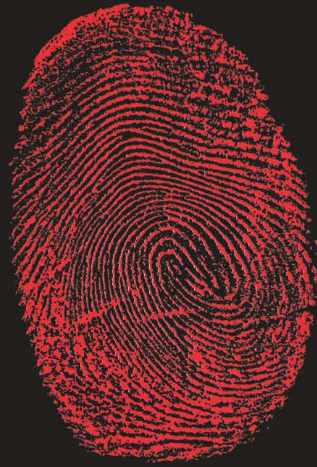

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"don't do the crime if you can't do the time"

Philip Dunn QC

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Managing Editor:
Richard Edney

Editor:
Jane Warren

Foreword:
Con Heliotis QC

Papers:
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Criminal Practice area Leaders:
Con Heliotis QC and Michael McGrath

Foley's List Clerking Team:
John Kelly, Andrew Turner, Matt Parnell and Kate Conners

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Foreword

Written by Con Heliotis QC

Over the last decade, the area of criminal law in Victoria has become more complex, technical and time consuming.

Solicitors practising in this area face a challenging role in guiding their clients through the preliminary stages - such as search warrants, police interviews, bail, subpoenas, and then through court appearances: from committal and trial to verdict and possible sentencing and appeal.

The authors for each chapter of this book were carefully selected for their experience in a particular phase of the criminal justice system.

Foley's List is proud to publish *Crime & Defence* to assist Solicitors, from the most junior to the more experienced, in tackling these challenges.

I hope you will find it useful.

Con Heliotis QC
Criminal Law Practice Leader
Foley's List

Introduction

Being a Criminal Defence Lawyer

The practice of criminal law as a defence lawyer is one of the most challenging areas in the legal profession. The stakes are incredibly high. So, too, are the expectations of our clients. But that, too, is a given considering what is at stake in the practice of criminal law.

The aim, or end, of the 'criminal justice system' is the attainment of 'justice' and a 'fair trial according to law'. For an accused person the notion of justice may seem somewhat more protean and contingent on the outcome. The criminal defence lawyer necessarily forms a crucial part of that process.

As a result, the practice of criminal law from the perspective of a defence lawyer is a challenging endeavour, having as it does not only profound, but also immediate and enduring, consequences for those who are represented by a criminal lawyer.

Wider questions about what are the appropriate ends of punishment, the purpose of sentencing and the causes of crime are not abstract concepts for a criminal defence lawyer but are reflected in the very practices in which we are engaged.

It is precisely because we act for those charged with, and sometimes convicted of, criminal offences that we have an important perspective on some of the fundamental questions that inhere in crime and punishment.
Our role as a criminal defence lawyer is unique. We know that. What we do, at least to some, must conflict with the utilitarian objective of ensuring that all those who are guilty should be punished and only the 'truly' innocent

should go free. Because, it may be said, we let 'truth' – whatever that means in a forensic setting – be trumped by a desire to ensure that no innocent person is ever convicted. It is also informed by an understanding that, like life, the application of the criminal law is not always straightforward and where the truth lies is not always clear.

Even after guilt has been determined – whether by trial or plea – the criminal defence lawyer is involved in an attempt of 'retrieval' on behalf of the client.

The plea that attempts to secure the least possible penalty is all part of that retrieval. What it is also about is the retrieval of the narrative of the stories and lives of our clients that are, at times, objectified by the 'criminal justice system'.

Because – like any totalizing system – the criminal law and its bureaucratic characteristics may at times obscure the humanity of our clients. It is also why criminal lawyers are defenders of human rights and why we hold tight to humanist ideals when we do what we do.

It is with all these things in mind that we have prepared this work.

The Scope of this Work

This is a work that has intentionally been constructed to provide an overview of the criminal justice system in Victoria. It is 'panoramic' in its breadth and the scope is informed by one fundamental idea: the tracing of the criminal law and its practical impact from start to finish.

So the work surveys the impact of evidential, substantive and procedural systems and rules that are relevant to the practice of criminal law in Victoria from the commission of an offence until the exhaustion of post-conviction relief by way of appeal. It aims to be practical. We have done so by selecting topics that we believe are of most practical use to the criminal defence lawyer.

This work is not then a black letter exposition on the criminal law or a treatise on the niceties of evidence and procedure – although, of course, there is a great detail about the criminal law and evidence – but is, instead, a work animated by desire to impart those ideas that may have real and significant consequences for practitioners and, ultimately, your clients.

Richard Edney
Crockett Chambers
21 June 2016

Part 1:

Ethical Responsibility of a Criminal Lawyer

Chapter 1

Ethical Responsibility of a Criminal Lawyer – *Written by Lesley Taylor QC*

Chapter 1

Ethical Responsibility of a Criminal Lawyer

Written by Lesley Taylor QC

The criminal law is a complex, changeable and contradictory beast. Its laws are many and varied. Its rules and procedures evolve quickly. Its various rationales are competing. At its core is a defining idea of our society; the line at which something is either wrong or right.

The touchstone of the criminal law is fairness: fairness to those accused of crime; fairness to victims of crime; and fairness to society. But reconciling those various interests of fairness can create tensions. While the right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system, an accused's right to a fair trial is, as has been stated by the High Court, more accurately expressed as the right not to be tried unfairly. And that right is manifested in rules of law and practice designed to regulate the course of the trial.[1]

Fairness is also the source of the ethical responsibilities imposed upon those who practice criminal law. So, while the ethical duties imposed upon defence practitioners and prosecutors are not the same, the content of the separate duties are designed to ensure that the process of the criminal law is fair.

The duties imposed upon the prosecution are designed to ensure that an accused knows the case to be presented against him or her and that

[1] *Dietrich v The Queen* (1992) 177 CLR 292.

prosecutors carry out their task absent a win-at-all-costs approach. Those imposed upon the defence are designed to ensure that, in putting the prosecution to its proof, the court is not deceived or misled and that the court is aware of what the issues in dispute. There is, of course, overlap between the two. All criminal law practitioners must act with integrity, honesty and candour. The duty not to mislead the court remains paramount. The two major ethical duties upon prosecutors and defenders are highlighted below.

Ethical Duties of Prosecutors

Disclosure

The most important ethical duty of the prosecution is disclosure. A prosecutor must disclose to the defence all material available to him or her which could constitute evidence relevant to the guilt or innocence of the accused.[2] The duty is continuous in that it applies to any material about which the prosecutor becomes aware throughout the course of the proceedings. The duty is very broad and subject only to material that attracts statutory immunity or material which the prosecutor believes, on reasonable grounds, would seriously threaten the integrity of the administration of justice or the safety of any person.[3]

The importance of the duty is highlighted by noting that some of the most notorious miscarriages of justice have arisen because non-disclosure of exculpatory evidence by the prosecution has denied the accused a fair trial.[4]

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[2] Director's Policy. Disclosure. (OPP Victoria www.opp.vic.gov.au).
[3] *Cannon v Tahche* [2002] VSCA 84 at [56]-[60].
[4] *Mallard v The Queen* (2005) 224 CLR 125.

Calling All Relevant Evidence

A prosecutor must call, as part of the prosecution case, all witnesses whose testimony is admissible and necessary for the presentation of all of the relevant circumstances.[5] In short, a prosecutor must call all relevant evidence, both inculpatory and exculpatory. A prosecutor may decline to call a witness whom he or she believes, on reasonable grounds, is plainly untruthful or plainly unreliable. In such circumstances, the prosecutor is obliged to tell the defence the grounds upon which that decision was reached unless the interests of justice would be harmed by their revelation.

Ethical Duties of Defence Counsel

Truthfulness

All defence counsel operate under a duty not to deceive or knowingly mislead the court. This extends to a duty to refuse to take any further part in a case if the practitioner discovers that the client or a defence witness has lied in a material particular to the court. The only exception to that duty is where the client authorises the practitioner to inform the court of the lie.

Allied to the overarching principle of truthfulness is the duty of defence counsel not to act as the mere mouthpiece of the client. Defence counsel must exercise forensic judgement independent from the client after taking appropriate account of the client's wishes.

The limits of these duties can sometimes be difficult to discern in practice. Blatant untruths and deceptions may be obvious but there are many circumstances in which deceptive or misleading information, instructions or behaviour is not so apparent.

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[5] *The Queen v Apostilides* (19840 154 CLR 563.

Limited Disclosure

Unlike the prosecution, the defence has no general duty to disclose its case or its evidence to the Prosecution. However, there are specific statutory obligations of disclosure imposed upon the defence by the *Criminal Procedure Act 2009*. These limited obligations are designed to identify the issues in dispute as between the prosecution and defence, leading to shorter and more efficient criminal trials.

Formal Responses to Prosecution Documents

Section 183 of the CPA establishes that 14 days prior to the commencement of trial, an accused must serve on the prosecution formal responses to the prosecution summary of opening and notice of pre-trial admissions. These responses obliged an accused to identify the acts, facts, matters, circumstances and evidence with which the accused takes issue and the basis upon which issue is taken.

These responses require more than a blanket denial of the prosecution case. If at a stage after the filing of the response documents the defence (or prosecution) forms an intention to depart substantially from a matter set out in that document, section 184 of the CPA requires the party to inform the court and the other side of that intention.

Expert Evidence

If an accused intends to call an expert witness at trial, pursuant to section 189 of the CPA the accused must serve a copy of the expert's statement of evidence at least 14 days prior to the commencement of trial.

Alibi Evidence

Section 190 of the CPA establishes that an accused must give notice to the prosecution of any alibi evidence that the accused intends to call at trial within 14 days after being committed to stand trial. Failure to do so means that such evidence could only be called at trial with the leave of the court.

All practitioners in the criminal law, both prosecutors and defenders, occasionally experience a situation in which the correct, ethical decision is not obvious. An understanding of the ethical duties does not always easily translate to complexity of human emotion and behaviour with which the criminal law is concerned. Seeking advice from colleagues and ethics bodies is to be encouraged. In any event, at all times, all criminal practitioners should be guided by fairness, truthfulness and integrity.

Part 2:

Interview, Search & Seizure

Chapter 2

Execution of Search Warrants at Solicitor's Offices: The Role of the Lawyer – *Written by Lucien Richter*

Chapter 3

Challenging Search Warrants – *Written by Kimberley Phair*

Chapter 4

Advising Clients Prior to Police Interview – *Written by Rose Cameron*

Chapter 2

Execution of Search Warrants at Solicitor's Offices: The Role of the Lawyer

Written by Louis Richter

Introduction

Occasionally the police, or some other agency with investigative functions, will obtain a warrant to search the professional premises of a solicitor, barrister, or law association or society for documents or other things relevant to an investigation.

If this occurs, the primary issue will be the question of client legal privilege. Client legal privilege is a fundamental right that exists at the investigative stage, as well as during a court proceeding.[6] A lawyer can claim client legal privilege over documents, on behalf of her or his client during the execution of the warrant. If appropriate, that is exactly what she or he should do.

The lawyer can therefore play an important role in safeguarding her or his clients' privileged information. The important thing to note is that this is usually done by working with the investigating agencies pursuant either to legislation or to an agreed procedure for such occasions.

In the first case, the legislation that governs either the warrant-executing body or the issuing of the warrant will stipulate a procedure for the claim and determination of privilege.

[6] *Baker v Campbell* (1983) 153 CLR 52.

In the second case, the warrant-executing body will have in place either a procedure, policy or guideline of its own, or a procedure agreed between that body and the relevant State or Commonwealth law association (the Law Council of Australia, or the Law Institute of Victoria, for example).

Both types of procedure have a broadly similar structure, in which three basic components can be identified:

1. The lawyer, being present at the time of the execution, will assert a claim of privilege over certain documents;
2. Those documents will be sealed in some container (be it audit bags, boxes or otherwise). There are some finer details around this stage - in some situations the lawyer can, under supervision, copy these documents; and
3. The documents will be stored securely in the custody of a third party (which varies from case to case) for a certain period of time (usually three days) until the claim of privilege is brought. The documents then remain in the custody of the third party until privilege is determined.

There are also scenarios, of course, where neither model will apply. There is no firm answer as to how to deal with a situation such as that, although some suggestions can be made.

First we will briefly examine the basics of the area: warrants and privilege. Then we will consider the three basic examples: where there is no system in place; where the system is governed by guidelines, and where there is legislative provision.

Basics

a. Search warrants

It is assumed for current purposes that the search warrant in question has been validly issued and is relevant to some material in the possession of the lawyer.

Many state and Commonwealth Acts provide for the issuing of search warrants to various agencies and organisations. The most common in Victoria are, of course, Victoria Police and the Australian Federal Police. These warrants are most commonly issued pursuant to the *Crimes Act 1958* (Vic), the *Crimes Act 1914* (Cth), the *Drugs Poisons and Controlled Substances Act 1981* (Vic) and so on.

Warrants can also be issued pursuant to, for example, the *Crimes (Family Violence) Act 1987* (Vic), the *Customs Act 1901* (Cth), the *Excise Act 1901* (Cth) and the *Wildlife Act 1975* (Vic), among dozens of others.

Assuming the warrant is valid, it gives a prima facie entitlement to (in most cases) enter a place (by force if necessary) and seize any thing which falls under the ambit of the warrant. This may *purport* to include documents for which client legal privilege will be claimed.

b. Privilege

Client legal privilege operates under a dual system.

The first aspect operates with respect to the conduct of a trial and pre-trial procedures. Privilege is, in that way, protected by the *Evidence Act 2008* (Vic), and its inter-state and federal counterparts. The privilege enshrined in

sections 118 and 119 of the Act prevents communications the subject of the privilege from being admissible in court. It is a law of evidence.
Secondly, the common law relating to privilege continues to operate as a fundamental right that exists independent of curial activity. It persists at the investigative stage, and is the relevant form of privilege with which we are here concerned.

