562BE) or a domestic violence offence.
  
  In such a case, the court must make an interim order to protect the person against whom the offence appears to have been committed. The court must then summons the defendant to appear at a further hearing of the matter on the determination of the charge against the person: s 562BF and;

- When a person pleads guilty or a finding of guilt is made against a person for an offence of stalking or intimidation (s 562BE) or a domestic violence offence.
  
  In such a case, the court must make an order to protect the person against whom the offence was committed unless the Court is satisfied that it is not required. A finding of guilt includes a reference to the making of an order under s 10 Crimes (Sentencing Procedure) Act 1999 (NSW).
Ways that AVOs can be finalised

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.

AVOs made by consent and without admissions — s 562BA

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 'consenting to an AVO without admissions'. The advantage of having orders made by consent is that there is no hearing – thus reducing costs, time, and inconvenience of giving evidence.

Following a contested hearing

If a defendant does not consent to an AVO and the AVO 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 lawyers, and a hearing can strain the continuing relationship of the parties.

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 six months: s 562E. 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 satisfied that it is proper to do so in all the circumstances: s 562F(3). 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 a number of ways, such as having its duration extended or reduced, or adding, deleting or amending prohibitions or restrictions. An AVO cannot be varied or revoked unless notice of the application to vary or revoke has been served on the corresponding party. The court can extend the period during which the order is to remain in force, in certain circumstances, for a period of not more than 21 days if there has been a failure to give notice to one of the parties: s 562F. 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).

Contacting complainants in ADVO proceedings

Sometimes it will be necessary to contact a complainant in an ADVO matter.
If contact with the complainant is essential, it is prudent to discuss this with the police officer in charge in the matter, the police prosecutor or the solicitor from the DPP with carriage of the matter prior to making contact.

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.

The Guidelines can be accessed at the Law Society's Internet site (www.lawsociety.asn.au) or can be obtained directly from the Law Society.

In summary, the Guidelines state that:

- **Apprehended domestic violence matters and criminal matters** are particular types of matters where practitioners must act prudently and be very cautious that they do not breach their obligations and responsibilities.

- A practitioner should be very careful when coming into contact with a complainant in apprehended domestic violence matters and criminal matters, irrespective of who initiates the contact.

- Practitioners should be mindful of their duties not to influence witnesses and to preserve the integrity of evidence.

- A practitioner should contact a complainant in an apprehended domestic violence matter or criminal matter only if it is necessary. When making contact, the practitioner should be sensitive and careful not to suggest any impropriety or intimidation.

- Where it is necessary for a practitioner to contact a complainant, whether in person or via telephone, and there is no order in place prohibiting this contact, the practitioner should state details such as: their name; the name of their firm; who they act for; and the reason for contacting the complainant.

- It is imperative that a practitioner keeps a detailed file note of any contact with the complainant, clearly dated and as far as possible in the exact words said by each party.

- If a complainant contacts a practitioner suggesting that they will not attend court, or refuse to comply with a subpoena, or change the evidence they propose giving, a practitioner must make a detailed file note and ensure no further discussion is entered into, and no further contact is made with the complainant.

- Practitioners must not be material witnesses in their client's cases.

**Costs in AVO proceedings**

A court has the power to order costs in favour of the PINOP or defendant in accordance with the *Criminal Procedure Act 1986* (NSW): s 562N(1).

A court can only award costs against the PINOP if it is satisfied the complaint was made frivolously or vexatiously: s 562N(2).

Costs are not to be awarded against police officers unless the court is satisfied the police officer made a complaint on behalf a PINOP knowing that complaint contained material which was false or misleading: s 562N(3).

**Appeals to the District Court**

The provisions relating to appeals to the District Court are contained in Part 15 Division 4 of the *Crimes Act 1900* (NSW).

A defendant may appeal to the District Court against an AVO made by a Local Court or Children's Court. Appeals must be made to the District Court within 28 days of the Local or Children’s Court decision.

Leave must be granted to tender further evidence at the District Court.
Tips when appearing in AVO proceedings

- Have a detailed understanding of the legislation.
- Remember that proceedings for an AVO are not criminal proceedings. Therefore there is no obligation on police to provide a defendant with a brief of evidence. The standard of proof in AVO hearings is the civil standard of the balance of probabilities.
- In appropriate circumstances, consider whether undertakings would be a satisfactory way of resolving the matter.
- Be aware of any mediation services (such as community justice centres) that may be available to the parties.
- Consider whether alternative remedies are more appropriate than an AVO application. It may be more appropriate to utilise provisions under the Protection of the Environment Operations Act 1997 (NSW) regarding offensive noise, and actions under the Anti-Discrimination Act 1977 (NSW) for sexual harassment or racial vilification.
- Ensure that your client understands the precise nature of the terms of the AVO.
- When appearing for a defendant, ensure that your client is advised that it is an offence to contravene any term of the AVO. This offence carries a maximum penalty of 50 penalty units and/or two years imprisonment.
- Be aware of the consequences of an AVO being made against a client who is the holder of a firearm licence or permit (see chapter 22(e)). The Firearms Act 1996 (NSW) states that a firearms license is automatically revoked if the licensee becomes subject to a firearms prohibition order or an AVO.
- When appearing for a defendant, advise your client of the potential career implications with regard to obtaining and/or retaining employment in a field involving contact with children. Section 38 Commission for Children and Young People Act 1998 (NSW) requires disclosure in certain circumstances of AVOs against a person for the purpose of employment screening.
- Ensure that AVOs are not in conflict with any existing Family Law Orders between the parties.
Ancillary orders and powers

A  Offenders’ contribution to victims compensation

Where a victim of a violent crime causing personal injury or death has been awarded compensation by the Victims Compensation Tribunal (VCT), the tribunal may take action against the person who was convicted of the offence by making a provisional order for restitution. Part or all of the money awarded to the victim may be recovered from the offender.

The purpose of this subchapter is to provide a general outline of this process.

Provisional order for restitution

The Victims Support and Rehabilitation Act 1996 (NSW) (‘the Act’) provides for the Director of Victims Services to issue a provisional order of restitution to people convicted of a relevant offence (Pt 2, Div 8).

A relevant offence is defined in s 46(2) of the Act as being:

a) An offence arising from substantially the same facts as those constituting an act of violence in respect of which the award of statutory compensation was made; or

b) Any other offence if an offence referred to in paragraph (a) was taken into account (under Division 3 of Part 3 of the Crimes (Sentencing Procedure) Act 1999) when sentence was passed on the offender for that other offence.

An act of violence is defined as an act or series of related acts, whether committed by one or more persons:

c) That has apparently occurred in the course of the commission of an offence; and

d) That has involved violent conduct against one or more persons; and

e) That has resulted in injury or death to one or more of those persons.

A conviction includes any orders under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW) and s 33(1)(b)–(g) Children (Criminal Proceedings) Act 1987 (NSW). Compensation paid to primary victims, family members of deceased victims, and secondary victims are all recoverable from the offender.

Compensable injuries are set out in Schedule 1 of the Act with a table of payments for general damages. The maximum amount of compensation that can be awarded to a victim of an act of violence is $50,000.00.

A provisional order for restitution may be made within two years of the award of compensation to the victim, or from the date of conviction, whichever is the later: s 46(5).

Practitioners should be aware that this restitution is in addition to the Victims Compensation Levy that is payable upon conviction: Part 5 Victims Support and Rehabilitation Act 1996. The levy applies to offences that are punishable by imprisonment and is not limited to acts of violence: s 78.

Objection to the provisional order

A person has 28 days to file a notice of objection to a provisional order (s 47). If no objection is made, the order becomes final and the debt is legally payable by that person.

1 “Secondary victims” are persons who received a compensable injury as a direct result of witnessing the act of violence that resulted in the injury to, or death of, the primary victim of that act (s 8 of the Act).
If a person objects to a provisional order, the VCT will conduct a hearing into the matter. There is provision for the setting aside of an order if sufficient cause is shown: s 56. However, the Act provides no guidelines as to what is considered to be sufficient cause.

There is a right of appeal from the Tribunal’s decision to make a provisional order in the same way as there is a right of appeal from a decision of a Local Court exercising civil jurisdiction: s 55.

It is always advisable to object to a provisional order. The defendant can enter into negotiations as to the amount of the debt and the way it is paid (periodic payments or lump sums). Forms are available from the website at http://www.agd.nsw.gov.au/vs.

**Determining the payment amount**

The VCT can take into account any matters as it thinks relevant, including a number of otherwise extraneous factors, in determining an award of compensation. It may also reduce the payment for contributory behaviour.

Section 30 provides that in determining whether or not to make an award of statutory compensation and in determining the amount of compensation to award, the compensation assessor must have regard to the following:

a) Any behaviour (including past criminal activity), condition, attitude or disposition of the primary or secondary victim concerned that directly or indirectly contributed to the injury or death sustained by the victim,

b) Whether the act of violence was reported to a police officer within a reasonable time,

c) Whether that victim participated in the commission of the act of violence, encouraged another person to commit the act of violence or otherwise gave assistance to any person by whom the act of violence was committed,

d) Whether that victim has failed to provide reasonable assistance to any person or body duly engaged in the investigation of the act of violence or in the arrest or prosecution of any person by whom the act of violence was committed or alleged to have been committed,

e) Whether that victim failed to take reasonable steps to mitigate the extent of the injury sustained by the victim, such as seeking appropriate medical advice or treatment, or undertaking counselling, as soon as practicable after the act of violence was committed,

f) Such other matters as the compensation assessor considers relevant.

Factors which do not amount to a defence at law, such as a victim’s intoxication at the time of an offence being committed, can be relevant to the appropriateness of an award of compensation, and might persuade the Tribunal to reduce the debt. A provisional order will be made against each convicted co-offender and the relative involvement of each offender may be an issue that can reduce the amount of the debt.

Common complaints by defendants, such as that the victim was not seriously injured or that the defendant did not know that they would be required to pay restitution, are not likely to be accepted by the Tribunal.
B Asset forfeiture

This chapter sets out the circumstances in which a person suspected to have been involved in the commission of a criminal offence can be forced to forfeit assets that are connected to the suspected criminal activity. The relevant provisions are contained in the following pieces of legislation:

- The Confiscation of Proceeds of Crime Act 1989 (NSW) ("The CPC Act");
- The Criminal Assets Recovery Act 1990 (NSW) ("The CAR Act");

The CPC Act deals with confiscation of property where there has been a conviction while the CAR Act deals with the confiscation of property where there has been no conviction.

**Confiscation of Proceeds of Crime Act 1989 (NSW)**

The objects of the CPC Act, set out in s 3, are primarily to:

a) Deprive persons of the proceeds of crime derived from the commission of certain offences;

b) Provide for the forfeiture of property used in the commission of such offences;

c) Enable law enforcement authorities to trace proceeds and property; and

d) Provide for the enforcement of forfeiture orders and penalty orders made for offences committed outside of NSW.

Under s 13(1) if a person is convicted of a serious offence an application can be made by an appropriate officer (usually the DPP) for either a forfeiture order against property that is tainted property in respect of the offence or a pecuniary penalty order against the person in respect of benefits derived by the person from the commission of the offence.

Note that conviction includes offences being dealt with on a Form 1 or under s 10 Crimes (Sentencing Procedure) Act 1999 (NSW): see s 5.

Under s 13(2) if the offence is drug trafficking then only a forfeiture order can be made.

A serious offence is defined in s 7 and includes:

a) An offence against the laws of NSW that may be prosecuted on indictment;

b) The offence of supplying any restricted substances prescribed for the purposes of s 16 of the Poisons Act 1966 (NSW) that arises under s 18A(1) of that Act; and

c) Other offences listed in regulation 10 CPA Regulation 1996, which includes offences under the Classification (Publications, Films and Computer Games) Enforcement Act 1995 (NSW), offences under section 578B (possessing child pornography) or 578C (publishing pornography or indecent articles) of the Crimes Act 1900 (NSW); and s 200 Police Service Act 1990 (NSW) (bribery or corruption).