It is assumed for current purposes that the lawyer or practice the subject of a given search warrant is aware of the test for whether or not a communication is privileged, and that any claims for privilege are made in good faith.

It is worth noting that, obviously, communications made in furtherance of an offence are not protected by privilege,[7] and furthermore that privilege applies to communications only, not "things" such as money.

Baker v Campbell is the starting point for the contemporary view of common law privilege, which persists as a substantive rule of law alongside the *Evidence Act* provisions. The facts of that case relate to precisely the scenario of the execution of a search warrant on the premises of a lawyer.

By majority, the High Court cast privilege as a fundamental common law right, assisting in the administration of justice by allowing people access to full and frank legal advice without fear of any subject disclosures being used against them.

As a consequence, common law privilege goes beyond and exists prior to the court proceeding, existing as a right in the context of the relationship

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[7] *R v Cox and Railton* (1884) 49 JP 374; *Commissioner Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Evidence Act 2008* (Vic), s 125.

between client and lawyer. It is therefore relevant at the investigative stage of a matter.

Critically, in that case, the Court formulated and answered this question with respect to the *Crimes Act 1914* (Cth):

> In the event that legal professional privilege attaches to and is maintained in respect of the documents held by the firm, can those documents be properly made the subject of a search warrant issued under s. 10 of the *Crimes Act*?

The Court answered no to this question, with the reasoning supporting the rights-based view of privilege.[8] Section 10 of the *Crimes Act 1914* (Cth), as it then was, is now reframed as section 3E.

Client legal privilege is, in many respects the most fundamental privilege in Australia; preserved because it is attached to the effective and just functioning of the legal system itself. The *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), for example, abrogates the privilege against self-incrimination,[9] yet upholds client legal privilege. The *Australian Crime Commission Act* (Cth) does more or less the same.[10]

The upshot of *Baker v Campbell* was that such a fundamental common law right cannot be overruled without the express and explicit intention of parliament to that effect. This has not been done in any of the primary warrant-issuing legislation, and therefore the common law protection of privilege persists.

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[8] ibid, in particular, the review of US, New Zealand, English and Australian law by Murphy J at [4]-[13].

[9] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), s 144.

[10] *Australian Crime Commission Act 2002* (Cth), ss 21A, 21E, 30.

The effect of that protection is that search warrants *do not apply to* privileged materials. It is not a case that the warrant approves the seizure or inspection of the material but that it is immune from use: privileged material can not be the subject of a properly issued warrant.[11]

Practical Concerns

However, as mentioned above, the basic procedure remains the same or similar for most types of warrant and executing agents, whether under guidelines, agreements or legislation.

The Guideline Model

There are guidelines in place, agreed between the AFP and the Law Council of Australia, that outline an agreed procedure for dealing with claims of privilege in the context of the search of a law practice premises. It is a good example of an established understanding between practitioners and executing officers.

In the case of the AFP, there is an agreed procedure contained in the document, *General Guidelines Between the Australian Federal Police and the Law Council of Australia as to the Execution of Search Warrants on Lawyers' Premises, Law Societies and Like Institutions in Circumstances Where a Claim of Legal Professional Privilege is Made*. This document is available from the Law Council of Australia or from the AFP.

Each warrant-executing body may have a separate set of guidelines to follow, or they may have none.

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[11] *Baker v Campbell* (1983) 153 CLR 52.

Most of these bodies will have an obligation to allow a practitioner to obtain specialised advice about the claim of privilege before the execution of the warrant.

The AFP guidelines, for example, require the executing officer to favour execution during business hours; to provide a 'reasonable' opportunity for the lawyer to be present during the execution of the warrant, to obtain legal advice about the warrant and associated privilege concerns, and to seek to obtain instructions from any affected clients.

Legislative frameworks

In the case of IBAC warrants, for example, section 97 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) provides the framework for claims of privilege over documents potentially the subject of search warrants.

Briefly, the act provides that the Supreme Court will determine any claims of privilege (over documents or otherwise).[12]

Once a claim of privilege is asserted over material during the execution of a search warrant, the claimant seals the material in question in an envelope or in another manner, but is required to give the sealed documents to the warrant-executing officer, who then gives it over to the proper officer at the Supreme Court.

[12] *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic), ss 100, 101.

Where there is no system in place

There may be occasions where warrants are issued under legislation that does not provide for the above procedures, or are issued to an officer whose organisation has no guideline in place.

In such circumstances, the law itself is unchanged and relatively straightforward: in the absence of clear statutory exclusion of client legal privilege, a search warrant will not apply to privileged material.

The practicalities of the situation may be more difficult. Although it is a matter for every legal practitioner to determine for her or himself, it seems that a good starting point would be to attempt to negotiate a procedure based on the basic structure outlined above.

In other words, where there is no procedure, try to agree on a reasonable way of dealing with the situation. That is, the lawyer should:

1. Insist on being present during the execution of the warrant;
2. Insist on being given an opportunity to seek specialised advice on the warrant or on issues related to privilege;
3. Should actively assert a claim of privilege over any appropriate materials;
4. Propose and insist on documents the subject of such claims being dealt with in such a way that they:
   - Are kept sealed from perusal by the executing officer; but
   - Do not remain in the custody of the lawyer such that they could be disposed of by them;
   - Can be copied under supervision if ongoing access to the information in them is required by the lawyer.

There is clear potential for conflict in such scenarios where a claim of privilege is made, but rejected out of hand by the warrant-executing officer. An assertion of privilege can obviously be made at the curial stage and prevent the admissibility of such evidence. Equally, an injunction can be brought to try to prevent the seizure, but it may be too late if the documents are not voluminous and they have already been thoroughly inspected.

Of course, where the procedure is governed by guidelines, rather than a legislative framework, there is always the potential for a lawyer or warrant executing officer to behave unreasonably and create serious problems, akin to the situation above.

It is worth bearing in mind that, anecdotally at least, a frivolous claim (for example that *all* documents in the entire office are subject to client legal privilege) is more likely to bring about such a result. This does not however excuse a disregard for a fundamental right.

Conclusion

The law in this area is relatively straightforward: privileged communications can not be the subject of a valid search warrant in the absence of clear legislative intent to abrogate the common law on that point. The trouble is simply how to determine claims of privilege without the warrant-executing officer examining the potentially privileged material.

To this end, the involvement of a third party (ideally the court that issued the warrant) in securing independently the material (and in sealed containers) until the claim of privilege is determined, is clearly the most important feature. To have a court or other independent body act as a kind of escrow seems to be the procedure that best protects the interests of both parties.

This is the most fundamental feature of the established systems - whether guideline-based, or legislative. In the absence of either of these schemes, it seems best simply to invent or negotiate a program that includes this feature.

Chapter 3

Challenging Search Warrants

Written by Kimberley Phair

> "To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation."[13]

This principle enunciated in *George v Rockett* is the starting point in challenging search warrants. However, challenges to the admissibility of evidence obtained pursuant to a warrant must be confined to attacks on the existence of the warrant rather than the sufficiency of the grounds for granting it.[14]

Search warrants are notoriously difficult to challenge. Even where such warrants are deemed invalid the items obtained under them may be admitted nonetheless.[15]

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[13] *George v Rockett* (1990) 170 CLR 104, [5].

[14] *Murphy v R* (1989) 167 CLR 94.

[15] See eg; *Evidence Act (2008)* (Vic) s138*; Bunning v Cross* [1978] 141 CLR 54; *DPP v Marijancevic & Ors* [2011] VSCA 355. The Court in *DPP v Marijancevic & Ors* [2011] VSCA 355 hearing an interlocutory appeal where the Judge at first instance determined that as a result of affidavits that were not sworn or affirmed the warrants issued were deemed invalid and the evidence obtained pursuant to the search warrants was excluded. Although the appeal was dismissed the Court stated; "although we have concluded that the appeal must be dismissed we would not wish it to be thought that the discretion should necessarily be exercised in the same way were the issues to arise again for consideration in similar circumstances" at [92]. Retrospective legislation was enacted in the form of s 165 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) which states that even if the affidavit in support is not properly sworn or affirmed, or indeed sworn or affirmed at all, the warrant is not invalid.

Issuing of Search Warrants

In order to consider how to challenge a search warrant one must first understand the source of the power to issue a warrant.

Search warrants may be issued under State or Commonwealth Legislation. The most frequently encountered Search warrants are issued pursuant to the *Drugs Poisons and Controlled Substances Act 1981* (Vic), *Crimes Act 1958* (Vic); and more recently the *Family Violence Prevention Act 2008* (Vic). However, search warrants can be issued pursuant to a multitude of legislation;[16] it is first necessary to examine the terms of the legislation that purports to allow the issue of a particular warrant.

Application for Search Warrants

A warrant may be challenged on the grounds that the application was made for an ulterior purpose.

If an application for a warrant is not a *bona fide* application for a warrant on the grounds stated, but is made for an ulterior purpose of obtaining information to be used in legal proceedings other than the criminal proceedings contemplated by the application, the warrant will be invalid, not because it authorises interference with the administration of justice in pending legal proceedings, but because the warrant was issued for an improper purpose.[17]

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[16] Which includes powers to search and seize Eg; *Australian Securities and Investments Commission Act 2001* (Cth), *Children Youth and Families Act 2005* (Vic), *Classification (Publications) (Enforcement) Act* 1995 (Vic), *Confiscation Act* 1997 (Vic), *Crimes Act 1958* (Vic), *Crimes Act 1914* (Cth), *Drugs, Poisons and Controlled Substances Act 1981* (Vic), *Legal Profession Act 2004* (Vic), *Proceeds of Crime Act 2002* (Cth), *Prostitution Control Act 1994* (Vic). Please note this is not an exhaustive list.

[17] *Grollo v Mccauley* (1995) 56 FCR 533.

Once it is determined that the application is not for an ulterior purpose one needs to turn their mind to the application process.

Generally, an investigative agency makes application to the court for a search warrant. In making the application, evidence is put before the court to justify the need for the warrant.[18] Each Act authorising the issuing of a warrant specifies who is an authorised person to apply.[19] Thus one must ensure the person applying for the warrant is an authorised person.

Providing there is no call for an analysis of the validity of the warrant itself[20] one may seek to challenge the search warrant based on the evidence put before the court when issuing the warrant – the supporting affidavit.

A warrant is not susceptible to collateral attack where it is said the material before the appropriate authority was inadequate or insufficient.[21] It must be arguable that it is "on the cards" or reasonably possible that the warrant was issued in bad faith.[22]

In attempting to set aside the warrant one must advance argument that would justify a finding that there has been fraud or misrepresentation. [23]

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[18] An application for a search warrant must be supported by evidence on oath or by affidavit *Magistrates Court Act* 1989 (Vic) s75(2). There are some exceptions permitting telephone applications in urgent matters.

[19] For example; An Authorised Applicant pursuant to the Crimes Act is a member of the police force of or above the rank of Senior Sergeant (*s465(1) Crimes Act 1958* (Vic)).

[20] See eg. *Murphy v R* (1989) 167 CLR 94.

[10] *R v Robinson* [1998] 1 VR 570, 586 cited with authority in *Commissioner of AFP v Magistrates' Cort of Victoria & Ors* [2011] VSC 3.

[22] *Ousley v R* (1997) 192 CLR 69.

[23] *Price v Elder* [2000] FCA 133.

Whilst there is authority setting out what would amount to the supporting evidence being fraudulent or misrepresentative,[24] to obtain that evidence is no easy feat.

In order to obtain the affidavit in support, one is required to provide probative evidence that there is a reasonable possibility that the information being provided by the authorised officer forming the basis for the grant of the warrant is misleading or in bad faith.[25]

There is a general proposition that the process of applying for and obtaining the search warrant is presumed to be rightly and duly performed until the contrary is shown.[26]
As such, the challenging of the search warrant from the issuing stage is notoriously difficult.[27]

Form of Search Warrants

If the warrant is validly issued one then considers the warrant itself. When determining what grounds there are to challenge one must look at the Act under which the warrant was issued and any related regulations.[28]

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[24] See eg; *Lego Australia Pty Ltd v Paraggio* [1994] FCA 571 at [25] " … a statement which was a half-truth, and thus misleading would be treated, in this, as in other contexts, as a misrepresentation." (Such to affect the validity of a warrant issued on the basis of that misrepresentation).

[25] *Commissioner of AFP v Magistrates' Court of Victoria & Ors* [2011] VSC 3.

[26] *Ousley v The Queen* (1997) 192 CLR 69. This proposition is in respect to warrants issued by Superior Courts, whilst the matter of whether that presumption of regularity should extend to inferior courts was raised in *Seven West Media Limited v Commissioner, Australian Federal Police* [2014] FCA 263 it was not determined as the warrants were invalid on other grounds.

[27] See eg. *DPP v Marijancevic & Ors* [2011] VSCA 355 and the subsequent enactment of *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 165.

[28] For example; the issuing of warrants under the *Crimes Act 1958* (Vic) are further regulated by the *Crimes (Search Warrant) Regulations 2014* (Vic).

When turning to the warrant itself if there is simply a clerical error this will not be sufficient. However, if there is a legal error – that is an error in complying with the statutory requirements - a challenge may be mounted.

Where the warrant states the basis for the issue of that warrant; any error more than simply a clerical error is open to review. Where there are legal errors in the warrant and those legal errors are material, going to the heart of the decision to issue the orders, they are reviewable.[29] As such, the warrant may be deemed to be invalid.

The respective Acts set out the required contents and form of the warrant.[30] Where the warrant sets out the basis for the granting of the warrant and that basis is recorded in error, that, itself, can amount to a legal error. In determining whether the error is a legal or clerical error one must again look to the Act.

Certain Acts require the warrant to specify the basis for forming the opinion that the warrant is necessary.[31]

In *Seven West Media Limited v Commissioner Australian Federal Police*[32] the Court held that the warrants[33] were invalid as the warrants contained erroneous statements.

That is not to say that all erroneous statements on a warrant will deem the warrant invalid.

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[29] See eg, *Seven West Media Limited v Commissioner Australian Federal Police* [2014] FCA 263.

[30] See eg; *Proceeds of Crime Act 2002* (Cth) s227, Schedule 10 *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

[31] See eg. *Proceeds of Crime Act 2002* (Cth) s 227.

[32] [2014] FCA 263.

[33] and s246 Orders (Pursuant to *Proceeds of Crime Act 2002* (Cth) s246)

The erroneous statements must be inferred to have been a central, indeed fundamental, matter which the Magistrates considered when exercising their discretion to issue the orders and search warrants.[34]

The important consideration when challenging a search warrant on the basis of a legal error is to ensure one carefully considers the Act the warrant is issued pursuant to. Given that search warrants may be issued pursuant to many different Acts the scope of a challenge on this basis is broad. It is important to consider whether the error is fundamental to the discretion to issue the warrant.

Where to challenge

If there are grounds to challenge a search warrant, it is necessary to ascertain where the warrant may be challenged.

The decision to issue a warrant is an administrative, not a judicial act.[35]

Usually, the review of warrants is considered by a superior court (County or Supreme Court) during the course of a trial; or indeed pre-trial argument. However, on occasions warrants are issued by a superior court (eg. Supreme Court) and the matter is dealt with by an inferior court (eg. County Court).

Ousley v The Queen [36] supports the proposition that even if a warrant has been issued in a superior court the decision to issue the warrant may be reviewed in an inferior court. The practical effect being that if a Supreme

[34] *Seven West Media Limited v Commissioner Australian Federal Police* [2014] FCA 263.
[35] *Love v Attorney General (NSW)* (1990) 169 CLR 307. Although it is noted that Judges are bound to act judicially in making the decision to issue a warrant; that is in a just and fair manner.
[36] (1997) 192 CLR 69.

Court Judge issues a search warrant, a County Court Judge may, during argument, determine the validity of the warrant.[37]

Excluding the Evidence

Even if the search warrant is found to be invalid the Court may nonetheless admit the evidence obtained pursuant to the warrant.

The court has power under s.138 of the *Evidence Act 2008* (Vic) to admit evidence improperly or illegally obtained.

However, material obtained pursuant to the compulsion of a search warrant may only be used for the statutory purpose for which the warrant was issued.[38] Although, if, in the course of executing search warrants, the persons making the search discover information that could be used in legal proceedings, that fact, of itself, could not make the search warrant invalid.[39]

The Court in *DPP v Marijancevic & Ors*[40] was hearing an interlocutory appeal where the Judge at first instance determined that as a result of affidavits that were not sworn or affirmed the warrants issued pursuant thereto were deemed invalid and the evidence obtained pursuant to the search warrants was excluded.

The Court stated at [57]:

> "A search warrant authorises an entrance upon property
> and the seizure of property which would otherwise

[37] See eg; *Ousley v The Queen* (1997) 192 CLR 69. In separate Judgments the Court determined that warrants may be subject to collateral review where the validity on its face is assessed but not where adjudication of the sufficiency of a warrant or whether the issuing authority was satisfied with any statutory requirements is assessed. In his judgment Kirby J highlighted the reluctance of County Court (or District Court) Judges in reviewing same and expressed his sympathy for them.

[38] *Johns v Australian Securities Commission* (1993) 178 CLR 408.

[39] *Grollo v Mccauley* (1995) 56 FCR 533.

[40] [2011] VSCA 355.

> constitute an unlawful trespass. The common law has jealously guarded private property rights and has upheld the right of property owners to exclude other people and the state. Search warrants, which are obtained ex parte, displace those rights."

To proffer to a magistrate material which is not sworn or affirmed in order to obtain a search warrant has a tendency to subvert a fundamental principle of our law.[41]

Although the Court strongly disapproved of the practice of not properly swearing affidavits the Court was still required to consider whether the Judge at first instance had properly exercised his discretion to exclude the evidence pursuant to s.138 of the *Evidence Act 2008* (Vic).

s138 of the *Evidence Act 2008* (Vic) states:

> (1)Evidence that was obtained—
>
> (a) improperly or in contravention of an Australian law; or
>
> (b) in consequence of an impropriety or of a contravention of an Australian law—
>
> is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138(3) goes on to set out the matters the Court is to take into account.[42]

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[41] *DPP v Marijancevic & Ors* [2011] VSCA 355, [58].

At first instance His Honour carefully considered the evidence before him in respect of the practice that had evolved within Victoria Police and those matters His Honour was required to take into account under s.138 of the *Evidence Act 2008* (Vic).

The Court of Appeal could not be satisfied that his Honour's finding in respect to his Honour's exercise of his discretion to exclude the evidence pursuant to s.138 of the *Evidence Act 2008* (Vic) was glaringly improbable or was not reasonably open[43] and the appeal was dismissed. The Court did state that;

> "Although we have concluded that the appeal must be dismissed we would not wish it to be thought that the discretion should necessarily be exercised in the same way were the same issues to arise again for consideration in similar circumstances. We have identified error in his Honour's reasons and expressed our serious reservations as to various findings made by his Honour. It should not be assumed that we would have made like findings or that we would have exercised the discretion in the same

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[42] Which include;

(a) the probative value of the evidence; and
(b) the importance of the evidence in the proceeding; and
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding; and
(d) the gravity of the impropriety or contravention; and
(e) whether the impropriety or contravention was deliberate or reckless; and
(f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
(g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

[43] See; *DPP v Marijancevic & Ors* [2011] VSCA 355, [83] and [89].

> way had a finding of inadvertent or careless conduct been made."[44]

Subsequently, retrospective legislation was enacted in the form of s.165 of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) which states that even if the affidavit in support is not properly sworn or affirmed, or indeed sworn or affirmed at all, the warrant is not invalid.

When attempting to ascertain if evidence is likely to be excluded consideration of the matters in s138(3) of the *Evidence Act 2008* (Vic) is of paramount importance, as even if the search warrant is deemed invalid the evidence may not be excluded.

In *DPP v Antonelli (Ruling No 1)*[45] a search warrant had been issued pursuant to s.465 of the *Crimes Act* 1958 (Vic). There is no expiration period for the execution of a warrant pursuant to this section and the warrant was executed 57 days after it had been issued.

His Honour found that the search warrant was not executed as promptly as was practicable and reasonable in all the circumstances. It was, accordingly, stale and of no legal effect at the time of its execution. It did not authorise the police intrusion. The items seized were improperly or illegally obtained.[46]

On the balance his Honour was satisfied that the prosecution had in all the circumstances proved that the desirability of admitting the disputed evidence clearly outweighed the undesirability of admitting it. Accordingly,

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[44] See; *DPP v Marijancevic & Ors* [2011] VSCA 355, [92].
[45] [2015] VCC 1738.
[46] *DPP v Antonelli (Ruling No 1)* [2015] VCC 1738 at [33].

a ruling was made in favour of admitting the evidence as part of the prosecution case.[47]

Conclusion

Search Warrants may be challenged based on an error at the application stage – there may be an argument that the warrant was issued for an ulterior purpose or the evidence in support of the application was misleading or in bad faith.

The warrant itself may highlight a ground for challenge – the warrant may obtain a legal error; it may not demonstrate jurisdiction or may not give the basis for the warrant in compliance with the Act authorising its issue.

Although the Courts have long considered the issuing of search warrants ought be governed by the strict compliance with the law the reality is that search warrants are not often deemed invalid and when they are, the Court allows the evidence to be admitted.

[47] *DPP v Antonelli (Ruling No 1)* [2015] VCC 1738 at [44].

Chapter 4

Advising Clients Prior to Police Interview

Written by Rose Cameron

A person who is suspected of a criminal offence and has been arrested by the police for the purpose of a record of interview is in a vulnerable position. The right to legal advice for such a person recognises that vulnerability and the importance of proper legal advice. The right to legal advice for a person prior to interview aims to ensure that such a person's interests are adequately protected.

Section 464A of the *Crimes Act* gives police the power to question a person they have arrested about the offence for which they have arrested the person. However, section 464A and other provisions of the *Crimes Act,* also impose obligations on the police.

Two of the most important obligations on the police are:

- that the police must inform the person in custody that he or she has a right to communicate with a legal practitioner (s.464C(1)(b)); and.
- that the police must caution the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence (s.464A(3)).

Right to legal advice before an interview

<u>You have a right to advise your client prior to interview.</u> A person taken into custody for an offence must be afforded a reasonable opportunity to communicate with a legal practitioner: section 464C of the *Crimes Act.*

If speaking to a client on the phone, you should confirm with them that police are out of the room and cannot hear your client's answers. If this is not the case, you can ask to speak to a police officer and request that your client be able to speak to you in private. If a legal practitioner attends a police station to provide advice in person, the police must allow that person to speak to their legal practitioner in circumstances in which communications will not be overheard: section 464C of the *Crimes Act.*

<u>You can ask to interrupt an interview that has commenced if you think your client wants legal advice.</u> Police must defer an interview for a reasonable time to enable a person to speak with a legal practitioner. If you find that an interview has commenced before you are able to speak to your client (for example, if you are returning a phone call from police in the middle of the night), it can be appropriate to ask a Sergeant to interrupt an interview to check whether your client still wants to speak to you.

If police refuse to interrupt an interview once it has started and you think that your client has not received pre-interview advice, it can be worthwhile writing down details of your attempt to interrupt an interview. If there is an argument to try to exclude admissions made during an interview, these might be helpful to show the conscious nature of the police's breach of their obligation to allow a person to receive pre-interview advice.

The police do not legally have to allow a legal practitioner to be present

during an interview. However, the Law Institute of Victoria has published guidelines, in cooperation with Victoria Police, which state at paragraph [18] that "If a legal practitioner requests to be present at the interview and/or the suspect requests his or her presence, the investigating member should allow the legal practitioner to be present"[48].

First contact with investigating police

Take note of the identity of investigating police (name and Victoria police number). Knowing which police officers are present can be important in the proceedings, for example:

- If there is an allegation of impropriety by the police;
- If the client says that they were not properly looked after (such as not receiving their medication).

Ask the police for as much information as possible about the offending and the state of the evidence, including:

- What are the main charges;
- What are the main pieces of evidence – do they have CCTV, witness statements etc;
- Are they proposing to remand or bail or summons your client;
- Are there co-accused.

Knowing this information will help you to formulate appropriate advice for your client.

The police are legally obliged to provide the accused with "the central

[48] LIV Guidelines for Police and Legal Practitioners at Police Stations (3 October 2001) available from the Ethics Guidelines section of the LIV website.

factual feature or features, expressed in general and abbreviated terms, of the offence for which the person is in custody": *R v Lancaster* (1998) 4 VR 550, recently affirmed in by Osborn J in *R v Willis (Ruling No 1)* [2015] VSC 261. However, the same case authorities confirmed that police investigators are not obliged to provide "precise details of the offence, or nominate a particular offence": see *Lancaster* at 557.

Right to silence

<u>Your client has the right to remain silent at interview.</u> It is always good to remind a client of their right to remain silent, even if your client has been at a police station before. Explain that by making 'no comment', they are not assisting the police to prove that they have committed an offence. Tell your client that it is generally better for them to tell *you*, their lawyer, their version of events, rather than telling the police on tape.

This right to remain silent at interview was recognised in *Azzopardi v The Queen* [2001] HCA 25 as one of a number of "immunities" which enable a person accused of a crime to remain silent and not incriminate themselves along, for example, with the right of an accused not to give evidence at his or her trial. Section 42 of the *Jury Directions Act 2015* now guides parties and the trial judge in this regard as follows:

- The trial judge, the prosecution and defence counsel/self-represented accused must not say, or suggest in any way, to the jury that, because an accused did not give evidence, the jury may-
  - conclude that the accused is guilty from that fact; or
  - use the failure of the accused to provide an explanation of facts, which must be within the knowledge of the accused,

to more safely draw an adverse inference based on those facts which, if drawn, would prove the guilt of the accused; or

- draw an inference that the accused did not give evidence because that would not have assisted his or her case.

Further, in a criminal proceeding, no unfavourable inference can be drawn from a person's failure or refusal to answer a question put to them by an investigating official: section 89 of the *Evidence Act 2008.*

Explaining the caution

Cautions will be foreign to anyone who has not been in custody before and also to some people who have been in custody before (such as children or people with a cognitive impairment).

Ask the person you are advising to explain the caution back to you in their own words and ensure they understand the two constituent parts of the caution, eg:

(i) that he or she does not have to say or do anything; and

(ii) that anything they say or do may be used in evidence against them in court.

If you think that your client is unable to understand the caution or needs it to be explained again to them, it is advisable to tell police this and to take a detailed filenote of your observations and which police officer you so advised. The information could bolster an application to exclude any admissions if the matter ultimately reaches court.

Tell your client that they do not have to prove their innocence and that it is the police and the prosecution who have the onus to prove the allegations they make beyond reasonable doubt.

Tell your client that they must give the police their name and address. This is because the police suspect them of having committed an offence: section 456AA of the *Crimes Act.*

'No comment' interviews

The safest option is often to advise your client to answer 'no comment' to every question. At pre-interview stage, you do not know what evidence the police already have or may collect. If a client makes a 'no comment' interview:

- they are not making any admissions that the prosecution might use to prove that they have committed an offence;
- they are not precluding the raising of any defence in the future;
- they are not restricting what the prosecution will need to prove if the matter is contested;
- they can't lie or misstate something, leaving them open to allegations of dishonesty by the prosecution.