A serious drug offence is also defined in s 7 and includes:

a) A drug trafficking offence;

b) A prescribed offence or an offence of a prescribed kind involving drugs; and

c) An offence which involved theft, fraud, obtaining financial benefit by vice engaged in by others, extortion, violence, bribery, corruption or harbouring criminals, committed in connection with an offence referred to in (a) or (b);

d) An offence under section 73 (money laundering) in relation to the proceeds of an offence referred to in (a), (b) or (c) above; or

e) An offence of attempting to commit, or of conspiracy or incitement to commit, an offence referred to in (a), (b), (c) or (d) above.
A drug trafficking offence means an offence under ss 23–28 Drug Misuse and Trafficking Act 1985 (NSW).

An application for forfeiture must be made to either the court that imposed the conviction or the Supreme Court and must be made within the relevant period: s 13(3).

The period is set out in s 4 and should be read in conjunction with the definition of conviction in s 5. Generally it is within 6 months of the date of the conviction. The application can be made in relation to more than one offence: s 13(4). Once an application is determined a second application can only be made with the leave of the court.

Note that an application can be made for an order pending forfeiture pursuant to s 22(1) of the CPC Act. This section enables the court to make an ex parte order, where a person has been convicted of a serious offence that the defendant or any other person must not dispose of the property. Section 14 requires the applicant to give written notice of the application for forfeiture order to the defendant and to any other person they believe may have an interest in the property.

In making the forfeiture order the court only has to be satisfied that a forfeiture order may be made in respect of the property. If no forfeiture is made then the court may set aside the order made, in part or whole, in respect of the property and may make any such orders it considers appropriate in relation to the operation of the order.

**Tainted property**

A forfeiture order can only be granted if the court is satisfied that the property is tainted property in relation to the offence.

Tainted property, as defined in s 4 of the CPC Act, means property that was either:

a) Used in, or in connection with, the commission of a serious offence; or
b) Derived or realised, directly or indirectly, by any person, from property used in, or in connection with, the commission of a serious offence; or
c) Derived or realised either directly or indirectly, by a person, as a result of the commission of a serious offence; or
d) Derived or realised either directly or indirectly, by a person for the depiction of a serious offence, or the expression of the offender's thoughts, opinions or emotions regarding the offence, in any public promotion.

If the court is satisfied the property is tainted the court must then take into consideration, pursuant to s 18(1)(b):

- The use that is ordinarily or had been intended to be made of the property; and
- Any hardship that may reasonably be likely to arise (whether on the part of that or any other person) following the making of the order.

In considering hardship the court is not to take into account the sentence imposed for the offence: s 18(2). Notwithstanding this, the effect of the forfeiture needs to be considered as compared to the gravity of the offence and the penalty imposed may be relevant for this purpose. For example, the fact that the respondent is serving a sentence in prison can be properly considered by the Court when assessing the total hardship to the respondent and his or her family that would result from the making of a forfeiture order: *R v Wealand* (2002) 136 A Crim R 159.

The court must be satisfied on the balance of probabilities that the property was used in, or in connection with the commission of an offence: s 18(4)(b). In the absence of refuting evidence the court shall presume such use: s 18(4)(a).

If the court orders that property is forfeited to the State, the court shall specify in the order the amount it considers to be the value of the property at the time the order is made. Once the order is made the property cannot be disposed of until the relevant time has elapsed. The relevant time is specified in s 19(4) and is the expiration of the period to appeal against the order made or against the conviction for the relevant serious offence, or the time when the appeal lapses, or is finally determined, as the case requires.
Third parties
An innocent third party can apply for an order under s 20 of the CPC Act, within six months of the making of the order, declaring the nature, extent and value of their interest in the property and setting aside the order as it applies to their interest.

Before such an order can be made the court must be satisfied on the balance of probabilities that:

- a) The applicant was not involved in any way with the commission of the serious criminal offence; and
- b) The applicant acquired the interest for sufficient consideration and had no reasonable suspicion that the property was tainted.

A forfeiture order is quashed if the conviction is quashed and the Attorney General should make arrangements for the property to be transferred back to the owner: s 21.

Pecuniary penalty orders
If a person is convicted of an offence other than a drug trafficking offence and an application has been made under s 13(1)(b) for a confiscation order in respect of the offence, the court may make a pecuniary penalty order under s 24 of the CPC Act.

This is an order whereby the offender is required to pay financial restitution for the value of the benefits derived from the criminal activity. The amount of the penalty is to be reduced by the value of any forfeiture order made. The amount payable shall be taken to be a civil debt due by the person to the state and enforced by civil proceedings.

The criteria for assessment of pecuniary orders are listed in s 25 and include:

- a) The money that came into the possession of the defendant or another person at the request or direction of the defendant as a result of the criminal act;
- b) The value of any benefit that came into their possession as per (a);
- c) If the offences involved prohibited drugs, the market value of the drugs at the time of the offence and the amount ordinarily paid for doing a similar act or thing;
- d) The value of the defendants property before, during and after the commission of the offence(s); and
- e) The defendant's income and expenditure before, during and after the offence(s).

Section 27 of the CPC Act enables the court to "lift the corporate veil" by treating as property of the defendant any property that, in the opinion of the court, is subject to the defendant's effective control.

If property has already passed to the Public Trustee under a restraining order (see below) an application can be made for an order under that the Public Trustee deduct from the property seized under the restraining order:

- a) Any amount to be paid pursuant to a drug proceeds order, penalty order or confiscation order (s 46); and
- b) The defendant's reasonable legal expenses in defending the charge (s 47).

Restraining orders
Part 3, Division 2 of the CPC Act deals with restraining orders. These are orders issued only by the Supreme Court, which direct that certain property is not to be disposed of by the defendant or any other person except in a manner specified in the order.

An appropriate officer can apply for the order on an ex parte basis when a person is charged or is about to be charged, see s 43(1). The order can be made against some or all of the property of the defendant or specified property of a person other than the defendant. If the person has not been charged, the court must be satisfied that the person will be charged within 48 hours. The court must also be satisfied that the property is in the effective control of the defendant or some other specified person.

Section 43(2) and (4) specifies what should be stated in the affidavit in support of the application for the order, and includes the grounds for the applicant's belief that the property is either tainted property from the commission of the offence, or is the defendant's proceeds of drug trafficking.
Tainted property includes property that was used in, or in connection with, the commission of a serious offence. Where an offence occurs on a particular property, the location itself will not be enough to establish the necessary nexus between the commission of an offence and the property on which it occurred. For example, in Director of Public Prosecutions (NSW) v King (2000) 49 NSWLR 727, a restraining order was sought over proceeds of sale of a boat on which a sexual assault had occurred, Justice O'Keefe determined that the boat was not used in the commission of the offence and therefore was not tainted property within the meaning of s 43 of the CPC Act.

The court may, if it thinks fit, require a copy of the application to be served on the person who has an interest in the property. Once the order is made a copy must be served on the person affected by the order.

The order can be made subject to conditions that allow for the defendant's (and their dependents) reasonable living expenses, reasonable business expenses and the reasonable expenses of defending a criminal charge: s 43(6).

It is an offence to knowingly contravene a restraining order by disposing or otherwise interfering with property which is the subject of the order. Contravention attracts a maximum penalty of a fine equivalent to the value of the property or 2 years imprisonment, or both.

Pursuant to s 55 a restraining order will cease to have effect:

a) 48 hours after the order is made if the person has not been charged; or
b) When the charge is withdrawn; or
c) When the person is acquitted of the charge (providing no other related charge is laid); or
d) If a court makes a forfeiture, pecuniary penalty or drug proceeds order then the Supreme Court may set aside the order.

**Production orders**

Part 4 of the CPC Act deals with information gathering powers. Where a person has been convicted of a serious offence and an authorised officer has reasonable grounds for believing that that person or some other person has property tracking documents, the officer can apply to the Supreme Court for a production order.

A production order requires the person to produce or to make available for inspection any property-tracking documents that are in their possession or control. A production order may not be made in respect of banker's books which include any accounting records used in the ordinary business of banking.

A production order will specify the time, place and to whom the documents are to be produced. The fact that the documents may be incriminating, or that the production would breach an obligation of the person not to disclose the existence or content of the document, does not excuse the person from having to comply with the order: s 62.

Failing to comply with a production order is an offence which carries a maximum penalty of two years gaol and/or 100 penalty units, or 500 penalty units for a corporation.

**Appeals**

Section 92 of the CPC Act says that an appeal can be lodged against the making of an order under the Act by any person who has an interest in the property, as if the person has been convicted of a serious offence and the order were, or were part of, the sentence imposed for that offence.

The time limit applicable to a severity or all grounds appeal will apply in relation to the orders made under the CPC Act, requiring an appeal to be lodged within 28 days of the making of the order: s 11(2)(a) Crimes (Local Courts Appeal and Review) Act 2001 (NSW).

**Criminal Assets Recovery Act 1990 (NSW)**

Under the CAR Act the NSW Crime Commission may apply to the Supreme Court to confiscate property if the court is satisfied, on the balance of probabilities, that the person has engaged in serious crime related activities.
The proceedings are civil proceedings and the rules of evidence applicable to civil proceedings apply: s 5. Accordingly the Supreme Court rules will apply to the forms, modes of service and the practice and procedure to be complied with in the conduct of these matters.

Serious crime related activity is defined in s 6 as a reference to anything done by the person that was at the time a serious criminal offence, whether or not the person has been charged with the offence. It is irrelevant for the purpose of the CAR Act as to whether the person, if charged, was acquitted or not.

A serious criminal offence is defined in s 6 to include:

a) A drug trafficking offence: ss 23 – 27 Drug Misuse and Trafficking Act 1985 (NSW); or
b) A prescribed indictable offence (similar in nature to a drug trafficking charge); or
c) An offence punishable by five years or more which involves theft, fraud, money laundering, extortion, violence, bribery, corruption, harbouring criminals, blackmail, obtaining or offering a secret commission, perverting the course of justice, tax or revenue evasion, illegal gambling, forgery or homicide; or
d) An offence under s 51B Firearms Act 1996 (NSW) (selling firearms on an ongoing basis); or

e) A drug premises offence; or
f) An offence involving an attempt to commit, conspiracy or incitement to commit an offence referred to above.

For an order to be made under the CAR Act the court must be satisfied that the person against whom the order is sought has an interest in the property, as defined in s 7 of the Act. This interest must not be subject to the effective control of another person: s 8.

Further, the order must relate to serious crime derived property or illegally acquired property as defined in s 9 of the CAR Act.

Restraining orders

Restraining orders may be sought ex parte on the basis of a suspicion that a person has engaged in serious crime related activity: s 10(3).

The Supreme Court may make the following orders under Part 2 of the CAR Act dealing with restraining orders:

a) A restraining order that no person is to dispose or otherwise deal with an interest in property except in such manner as the court specifies;
b) That the property or interest in property be transferred to the Public Trustee; and
c) That a person be examined under oath concerning the nature and location of property (even if this may incriminate them or in answering would breach legal professional privilege: see s 13).

A restraining ordinarily remains in force for 48 hours, but will continue to have effect pursuant to s 10(9).if:

• there is an application for an assets forfeiture order pending in relation to the same interest;
• there is an unsatisfied proceeds assessment order or an application for a proceeds assessment order pending; or
• the Court extends its operation where a confiscation order has been refused.

Asset forfeiture orders

Part 3 of the CAR Act deals with confiscation and Division 1 with asset forfeiture orders.

Where the court has made a restraining order, the NSW Crime Commission may apply to the Supreme Court for an order forfeiting to, and vesting in, the Crown all or any of the interests in property that are subject to the restraining order when the assets forfeiture order takes effect: s 22(1).

The court must be satisfied on the balance of probabilities that the person was engaged in a serious crime related activity involving an indictable quantity, or involving an offence punishable by 5 years or more imprisonment, within the 6 years before making the application for the order: s 22(2).
Of note are ss 22(6) and (7), which state that the raising of doubt as to whether a person engaged in a serious crime related activity, or even if the conviction is quashed or set aside, is not in itself sufficient to avoid a finding under sub-section (2).

Importantly, an order under section 22(2) need not be based upon the finding of a particular offence. That is, the legislation requires no causal connection between the assets forfeited and the crime committed. The extraordinary consequence is that a person convicted of a simple shoplifting offence can be required to forfeit their interests in any property that the Commission seeks. Such was the case in *NSW Crime Commission v D’Agostino & Anor* (1998) 103 A Crim R 113, in which the defendant, who had been convicted of shoplifting goods valued at under $500 was made subject to a forfeiture order over her interests in a house property at Coogee and a Mercedes motor vehicle. After such an order is made, the onus shifts to the defendant to establish that an exclusion order should be made.