If you are advising a client to make a 'no comment' interview, tell them to answer *every* question with 'no comment'. There can be no adverse inference drawn from a person choosing to answer some questions and answering 'no comment' to others: *R v McNamara* [1987] VR 855; *Evidence Act 2008* s89(1)(a). However, a court might decide that the whole

of a partially 'no comment' interview is admissible such that it can be considered by a magistrate or jury: *Brain v The Queen* [2010] VSCA 172.

Your client should be told that anything they may have told police prior to interview is likely to be inadmissible because of the recording requirements in section 464H of the *Crimes Act.* Many clients will make admissions prior to receiving legal advice, for example in the police car on the way to the station or at the scene of an alleged crime. This way they can make a proper choice about making a no comment interview without feeling that it is too late to do so.

Come up with a 'plan' for your client's interview. Your client is under a lot of pressure at the police station and will be pressured by police to answer questions. It can help a client if you:

- Ask them to tell you before they go into the interview whether they are going to say 'no comment' to every question or whether they are going to answer police questions;
- Warn them that police will push them for answers;
- Give your client examples of apparently innocuous questions that the police might ask ("did we pick you up at your girlfriend's house? Did you go to work today?") and remind them that if they choose to make no comment, they should answer 'no comment' to these questions too;
- Give them examples of what police might say to pressure them, such as repeating the same question many times, or telling your client that it is in their best interests to answer a question;
- Reassure them that whatever police say on or off tape, that no adverse inference can be drawn from your client answering 'no comment'.

It is also good practice to tell a client that they might be charged with offences even if they make a ‘no comment’ record of interview. However, you can reassure them that making ‘no comment’ will still help them mount a stronger defence as the prosecution progresses.

Tell your client that, as well as refusing to answer questions, they have a right to:

- Refuse to sign police notes;
- Refuse to sign CCTV stills, photos or other documents;
- Refuse to participate in a lineup.

When ‘no comment’ might be the wrong advice

There may be rare cases where it is best for your client to speak to police in an interview. These include:

- In a case involving rape (but not involving a child or cognitively impaired complainant), if your client wishes to argue that the complainant consented to sex;
- If your client wishes to argue that they acted in self-defence;
- If the matter involves a child who might be eligible for ROPES or Diversion, their early cooperation with police might increase their chances of being recommended for a diversionary disposition. However, such dispositions remain obtainable with a ‘no comment’ interview as well;
- Where you can be certain that the evidence is overwhelming, early cooperation with police and admissions will mitigate sentence: see recently *Power* [2016] VCC 226.

However, unless you know a lot about the particular client or case it is still always safer to advise your client to make a 'no comment' interview. It is very hard to predict how your client will come across on tape. It is even harder to predict whether the matter will be contested, in which case an interview with denials might be preferable to your client having to give evidence and be cross-examined by the prosecution.

Finally, it must also be borne in mind when advising an accused person in custody that an interview in which they give a complete account of their version of events may avoid the need for cross-examination at any future trial. As with the factors outlined above, it will often be too difficult to predict such a need to avoid cross-examination – or even whether the matter might even reach trial – which again points towards the safest approach being to advise 'no comment'.

Getting instructions and conflicts

Be aware that if your client tells you too much at pre-interview stage, you might become conflicted. For example, you do not want your client to admit to offending during pre-interview advice, otherwise you may not be able to properly defend them as the proceedings continue. This is another reason why it might be safest to advise them to do a 'no comment' interview. You can then probe for their version of events once you know what evidence the prosecution has against them.

Police duress

Tell your client that police are not allowed to use inducements to

procure admissions during interview. There may be situations where a client alleges that police used inducements such as a promise of bail to get them to speak during an interview. It is good practice to write down such allegations contemporaneously with the Victoria police number of any officers you speak to at the station.

A recent example of an unsuccessful attempt to have an interview excluded on the basis of inducement is *The State of WA v Partington* [2014] WASC 106.

Offences made out by silence

Some offences are made out by a person's silence. In such cases, you must warn your client that if they choose not to answer a police officer's question, they may be charged with an offence. Examples include:

- An owner of a motor vehicle fails to give information within their power which may lead to the identification of the driver of a motor vehicle: sections 60(1) and 60A(1) of the *Road Safety Act 1986;*
- Name and address if stopped while driving: section 59 of the *Road Safety Act 1986.*

Vulnerable clients – Children & clients with cognitive impairment

If your client is entitled to an independent third person (ITP), insist that the police obtain one prior to interview. Children and clients with cognitive impairment are entitled to an Independent Third Person. You can request notes taken prior and during an interview by an ITP from the Youth

Referral and Independent Third Persons Program (YRIPP). The contact email is: admin@yripp.com.au. These may assist in demonstrating that a child did not properly understand their right to remain silent or that police acted improperly towards a child, for example.

The ITP has a responsibility to explain properly the nature of the caution and the right of a person to exercise their right to silence. They should be actively involved in the protection of the rights of the person who they are assisting and support that person in a non-judgmental and independent way: *DPP v Toomalatai* [2006] VSC 256 at [78].

Vulnerable clients – Aboriginal & Torres Strait Islander persons

Victoria police must notify the Victorian Aboriginal Legal Service (VALS) within one hour of taking an Aboriginal or Torres Strait Islander person into custody: Victoria Police Manual section 1.9. The notifications are sent via computer to VALS, which employs Client Service Officers 24 hours a day to contact police stations which have issued the notification, ensure that legal advice through an on-call solicitor is available and provide welfare checks. Community Justice Panel members may also be available locally to check on a person's welfare in custody, in-person. VALS has a 24-hour number: 1300 064 865.

In New South Wales, failure to properly notify the Aboriginal Legal Service has resulted in the exclusion of admissions made during interview: *Campbell & 4 Ors v DPP (NSW)* [2008] NSWSC 1284.

Vulnerable clients – Individuals who may need an interpreter

<u>If you think that your client needs an interpreter, tell the police officer investigating your client's case.</u> Take note of your concerns and to whom they were relayed such that, if an interpreter is not then present during questioning, an application to exclude any admissions can be made using these details.

Police must provide an interpreter when required.

Ancillary matters at interview – fingerprints

<u>You should warn your clients over 15 years of age that police will ask them for their fingerprints at the end of the interview.</u> Police can use reasonable force to obtain fingerprints if your client refuses, so it can be appropriate to advise a client to comply with the request. You can advise your client that the fingerprints will be destroyed as long as they are not charged with an offence within 6 months or are found not guilty of that offence: section 464K of the *Crimes Act.*

In relation to children under 15, the procedure in section 464L of the *Crimes Act* must be followed by police (eg, consent of the child and parents, or an order of the Children's Court).

Forensic procedures

Police have power to *request* a suspect to undergo a *forensic procedure* where there are reasonable grounds to believe that the result of the procedure will tend to confirm or disprove the suspect's involvement in an

indictable offence.

You should refuse to undergo any forensic procedure unless the police have a court order compelling you to do so.

Under both the Victorian and the Commonwealth *Crimes Act*, there are now specific legislative powers for taking forensic *material* from suspects.

Other considerations – welfare check

<u>You can use time for pre-interview advice to conduct a welfare check.</u> Things to check on include:

- Whether they want you to contact a family member or friend;
- Whether they are physically injured;
- Whether they require any medication in custody;
- Whether they are presently under the effects of alcohol or drugs.

Relay any medical needs to police after you have finished speaking with your client and note down the name and Victoria police number of the officer that you relayed that information to.

<u>If your client is under the effects of alcohol or drugs and you think they are unfit for interview, tell the police and ask that the interview be postponed. Ask the police to contact a Forensic Medical Officer immediately if you think your client is suffering from a psychiatric or psychological illness.</u>

Other considerations – Preparation for bail application

<u>You can use time for pre-interview advice to start preparing for a bail application.</u> If police are proposing to remand your client on the charges for which he or she is being interviewed, the following important information can be obtained to facilitate the preparation of a bail application without delay:

- Name and phone numbers of relatives or friends with whom your client can live;
- Name and phone numbers of support services with whom your client is engaged: doctors, psychologists, educational organisations;
- Whether they have engaged in the past with CISP, CREDIT or Corrections and if so which office;
- Medical problems and medication required by your client, physical injury or anything else that makes them vulnerable in custody.

Other considerations – Where client wishes to make a statement or police complaint

If you clients wants to seek that another person involved in the investigation be charged, it may be best to advise them to say on tape that they wish to make a statement against that person. Even if a client makes a no comment interview, they should be asked whether they wish to make a further statement in relation to the matter and they can say yes to this and then seek to make a written statement of the matter.

If your client wishes to make a police complaint, it might assist to have this recorded on tape. You can tell them to raise it at the end of the interview.

To conclude, the quality of pre-interview legal advice can have an immeasurable impact on your client's future prospects of properly defending their case. Pre-interview advice prevents investigating officials from taking advantage of the inherent power imbalance which exists when a person is taken into custody for questioning. By mandating the provision of pre-interview advice when requested by an accused person, the law in Victoria continues to recognise the importance of pre-interview advice to counter-balance the vulnerability of suspects in custody.

Part 3:

Bail

Chapter 5

Bail in 'Show Cause' and 'Exceptional Circumstances' under the *Bail Act 1977* and *Commonwealth Crimes Act 1914 – Written by Daniel Gurvich QC*

Chapter 6

Contested Bail Applications – *Written by Chris Farrington*

Chapter 7

Preparing a Supreme Court Bail Application – *Written by Sam Tovey*

Chapter 5

Bail in 'Show Cause' and 'Exceptional Circumstances' under the *Bail Act 1977* and *Commonwealth Crimes Act 1914*

Written by Daniel Gurvich QC

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Exceptional circumstances

For some alleged offences, bail shall be refused unless the court is satisfied that exceptional circumstances exist which justify the grant of bail. Such offences include murder and commercial drug trafficking (ss 4(2)(a) to (aa) of the *Bail Act 1977*).

The concept of exceptional circumstances is imprecise and difficult to define. The onus is on the accused to satisfy the court that exceptional circumstances exist. Exceptional circumstances may be constituted by one factor or a combination of factors.

Ultimately, what factor or factors amount to exceptional circumstances will involve a balancing or synthesis of all the factors, which lead the judge to the impression that the case falls into the exceptional category: *Beljajev v DPP* (unreported, VSCA, 8/8/91 at 34–35). Whilst the test for exceptional circumstances is a stringent one, “the hurdle should not be set so high that it is impossible for an accused person presently in custody to ever achieve or

virtually ever achieve bail": Re Application for bail by Whiteside [1999] VSC 413 at [10] per Warren J (as her Honour then was).

There are a number of specific considerations relevant to the question of exceptional circumstances. These factors may constitute exceptional circumstances on their own, but more commonly, as one of a number of contributing factors.

Combination of factors

An analysis of the authorities establishes the following combination of factors, none of which may be sufficient by itself, can constitute exceptional circumstances:

- a prosecution case that is not strong;
- absence of relevant prior convictions;
- potential delay before trial;
- suffering of emotional trauma in prison;
- the existence of family support;
- strong community ties;
- stable accommodation;
- low risk of flight or re-offending;
- a good employment record;
- employment opportunities upon release;
- absence of opposition to bail;
- the accused's family situation and financial needs;
- the likelihood of the accused not interfering with witnesses;
- the need for the accused to prepare his defence;
- the difficulty of getting medical treatment in custody;
- harsh conditions of confinement; and
- the effect on the accused's business.

Establishment of exceptional circumstances

The grant of bail does not automatically follow from the demonstration of exceptional circumstances. Bail will be refused if, despite the existence of exceptional circumstances, there is an unacceptable risk of failing to answer bail, committing an offence while on bail, interfering with witnesses or obstructing the course of justice: *DPP (Cth) v Barbaro* (2009) 20 VR 717 at [6]; *Paul Dale v DPP* [2009] VSCA 212 at [27].

Show Cause

Introduction

The scheme of the *Bail Act 1977* creates a presumption in favour of bail at the one extreme and the need to demonstrate exceptional circumstances at the other. The other part of the bail scheme is found in s 4(4), which isolates a number of charges (including stalking, aggravated burglary and armed robbery) where an accused is required to show cause why his or her detention in custody is not justified. Whether unacceptable risk requires a separate determination by the court in show cause situations as occurs in cases of exceptional circumstances and cases where there is a prima facie entitlement to bail is the subject of differing views in the Supreme Court and is yet to be determined in the Court of Appeal. In *Robinson v The Queen* [2015] VSCA 161, it was said that the debate over the interpretation of s 4(4) will rarely be of practical significance. On either approach, the judge must consider whether a grant of bail would create unacceptable risk of one or more kinds.

Defining "Show Cause"

As in the case of exceptional circumstances, the concept of showing cause cannot be clearly defined. This is because it can encompass one factor or a combination of factors and therefore involves a degree of subjective judgment and a balancing of a number of factors. Each case must be considered on the basis of its particular facts.

The requirement of showing cause is limited to the specific offences mentioned in s 4(4) and it does appear to require something less than the demonstration of exceptional circumstances. In such cases, the presumption in favour of bail has been removed, and the onus is on the accused to establish that, despite the nature of the charge, bail should nevertheless be granted.

It is difficult to find a common characteristic of these offences that gives rise to the requirement to establish a show cause situation. The stalking and breach of intervention order offences may have been included because of the risks of repetition of offending, although it may be perceived that this is adequately addressed in a consideration of unacceptable risk. On the other hand, it is unclear why drug and other offences are specifically included within this category.

Combination of factors

More often than not a number of factors in combination will show cause why the detention of the accused is not justified.

Factors relevant to demonstrating exceptional circumstances (listed above) are generally relevant to showing cause why detention in custody is not justified.

Accordingly, the accused's background, prior convictions, the strength of the prosecution case and bail history are all relevant factors.

Bail in Federal Offences

Bail provisions in the Crimes Act 1914 (Cth)

When a person is charged with a federal offence, s 15AB of the Crimes Act 1914 (Cth) specifies matters that must be (and must not be) considered when determining whether to grant bail or in determining conditions of bail.