Section 24 provides relief from hardship for dependants and the spouse of the person against whom the order is made. A dependant is defined as a spouse or de facto partner of the person, a child of the person or a member of the household of the person who is dependant for support on that person. The application for relief against forfeiture need not be made prior to the forfeiture order, though an applicant will face practical difficulties in seeking relief once the property is quantified or order executed: *NSW Crime Commission v Kelly* [2003] NSWSC 56.

If the court finds that the order would cause hardship to any dependent, it may order the dependent to be paid a specified amount out of the proceeds of the sale of the interest or, where the dependent is less than 18 years old, make orders for the proper application of the amount to be paid to that dependent.

### Exclusion orders

A person against whom an application for a restraining or forfeiture order is served should file an application for an exclusion order under s 25(1) of the CAR Act to exclude some or all of the property from the order.

Section 25(2) puts the onus on the person applying for the exclusion order to prove on balance that the interest is not illegally acquired property. The application for an exclusion order can be made any time before the forfeiture order is made. However, once the order has been made, if the person is served with the notice of the application, it must be lodged within 6 months of when the order took effect and with the leave of the Supreme Court. If the person has not been served, the application must be lodged within 6 months of when the order took effect, or with the leave of the Supreme Court.

### Proceeds assessments orders

The NSW Crime Commission may also apply to the Supreme Court for an order requiring the person to pay the Treasurer an amount assessed by the court as the value of proceeds derived from illegal activity that took place not more than six years before the making of the application.

### Appeals

As these proceedings are civil proceedings any appeal against a decision made under the CAR Act should be done in accordance with the Supreme Court rules to the Full Bench of the Supreme Court and lodged within 28 days of the date the order is made.

### Commonwealth matters

The *Proceeds of Crime Act 2002* provides a civil forfeiture regime broadly similar to what exists under the State CPC Act, and strengthens the Commonwealth provisions for conviction based confiscation.

The POC Act also provide for the freezing and confiscation of property used in, or intended to be used in, or derived from, terrorist offences in accordance with the International Convention for the Suppression of the Financing of Terrorism and United National Security Council Resolution 1373.

As with the CPC Act, the types of orders which can be made are:

a) A forfeiture order against tainted property;

b) A pecuniary penalty order in respect of benefits derived by the person from the commission of the offence; and
c) A restraining order.
The orders referred to in (a) and (b) are referred to as confiscation orders.

Under Part 2-1 of this legislation the Commonwealth DPP can apply for a restraining order in circumstances where:

- A person has been convicted, charged with, or it is proposed that the he or she be charged with, an indictable offence: s 17;
- A person is suspected to have committed a serious offence within the last 6 years: s 18;
- There are reasonable grounds to suspect a person has committed a terrorism offence, or any other indictable offence, a foreign indictable offence or an indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); and, if the offence is not a terrorism offence, that the offence was committed within the 6 years preceding the application, or since the application was made: s 19; or
- A person is suspected to have derived literary proceeds from the commission of an indictable offence: s 20.

In most of these circumstances, a restraining order may be issued over:

- All or specified property of the suspect;
- All property of the suspect other than specified property;
- Specified property of another person (whether or not that other person's identity is known) that is subject to the effective control of the suspect;
- Specified property of another person (whether or not that other person's identity is known) that is proceeds of the offence or an instrument of the offence.

A restraining order may only relate to one suspect, but may relate to more than one offence in respect of that suspect: s 22.

Provisions for the exclusion of property from restraining orders are contained in Division 3 of Part 2-1; and notice requirements are set out in s 33. A court also has the power to make ancillary orders under s 39.

A restraining order ceases to be in force 28 days after the person's acquittal, withdrawal of charge or conviction is quashed, or within 28 days of the order if no conviction, charge or confiscation order has been made: s 45.

Contravention of a restraining order is a strict liability offence carrying a maximum penalty of 300 penalty units or 5 years imprisonment, or both: s 37.

Forfeiture orders are to be made:

- In respect of property the subject of a restraining order and a serious offence is suspected to have been committed within the last 6 years: s 47; or
- A person has been convicted or an indictable offence: s 48; or
- The property is covered by a restraining order and the property is proceeds of either an indictable offence, a foreign indictable offence, an indictable offence of Commonwealth concern, or a terrorism offence, and each offence that is not a terrorist offence was committed within the last 6 years: s 49.

The Act incorporates provisions for reducing the effect of forfeiture orders where the order would cause hardship caused to a dependant of the person (s 72); an exclusion order is sought (s 73); or a compensation order is sought for the proportion of the property that did not involve proceeds of an offence (ss 77-79).

The assessment of pecuniary penalty orders is also similar to those in the CPC Act and is contained in Part 2–4 of the Act.

Provisions for the making of literary proceeds orders are contained in Part 2-5. The Act also re-enacts the information gathering powers which exist under the Proceeds of Crime Act 1987 (Cth), with some modifications (Chapter 3 of the POC Act 2002).
Note that if proceedings relate to an offence committed or a conviction recorded before the commencement of the POC Act 2002, or an application or order made under the *Proceeds of Crime Act 1987* (Cth), see the *Proceeds of Crime (Consequential Amendments and Transitional Provisions) Act 2002* for details regarding the application of the 1987 Act.
C Offender Registration

This sub-chapter introduces the legislative scheme that places people who have been convicted of particular offences against children on a Register and requires them to report to police.

The Child Protection (Offenders Registration) Act 2000 (NSW) (the Act) applies to sexual and other specified offences committed against child victims (that is, a victim under 18 years of age). The Act does not apply to offences against an adult victim. In certain circumstances the Act can have a retrospective effect.

The Act provides the legislative framework for the Sex Offender Register, hereafter referred to as ‘the Register’.

Importance of being aware of the legislation

It is essential that a legal practitioner appearing for a client who has been charged with a sexual or related offence against a child is aware of the operation of the Act, so that the practitioner can:

- Give accurate advice to the client pre and post plea/sentence issues.
- Engage in informed negotiations with the prosecutor regarding the charges.
- Consider various sentencing options.
- Put informed submissions before a court regarding the impact and operation of the legislation.

Offences to which the Act applies

The Act classifies criminal offences to which the Act applies as either a ‘Class 1’ or ‘Class 2’ offence.

The definitions of Class 1 and Class 2 offences are outlined in section 3(1) of the Act. Class 1 offences are the more serious offence category whilst Class 2 offences are the less serious offence category.

A Class 1 offence includes:

- The murder of a child;
- An offence that involves sexual intercourse with a child;
- An offence under s 66EA Crimes Act (NSW), that is, persistent sexual abuse of a child;
- Attempting, conspiring or inciting any of the above offences; and
- Anything done outside NSW that, if done within NSW, would constitute an above offence.

A Class 2 offence includes:

- An offence that involves an act of indecency against or in respect of a child, being an offence that is punishable by imprisonment of 12 or more months;
- Detain for advantage or kidnap of a child (unless the person found guilty was, at the time the offence was committed or some earlier time the parent or carer of the child);
- An offence under ss 91D – 91G Crimes Act, that is, promoting and benefiting from child prostitution (unless the offence was committed by a child);
- An offence under ss 578B – 578C(2A) Crimes Act, that is, child pornography offences;
- Attempting, conspiring or inciting any of the above offences; and
- Anything done outside NSW that, if done within NSW, would constitute an above offence.

People to whom the Act applies

The Act applies to 2 types of offender:
• Registrable persons (that is, people who a court has at any time found guilty and sentenced in respect of a Class 1 or Class 2 offence), noting that ‘finding of guilt’ is broadly defined in s 3(2) of the Act.

• Existing controlled persons (as defined in s 3(1) of the Act), who are people previously convicted of Class 1 or Class 2 offences whose sentence is still current and not yet finalised.

However, a number of categories of offenders who would otherwise be registrable persons are specifically excluded from the operation of the Act.

For example, a person whose matter(s) are dealt with under s 10 Crimes (Sentencing Procedure) Act 1999 (NSW) (in the case of an adult offender) or under section 33(1)(a) Children (Criminal Proceeding) Act 1987 (NSW) (in the case of a child offender) is not on the Register. As another example, a person who has committed a single Class 2 offence and who is placed on an unsupervised bond is not a registrable person.

You must look in detail at the definition of ‘registrable person’ in section 3(1) of the Act to determine whether your client falls within its provisions.

Advising a client who will be placed on the Register

A client who has, or is alleged to have committed a sexual or other specified offence to which the Act applies should be advised of the following:

• Whether the charge potentially places the client on the Register (being Class 1 or Class 2 offences, within the meaning of s 3(1) of the Act).

• The likely/available sentencing options and whether these attract or avoid placement on the Register.

• The nature of the reporting obligation when placed on the Register, in particular:
  • The notification that should be received by the client: s 10 of the Act
  • When to report: s 10 of the Act
  • What to report: ss 9 of the Act
  • Reporting changes in personal details and any travel/movement plans: ss 10 and 11 of the Act
  • Who to report to: ss 12 and 13 of the Act.

• The duration of the reporting obligation: s 14 of the Act.

• That it is an offence punishable by a fine of $1,100 and/or two years imprisonment to fail to comply with the reporting obligation or to knowingly furnish information that is false or misleading in any particular: ss 17 and 18 of the Act.

• The client has a right of appeal to the Administrative Decisions Tribunal to seek to have the reporting obligation suspended: s 16 of the Act.

There is a crossover between the Act and the Child Protection (Prohibited Employment) Act 1998 (NSW) (‘the 1998 Act’). In the 1998 Act, a “prohibited person” includes a person on the Register and accordingly, there will be career (and presumably economic) restrictions for some registrable persons: see section 5 of the 1998 Act.

A relevant discussion of the construction and intention of the 1998 Act may be found in Commission for Children and Young People v “A” [2003] NSWIRComm 6. This case involved an appeal against an earlier declaration that “A” was not a ‘prohibited person’ within the meaning of section 5 of the 1998 Act.

Pending legislative changes

The Child Protection (Offenders Prohibition Orders) Act 2004 (NSW) (‘the 2004 Act’) will introduce a new scheme by which police can apply to a Local Court for a ‘child protection prohibition order’ against a person who is liable to be placed on the Register.

The scope of these child protection prohibition orders is sweeping, and includes the following:
• Prohibiting a person from associating with or other contact with specified persons or kinds of persons.
• Prohibiting a person from being in specified locations or kinds of locations.
• Prohibiting a person from engaging in specified behaviour.

The 2004 Act will also amend the Act to insert a new section (s 20A) to impose reporting obligations on persons who are subject to child protection prohibition orders.

It is important to note that the 2004 Act has not commenced at the time of this book’s publication. It is to commence on a day to be appointed by proclamation.

Practical tips on the legislation

Following are some practical tips to consider:

• In appropriate cases, seek to have your client’s matter dealt with either under s 10 Crimes (Sentencing Procedure) Act or s 33(1)(a) Children (Criminal Proceedings) Act. A s 10 bond, even with supervision, will avoid registrable person status.

• If the Magistrate does dispose of a matter pursuant to s 10 Crimes (Sentencing Procedure) Act or s 33(1)(a) Children (Criminal Proceedings) Act, consider making an application for a s 11 Crimes (Sentencing Procedure) Act remand to enable the person to participate in some form of supervision or program with the Community Offender Service (formerly known as the Probation and Parole Service) or the Department Juvenile Justice (such as the Department’s Sex Offender Program) with the hope of a more favourable result after completion of supervision or program.

• Attempt to negotiate the charge(s) with the prosecution to charge(s) that will avoid your client being placed on the Register at all, or that will alternatively minimise his/her time on the Register.

• Be aware that if there is more than one Class 2 offence against the one victim within 24 hours, this is considered a ‘single offence’: s 3(3) of the Act.

• Be aware of the other specified offences that are not sexual offences which the Act relates to. This is particularly in cases where the other specified offences do not have any sexual component at all. An example of such an offence is detain for advantage when it may be committed as the same time as a robbery offence. Try negotiating a plea that involves the charge of detain for advantage being withdrawn. The facts will not necessarily need to be amended to reflect the charge of detain for advantage being withdrawn.

• When appearing for a client charged with an offence under ss 17 or 18 of the Act, that is, not complying with the reporting obligation or furnishing false information, if there is media interest in the matter consider asking the court to direct non-publication. It can be argued that:
  
  A Media reporting of the offence would lead to identification of a person on the Register. The spirit of the legislation is that the general public is not to have access to the identity of people on the Register.
  