A bail authority must consider the potential impact of a grant of bail on the victim of the alleged offence, and any potential witness: s 15AB(1)(a). Whether a potential witness or a victim is living or located in a remote community must also be taken into account by the bail authority when considering the potential impact of granting bail: s 15AB(2). However, and subject to some offences listed at s 15AB(3A) which are excepted, s 15AB(1)(b) provides a bail authority must not take into consideration any form of customary law or practice as a reason for excusing or lessening the seriousness of the alleged offence or aggravating the seriousness of the alleged offence.

These provisions apply generally to each State and Territory by operation of s 68 of the *Judiciary Act 1903* (Cth) and s 15AB(4) of the *Crimes Act 1914*. Further, s 15AB does not, except as provided, affect the operation of the *Bail Act 1977* (Vic).

Certain Commonwealth offences to require "exceptional circumstances"

Section 15AA of the *Crimes Act 1914* (Cth) provides that certain federal offences require exceptional circumstances to be demonstrated before bail can be granted. Offences in this category include:

- Terrorism offences: s 15AA(2)(a).
- Offences involving the death of a person: s 15AA(2)(b) & (2)(c).

Bail decisions made in respect of persons charged with offences specified in s 15AA include *DPP (Cth) v Thomas* [2005] VSC 85; *Haddara v DPP* (2006) 159 A Crim R 489 and *Hammoud v DPP* [2006] VSC 516.

Chapter 6

Contested Bail Applications

Written by Christopher Farrington

Introduction

A contested bail application will take place when an accused person applies for bail, and the prosecution opposes bail being granted. The prosecution may oppose bail being granted in circumstances where the accused is required to demonstrate exceptional circumstances, show cause, or even where there is a presumption in favor of granting bail.

The prosecution opposition to bail, regardless of the threshold that must be met, will inevitably include an allegation that an accused person is an unacceptable risk. Section 4(d) of the *Bail Act 1977* provides that the court shall refuse bail if the accused is an unacceptable risk of:

a. Failing to answer his or her bail;
b. Committing an offence whilst on bail;
c. Endangering the safety or welfare of members of the public; or
d. Interfering with witnesses or otherwise obstructing the course of justice.

The stages of a Contested Bail Application

The court will determine whether or not to grant bail following the contested bail application. The contested bail hearing will usually consist of three distinct stages.

1. The first stage is the prosecution case, during which the prosecution will call evidence, usually from the informant. The evidence led by the prosecution will usually inform the court of the charges alleged against the accused, a summary of the allegations in relation to each charge, and also the reason for any opposition to bail being granted.
2. The second stage is the defence case, during which the accused is permitted to call evidence in support of their application for bail; and
3. The third stage will consist of submissions made by the prosecution and the accused in support of their respective positions.

The Prosecution Case

As indicated above, the prosecution case will usually consist of evidence led from the informant during which the court will be informed of the charges alleged against the accused, a summary of the allegations in relation to each charge, and also the reason for any opposition to bail being granted.

Although this evidence will be led through the informant, it has become common practice for a copy of the Remand Summary to be tendered, and then for the informant to read the Remand Summary into evidence. If there is good reason for doing so, you may wish to object to the Court receiving a copy of the summary. If the accused has a prior criminal history, that will be tendered through the informant.

In addition to the informant providing the court with this summary, the prosecutor appearing will also ask the informant to detail their concerns

in relation to the accused. Typical concerns include a risk of failing to appear, a risk of further offending, and a risk of interfering with witnesses.

Following this evidence the counsel for the accused will be called upon to cross-examine the informant.

One of the most important things to remember when appearing in a contested application for bail, or any contested hearing for that matter, is that you never ask a question of a witness, unless you intend on relying upon that answer in support of a submission that you will later make. This means that you extract the information that you require from the witness through questions, and then rely on the answer in submissions. Do not attempt to make your arguments through the witness.

An example of attempting to make an argument through the witness can be found in the often-asked question "would the availability of CISP (or some other treatment / condition of bail / factual circumstance) alleviate your concerns in relation to the accused being granted bail".

Such a question will rarely be of any assistance in the application for bail because;

a. The question of whether or not the accused is an acceptable risk is for the court to determine, and not for the informant; and
b. Perhaps more importantly, such a question gives the informant the perfect opportunity to further criticise your client and allege risk. If faced with such a question the experienced or wily informant will seize the opportunity to not only disagree with

> the suggestion that risk is alleviated, but may go so far as to suggest that no support and/or condition would go so far as to make the risk acceptable.

This means, that before you ask any questions of the informant, you need to ask yourself what it is that you are hoping to achieve through the cross-examination.

For example, if you intend to attack the strength of the Prosecution Case and then rely upon that as a basis for showing cause / exceptional circumstances then do so through clear, concise questions. Keep in mind that the argument will come when you make your submissions, not when you ask the questions. Long searching questions, crafted in an attempt to discover a weakness will not be tolerated, because, for the purpose of the application, the Court will take the Prosecution case at its highest.

So remember, ask only questions that will improve your client's chance of being granted bail.

Another example can be found in the circumstance where the informant alleges that the accused is a risk of flight or further offending. Consider what the basis is for the informant to make such an allegation.

If there is no evidentry basis for making such an allegation, again craft you questions to highlight that fact, and then argue the point in your submissions.

In *Woods v DPP* [2014] VSC 1 Bell J stated at [25];

It is established that the bail authority must carefully consider the facts and circumstances of the individual case and determine whether the continued detention of the accused is justified. As was held in Clooth v Belgium, reliance by the prosecution on 'general and abstract' considerations and a 'stereotyped formula', without more, will be insufficient. Particular allegations, such that the accused would disturb public order, must be based on facts reasonably capable of showing that kind of threat. Moreover, generalised concerns that an accused might abscond are not regarded as sufficient justification for refusing bail.

So to reiterate the point, ask only questions that will improve your client's chance of being granted bail. It is important to recognize that there will be contested bail applications where there is nothing to be gained through the cross examination of the informant. If that is the case identify the issue early, raise it with the prosecutor, and it may be that the application can proceed without the informant giving evidence, with the prosecution relying on the remand summary only.

The Defence Case

Once evidence of the informant is complete the Prosecution will not normally call any further evidence. That being the case, counsel for the defence will be called upon, at which stage the defence may call their own witnesses.

An accused person is under no obligation to call any evidence on an application for bail; however where you are endeavoring to demonstrate exceptional circumstances, show cause, or demonstrate that your client is not an unacceptable risk you will likely need to call some evidence in

support of that.

One of the issues that you will often be confronted with on a bail application is limited time to prepare. This will be in circumstances where an accused has been remanded overnight and instructs you to apply for bail immediately upon being brought before the court.

Clearly the alternative in such a situation is to delay any application for bail until the time you are adequately prepared to proceed with the application. This is a forensic decision that will need to be made and a decision that should be made in contemplation of the fact that, if you are unsuccessful on the application, you will be required to demonstrate that new facts or circumstances have arisen since the previous application (see section 18AA of the *Bail Act 1977*).

The decision of whether or not to delay an application for bail can be a difficult decision to make and, as with any forensic decision made, there can be both good and bad consequences from the decision.

That being the case you should always ensure that you are adequately prepared for the appearance and it is important to ensure that you are fully aware of the evidence that any witness you will call will give. Furthermore you should ensure that when you determine that it is appropriate to proceed with the application for bail, you are giving your client the best possible opportunity at securing their liberty.

Generally speaking you would call evidence on a contested application for bail to either demonstrate exceptional circumstances / show cause, or to establish that there are protective factors in the community, for example

drug and alcohol rehabilitation, which would ameliorate risk.

That being the case, call only the evidence that will improve your client's prospect of being granted bail.

Finally in relation to evidence called in support of the application for bail, you may also choose to call your client.

Section 8(b) of the *Bail Act 1977* provides that the accused is not to be examined or cross-examined in relation to the offences with which they have been charged, which affords the accused some protection. This however does not mean that the accused will give good evidence.

Before you would call your client however, you would need to be certain that it would be beneficial to the application - even the most favorable assessment of an accused would leave you reluctant to go down this path. There would be very rare cases where the calling of the accused would be beneficial to the application. If you form the view that this is the case, it would be prudent to obtain a second opinion before doing so.

Submissions

After all of the evidence has been called you will be permitted to make submissions in support of your application. You should ensure that you are given the opportunity to make submissions and, unless the Court has indicated that your client will be granted bail, you should insist on doing so.

You will either be submitting that your client has demonstrated that there are exceptional circumstances which justify the grant of bail, that

your client has shown cause, or that the prosecution have failed to establish that your client is an unacceptable risk or the risk can be ameliorated though the imposition of conditions.

The most important thing to keep in mind when making submissions in support of bail, is to direct your submissions towards the real issues in the application.

If the real issue on the application is a risk that the accused will fail to appear on bail, direct your submissions to that issue. Direct the court to those matters, which are in existence, which ameliorate that risk. For instance, is there a surety available? Has that surety given evidence? Do not waste court time making submissions on matters, which are not of concern to the court.

In my experience it has often been helpful to list the matters which you will rely upon in your application for bail and then develop upon those submissions.

Matters which you may seek to address the court on include;

- The age of the accused
- Delay in the matter being heard
- The nature of the charges
- The seriousness of charges
- The lack of, or limited prior criminal history
- The lack of history of failing to appear
- The availability of drug and alcohol/mental health support
- Other conditions / supports available should the accused be granted bail

- The strength of the prosecution case
  Factors tying the accused to the jurisdiction such as family, work, children
- Any other protective facts that may be in existence

Finally, when making submissions know you client and your material. For example, an extensive criminal history may on first blush militate against the granting of bail, but you may be able to use such a criminal history to your advantage if, for example, the history demonstrates that accused has never before offended whilst on bail and has never before failed to appear.

Conclusion

There are a number of things which will impact upon your prospects of success in a contested application for bail. These include but are not limited to;

- the seriousness of the offence
- the strength of the prosecution case
- the material which is available to you in support of the application.

One of the most significant things to remember though is that the more material available in support of bail, the better the prospect of bail. Short of taking the matter to the Supreme Court, and in the absence of new facts and circumstances, you client will get only one chance at an application for bail. We must always weigh the need to avoid the confinement of our clients unless absolutely necessary, against proceeding with an application that could be more properly prepared.

So whether you are appearing on an application yourself, or preparing an application to brief counsel, take your time in preparing the matter, avoid being rushed. And if you are appearing on behalf of your client remember; never ask a witness a question unless it will help your application.

Chapter 7

Preparing a Supreme Court Bail Application

Written by Sam Tovey

Introduction

While the underlying legal principles remain the same, applications for bail in the Supreme Court are different beasts to those undertaken in the lower courts.

This chapter aims to assist the reader with the following:

i. Identifying appropriate cases to make a Supreme Court bail application;
ii. Listing an application in the Supreme Court; and
iii. The proper preparation of the appropriate documents, most importantly - the affidavit in support.

Perhaps *the* key difference is the amount of preparation required. While in the Magistrates' Court (or County Court) it's not unusual for a bail application to be run on the day of your client's remand, Supreme Court filing requirements mean such applications will invariably require a great more pre-hearing preparation.

Although a Supreme Court bail application is a significant undertaking, it should not be viewed as some kind of mythic impossibility. The familiar bail principles apply, it is simply the way in which they are put before the Court that changes.

As such, bail in the Supreme Court comes with the opportunity to carefully plan and prepare your application. It also comes with the expectation by the Court that parties are completely versed in the relevant materials, the relevant legal principles and are able to competently address them during the course of evidence and argument. As such, it will usually be advisable to brief counsel.

When can a Supreme Court Bail application be undertaken?

In addition to legislative power conferred by the *Bail Act 1977 ('the Act')* (see s4, 5, 8 and 18AA(2)) the Supreme Court has inherent power to grant bail to any accused person awaiting determination of their case.

While that inherent jurisdiction allows the Court to hear an application at first instance, the majority of Supreme Court applications are launched after bail is refused in a lower court. That is of course aside from murder or treason cases, in which only the Supreme Court can grant bail (see s13 of the *Act)*.

When asking the question "should I take my application to the Supreme Court?", consider the following:

i. What are the strongest arguments in favour of granting bail?
ii. What are the arguments against granting bail?
iii. Did the Magistrate or Judge misapprehend the appropriate test or give weight to irrelevant considerations in refusing bail?
iv. Is there further material now available (further prosecution disclosure, a surety, available psychological or drug treatment etc) not available to the original application which reflects positively on your client's prospects for bail?

v. Are there other reasons why your application is better off being heard in the Supreme Court such as a high level of seriousness or a case that calls for a stricter intellectual approach?

Taking some of these factors into account, lawyers should be satisfied that (i) the prospects of success are reasonable; and (ii) your client is not better served re-applying in the lower Court under 'new facts and circumstances'.

Procedure for listing Supreme Court bail

Once the decision has been made to launch the application, look to Supreme Court Practice Note No 8 of 2016, which provides guidance on the procedure as to bail applications and sets out the documents which need to be filed in order to initiate the application.

You will need to file:

i. Notice of Intention;
ii. Affidavit in support (see below);
iii. Any other material you seek to rely upon as part of your application.

Once the documents have been completed, personally file them (or via email to criminaldivision@supremecourt.vic.gov.au) at the Supreme Court Registry so the application can be sealed and returned to you for you to serve a copy on the Office of Public Prosecutions (OPP).

The OPP is allowed five working days to file with the Supreme Court material in response to the application.

When filing, be sure to alert the Court to any particular physical or mental health condition of your client or other kind of vulnerability which makes the listing more urgent.

If the prosecution indicate consent, the Practice Note allows for bail to be granted without appearance being required, as long as the judge is satisfied it is appropriate to do so based on the filed material.