  B Section 11 Children (Criminal Proceedings) Act (NSW) makes it an offence to publish the name of any child victim. Identification of the registrable person may, in some circumstances, lead to identification of the child victim.

• When appearing on sentence for a client charged with an offence to which the Act applies, it can be argued that placement on the Register is a relevant factor that can be taken into account on sentence. The reporting obligation may place a more onerous restriction on an person whose duration of reporting is at the highest end of the scale (for example, an offender with a lifetime reporting obligation) or an offender who for cultural, occupational or other reasons has a transient or mobile lifestyle. One can argue by analogy with cases that consider the relevance of bail conditions to a person’s sentence. It is arguable that the reporting obligation under the Act will be a restriction on the liberty of the person and that any such restriction is relevant to sentence. Bail authorities to consider include: R v Keyte (unreported, Court of Criminal Appeal, 26 March 1986); R v Cartwright (1989) 17 NSWLR 243; R v Khamas (1999) 108 A Crim R 499; and R v Eastway (unreported, Court of Criminal Appeal, 19 March 1992).
D Interstate warrants and extradition

This subchapter discusses the powers of arrest within New South Wales of people who are alleged to have committed an offence outside of the State, and extradition to the State where the offence is alleged to have been committed.

State and Commonwealth powers of arrest are found in s 352A Crimes Act (NSW) and in the Service and Execution of Process Act (Cth) respectively.

For the purpose of this chapter, all references to the Crimes Act are references to the Crimes Act 1900 (NSW). The Service and Execution of Process Act 1992 (Commonwealth) will be referred to as ‘SEPA’.

Section 352A Crimes Act 1900 (NSW)

Powers of arrest

Section 352A Crimes Act authorises police officer(s) to:

- apprehend any person;
- at any hour of the day or night;
- without a warrant.

The police officer has to have reasonable cause to suspect the person:

- has committed an offence against the law of a State/Territory of the Commonwealth (other than NSW); and
- that offence, if committed in NSW, would constitute an indictable offence or an offence punishable by imprisonment of 2 or more years.

For more detail on what constitutes an indictable offence, see chapter 4).

Procedure upon arrest

Section 352A(3) Crimes Act provides that a person apprehended under that section is to be taken as soon as practicable before a court, where the court may:

- discharge the person;
- commit the person to custody; or
- admit the person to bail.

This determination is temporary, pending:

- the execution of an interstate warrant;
- the person’s earlier release from custody or discharge from custody under s 352A(7) Crimes Act.

Section 352A(7) Crimes Act states that if a person is admitted to bail or remanded in custody under s 352A(3) and a warrant is not executed within a reasonable time (not exceeding 7 days) the person may be released from bail or shall be discharged from custody by order of the court.

Other relevant considerations

The person apprehended is to be dealt with in the same way and has the same rights as a person charged with a similar offence in NSW.

The Bail Act 1978 (NSW) and Criminal Procedure Act 1986 (NSW) apply (with such modification as may be necessary) in relation to bail and proceedings before the court (s 352A(4)(b) Crimes Act).

A police officer may take fingerprints, photographs and exercise powers of search and medical examination: s 353 Crimes Act.
Power of arrest

Section 82(1) – (3) Service and Execution of Process Act 1992 (Cth) (SEPA) authorises the apprehension of a person who is named in a warrant issued in a State of the Commonwealth in another State (provided the person is not already in custody).

Pursuant to s 82(3) SEPA the person may be apprehended by:
- a police officer in the State in which the person is found;
- the Sheriff or a Sheriff’s officer of that State; or
- a member of the Federal Police.

It is not necessary to produce the warrant when the person is apprehended (s 82(4) SEPA).

Procedure upon arrest

As soon as practicable after being apprehended, the person is to be taken before a Magistrate of the State in which the person was apprehended (s 83(1) SEPA).

A copy of the warrant is to be produced to the Magistrate if it is available (s 83(2) SEPA).

Where the warrant is produced

If a copy of the warrant is produced, the Magistrate must order one of the following:
- That the person be remanded on bail on condition that he/she appear at a time and place in the place of issue of the warrant as the Magistrate specifies; or
- That the person be taken in custody or otherwise as the Magistrate specifies, to a specified place in the place of the issue of the warrant.

The Magistrate does not need to do this if satisfied that the arrested person is not the person named in the warrant or that the warrant is invalid, in which case the Magistrate must order that the person be released from custody (s 83(10) SEPA).

When considering the validity of the warrant, the Magistrate is not limited to a consideration of the face of the warrant but may also receive evidence addressing the validity of the warrant (R v Gummer (1994) 71 A Crim R 140).

Where the warrant is not produced

If the warrant is not produced, the Magistrate may order:
- The person be released; or
- Adjourn the proceedings for such reasonable time subject to a grant of bail or bail refusal (s 83(3) SEPA).

If on the adjourned date, a copy of the warrant is not produced, the Magistrate may:
- Order the person be released; or
- If reasonable cause is shown, adjourn the proceedings for a further specified time subject to a grant of bail or refusal of bail (s 83(4) SEPA).

The total time of adjournments must not exceed 5 days (s 83(5) SEPA).

If the warrant is not produced after the second adjournment, the Magistrate must order the person to be released (s 83(7) SEPA).

If a person has been released on the warrant, the person may be re-apprehended if/when the warrant is produced (s 82(5) and (6) SEPA).

Other relevant considerations

When considering extradition, the Magistrate is not bound by the rules of evidence (s 83(1)(b) SEPA).
The avenue for review of a Magistrate’s order for extradition is to the Supreme Court of the State in which the order was made (s 86(1) SEPA). The application must be made within 7 days of the making of the order (s 86(2) SEPA). Pending the review, the Supreme Court may stay the execution of the order and order that the person be remanded on bail or in custody (s 86(6) SEPA). The review is by way of rehearing (s 86(7) SEPA) and the Supreme Court may confirm, vary or revoke the order for extradition (s 86(8) SEPA).

In summary, a Magistrate does not have any power to refuse interstate extradition unless he/she is satisfied that the person arrested is not the person named in the warrant or that the warrant is invalid. This is in contrast to the repealed Service and Execution of Process Act 1901 whereby a Magistrate had power and discretion to refuse interstate extradition.

Accordingly, in the current legislative framework, the relevant questions are:

- Is the person arrested the person named in the warrant?
- Is the warrant valid?
- Will extradition be ordered subject to a grant of bail or bail refusal?

**Practical tips on the legislation**

- Ascertain whether the arresting authority is relying on the powers in the State legislation or Commonwealth legislation.
- If the arresting authority is relying on the Crimes Act 1900 (NSW), establish whether the offence is an indictable offence or an offence punishable by two (2) or more years. Section 352A only authorises the power of arrest for an offence, which, if committed in NSW would constitute an indictable offence or an offence punishable by two (2) or more years.
- If the arresting police took fingerprints, photographs or conducted other procedures, consider whether it is appropriate to submit to the court that these should be destroyed. The relevant power is s 353 Crimes Act in the case of an adult client, and s 38 Children (Criminal Proceedings) Act 1987 (NSW) in the case of a child. The basis of this submission would be the subjective circumstances of the client combined with the general undesirability (from the client’s perspective and in regard to civil liberties) of having fingerprints/photographs in the NSW databank/system when there has been no offence committed within NSW. This submission may carry significantly more weight in the case of a child client.
- Be familiar with the Bail Act 1978 (NSW) (see chapter 3) and be ready to make a detailed application for bail addressing the relevant criteria.
- Examine the warrant with a view to being satisfied that the person arrested is the person named in the warrant and the warrant, on the face and in substance, is valid.
- Check the name, date of birth, whether the person was aware of the offences/allegations and whether the person had been in that State at the time
- Be aware that the Magistrate has an obligation under s 84 SEPA to make reasonable enquires to ascertain if the arrested person is “a person under a restraint” as defined in s 3 SEPA. If the arrested person is a “person under restraint” the Magistrate then has an obligation to notify certain authorities of the arrest and extradition. A practitioner should be familiar with s 84 SEPA in order to assist the court if necessary.
- Advise the client of the avenue of review and the timeframe within which the review must be lodged.
- As a matter of professional courtesy and to ensure the availability of representation for your client, refer the matter to the local Legal Aid office or to a private solicitor in the State (or court) where the client is to be extradited.
- If you are not sufficiently familiar with the relevant legislation to proceed with the extradition hearing, seek an adjournment and research the legislation. A short adjournment would not be unreasonable in these circumstances. In addition to being familiar with NSW legislation, a practitioner must also be familiar with the relevant legislation of the State in which the warrant was issued (to ascertain the validity of the warrant).
E Other consequences of conviction

There can be specific consequences for people who are convicted of certain offences or who have certain orders made against them.

The following outlines some of the major areas where practitioners need to keep the specific consequences of convictions or orders against their clients in mind.

Firearms licences

The *Firearms Act 1996* has numerous restrictions about who may be granted a firearms license (see s 11(5) in particular).

There can be serious consequences of a conviction or an Apprehended Violence Order (AVO) being made against someone who uses firearms as part of their employment.

A person’s firearms license is automatically suspended upon the making of an Interim AVO until the AVO is confirmed or revoked (s 23 *Firearms Act 1996* (NSW)).

Once an AVO is made, the court has a discretion to prohibit or restrict the possession of all or any specified firearms by the defendant (s 562D *Crimes Act 1900* (NSW)).

Section 24(1) *Firearms Act 1996* (NSW) states that a firearms license is automatically revoked if the licensee becomes subject to a firearms prohibition order (s 73 *Firearms Act 1996* (NSW)) or an AVO.

Spent convictions

Section 7(1) *Criminal Records Act 1991* (NSW) states that all convictions (defined to include matters proven without conviction) can be spent. There are however certain categories of offences where convictions cannot be spent.

For adults, a conviction becomes spent after at least ten consecutive years after the date of conviction, during which the person has not been convicted of an offence punishable by imprisonment, and the person has not been in prison because of a conviction for any offence and has not been unlawfully at large: s 9 *Criminal Records Act 1991* (NSW).

When a matter is dealt with without proceeding to a conviction, the conviction is spent immediately: s 8(2) *Criminal Records Act 1991* (NSW).

For children, a conviction becomes spent not less than 3 consecutive years after the date of the order during which the person has not been subject to a control order, and the person has not been convicted of an offence punishable by imprisonment, and the person has not been in prison because of a conviction for any offence and has not been unlawfully at large.

People in certain occupations

There can be specific consequences of conviction or misconduct of people in certain occupations.

Medical practitioners

Any conviction for a criminal offence is required to be notified to the Registrar of the NSW Medical Board: see s 71 *Medical Practice Act 1992* (NSW).

Nurses

A conviction for an offence may make a person ineligible for registration if it is considered by the Nurses Registration Board to render the applicant ‘unfit in the public interest to practice nursing’: see s 29A *Nurses Act 1991* (NSW).

Legal Practitioners

A legal practitioner convicted of an indictable offence, a tax offence or has committed an act of bankruptcy must provide a written statement to show that they are still a ‘fit and proper person’ to hold a practicing certificate: see Part 3 Division 1AA *Legal Profession Act 1987* (NSW).
The commission of an indictable offence, a tax offence or an act of bankruptcy will constitute professional misconduct: s 127(4) *Legal Profession Act 1987* (NSW).

**Teachers**

Any conviction for an indictable or summary offence punishable by 12 months imprisonment or more is treated as a 'breach of discipline': s 86 *Teaching Services Act 1980* (NSW).

A conviction may result in a range of punishments, including: caution or reprimand, a fine, demotion, reduction in salary, dismissal or instruction to resign: see s 85(1) *Teaching Services Act 1980* (NSW).

**Police**

Police misconduct and complaints about police misconduct may be investigated by the Police Integrity Commission, the Police Commissioner, the NSW Ombudsman and ICAC. There is a detailed regulatory scheme governing these investigations and describing which body is responsible for investigating different types of complaint.

**Security guards**

The Commissioner of Police must refuse to grant an application for a licence if the Commissioner is satisfied of certain matters: see s 16 *Security Industry Act 1997* (NSW).

**Defence personnel**

Part VIIIA *Defence Act 1903* (Cth) makes provision for urinalysis of people engaged in combat or combat related duties to test for narcotic substances. Positive test results can result in dismissal from the armed forces.

**The effect of convictions on overseas travel**

Two useful internet sites with information about the effect of convictions on people who want to travel to certain countries are:

For the United States, see: http://travel.state.gov

For the European Union, see: http://www.ecdel.org.au/eu_guide/faqsvisas.htm
Costs in criminal law

In NSW, there are three pieces of legislation that deal directly with the issue of costs. They are:

- The Criminal Procedure Act 1986 (NSW);
- The Costs in Criminal Cases Act 1967 (NSW); and
- The Suitors Fund Act 1951 (NSW).

This chapter focuses on the Criminal Procedure Act (CPA), as it is the Act that will most frequently apply in Local Court Proceedings.

The Justices Act 1902 (NSW) was the Act that contained most of the provisions in relation to costs. When the Justices Act was repealed, the relevant provisions in relation to costs were transferred to the CPA. Much of the law in relation to costs came from interpreting provisions previously in the Justices Act. For this reason, the Justices Act will be referred to in this chapter.

All references in this chapter are to the CPA, unless stated otherwise.

An overview of costs provisions in the Criminal Procedure Act 1986

The principle provisions concerning the awarding of costs in committal and summary matters are now contained within the CPA.

Sections 116 - 120 deal with costs in committal proceedings.

Sections 211 - 218 deal with costs in a summary proceedings.

There is a large degree of similarity between these different sections of the CPA. This chapter refers only to the specific provisions in relation to summary proceedings.

Awarding costs if a matter is withdrawn or dismissed

Pursuant to s 213, costs may be awarded if the matter is dismissed or withdrawn.

Previously, if a matter had been set down for hearing, prosecutors would often withdraw matters (although the leave of the court was required) rather than offer no evidence against an accused, to avoid any possible award of costs against the prosecution. This problem is now less likely to be faced by practitioners.

Costs when adjournments are granted

Section 216 allows a court to award costs at its discretion or on the application of a party, if the matter is adjourned.

An order may be made only if the court is satisfied that the other party has incurred additional costs because of the "unreasonable conduct or delays" of the party against whom the order is made.

The provision is not restricted only to the adjournment of hearings but would apply equally to an adjournment when a matter was listed for mention, if there is satisfactory reason for costs being awarded.
Limits on awarding costs against the prosecution — section 117

The limitations on the awarding of costs are contained in s 214.

Professional costs are not to be awarded against a public informant (the police) in favour of an accused person unless the court is satisfied as to any one or more of the following:

- That the investigation into the alleged offence was conducted in an unreasonable or improper manner.
- That the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner.
- That 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.
- That, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs.

There is no requirement for a connection between the reason for dismissing the charge or discharging the defendant and the facts upon which the court relies to make an order for costs (see R v Hunt [1999] NSWCCA 375).

Therefore, a practitioner is entitled to tender evidence on a costs application which is beyond the evidence called at the hearing. An example of further evidence may be representations made to the prosecution to withdraw the offence before to the hearing.

Discussion of the criteria in section 117

The application of the criteria in s 117 will depend on the particular circumstances of each case.

Some of the general principles in relation to the s 117 criteria are now discussed.

That the investigation into the alleged offence was conducted in an unreasonable or improper manner

For the conduct of an investigation to be unreasonable it is not necessary to impugn the general competence, far less the integrity, of those responsible for the investigation (see JD v DPP [2000] NSWSC 1092).

That the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner

The meaning of whether proceedings are instituted “without reasonable cause” was considered in the context of an industrial case of Canceri v Taylor (1994) 123 ALR 676. Justice Moore of the Industrial Relations Court of Australia accepted the approach of Wilcox J in Kanan v Australian Postal and Telecommunications Union (1992) 43 IR 257 at 264, where Wilcox J said:

It seems to me that one way of testing whether a proceeding is instituted “without reasonable cause” is to ask whether, upon the facts apparent to the applicant at the time of instituting the proceedings, there was no substantial prospect of success. If success depends upon the resolution in the applicant’s favour of one or more arguable points of law, it is inappropriate to stigmatise the proceeding as being “without reasonable cause”. But where, on the applicant’s own version of the facts, it is clear that the proceeding must fail, it may properly be said that the proceeding lacks reasonable cause.

An inability to prove an element of an offence, which does not depend on issues of credit or balancing of issues, may justify a costs order (see Turner v Randall; Ex parte Randall [1988] 1 Qd R 726).
That 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

This provision seems to bear some similarity to the previous criteria in that it relates to the conduct of the investigation. This section is particularly concerned with the failure to investigate matters that are brought to the attention of the prosecution by the defendant.

This extends to those situations where an accused person has disclosed matters to the prosecution that the prosecution has failed to investigate. This would especially be the case if, had the prosecution investigated, they would not have brought or continued the prosecution.

This provision may be triggered by matters such as what an accused says in a record of interview or statement to police, or information that is provided by a defendant’s legal representative. It could also be triggered by written representations by the accused’s lawyer to the prosecution that contain evidence or information pointing to an accused being not guilty.

That, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs

This provision requires something in the conduct of the proceedings to justify an order for costs. The fact that the charge is dismissed will not, on its own, suffice.

Examples of matters that may satisfy this criterion include the failure of the prosecution to disclose relevant material, or the failure of the prosecution to call a relevant witness.

Costs awarded are to be “just and reasonable”

Section 213(2) requires that the costs that are awarded are to be “just and reasonable”.

In *Caltex Refining Co Pty Ltd v Maritime Services Board* (1995) 36 NSWLR 552 the meaning of “just and reasonable” was considered in the context of costs pursuant to the *Land and Environment Court Act 1979* (NSW). The following principles emerge:

- For an order to be just and reasonable there must be both a fair hearing on the merits of the application for the order, and the terms of the final order must be reasonable.
- The judge is entitled and bound to receive any relevant evidence presented in admissible form by any party wishing to be heard as to the terms of the final order.
- The judge is entitled to any other assistance lawfully available to him/her. This would include taxation of the bill of costs. The taxation is not to finally determine the issue but so as to provide assistance to the judge in determining the appropriate order, subject to submissions by the parties.
- The judge must make the costs order. It is not permissible for the judge to make an unquantified order leaving it to some other person or agreement by the parties to determine quantum.

The wording of s 213 makes it clear that the principles above apply to the determination of costs pursuant to the *Criminal Procedure Act*. The Magistrate must make an order quantifying the amount of costs.

“Professional costs” are defined in s 211 to mean costs (other than court costs) relating to professional expenses and disbursements (including witness expenses) in respect to proceedings before a court.

The manner in which a defendant conducts the proceedings, for example, by unnecessarily prolonging the hearing, may disentitle the defendant to part of the costs (see *Emanuele v Dau* (1996) 87 A Crim R 417).

A Magistrate will usually hear submissions on the amount of costs to be awarded once the Magistrate has determined that an order for costs will be made. It is therefore helpful to be able to tender a prepared bill of costs if you are likely to make a costs application.

It is best to avoid advising the magistrate of the costs sought during the application for costs. The amount of costs sought only becomes relevant once the Magistrate decides that costs will be awarded.
When to make an application for costs

A court may make an award of costs at the end of summary proceedings (s 213 (1)).

As a matter of caution, an application for costs should be made prior to the formal discharge of the defendant.

There is no right of appeal by an accused when an order for costs is not made

Section 23 (2) Crimes (Local Courts Appeal and Review) Act 2001 provides for appeals by the prosecution against an award for costs made against a prosecutor in a summary or committal hearing.

An accused person who was not awarded costs in his/her favour has no right of appeal against a decision not to award costs.

When costs can be awarded to a prosecutor

It is important to be aware that costs can be awarded to a prosecutor, although it is unlikely to happen in a Local Court defended matter prosecuted by police or the DPP. The circumstances where costs may be awarded to a prosecutor are set out in s 215.
Part 9
Options after conviction
Annulling convictions

People who have been convicted in their absence in the Local Court can apply to the Local Court to have their convictions annulled (that is, taken away).

This chapter deals with applying to annul convictions in the Local Court. The general principles discussed in this chapter are also applicable to the Children’s Court.

All references to legislation in this chapter are to the Crimes (Local Courts and Appeal Review) Act 2001 (NSW) unless otherwise stated.

What can happen if a person does not attend court?

If an accused person attends court, they can answer their charges and plead guilty or not guilty. They will then either be sentenced or their matters will be set down for hearing.

There are different ways in which a court can deal with a person who is not at court. One way is for the court to convict a person in his or her absence. The Court may then sentence the person.

For more serious matters, a person will not be sentenced in their absence. Section 25(2) Crimes (Sentencing Procedure) Act states that certain penalties, including sentences of imprisonment, community service orders and good behaviour bonds, must not be imposed unless the accused person is present at court. In such a case, a warrant may be issued by a court to bring a person before the court for sentencing.

If the matter has been set down for a hearing, s 196 Criminal Procedure Act 1986 states that if an accused person is not present at the day, time and place set for the hearing and determination of the matter (including a day to which the hearing has been adjourned), the court may proceed to hear and determine the matter in the absence of the accused person. This does not happen unless a court is satisfied that the accused person had reasonable notice of the first return date or the date, time and place of the hearing.

Reasons why a person may want to have a conviction annulled

A person may want to have a conviction annulled because:

- The charge cannot stand as a matter of law. For example, the facts on which your client was convicted may not support the charge or all of the elements of the offence may not have been made out.

- They wish to preserve their right of appeal to the District Court on all grounds (that is, against conviction). An all grounds appeal requires the leave of the District Court if an application under s 4 has not been made (section 12).

- They wish to obtain the benefit of a guilty plea. The person might not otherwise be entitled to this benefit, if convicted in his or her absence (see s 22 Crimes (Sentencing Procedure) Act). A successful annulment of a conviction, followed by a plea of guilty being entered, will mean that the Magistrate should then give a discount at sentence for the plea of guilty.

- To remove a fail to appear entry/ s 25(2) Crimes (Sentencing Procedure) Act warrant entry/ from your client’s criminal record. This is particularly important because the presence of such an entry can remove the presumption in favour of bail if your client is arrested in the future (see s 9B Bail Act 1978 (NSW)).

The relevant legislation

The provisions of the Crimes (Local Courts Appeal and Review) Act 2001 apply.
Section 4 is the applicable section and states that:

(1) An application for annulment of a conviction or sentence made or imposed by a Local Court may be made to the same Local Court:

(a) by the defendant, or

(b) by the prosecutor,

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.

The nature of annulment applications

Miller v DPP [2004] NSWCA 90 is a decision of the Court of Appeal. This case examined, in part, the legislation dealing with annulment of convictions in the Local Court.

The specific section that the Court examined was the meaning of "otherwise hindered by accident, illness, misadventure or other cause from taking action" in s 100K(2)(b) Justices Act. The Justices Act has now been repealed and that particular section is now almost entirely reproduced in s 8(2)(b) Crimes (Local Courts Appeal and Review) Act. Accordingly, what was said in Miller remains applicable.

In Miller, the hearing in the Local Court was held over an extended period of time. On the day that the appellant had been convicted in his absence, the appellant went to his doctor and was physically examined. The doctor's view was that the appellant was not fit to attend court on that day. The appellant let his solicitor know that he could not attend court and instructed his solicitor to seek an adjournment. The adjournment was not granted and the appellant was convicted in his absence.

The appellant's s 100D application (equivalent to s 4) was heard by a different Magistrate and was held over four days. The doctor who examined the appellant gave evidence. The doctor's opinion was never challenged in cross-examination. The Magistrate refused the s 100D application.

The appellant appealed the failure to grant the s 100D application and his matter was heard before a single Judge of the Supreme Court, who found no error in the Magistrate's decision. The case was then appealed to the Court of Appeal.

Justice Sheller gave the leading judgment in the Court of Appeal, with Beazley JA and Young CJ in Eq agreeing.

Justice Sheller stated the following at paragraphs 23 - 25, in relation to the Magistrate's decision and in relation to s 100K more generally:

The learned Magistrate was of the opinion, which the respondent sought to support, that the requirements of s 100K(2)(b) were not met because the appellant was well enough to take action in relation to the relevant proceedings. He was well enough to contact his solicitor and ask the solicitor to arrange for an adjournment. The Magistrate said "He simply chose not to attend court that day." That was never suggested to the appellant in cross-examination and was a finding not open to the Magistrate on the evidence.