When a date has been set for the hearing, the Criminal Division Legal Officer will contact the parties to notify them of the listing time. The Registry will make arrangements for your client's attendance, either in person or via videolink.

Preparing the affidavit in support

Unlike in the lower courts, the Judge hearing your application will have all of the relevant material well in advance of the hearing. This provides a tremendous opportunity to put your case before the Court at its highest from an early stage. Careful preparation of the affidavit in support is crucial.

Your affidavit should include the following material, at a minimum:

i. That the accused is applying for bail;
ii. The charges the accused faces;
iii. The procedural history of the matter including the next hearing date;
iv. Any details about outstanding disclosure, such as forensic testing, that may cause delay;
v. A brief background of your client;
vi. Details of any proposed address and any family support in the community;

vii. Details of any available employment;
viii. Details of any relevant treatment / support that will be in place if bail is granted (eg. residential rehabilitation, counselling, testing etc);
ix. If the informant gave evidence in the lower court – it may be useful to provide an accurate summary of the relevant parts of that cross-examination;
x. A skeleton outline of your argument in support of bail;
xi. All material you intend to rely upon during the application (See below); and
xii. The suggested conditions the Court should impose if bail is granted.

The preparation of your affidavit should be focused on providing the court with an evidentiary basis for your argument as to why bail should be granted. If in the lower court you called evidence or tendered a document, that material should be advanced through the affidavit in support.

For instance, if you called a witness who can offer stable accommodation or similar then considering preparing a witness statement outlining their evidence, have the statement signed and annex it to the affidavit.

When considering what material may need to be annexed to the affidavit in support, any document that might ordinarily be tendered at a bail application should be included. Consider the following:

i. Any professional reports (medical, psychological or other) relevant to the question of bail;
ii. Material that supports the availability of stable accommodation or employment on release;

iii. Material outlining the location and practitioners at rehabilitative services available to an accused should bail be granted; and
iv. Documents confirming the availability of a surety;

Once your affidavit and supporting material are filed, the Court will set a hearing date.
Prior to the hearing, the prosecution will have to serve an affidavit in response. Again, this will set out in detail the prosecution opposition to bail and the basis for it.

Of equal importance to your affidavit being well prepared, so will be anticipating the arguments against bail, and including material that counter (insofar as possible) those arguments.

The prosecution affidavit will usually contain a copy of the remand summary, your client's prior history and in many instances, a further 'statement' from the informant setting out in detail police concerns about bail.

Again, the defence has a meaningful opportunity to see the precise form the opposition to bail will take and carefully prepare material and arguments in response.

For instance, if in the lower Court the prosecution relied heavily on a lack of stable accommodation, ensure that there is material in your affidavit addressing this point. If the concern is the strength of the case, use the time to obtain as much disclosure as possible and attempt to identify a viable defence.

It is highly advisable to make contact with the prosecution and ask to be advised whether they seek to cross-examine any witness from whom you have filed material. If they do not seek a witness for cross-examination, then at the hearing the court can be informed that their evidence is not contested.

The hearing

In the Supreme Court, applications for bail are made to the Trial Division. These applications may be heard either by a Judge of the Trial Division (Criminal) or a Judge in the Practice Court.

How the application unfolds can change wildly from judge to judge, so be ready for this.

Some judges will run the application as they would be run in the lower court (prosecution case, defence case, submissions, ruling); while others will come on the bench and indicate they are only interested in one or two discreet issues and asked to hear evidence / argument with respect to those.

It is not unusual for a Supreme Court application to proceed without the informant being required to give evidence.

As it is your application, you will have the running. If you have good reason to cross-examine the informant or some other witness (obvious weakness in the crown case, delay in serving of material) which cannot be put before the Judge without calling the witness, then do so.

Similarly, if you have available witnesses who are compelling and the impact of whose evidence would not be felt without calling them to give *viva voce* evidence, then do so.

Any witness called must have a clear purpose. There will be little utility in calling someone simply because they present as a ‘good witness’. It is imperative that their evidence progresses your case in a meaningful way.

Conclusion

In Supreme Court bail applications, preparation is the key. The golden opportunity to place your argument and supporting material before the Court well in advance of the hearing cannot be underestimated.

In addition to your affidavit, it is highly recommended to also provide the Court with an outline of submissions. This can be filed with your affidavit material or alone prior to the hearing. Never give up a chance to get your argument under the Judge’s nose.

In essence, your aim is to have your best arguments laid out before the Judge, supported by evidence, in advance of the hearing. Then you must be ready and able to address or expand upon any one of those matters if and when called upon.

Know the material, know how to capitalise on your strengths and have a clear plan as to precisely how you will deal with your weaknesses. Most importantly, know the relevant law.

If the above steps are taken as a minimum, you place your client in the best possible position to be granted bail.

Part 4:

Diversion

Chapter 8

Applying for Diversion: A guide – *Written by Cara Foot*

Chapter 8

Applying for Diversion: A guide

Written by Cara Foot

Introduction

The Criminal Justice Diversion Program ('Diversion') was developed in the mid-1990s by Magistrates Barrow, Kumar and Doherty, with the cooperation of Victoria Police. A pilot Diversion scheme was first launched at the Broadmeadows Magistrates' Court in 1997. Its success led to the program being made available in Magistrates Courts state wide by 2001.

Diversion provides first time offenders the chance to avoid a criminal record by completing any number of tasks or conditions agreed to between the parties and the Court. If successfully completed, no plea is formally entered and the charge/s the subject of the Diversion plan will be discharged by the Court.

Although Diversion is not strictly speaking a sentencing option (because the matter is being diverted out of the criminal justice system), it can be viewed as the best possible outcome for an accused who is admitting guilt. It is particularly useful for avoiding an accessible criminal record, as matters dealt with by way of Diversion cannot be publicly disclosed.

From a practical perspective, every Magistrates' Court has an idiosyncratic system in place for dealing with Diversion matters. Contact the Diversion Coordinator at the Court where the matter is listed prior to the hearing if Diversion is a live option.

Diversion is governed by s.59 of the *Criminal Procedure Act*.

Eligibility

- Only available for offences that are triable summarily;
- Offences cannot be subject to a minimum or fixed sentence or penalty, for example driving offences subject to a minimum license suspension period (except demerit points);
- Not available for offences against s.49(1) of the *Road Safety Act 1986* (drink/drug related driving offences);
- The accused acknowledges responsibility for the offence;
- The prosecution consents to Diversion being granted;
- The accused consents to Diversion.

Prosecution consent

The accused will always be in a much better position if the informant agrees that Diversion is suitable. Ultimately it is the consent of the prosecutor that is required; however it is common practice for prosecutors to be guided by the informant's view.

Be pro-active. Contact the informant to get their view on the appropriateness of Diversion before the first mention. Be prepared to get a standard response; the matter is too serious. Do not let that put you off. It is often helpful to outline the personal circumstances of your client, an explanation for the offending or other factors in mitigation (the points you might make at a plea hearing). If a criminal record will have a significant impact on the client's life (for example on the ability to work or travel) this can also be raised.

A prosecutor can still consent to Diversion without agreement from the

informant. Some prosecutors take a much more interventionist role and will recommend Diversion without necessarily consulting the informant.

Diversion can sometimes be a good negotiating tool if there is a disagreement as to a suitable resolution of the matter. A client may be more willing to acknowledge responsibility for an offence with the agreement that Diversion will be recommended by the prosecution. This can be discussed with the prosecutor during a summary case conference as part of the negotiating process.

On a practical note, it is unusual for Diversion to be recommended in relation to driving matters, given many have discretionary license loss provisions. If Diversion is granted, no order can be made on the client's license.

Another area where the prosecution is unlikely to consent to Diversion, or it is unlikely to be deemed suitable by a Magistrate, is family violence. Although the legislation does not prohibit Diversion in such matters, there seems to be a broad policy (enforced to varying degrees) that consent to Diversion will not be granted where the matter involves family violence.

Prior convictions

Usually only accused with no criminal history will be deemed suitable for Diversion. Although the legislation does not disqualify those with prior findings of guilt from being granted Diversion, this will be taken into account in assessing whether Diversion is appropriate in the circumstances. As a general rule of thumb, if the client has prior convictions, Diversion is unlikely to be considered suitable. If the offending is different in nature, this may be a consideration in favour of Diversion being granted, depending on

the circumstances of the case.

Nothing in the legislation prevents an accused from being granted Diversion more than once. Previous participation in Diversion will be one of the factors considered when determining suitability. The fact that Diversion has been previously granted must be disclosed as part of the interview process. The Victoria Police database does record previous participation in Diversion.

Procedure

1. The prosecution must complete and file a Diversion Notice, which indicates consent to Diversion.
2. If the matter involves a victim, the Court will seek the victim's view in relation to whether they agree with Diversion, whether any compensation is sought and the impact of the crime on the victim.
3. The accused will be interviewed by the Diversion Coordinator (either in person or by way of a questionnaire) – this information will assist the Magistrate in determining the suitability of Diversion.
4. A Magistrate or Judicial Registrar will assess whether the matter is suitable for Diversion based on all the information gathered (summary, priors, victim's views and personal information (usually obtained through the interview/questionnaire process)) – this can occur in the Magistrates' chambers or in open Court.
5. If Diversion is deemed suitable by the Magistrate a Diversion Plan is drafted (usually a one page document). The plan will detail the offence/s which it relates to, the length of the plan (cannot exceed 12 months), and any conditions attached to the plan. It will also have an acknowledgment that by signing the plan, any admissions of guilt will not be used against the accused in any subsequent Court

proceedings for the offence/s.

6. The charges will then be formally adjourned by the Magistrate for the period of the Diversion Plan. No plea is entered.
7. If the Diversion Plan is successfully completed, the accused is not required to attend Court on the return date. The Magistrate must discharge the accused without any finding of guilt (s.59(4)(b) *Criminal Procedure Act*). It is important to provide proof of completion of the plan to the Court ahead of the plan expiry date (for example a treatment report from a psychologist or receipt for a charitable donation).
8. If the Diversion Plan is not completed to the satisfaction of the Court, the accused will be notified of when the matter will be returned to Court for mention.
9. All information regarding Diversion should be removed from the Court file.

Conditions on Diversion Plan

The Prosecution will usually propose conditions for the Diversion on the Diversion Notice; however there is nothing to prevent the accused or legal representative also suggesting conditions. You can be creative with proposed conditions, if the circumstances of the case call for it. Ultimately the Magistrate will determine the conditions of the Diversion Plan; however some Magistrates will allow you to make submissions on the appropriateness of conditions. The types of conditions that may be imposed are numerous and diverse. For example:

- Letter of apology to the victim
- Letter of gratitude to informant
- Compensation/restitution to victim
- Participate in counselling and/or treatment

- Donation to charity
- Voluntary work
- Attend relevant course/s (for example Road Trauma Awareness Seminar)

Diversion deemed unsuitable by Magistrate

If a Magistrate deems the matter unsuitable for Diversion, it will be referred back to the mention list of the Magistrates' Court. Any acknowledgement of responsibility for the offence during the process is inadmissible in a proceeding for that offence and does not constitute a plea (s.59(3) *Criminal Procedure Act*).

The fact that the prosecution consented to Diversion can be used as part of any submissions on a subsequent plea hearing should the Court deem the matter not suitable. For example, it may go to the seriousness of the offending, the character of the accused, prospects of rehabilitation or the victim's view, depending on the circumstances of the case.

Successful Diversion is not a finding of guilt

Section 59(4)(c) makes it clear that the fact of participation in the Diversion program is not to be taken as a finding of guilt, except for the purpose of:

- Division 1 of Part 3 and Part 10 of the *Confiscation Act 1997*
- s.9 of the *Control of Weapons Act 1990*
- s.151 of the *Firearms Act 1996*
- Part 4 of the *Sentencing Act 1991*

Helpful resources

- Section 59 of the *Criminal Procedure* Act 2009
- Magistrates Court website - https://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-justice-diversion-program
- Practice Direction 1 of 2003 Criminal Justice Diversion
- Diversion Coordinators

<u>Part 5</u>:

Summary Hearings

<u>Chapter 9</u>

A guide to Summary Plea Hearings – *Written by Gordon Chisholm*

<u>Chapter 10</u>

Contested Hearings in the Magistrates' Court – *Written by Amelia Beech*

Chapter 9

A guide to Summary Plea Hearings

Written by Gordon Chisholm

Purpose of a Plea

This paper seeks to provide a short outline in respect of conducting guilty pleas in the Magistrates' Court.

This chapter is concerned with a situation where the client is pleading guilty to a charge as opposed to a plea following a contested hearing.

In orthodox terms, the purpose of the advocate's submissions during the plea is to reduce the 'harm' to the client that may be imposed from the exercise of judicial sentencing power. The conventional way to do this is to seek the lowest possible punishment on the sentencing scale.

Listing of the Plea

In the Magistrates' Court the plea will usually be heard in either:

- A mention court, if the plea will take less than 10 to 15 minutes (including the Prosecution summary); or
- Adjourned to a fixture with a time estimate, if the plea is a consolidation of a number of briefs or more than 15 minutes needs to be allocated to the hearing.

Depending on the client and the offence, the Specialist Courts which apply a therapeutic and restorative theory to sentencing, and that only hear guilty pleas, could be kept in mind.

Specialist Courts include the:

- Koori Court;
- Drug Court;
- Neighbourhood Justice Centre; and
- Assessment and Referral Court List.[49]

Defence Materials Used During a Plea

The material used during a plea by defence will usually consist of some combination of:

- Psychological or psychiatric reports;
- Counselling or treating reports;
- Certificates of courses undertaken; and
- Character references.

You want to have a copy of the defence material for the prosecution and a copy for the Magistrate.

For the prosecution copy, if the material is being given on the day this should be done with sufficient time for them to read the material. Handing plea material to the prosecution at the bar table during the plea is, justifiably, likely to cause them to take exception or find some point to take issue with in the material. Quickly running through your material with the prosecutor and highlighting relevant parts in longer reports can only aid your client's case.

[49] For further information see www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions.

The Importance of an Early Conference with the Client

Having an early and comprehensive conference with a client is the best way to identify material to use on the plea.

Taking a detailed personal history will often suggest avenues of inquiry that are not evident on the face of the case or the individual. And, the further out this conference is the better the opportunity to obtain the necessary material.

Speaking to the client for the first time on the day of Court is unlikely to yield much material. The day before might see a letter from the husband, wife or partner. A week out is about enough time to organise a few character references and a doctor's report. A month out will often give time to get mental health reports, or refer the client for specialist treatment, or give time for character references to be looked at before the day of Court.

Another source of material can be the client's previous superior Court sentences. The client's criminal history will disclose if they have sentences in the Supreme or County Court.

The sentencing remarks from these can sometimes provide a useful personal history or explanation for otherwise bad offending or a valuable historical diagnosis from psychologists or psychiatrists who have been asked to write reports. The sentencing remarks can be obtained:

- For the Supreme Court, as most are published, from AustLII or unreported judgments and sentencing remarks can be found by searching the Law Library (www.lawlibrary.vic.gov.au/judgments); and
- For the County Court, only some sentences can be found on AustLII. Otherwise most sentencing remarks can be obtained from

the County Court by emailing information.services@countycourt.vic.gov.au.

Obtaining Character References

When getting character references in advance, keep in mind whether the material suggests that the letter writer could be a good person to call to give evidence in Court.

A character witness giving evidence at Court can often be some of the most persuasive evidence.

For character references, ensure that they are signed, dated and include a contact number for the author. Best practice is that you have also called the author of each letter you are tendering to confirm the contents.

In addition, make sure that the people writing character references are aware of the criminal charges the client has committed. If they do not have that knowledge, then a Magistrate is unlikely to give much, if any, weight to their opinion.

It is not usually possible to call a witness in a busy mention court, so getting this material early might prompt you to book the plea to a plea fixture with more time.

At the very least, it can identify people who you can ask the client to organise to bring to court to support him or her on the plea.

Other Steps Before the Plea: Psychological/Psychiatric Material and Voluntary Completion of Rehabilitative Programs

A number of observations may be made about psychological and psychiatric reports.

First, for what purpose are they being tendered? Second, how do you best highlight the helpful parts of the report? Third, what is your response to any adverse aspects of the report? Finally, avoid relying on psychological or psychiatric reports as a short hand way of conveying the client's personal history.

Depending on the offence and the particular circumstances under which it was committed, a court may be contemplating ordering some specific offender behaviour program as part of any sentence.

This might be a men's behavioural change course for family violence, or a driver awareness course for road traffic offences, or a specialist sex offender program. Meeting early with the client allows the accused to be enrolled in such programs before the eventual plea.

Material showing the completion or progress in such programs can be a significant factor in mitigation on any plea because it is relevant to a positive finding about the client's prospects of rehabilitation, as well as evidence of remorse.

Prosecution Materials Used During a Plea

You need to be aware of not only the materials you want to use on a plea, but also the material the prosecutor will use.

The prosecution material will usually consist of the summary of charges and the accused's criminal history.

You will want to have checked both of these before the case is called on before the Magistrate.

In assessing the prosecution material you could keep in mind the following:

- Does the summary accord with the charges your client is pleading guilty to?;
- Are there references to aggravating features not supported by the evidence, or uncharged acts, or references to charges that have been withdrawn – if so, you should seek that the prosecution remove this material before it is read to the Magistrate;
- Is the explanation in the Prosecution summary consistent with the record of interview by the accused? As the prosecutors do not usually have ready access to the DVD recordings this is something you need to check in advance. Further, if the explanation given by the client at the time to the police is different from his explanation now, have you thought about how to account for or explain the difference?;
- Have you gone through with the client and confirmed that the criminal history is accurate. If there is significant offending or similar offending in the accused history, have you obtained some brief instructions on the factual circumstances of the offence and the finding of guilt (was it a plea or was it a finding of guilt following a contest);
- If the prior convictions reveal a client is breaching a Court order, have you considered whether or not to ask Victoria Police or Corrections to have the client charged with the offence of

contravention of an order so that the breach can be listed at the same time as the plea hearing?:

- If the client is on a current Corrections order that is not breached by the offending subject of the plea (meaning no written report will be prepared by Corrections), have you called and spoken to the Corrections Officer to get a verbal update on the client's compliance with the order.

Victim Impact Statements (VIS)

The Prosecution will sometimes have Victim Impact Statements for summary matters.

It is not uncommon in family violence offences for some Magistrates to adjourn hearings for the prosecution to obtain Victim Impact Statements (VIS). Ensure you have time to read these statements before they are handed to the Magistrate. Ask for time if you need it.

When reading a VIS, consider whether there is any objectionable material and whether it rises to a level that you can object to it being taken into account and, whether, strategically you should object.

A reasonable rule of thumb is that in the short time in which summary pleas are conducted, you may want to spend more time talking about your client than debating the impact the crime had on the victim.

Prosecution Applications During a Plea

As well as checking the Prosecution materials, it is necessary to be aware of applications or orders that the Prosecution are seeking in addition to sentence.

Some common applications include:

- Forfeiture or Confiscation order applications under the *Confiscation Act 1997* (Vic);
- Compensation or Restitution order applications, keeping in mind if any reductions need to occur because of the *Victims of Crime Assistance Act 1996* (Vic);
- S 464ZF applications under the *Crimes Act 1958* (Vic);
- Sex Offender Registration orders under the *Sex Offender Registration Act 2004* (Vic);
- Road Safety orders or applications – such as suspension or cancellation of licences, or impoundment or confiscation of a vehicle – under the *Road Safety Act 1986* (Vic) or the *Sentencing Act 1991* (Vic)

Content of a Plea

You now have the material for the plea, but what do you do with it?

His Honour Judge Smallwood recounts that the four things he was told by Justice Vincent that the bench wants to know on any plea are:

1. Who is he she?
2. What has he or she done?;
3. Has he or she done it before; and
4. What do you want me to do about it.[50]

If the advocate can fully answer these four questions when preparing for a plea (with the addition to question three of, 'and will he do it again'), then most of the requirements of section 5 of the *Sentencing Act 1991* (Vic) can be met.

[50] Sean Cash, CPD paper "Presenting Pleas in Higher Courts"

The advantage of Judge Smallwood's four questions is that the answers can be easily tailored to fit the 15 minutes or less afforded to a summary plea in the Mention Court or the one hour that the Court may set aside for a complex plea.

The Delivery of the Plea – Structure, Story and Narrative

If preparation is the watchword for the advocate, then the preparation for a plea in mitigation will take the form of a detailed personal history of the client. Did your client repeat year 10? When was their first joint? When did they first start using drugs? What sports have they played since they were little? What are they passionate about? If in the plea you use 10% to 20% of the history you take, you are going well.

It is also through taking such a detailed history that you can discover your 'hook'. The 'hook' is a piece of interesting information about your client around which you can build your presentation of the plea.

To an extent the structure for a plea arises from this preparation.

It is vital in the Magistrates Court to realize that judicial officers have the challenge of dealing with a large number of matters, often of a repetitive nature, and plead in a repetitive way, while coming to an 'instinctive synthesis' about the appropriate punishment.

The advantage of using a 'hook' for driving the narrative about your client allows a flexible approach that can help avoid the repetitive "my client is 33 years old and was under the influence of ice when he…".

Not only can a narrative be convincing in explaining your client's actions, it also humanises them.

This is important because imprisoning an offender, even if they have to, is a difficult task for a Magistrate. If you can humanise your client it makes the task of imprisoning them just that little bit harder. When the client is facing imprisonment you want to make that decision, and the anxiety that might attach, as difficult as possible.

To do so goes back to the purpose of a plea; to ensure that the State causes the least harm possible to an offender by getting the Court to impose the lightest penalty possible.

Identifying the Appropriate Sanction

The first step to identifying the appropriate sanction is to know what the Court's options are.

In Victoria the sanction hierarchy is as follows:

- Term of immediate imprisonment (with or without parole);
- Suspended sentence of imprisonment (for offences committed before 1 September 2014 (as long as they are not serious or significant offences as defined) and for re-sentencing on old offences following the breach of an order);
- Community Corrections Orders (with or without conviction);
- Fines (with or without conviction);
- Dismissals, discharges and adjournments / good behaviour bonds (with or without conviction).

Working out the appropriate sanction is difficult because there is not one correct sentence.

Each case turns on its own facts, and also the nature of the instinctive synthesis means that different Magistrates can quite reasonably come to a variety of conclusions as to the appropriate sanction.

The ultimate sentence is informed by:

- The maximum penalty. In short, the higher the maximum the potential for a higher sanction. But because of the large numbers of cases heard in the Court, the prosecutor may not always have the maximum penalty to hand. As Magistrates do ask what the maximum penalty is, it is useful to have this written out for each of your client's charges. It is also of help to identify the "fine only" offences if your client has a large number of charges and an aggregate sentence is going to be imposed;

- Current sentencing practices. That is, the 'range' of sentences typically imposed for a specific offence. Useful information can be obtained from the Sentencing Advisory Council website. If statistics are used care needs to be taken that some kind of mathematical equivalence is not being submitted to the Court.
  This resource can be found at:
  www.sentencingcouncil.vic.gov.au/statistics;
- As to the identification of specific aggravating and mitigating circumstances, and how these can be taken into account in arriving at a sentence, the Judicial College Sentencing Manual is the best resource. Because of the approval it has from the Courts, making references to specific chapters of the manual is acceptable to

Magistrates. This resource can be found at: www.judicialcollege.vic.edu.au/publications/victorian-sentencing-manual;

  - The Sentencing Manual also provides a break down and analysis of specific offences; although the full range of summary offences are not included in the manual. It is nonetheless quite useful for the large number of indictable offences that can be heard and determined summarily by a Magistrate;
  - The above resources can be of assistance in working out the appropriate sentence for Victorian offences;
- If a client is pleading guilty to Commonwealth offences or a mix of Commonwealth and Victorian offences, the sentencing options can become extremely complicated. For pleas involving Commonwealth offences the best resource to use is a paper published by the Commonwealth Director of Public Prosecutions called "Federal Sentencing in Victoria", updated as at 1 August 2015. This paper sets out the sanctions available, common problems that can arise, practical examples and permissible combinations of Federal and State sentences. This resource can be found at:
  www.cdpp.gov.au/publications/federal-sentencing-victoria-0.

The above information only helps identify some possible appropriate sanctions.

Nonetheless, by the time of the plea hearing you need to have decided what sentence you are going to ask for. When the bench asks, "what do you want me to do about it", your plea lacks persuasion if you do not have an answer.

Conclusion

There are plenty of technical aspects to a plea hearing and sentencing that the Magistrates expect practitioners to be familiar with. But ultimately, a plea is an exercise in the art of persuasion.

In seeking to persuade the Magistrate as to the correctness of your position, you do not just want to focus on the points in mitigation or the parts that help your case.

Part of being persuasive is to deal directly with the most difficult points or the most aggravating features of the offending. This could be by providing a good reason to minimise how much they should play on the mind of the Magistrate, or how the negative factors when properly considered support the conclusion you are seeking the Magistrate to come to. Section 5 of the *Sentencing Act* 1991 (Vic) requires the Magistrate to consider the aggravating features of the offending and the offender. It must be dealt with in some way and cannot be avoided.

A plea that just focuses on the client's positives is not sufficient because it simply ignores half of the task that the Magistrate must undertake when imposing a sentence. Such a plea is unlikely to be persuasive or realistic.

Finally, the aim is to get the desired result on the first occasion. This unfortunately does not always happen.

The right of appeal against sentence to the County Court should be kept in mind. Putting to one side questions of funding, as the County Court judge must warn the appellant if the sentence is going to be increased, and as leave

is no longer required to abandon an appeal, there is not often a downside if the accused wishes to appeal their sentence to the County Court.

Chapter 10

Contested Hearings in the Magistrates' Court

Written by Amelia Beech

Introduction

Contested hearings in the Magistrates' Court result in mixed emotions in practitioners. They can be efficient and productive and satisfying or they can be the opposite. The smooth running of hearings are often frustrated by the prosecutor, the informant, the Court, the witnesses and even your client. However, what you will find is the first person to be blamed will be the last person responsible; the defence practitioner. For this reason, this chapter is aimed as self-preservation. From here on, everything I suggest you do in preparation comes from bitter or sweet experience.

Pre-hearing

We are starting with the most important lesson of all and if you take nothing from this chapter, please take just this; you will never regret preparing your contest early.

These are things to think about at least a month before the hearing.

Disclosure

In writing, request all outstanding statements and exhibits be provided. Ask for photos in colour, CCTV footage, the DVD of the Record of Interview, the transcript of the Record of Interview. Ask for the civilian witness priors, police notes, LEAP entries and INTERPOSE entries. Ask for the details of the attendance register regarding your client.

Make sure your request is sent to the Informant and the police prosecutor. Ask them to confirm whether they have any objection to providing the materials and ask them to indicate when the materials will be provided. I recommend a polite but firm tone.

If it becomes clear they will not provide certain items requested, issue subpoenae. You have time and it will be less frustrating than an email fight.

Conference

Sometimes that conference so far out from the contest is hard to get motivated for. However, the worst that can come from it is that you've saved yourself another conference closer to the hearing itself.

It's a good idea to use this conference to delegate homework to your client and to help you know where the contest is going.