Under the earlier provision of s 100A(3), if the summons or attendance notice did not come to the notice of the defendant the defendant was not aware of an adjourned date the Magistrate "may order" that the conviction be annulled. By contrast s 100K(2) in the new Part 4A, by adopting the language "must grant" an application for an annulment, requires the Local Court to grant the application if the conditions are satisfied. If the narrow construction that the Magistrate preferred be given to the words "from taking action in relation to the relevant proceedings" is correct, such relief could be refused in the case of an applicant on the way to court who is badly injured in a motor vehicle accident and fails to ring his or her solicitor from the hospital to ask for an adjournment, because no doubt it could be argued that the accident had not hindered the defendant from taking that action. In my opinion, the phrase must be given a different construction. It is clearly part of a scheme to avoid the obvious injustice to a defendant who is unable, properly, to defend the case against him, on the day he is convicted in his or her absence, because of an accident, illness or misadventure or other cause.

The use of the word "hindered" is instructive. It does not only mean "prevented" but also "impeded" or "obstructed". There are no doubt many ways in which this can happen and it is
not desirable, even if possible, to catalogue them here. The basis for the application is that the conviction was made in the absence of the defendant. It seems to me quite obvious that if the appellant was prevented from coming to court on 10 December 2001 because of illness, that falls well within the ambit of the expression "hindered by illness from taking action in relation to the proceedings". It is not to my mind, significant or any answer to such a claim that the appellant was well enough to telephone his solicitor or to write a letter. To conclude otherwise, defeats the intention of the legislation.

The case illustrates that a wide interpretation is to be given to the relevant legislation. Sheller JA examined the Second Reading Speech in relation to the introduction of amendments to the *Justices Act* in 1997. Justice Sheller said at paragraph 21 that it was apparent that the amendments were directed, in addition to other matters, to widen the grounds for review of a Local Court decision. The particular mischief which Sheller JA found that the amendments were directed to was that of a person who knew that the court case was listed for a particular date but was prevented by accident or other reason from getting to the court.

The Court of Appeal allowed the appeal, granted the application for annulment, and remitted the matter to the Local Court.

**Lodging and hearing of the annulment application**

- The application for annulment must be lodged within two years of the relevant conviction or sentence being made or imposed (s 4(2)(a)).
- Applications must be in writing and must be lodged with a registrar of a Local Court (s 4(4)).
- A Local Court dealing with an application for annulment may stay the execution of the sentence concerned subject to such terms and conditions as it thinks fit (s 7(2)).
- The application must be dealt with at the court at which the person was found guilty. If the application is lodged with a court that is not the court at which the person was convicted, the application is to be sent to the court at which the person was convicted (s 4(5)).
- A Local Court may deal with an application with or without the parties being present and in open court or in chambers (s 7(1)). Although this is the case, it would be usual that you would ask that your client's application is heard in open court with your client being present.
- There is a limit to the number of s 4 applications that can be made. The leave of the court is required for a person to make more than one application in relation to the same matter (s 4(3)).

**Section 8 — the basis for an application to annul a conviction**

Any application under s 4 must address the criteria set out in s 8.

Section 8 provides as follows:

1. A Local Court must grant an application for annulment made by the prosecutor if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so.

2. A 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.

You should always specify which of the grounds under s 8(2) apply to your application, and address the Court specifically in relation to those grounds.
Practical tips when making section 4 applications

Looking at the Bench Papers
You should always try to look at the original bench papers, which is the court file concerning your client’s case. You can look at these papers before court by going to the Local Court Registry at the relevant Court and asking for access to the papers, or you can look at the Bench papers on the day by asking the Magistrate or the court officer for access.

The bench papers are important because they may contain information to support your client’s instructions. For example, if a person telephones the court and leaves a message with court staff as to why they did not attend court, these messages should be placed on the bench papers.

The bench papers also contain the history of the matter, and may, for example, indicate that your client attended court on a number of occasions before being convicted in his or her absence.

Obtaining evidence to support your client’s instructions
It is essential to have evidence supporting your case when making a s 4 application.

The evidence will need to relate to the reason(s) your client was unable to attend court. Examples are:

- If your client was ill, you will need medical certificates/hospital records. These documents must specifically indicate that your client was unfit to attend court.
- If your client was in custody on the court date, a custodial record should be obtained from the Department of Corrective Services or the Department of Juvenile Justice.
- The circumstances giving rise to the matters referred to in s 8(2).

Calling evidence
If evidence is not contested (for example, when there is proof that your client was in custody at the date of his or her conviction) there will be no need to call evidence.

Other cases will depend on your client giving evidence. Your client may have to explain the circumstances that prevented him or her from attending court if this is the case. You should prepare your client to give evidence as you would prepare a client to give evidence in chief in a defended hearing, and you should also prepare your client for the possibility of cross examination by the prosecution.

Speaking to the prosecution
You should serve your client's written application and any documents upon which you will be relying on the prosecution before making a s 4 application.

You should also be aware that the prosecution can also make an application for annulment of a conviction (s 4(1)(b)). If the prosecution makes the application, the application has to meet the criteria of "just cause" as referred to in s 8(1).

The procedure for making an application to annul a conviction
The following is the usual procedure in court for making a s 4 application:

- The matter is called on and you indicate that a s 4 application is to be made. The court should have the s 4 application form on the Bench papers, as the s 4 application should have been filed before the court date. The court should also have the original papers relating to the matter.
- You indicate the basis of the s 4 application (that is, which of the grounds under s 8 are applicable).
- You tender documents on which you will be relying. These documents will relate to the relevant ground(s) under s 8.
- You call evidence if required. The prosecution may cross examine your client. You then indicate that, that is the evidence that you will be relying on in support of the application.
• You make submissions as to why the application should be granted, which will be followed by the prosecution’s submissions.

• The prosecution may be asked to indicate their attitude to the application. If the prosecution does not oppose your application, then you may not need to go through the whole procedure set out above.

**If the annulment application is successful**

After a decision is made on an application for annulment of a conviction or sentence, a Local Court must notify each of the interested parties of its decision (s 9(1)).

If the Local Court annuls the relevant conviction or sentence, s 9(2) states that the court:

a) must deal with the original matter afresh (either immediately or at a later date), and

b) unless it does so immediately, must notify each of the interested parties of the date, time and place fixed for dealing with the original matter.

When the Local Court deals with the original matter, it must do so as if as if no conviction or sentence had been previously made or imposed (s 9(3)).

**The effect of annulling a conviction or sentence**

If a conviction or sentence is annulled:

• The conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed (s 10(1)).

• If a fine is annulled, any amount paid towards the fine is repayable to the person by whom it was paid (s 10(3)).

If your client wishes to plead not guilty, you should be in a position to set a hearing date if a brief of evidence has previously been served. This will mean knowing how many witnesses you are likely to call and how long you estimate that the hearing will take.

**Appealing to the District Court against the refusal to annul a conviction**

Section 11A states that there is an appeal to the District Court against a Local Court’s refusal to annul a conviction or sentence.

An appeal must be made within 28 days after the Local Court notifies the defendant of its refusal of the application (s 11A(2)).

There can be only one appeal in respect of any particular conviction or sentence (s 11A(3)).
APPLICATION TO ANNUL A COURT CONVICTION/ORDER

*Crimes (Local Courts Appeal and Review Act) 2001 (NSW) s 4*

IMPORTANT INFORMATION FOR THE APPLICANT

This application does not stay the court conviction/order or sentence. You may ask the court dealing with this application to stay the order and any enforcement action taken under that order. Speak to the court staff for more information.

I ask the court to annul the conviction or order made against me by the court in my absence. The details of the case are:

**Applicant/Defendant (your name):** Kay Ottick

**Date of Birth:** 26 February 1975

**Driver’s Licence Number:** 4775 YT

**Court Case Reference Number:** 2004/12987

**Date of Court Conviction/Order:** 12 October 2004

**Place of Court Conviction/Order:** Sydney (Downing Centre)

**Offence:** Receiving

**Place of Offence:** Maroubra

**Date of Offence:** 11 July 2004

**SDRO Enforcement Order Number (if applicable):**

(* delete any statements that do not apply)

I am making this application because the conviction and/or order was recorded in my absence AND:

**DETAILS:**

I was found guilty without being at court on the date that my matter was listed for hearing.

I was very sick on the morning of my hearing. I telephoned the court at 9 o’clock and told the person that I spoke to that I would be going to see my doctor. The person I spoke to took my name and details. I went to my doctor, Dr Marlowe, at about 10 o’clock in the morning. She gave me a medical certificate which I asked her to fax to the court. Dr Marlowe told me that she faxed this certificate to the court. I attach a copy of the medical certificate. I contacted my solicitor, Mrs Marston, but was not able to speak to her. I left a message with her secretary to let her know that I was sick and could not go to court.

When I rang the court in the afternoon to find out what had happened with my court matter, I was told that I had been found guilty. I contacted my solicitor and I went to the court the next day and had my court matter re-listed.

I took all the steps I could take to let the court know why I would not be able to make it to court on 12 October 2004.

The date of hearing of my matter was 12 October 2004. I had attended court on the two previous dates that this matter was listed at court, which were 25 July and 30 August 2004.
I have never had a fail to appear or conviction in my absence.
I wish to plead Not Guilty to the matter.

Defendant’s signature
(you sign here): ............................................................. Date:

NOTICE OF HEARING - When and where to go to court
THIS APPLICATION will be heard by the LOCAL COURT
at Sydney (Downing Centre)
on  at  am/pm

Signed: ....................................................Clerk of the Local Court at Sydney (Downing Centre)

Date: ...............
Appealing from the Local Court to the District Court against severity of sentence

This chapter discusses appeals to the District Court on the grounds 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 (Local Courts Appeal and Review) Act 2001* 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 in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings (s 17). This means that an appellant can tender additional material (such as references and reports), even though that material was not tendered in the Local Court.

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)). The appropriate form is the Notice of Appeal. If the 28 day period has passed, leave of the District Court must be sought by way of 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 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 a 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.

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)).
- If a person requires leave to appeal, the stay only takes effect when leave to appeal is actually granted (s 63(2)(b)).
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. The effect of these sections should be looked at, if applicable, and are not set out in detail here.

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.

In determining an appeal, the District Court must not make an order or impose a sentence that could not have been made or imposed in the Local Court (s 71).

As a matter of fairness, 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’.

If a Judge gives you a ‘Parker warning’, it is usually best to get your client’s instructions to seek leave to withdraw the appeal. It is up to the Judge whether leave to withdraw the appeal is granted. If the Judge does not grant leave to withdraw the appeal, you will have to go ahead and argue the appeal.

Hearing an appeal in the District Court

Getting the depositions before the hearing of the appeal

The depositions that are tendered by the DPP at the hearing of a severity appeal contain 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 depositions in your client’s matters by applying in writing to the following:

- The Senior Solicitor of the DPP office that will be dealing with your client’s appeal;
- The Registrar of the relevant Local Court.

You should check the depositions to make sure that all the relevant papers have been included. It is common that documents tendered in the Local Court are not included with the depositions which are prepared for the District Court. 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 documents have not been included with the depositions for the District Court, you should let the DPP solicitor know this before the appeal is heard and provide him or her with copies.

The general procedure for a severity appeal in the District Court

This is a general outline of the procedure for a severity appeal in the District Court:

- The DPP solicitor tenders the depositions from the Local Court.
- The DPP solicitor indicates the penalties imposed in the Local Court, and the applicable maximum penalties.
- This usually constitutes the Crown case, and the DPP solicitor might say “That is the Crown case”.
- You tender any additional reports, references or other material that you rely on. Ensure that you have served this material on the DPP solicitor before court.
- You call the appellant and/or any relevant witnesses give evidence. Calling oral evidence is not done in every case (see below).
• If there is no further evidence, you say "That is the case for the appellant".
• You make your submissions, followed by the DPP solicitor making submissions.
• The Judge gives his or her decision.

Practical tips

• Keep in mind what result you are aiming for. For example, your appeal may be limited to the length of a disqualification period that may have been imposed, or the structure of sentences imposed, 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.
• Think carefully about whether you call evidence from your client or any other witness (for example, a relative, drug and alcohol counsellor, or chaplain). You should call evidence if it will assist your client's case. If the evidence you want to call is not disputed, or is contained in other documents before the court, there is little benefit in calling that evidence.
• 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.
• If you are calling evidence, remember that leading questions that result in your client or witness answering simply 'yes' and 'no' are less persuasive than asking open questions. Open questions allow your witness to give evidence in their own words. Open questions include questions which start with 'What', 'When', 'Where', 'How', 'Why', and 'Who'.
• Before court you should tell your client what a Parker warning is, so that your client knows of the risk and so that if you do get a Parker warning, your client will know what it means.
Appeals to the Court of Criminal Appeal

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

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).

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 have been filed. 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.

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

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. The form can be obtained by contacting the CCA Registry.

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.

Preparing to lodge the Notice of Appeal

Almost all of the preparation for the appeal must be done before the Notice to Appeal is lodged. All documentation from the lower court should be obtained, counsel briefed to advise on the merits of an
appeal (that advice will later form the basis for the written submissions), 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. 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.

**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.

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, the Legal Aid Commission requires that an advice on the merits of the appeal is obtained before a grant of legal aid is made. The Legal Aid Commission 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.

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.
Call-overs

The CCA regularly holds 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

A two-Judge bench often hears appeals against sentence. Appeals against conviction and Crown appeals are heard by a three-Judge Bench.

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 some other sentence is not warranted in law (s 6(3) Criminal Appeal Act 1912 (NSW)).

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 (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

Bail

Bail pending the hearing of an appeal in the CCA

Pursuant to s 30AA *Bail Act 1978* (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. A client in a remote gaol may prefer not to attend court.

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 (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. If you are able to reach agreement regarding potential bail conditions, it will usually be possible to arrange a Supreme Court bail application on the same day as the CCA hands down its decision.

Risk of sentences being increased on hearing of severity appeals

Appellants are often concerned that the CCA will increase their sentence if they appeal. This concern has no basis in fact. While the CCA does have the statutory power to increase sentences on appeal, 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:

Part 10
Getting assistance
Chapter 27: Briefing counsel

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 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;
Preparation 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.
Contacts

The following is a list of contact details of various government, community and other organisations that you may find helpful to know about.

**Children**

**Ask! A free Legal Service for Youth**

**Function:** Provides free advice in all areas of law for 14 to 21 year olds in the Sydney metropolitan area

**Address:**
- Randwick: c/o Ted Noffs Foundation
- **206A Alison Road (corner Avoca Street)**
- **Parramatta:** c/o The Smith Family
- **Level 1, 239 Church Street (corner George Street)**

**Telephone:** (02) 8383 6629
**Fax:** (02) 9310 0020
**Email:** ask@noffs.org.au

**Legal Aid Commission under 18s hotline**

**Function:** Provides criminal law advice to children under 18, especially those in police custody.

**Phone:** 1800 10 18 10

**Department of Juvenile Justice**

**Function:** Administers the children's criminal justice system

**Address:**
- Central Support Office
- **Levels 22, 23, 24**
- **477 Pitt Street**
- **Sydney NSW 2000**

**Phone:** (02) 9219 9400
**Fax:** (02) 9219 9500
**Email:** djj@dj.j.nsw.gov.au
**Website:** http://www.djj.nsw.gov.au

**Department of Community Services**

**Function:** Promotes the protection of children and young people from risk of harm and provides care for children and young people who are not able to live with their families.

**Address:**
- 4-6 Cavill Ave Ashfield NSW 2131
- **Locked Bag 28**
- **Ashfield NSW 1800**

**Phone:** (02) 9716 2222
**Helpline:** 13 2111 (24hrs)
**Fax:** (02) 9716 2999
**Website:** http://www.community.nsw.gov.au

**National Children’s and Youth Law Centre**

**Function:** Provides advice and limited representation for children and young people. Provides an email advice service, LawMail, where people under 18 years of age can email their legal question.

**Address:** c/- University of New South Wales, Sydney 2052
**Phone:** (02) 9398 7488
**The Shopfront Youth Legal Centre**

**Function:** The centre is a free legal service for homeless and disadvantaged young people aged 25 and under. It also provides legal information and training for young people and youth workers.

**Address:** 356 Victoria Street, Darlinghurst NSW 2010

**Phone:** (02) 9360 1847, mobile 0418 407 290

**Fax:** (02) 9331 3287

**Email:** shopfront@freehills.com

**Website:** www.theshopfront.org

**Notes:** Hours Mon-Fri 9.30-5.00 (arrangements can be made outside hours if necessary)

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**Courts**

**District Courts**

**Phone:** (02) 9287 7581 (7582) (Downing Centre, Sydney)

For a complete list of regional and city District Courts go to

**Website:** http://www.lawlink.nsw.gov.au/dc

**Additional information:** You can also download relevant court forms at the above address

**Drug Court of NSW (adult)**

**Legal Aid solicitors**

**Function:** Provide advice regarding entry criteria and procedural issues in having clients admitted to the Drug Court program

**Phone:**
- (02) 9685 8013 (senior solicitor)
- (02) 9685 8020

**Drug Court Registry**

**Function:** Assists with entering clients into the ballot for referral to the Drug Court

**Phone:**
- (02) 9895 4511

**Website:** http://www.lawlink.nsw.gov.au/drugcrt

**Address:** Drug Court of NSW
- PO Box 92
- Parramatta NSW 2124

**Local Courts**

For a complete list of regional and city local courts go to

**Website:** http://www.lawlink.nsw.gov.au/lc

**Additional information:** You can also download relevant court forms at the above address

**Supreme Court of NSW**

**Address:** Level 5 Law Courts Building
- Queen’s Square
- 184 Phillip Street
- Sydney NSW 2000

**Phone:**
- (02) 9230 8111 Switch
- (02) 9230 8723 Criminal Matters Registry
- (02) 9230 8045 Bail Registry
- (02) 9230 8717 Court of Criminal Appeal
Fax: (02) 9230 8628
Principal Registrar
Phone: (02) 9230 8729
Registrar, Court of Criminal Appeal
Phone: (02) 9230 8066
Email: Supreme_Court@agd.nsw.gov.au
For more information and a complete list of NSW Supreme Courts go to
Website: http://www.lawlink.nsw.gov.au/sc
Additional information: You can also download court forms from the above address

Victims Compensation Tribunal
Phone: (02) 9374 3111
Email: vct@agd.nsw.gov.au
Fax: (02) 9374 3175 (Compensation & Counselling)
(02) 9374 3120 (Restitution & Appeals)
(02) 9374 3040 (Admin & Accounts)
Website: http://www.lawlink.nsw.gov.au/vs
Youth Drug Court
Legal Aid solicitor
Phone: 0418 663 574

Youth Drug Court Registry
Address: Railway Street
Campbelltown NSW 2560
Phone: (02) 4629 9777
Fax: (02) 4629 9744

Indigenous Services
Aboriginal Medical Service
Function: Provides medical care to Aboriginal clients in NSW. Services are generally provided from several clinics on a ‘drop-in’ basis.
Phone: (02) 9319 5823
Fax: (02) 9139 3345
E-mail: amsredfern@amsredfern.org.au
Address: 36 Turner Street, Redfern NSW 2016
Clinic Hours: Mon–Thurs 9.00am–6.00pm
Friday 10am-5pm

Aboriginal Tenants Advice, Advocacy and Resource Service
Function: Provides information, advice and advocacy for tenants about their rights. Provide help with Residential Tenancy Tribunal hearings and tenancy disputes.
Phone: (02) 9564 5367, 1800 772 721 (Sydney)
1800 810 233 (Dubbo)
1800 248 913 (Grafton)
1800 672 185 (Batemans Bay)

Aboriginal and Torres Strait Islander Legal Services (ATSILS)
Function: ATSILS provides a 24 hour legal representation service for Indigenous people. This service is provided in courts, corrective institutions, police stations, and watch houses.

Sydney Regional Aboriginal Corporation Legal Service
Phone: (02) 9318 2122

Kamilaroi Aboriginal Legal Service (Tamworth–Moree)
Phone: (02) 6772 5990

Many Rivers Aboriginal Legal Service
Phone: (02) 6651 8033 (Coffs Harbour, Grafton and Maclean areas)
(02) 6622 7088 (Lismore)

Central Southern Corporation Wiradjuri Aboriginal Legal Service
Phone: (02) 6921 9230

South Eastern Aboriginal Legal Service (Nowra/Canberra)
Phone: (02) 4422 3255

Western Aboriginal Legal Service (Bourke/Broken Hill/Walgett)
Phone: (02) 6882 6966

Lawyers
Director of Public Prosecutions (NSW)
Function: Prosecutes indictable offences (except Commonwealth matters) in NSW courts
Address: 265 Castlereagh Street
Director of Public Prosecutions (Commonwealth)
Function: Prosecutes Commonwealth offences
Address: Level 7, 66–68 Goulburn Street
Sydney NSW 2000
Phone: (02) 9321 1100
Fax: (02) 9264 8241
Website: http://www.cdpp.gov.au

Law Society of New South Wales
Function: Representative body of lawyers in NSW
Address: 170 Phillip Street
Sydney NSW 2000
Phone: (02) 9926 0333 or 1300 888 529 (outside Sydney)
Fax: (02) 9231 5809
Email: lawsoociety@lawsocnsw.asn.au
Website: http://www.lawsociety.com.au

Bar Association of New South Wales
Function: Representative body of barristers in NSW
Address: Selborne Chambers
174 Phillip Street
Sydney NSW 2000
Phone: (02) 9232 4055
Fax: (02) 9211 1149
Website: http://www.nswbar.asn.au/
Legal Aid Commission of NSW
Function: Provides legal advice and assistance to socially and economically disadvantaged persons to understand and protect their rights.
Address: 323 Castlereagh Street
         Sydney NSW 2000
Phone: (02) 9219 5000
Fax: (02) 9219 5935
Website: http://www.legalaid.nsw.gov.au

Public Defenders Office
Function: Barristers who appear in indictable criminal matters for clients who have been granted legal aid.
Phone: (02) 9268 3111
Fax: (02) 9268 3168

Legal Institutions
Commonwealth Ombudsman
Function: Investigates complaints against Commonwealth public officers, including police officers.
Address: 477 Pitt Street
         Sydney NSW 2000
Phone: 1300 362 072
Fax: (02) 9211 4402
Website: http://www.ombudsman.gov.au

New South Wales Ombudsman
Function: To assist agencies and persons within NSW to be aware of their responsibilities to the public and to ensure they comply with the law and best practice in administration.
Address: 580 George Street
         Sydney NSW 2000
Phone: (02) 9286 1000
Toll free: 1800 451 524
Email: nswombo@ombo.nsw.gov.au
Website: http://www.ombo.nsw.gov.au

Human Rights and Equal Opportunity Commission
Function: The promotion and protection of human rights
Address: 133 Castlereagh Street
         Sydney NSW 2000
Phone: (02) 9284 9600
1300 369 711 (general enquiries)
1300 656 419 (complaints)
Website: http://www.hreoc.gov.au

Independent Commission Against Corruption
Function: Prevent and investigate corruption in the public sector.
Address: Level 21
         133 Castlereagh Street
         Sydney NSW 2000
Phone: (02) 8281 5999
Fax: (02) 9264 5364
Email: icac@icac.nsw.gov.au
Website: www.icac.nsw.gov.au
Judicial Commission of NSW
Function: Educate and examine complaints against the judiciary
Address: Level 5
Thankral House
301 George Street
Sydney NSW 2000
Phone: (02) 9299 4421
Fax: (02) 9290 3194
Email: judcom@judcom.nsw.gov.au
Website: http://www.judcom.nsw.gov.au

Mediations
Community Justice Centre directorate
Function: Provides mediation and dispute resolution services
Address: Level 8, Goodsell Building
8-12 Chifley Square
Sydney NSW 2000
Phone: (02) 9228 7455
Fax: (02) 9228 7456
Email: cjc_info@agd.nsw.gov.au
Additional information: Has a large number of suburban and regional offices

NSW Police Service
Phone: (02) 9281 0000
Address: Police Headquarters
1 Charles Street
Parramatta NSW 2150
Website: http://www.police.nsw.gov.au
Additional information: Universal switch number which can connect you to any police officer, unit or station in the state
Police Integrity Commission
Function: Investigate serious complaints against police officers in NSW.
Address: 111 Elizabeth Street
Sydney, NSW 2000
Phone: (02) 9321 6700
Toll free: 1800 657 079
Fax: (02) 9321 6799
Website: http://www.pic.nsw.gov.au

Locating clients in custody
Adults—Department of Corrective Services sentence administration
Function: Advise the whereabouts of adult clients in custody, providing release dates and upcoming court dates
Phone: (02) 9289 3378, (02) 9289 1373

Children—Department of Juvenile Justice records
Function: Advise the whereabouts of children in custody, providing release dates and upcoming court dates
Phone: (02) 9219 9420, (02) 9219 9442

Mental Health Services
Justice Health Court Liaison Service (formerly Corrections Health)
Function: Provides psychiatric expertise and advice to magistrates when people with mental illness first appear in court.
Address: Suite 702 Level 7
491 Kent Street
Sydney NSW 2000.
Phone: (02) 8295 7000
Website: http://www.chs.health.nsw.gov.au

Mental Health Advocacy Service
Function: Provides free legal advice and assistance about mental health law
Address: Level 4, 74–76 Burwood Road
Burwood NSW 2134
Phone: (02) 9745 4277
Website: http://www.legalaid.nsw.gov.au

Mental Health Review Tribunal
Function: Determines the appropriate treatment for people with mental illness.
Address: Building 40, Digby Road, Gladesville Hospital
Gladesville NSW 2111
Phone: (02) 9816 5955
1800 815 511
Website: http://www.mhrt.nsw.gov.au
Email: mhrt@mhrt.nsw.gov.au

NSW Association for Mental Health
Function: Mental health information services. Free, anonymous helpline via phone or email. Referrals to NSW support services. Fact sheets available to download.
Address: 60 Victoria Road
Gladesville NSW 2111
Phone: (02) 9816 5688
Freecall: 1800 674 200
Transcultural Mental Health Centre
Function: State-wide service that promotes access to mental health services for people of non-English speaking background. Clinical consultation, an assessment service and translators available.
Address: 5 Fleet Street
Nth Parramatta NSW 2151
Phone: (02) 9840 3800
Freecall: 1800 648 911 (for callers in NSW)
E-mail: general@tmhc.nsw.gov.au
Website: http://www.tmhc.nsw.gov.au
Hours: Mon-Fri 8.30am–5pm

St Vincent’s Mental Health Service: Community
Phone: (02) 8382 1911
Fax: (02) 9360 3678

MERIT program
Function: Is a Local Court based diversion program that targets adult defendants with illicit drug problems who are motivated to undertake drug treatment. Defendants who are assessed as suitable for MERIT can undertake supervised drug treatment as part of their bail conditions.

<table>
<thead>
<tr>
<th>Area Health Service</th>
<th>Contact person</th>
<th>Phone</th>
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<tbody>
<tr>
<td>Central Coast</td>
<td>Lyn Bond/Steve Childs</td>
<td>4320 3752</td>
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<tr>
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<td></td>
<td>4320 3057</td>
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<tr>
<td>Central Sydney</td>
<td>Craig Cooper</td>
<td>9797 9930</td>
</tr>
<tr>
<td>Far West</td>
<td>Sue Robbie</td>
<td>(08) 8080 1540</td>
</tr>
<tr>
<td>Greater Murray</td>
<td>Bronwyn Buller</td>
<td>6921 3159</td>
</tr>
<tr>
<td>Hunter</td>
<td>Clare Felton</td>
<td>4924 6800</td>
</tr>
<tr>
<td>Illawarra and Shoalhaven</td>
<td>Mark Buckingham</td>
<td>4228 8211</td>
</tr>
<tr>
<td>Macquarie</td>
<td>Nicole Maher</td>
<td>6845 3300</td>
</tr>
<tr>
<td>Mid North Coast</td>
<td>David Rogers</td>
<td>0408 477 832</td>
</tr>
<tr>
<td>Mid West</td>
<td>Kylie Crawford</td>
<td>6392 6800</td>
</tr>
<tr>
<td>New England</td>
<td>Lyn Gardner</td>
<td>6766 8081</td>
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<tr>
<td>North Sydney</td>
<td>Matt Jessimer</td>
<td>9906 7083</td>
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<tr>
<td>Northern Rivers</td>
<td>John Scantelton</td>
<td>6620 7650</td>
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<tr>
<td>South East Sydney</td>
<td>Julie Carter</td>
<td>9521 8922</td>
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<tr>
<td>South West Sydney</td>
<td>Sandra Sunjic/Andre Van Altena</td>
<td>9828 6746</td>
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<tr>
<td>Southern</td>
<td>Susie Wallis/Andre Van Altena</td>
<td>6299 1725</td>
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<tr>
<td>Wentworth</td>
<td>Mark Milic</td>
<td>4734 2131</td>
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<tr>
<td>Western Sydney</td>
<td>Tanya Merinda</td>
<td>9840 3474</td>
</tr>
<tr>
<td>Wellington</td>
<td>Nicole Maher</td>
<td>6845 3300</td>
</tr>
</tbody>
</table>
Prisoners’ legal services

Legal Aid Commission Prisoners Legal Service
Function: Provides legal advice to people in custody on a range of legal issues affecting prisoners, including their rights while in custody
Address: Level 2, 323 Castlereagh Street
        Haymarket NSW 2000
Phone: (02) 9219 5888 or 1800 806 913 (outside Sydney)

Probation & Parole Service
Address: Responsible for the management of offenders with the community
Phone: (02) 9265 7500
Website: http://www.dcs.nsw.gov.au/probation/
Additional information: Has a large number of suburban and regional offices

Children of Prisoners Support Group
Function: Provides information and referral services, Family worker services (in home and centre based), groups, transport, casework, childcare on weekends
Address: Holker St, Silverwater or
        PO Box 1700, Ermington NSW 2115
Phone: (02) 9648 5866
Fax: (02) 9648 5669
Email: copsg@ihug.com.au

Women’s legal services

Women’s Legal Resources Centre (NSW)
Function: Promoting access to justice for women, in particular for disadvantaged women
Address: 35 Sweet Street
        Lidcombe NSW 2141
Phone: (02) 9749 5533
Rural free call: 1800 801 501
Indigenous women: 1800 639 784
Fax: (02) 9749 4433
Email: Womens_NSW@fcl.fl.asn.au
Website: http://www.womenslegalsnsw.asn.au

Wirringa Baiya Aboriginal Women’s Legal Centre
Function: Provides legal services for Aboriginal women
Address: Marrickville Hospital
        Cnr Marrickville & Livingstone Streets
        Marrickville NSW 1475
Phone: (02) 9569 3847
Rural Free Call: 1800 801 501
Indigenous Women: 1800 639 784
Fax: (02) 9569 4210
Email: Aboriginal_Womens_NSW@fcl.fl.asn.au
Website: http://www.nwjc.org.au

Domestic Violence Advocacy Service
Function: Provides a free confidential legal service to women experiencing domestic violence
Phone: 1800 810 784 (freecall) or (02) 9637 3741
Fax: (02) 9682 3844
Email: DVS_NSW@fcl.fl.asn.au
Web address: http://www.dvas.org.au
Rural Women’s Outreach Program
Function: Community legal service for western NSW
Address: 51 Bultje Street
          Dubbo NSW 2830
Phone: 6884 9422
Fax: 6884 9397
Email: western_nsw@fcl.fl.asn.au

General Research
Useful Websites
Austlii http://www.austlii.edu.au
Scaleplus http://scaleplus.law.gov.au
Lawlink http://www.lawlink.nsw.gov.au
State Library of NSW:
        Legal Information
        Access Centre (LIAC) http://liac.sl.nsw.gov.au
        NSW Government portal http://www.nsw.gov.au
        NSW legislation http://www.legislation.nsw.gov.au

Interpreting Services
Translating and Interpreting Services
Phone: 131 450
Website: http://www.dimia.gov.au

Language Services, Community Relations Commission
Phone: 1300 651 500
Sydney: Level 8, Stockland House
        175-183 Castlereagh Street
        Sydney NSW 2000
Newcastle: 117 Bull Street
          Newcastle NSW 2300
Wollongong: 84 Crown Street
           Wollongong NSW 2500
Website: http://www.crc.nsw.gov.au/interpreting/

Deaf Society of NSW Interpreting Service
Function: Provides interpreting services state-wide (must give a minimum of one week’s notice)
Address: Suite 104, Level 4
         Macquarie House
         169 Macquarie St
         Parramatta 2150
Phone: (02) 9893 8555
Fax: (02) 9893 8333
Email: deafsoc@tig.com.au
Website: http://www.deafsocietynsw.org.au
Drug & Alcohol Clinics and Contacts

General

Alcohol and Drug Information Service
Function: State-wide referral service for rehabilitation, detoxification, counselling and other support services.
Phone: (02) 9361 8000

Australian Drug Information Network
Website: http://www.adin.com.au

Detoxification, Rehabilitation and Methadone Units

Jarrah House
Function: Programs for women and women with children (under 8 years).
Address: Prince Henry Hospital
Anzac Parade
Little Bay
Phone: (02) 9661 6555
Fax: (02) 9661 6595

McKinnon Unit
Function: Medicated selective detoxification for people from the local area.
Address: Rozelle Hospital
Glover Street
Rozelle NSW
Phone: (02) 9556 9241
Fax: (02) 9556 9246

Palm Court
Function: 4 week residential rehabilitation program
Address: Rozelle Hospital
East Balmain Road
Leichhardt NSW
Phone: (02) 9556 9752
Fax: (02) 9556 9766

William Booth House
Function: Long term residential rehabilitation program
Address: 56 Albion Street
Surry Hills NSW 2010
Phone: (02) 9212 2322
Fax: (02) 9281 9771

Odyssey House
Function: Rehabilitation for drugs, alcohol and gambling
Address: 431 Elizabeth St
Sydney NSW 2000
Phone: (02) 9281 5144 (for admissions)
(02) 9820 9999 (treatment centre)
Treatment centre: 13a Moonstone Place
Eagle Vale
Wisteria House
Function: Drug and alcohol detoxification
Address: Cumberland Hospital, ward 12
Parramatta NSW 2150
Phone: (02) 9840 3462
Fax: (02) 9840 3869

WHOS (We Help Our Selves)
Function: Community self-help group for men or women, residential rehab. Has centres in Chippendale (for men), Redfern (for women) and Cessnock (men and women)
Address: PO Box 1237, Strawberry Hills NSW 2012
Phone: (02) 9318 2980
Fax: (02) 9318 1987
Email: info@whos.com.au
Website: http://www.whos.com.au

Kirketon Road Centre
Function: Drop-in centre/clinic; needle and syringe exchange; methadone treatment; referral service.
Address: 100 Darlinghurst Road
Darlinghurst NSW
Phone: (02) 9360 2766
Fax: (02) 9360 5154

Kobi Clinic
Function: Private methadone and buprenorphine treatment clinic; counselling and referral service.
Address: 166 Bronte Road
Waverly NSW
Phone: (02) 9369 1277
Fax: (02) 9369 4985

Herbert Street Clinic
Function: Methadone maintenance and detoxification; counselling.
Address: North Sydney
Phone: (02) 9906 7083
Fax: (02) 9926 8419

Langton Centre
Function: Assessment and counselling; methadone maintenance; needle and syringe exchange; outpatient detox; chemical use in pregnancy service.
Address: 591 South Dowling St
Surry Hills NSW 2010
Phone: (02) 9332 8777
Fax: (02) 9332 8700

Clinic 36
Function: Specialist drug and alcohol medical service, methadone maintenance.
Address: 36 Regent Street
Chippendale NSW
Phone: (02) 9211 2311
Fax: (02) 9211 2443
Accommodation Services

Lifeline
Function: Provide referral to crisis accommodation services in all local areas, including refuges and low cost accommodation.
Telephone: 13 11 14

Homeless Persons Information Centre
Function: Telephone information referral of available refuges in the Sydney area
Phone: (02) 9265 9087
(02) 9265 9081

Youth Accommodation Association
Function: Telephone information referral for 12–21 year olds for refuges in Sydney area.
Phone: (02) 9318 1531

Aboriginal Hostels Ltd
Function: Short term accommodation in various locations across NSW.
Address: (NSW Regional Office)
5/134 Chalmers Street
Surry Hills NSW 2010
Phone: (02) 9310 2777
Fax: (02) 9310 3044
Website: http://www.ahl.gov.au