Firstly, are there <u>eye witnesses</u> not included in the police brief? If those witnesses are helpful to your client's case and willing to speak with the police, you should suggest, in writing, that the Informant contact them. You can even provide their contact details. If the Informant contacts them and their evidence is helpful, then you will have the opportunity to make sure it's really helpful through your cross-examination. If the Informant refuses to contact them, or refuses to call them when their statements don't assist the Crown case, then you can be critical in your cross-examination of him/her.

Secondly, does your client have an <u>alibi</u>? If so, you will need to obtain the details of the alibi, check them, and then file an alibi notice. This should in fact be filed seven days before the contest mention, or if there is no contest

mention (or you were unaware of it) then seven days prior to the hearing (see s 51 *Criminal Procedure Act*).

Thirdly, can your client call evidence of good character? I think that good character evidence can be very powerful. Particularly if the witness can say that your client is firstly very truthful and secondly, very unlikely to act in the manner he has been accused (see s 110 *Evidence Act*). Ask your client to ask the potential character referees to write a proof first so you have a guide about what they would say and therefore, who to call.

Fourthly, (if your matter is a sexual offence) might you need to cross-examine the complainant about their prior sexual history or do you need to subpoena confidential communications? The prior sexual history application will depend on you client's instructions. For example, consider whether someone else may have sexually abused the complainant and whether you need to explore a conflation of memories. This is more likely to arise in the context of a dysfunctional family or historical offending. You may need to subpoena school records, counsellor/doctor/psych records as well. I recommend erring on the side of caution and listing a s32C Application at a special mention in case the records contain confidential communications. Remember that school records might contain school counsellor's records.

Finally, does your client have any other proof in documentary form that might assist his case? On many occasions I have met a client close to the contest date only to find that they could have had photos or phone records or bank records or Facebook extracts that would have assisted, if only we had more time to track them down. These are great homework tasks for your client to follow up, with a bit of warning.

Pack your toolkit

You can do this part closer to the time of the hearing.

You contested hearing toolkit is essentially a set of short notes on topics that commonly pop up. You can have a hard copy or just keep it on your iPad if you prefer to pack lightly. Another option is a really well tabbed *Odgers* if you're time poor. You only have to prepare this once and then you can take it with you to every hearing you encounter. This is a list of topics I have found to pop up when you least expect it:

- **Section 38 *Uniform Evidence Act***

  When a witness gives evidence that is adverse to the Crown case and the prosecutor seeks leave to cross-examine his or her own witness. Remember, they ought not be granted leave to cross-examine at large, but rather, only on a discreet topic. Keep some short notes with you or keep your *Odgers* nearby.

- **Section 65 *Uniform Evidence Act***

  When you arrive on the morning of the contest only to be told that a witness is not coming or is there but is refusing to give evidence, and Prosecutor is going to attempt to tender his/her statement as an exception to the hearsay rule, you will need s65 handy. Remember, notice provisions apply.

- **Section 342 – 344 of the *Criminal Procedure Act***

  Remember that the prohibition on adducing evidence in relation to prior sexual history relates to both the Prosecution and the Defence. No doubt you've already considered whether you might need to seek leave (see above). You might find a Prosecutor tries to lead evidence of prior sexual history without

seeking leave. Keep an eye out and object if necessary. Remember also that notice provisions apply.

- **Section 55 *Uniform Evidence Act***
  Remember that evidence is only admissible if it's relevant. Keep an eye out for Prosecutors seeking to lead irrelevant evidence or for witnesses who are not being controlled by the Prosecutor.

- **Sections 97 and 98 *Uniform Evidence Act***
  Remember there is a prohibition against tendency and coincidence evidence unless the party seeking to adduce it gives notice and shows that the probative value of the evidence would substantially outweigh the prejudicial effect. You can raise your concerns about the portions of the statements that you think amount to tendency or coincidence evidence on the morning of the contest. Often, Prosecutors will be reasonable and will not lead it. If they are not being reasonable, take it to the magistrate.

- **Section 102 of the *Evidence Act***
  The Credibility Rule disallows a prosecutor from leading evidence in chief to bolster the credibility of the witness. Examples of this sort of evidence include witnesses stating that they have always have a great memory or are just really observant people.

- **Section 128 of the *Evidence Act***
  Should any witness be given advice about self-incrimination? For example, the usual way this will come up is that you realise

you would like to cross-examine a witness about drug use. If you can raise it early with the prosecutor and the witness can get some advice, everything will move more smoothly.

Costs

Hopefully you win and need to worry about this sort of application. The Court has a really wide discretion to award costs, pursuant to s 131 of the *Magistrates' Court Act*. It's worth familiarising yourself with the section although many costs orders will be made with the figure to be agreed between the parties. However, if your client has come from interstate or travelled a great distance or there have been other costs as a result of the prosecution, there is no harm is asking for those costs to be covered as well. This is particularly so where you have made attempts to resolve the matter or have the charges withdrawn.

Prosecutorial Duties

Unfortunately, you might need to pull this out from time to time as well. Prosecutors who refuse to call evidence that is adverse to their case may need to be reminded of their obligations. Similarly, issues in relation to disclosure might need to be resolved by reference to the *Criminal Procedure Act*, Part 3.2.

Prepare a Chronology

It is surprising how often the key to your case will be in the chronology. I recommend a chart along the following lines:

Date/time	Event	Source	Comment

This won't take you long and it can be used as the basis for some of your cross-examination. The 'source' might be a paragraph reference in a statement or in your client's record of interview, or just instructions. I also include details such as the dates that statements were made, where they're made and what time and to whom. You might discover police officers swearing each other's statements or witnesses making their statements moments apart.

The comment section allows you to cross-reference the other information, for example, 'this contradicts X's statement.' It will help you familiarise yourself with the brief and really get to know the materials.

Prehearing Checklist

Task	Particulars
One month prior to hearing	
Disclosure request <u>in writing</u>	- Civilian witness priors - Police notes, diary entries, daybook entries, LEAP and INTERPOSE entries, attendance registrar for the accused. - Any missing statements, including forensic reports, photoboards. - Any missing exhibits, including colour photos, DVDs. - Transcript of the ROI for accused and co-accused. - Recording of the ROI
Conference with your client	- Does he have any witnesses to call? - Can you call character witnesses and if so, who? - Ask the character witnesses to prepare a proof. - Will there be alibi evidence? - Do you need to prepare an alibi notice? - Is there any documentary evidence that

	might assist? ie: photos, bank records, phone records, Facebook records or emails.
Sex matters	- Will you need to cross-examine the complainant about their prior sexual history? (s 342 – 344 *Criminal Procedure Act*) - If so, you'll need to draft a notice and list an application. - Do you need to issue any subpoenae for counsellor/medical/psychiatric records? (s 32C *Evidence (Miscellaneous Provisions) Act*. - If so, you'll need to draft a notice, the subpoena and list the application.
Just before the hearing	
Evidentiary tool kit	Pack notes or tab your Odgers as follows (from the *Evidence Act*); - s 128: Self incrimination - s 65: Exceptions to the hearsay rule - s 102: Credibility Rule - s 97 and s 98: Tendency Rule and Coincidence Rule - s55: Relevance - s 38: Unfavourable witnesses
Procedural tool kit	Pack notes as follows; - s 342 – 344 *Criminal Procedure Act* - Part 3.2 *Criminal Procedure Act*: Disclosure Obligations - S 131 *Magistrates' Court Act*: Costs provision
Prepare a Chronology	Perhaps a chart with the following columns; - Date/Time - Event - Source (eg: statement ref, ROI ref) - Comment

On the day of the Contest

Have a chat with the prosecutor. Work out the order of the witnesses, the exhibits they plan on tendering and raise any objections you have that haven't been raised already.

Also, ask them how they put their case. If they are relying on complicity, get them to tell you the basis and even ask them to open to the Magistrate on whatever that basis is. If there are duplicitous or alternative charges, get them to explain that to the Magistrate as well. Finally, if a particular charge relates to particular conduct (for example, multiple unlawful assaults, one for a punch, then one for a kick and one for a threat) ask them to specify that too.

Finally, perhaps my second most important tip for Magistrates' Court Contests: do not waste your energy fighting about legal points with the Prosecutor outside of Court. You don't have to convince them of anything. You only need to convince the Magistrate.

Conclusion

I wish I could say that contests are won and lost in their preparation, but unfortunately, that's not the case. I can't promise that my tips in how to prepare hearings will win your case, but I can promise you will be left with no regrets in terms of your own conduct if you prepare well and prepare early.

Finally, preparation of contests does get easier every time. With every set of closing submissions you prepare and every piece of research you do, you get closer to the ultimate library of resources. And remember, appeal rights are easily exercised.

Part 6:

Disclosure & Subpoenas

Chapter 11

Disclosure and the Modern Criminal Trial – *Written by Rae Sharp*

Chapter 12

Subpoenas in Criminal Cases – *Written by James Westmore*

Chapter 11

Disclosure and the Modern Criminal Trial

Written by Rae Sharp

Both prosecution and defence have disclosure obligations in the modern criminal trial conducted pursuant to the *Criminal Procedure Act 2009*. The obligations extend further than the traditional disclosure obligations on the prosecution, and increasingly impinge on the accused's traditionally unqualified right to silence.

The obligations on prosecution and defence are different, and the failure to comply has different consequences.

Prosecutorial disclosure obligations

A prosecutor's common law duty of disclosure is long standing and remains one of the corner stones of a fair trial; an accused is entitled to know the case being brought against her or him. Although it is a duty to disclose material to the defence, it is a duty owed to the Court[51]. The duty extends beyond the evidence on which the prosecution will rely to all material that meets the relevant test.

That includes material which is not in the possession of the prosecutor but might only be available to her or him (for example, evidence in the possession of the police)[52].

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[51] *Cannon v Tahche* [2002] VSCA 84; (2002) 5 VR 317 at [57] (Winneke P, Charles and Chernov JJA).

[52] See *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125 at [57] per Kirby J.

However the responsibility of disclosure is dependent for its content on what a prosecutor perceives fairness requires in the present trial, in light of the facts known to him or her[53].

The duty of disclosure: what must be disclosed **?**

In *R v Farquharson*,[54] the Court of Appeal (Warren CJ, Nettle And Redlich JJA) adopted the test for disclosure as set out in *R v Spiteri.*[55]

In *Farquharson*, the Court held (at [213] –[214]) that:

> … the Crown has a duty to disclose material which can be seen on a sensible appraisal by the prosecution:
>
> a. to be relevant or possibly relevant to an issue in the case;
> b. to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
> c. to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).

A number of limits were also set out to these obligations:

> The prosecution duty of disclosure does not extend to disclosing material:
>
> a. relevant only to the credibility of defence (as distinct from prosecution) witnesses;
> b. relevant only to the credibility of the accused person;

[53] *Cannon v Tahche* at [57].
[54] [2009] VSCA 307; (2009) 26 VR 410.
[55] [2004] NSWCCA 321; (2004) 61 NSWLR 369.

c. relevant only because it might deter an accused person from giving false evidence or raising an issue of fact which might be shown to be false;
d. for the purpose of preventing an accused from creating a trap for himself, if at the time the prosecution became aware of the material it was not a relevant issue at trial.

Cases involving allegations of non-disclosure include the failure to disclose:

- so called "post-trial" information, which came to light 18 months after the accused was convicted (which it was found did not provide a basis for a claim of misfeasance in a public office against the prosecutor): *Cannon v Tache* [2002] VSCA 84; (2002) 5 VR 317 (special leave was refused [2003] HCATrans 524).
- prior convictions of a witness and information that may reflect materially on a witness's credibility: *R v K* (1991) 161 LSJS 135 and *R v Garofalo* [1998] VSCA 145; [1999] 2 VR 625;
- a victim impact statement containing an inconsistent statement by the complainant, upon which she could have been cross-examined: *R v Lewis-Hamilton* [1998] 1 VR 630; (1997) 92 A Crim R 532; and
- the statement of a witness whom the Crown regards as not being a witness of truth: *R v Mills* [1998] AC 382; [1997] 3 All ER 780.

The duty may also include an obligation to make enquiries in appropriate cases: see *AJ v The Queen* [2011] VSCA 215 at [8] per Weinberg and Bongiorno JJA (with whom Buchanan JA agreed), although the precise content of and limits of that duty was not explained.

The common law duty is also embodied in:

- the conduct rules applicable to solicitors and barristers[56];
- the *Criminal Procedure Act 2009*[57];
- the Director of Public Prosecution's Policy on Disclosure[58]; and
- the Commonwealth Director of Public Prosecution's *Statement on Prosecution Disclosure*[59].

The duty of disclosure: when must information be disclosed?

The duty of disclosure is a positive, ongoing obligation.

Section 185 of the *Criminal Procedure Act 2009* confirms the ongoing nature of the disclosure obligation. It applies to any information, document or thing that comes into the possession of the prosecution after an accused is committed to stand trial or is directly presented, and which would have been required to be listed in the hand up brief (if available at that time). Section 110 sets out the contents of the hand up brief, and requires the hand up brief to list "any other information, document or thing in the possession of the prosecution that is relevant to the alleged offence": s 110(e).

That obligation must be read together with the common law obligation in relation to material that might have only been available to the prosecutor (for example, evidence in the possession of the police)[60].

The pre-trial disclosure obligations set out in the *Criminal Procedure Act 2009* require the prosecution to file and serve a summary of its proposed

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[56] Rules 87 and 88 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, and r 29.5 and r 29.6 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

[57] In relation to summary proceedings in ss 35 – 49, in relation to committal proceedings in ss 107 – 117 and pre-trial disclosure in ss 182, 184 – 189.

[58] Available at: http://www.opp.vic.gov.au/getattachment/bf6aca19-dbf7-4044-a4f7-be7b835cc2c7/5-Disclosure.aspx

[59] Available at: https://www.cdpp.gov.au/sites/g/files/net391/f/CDPP-Disclosure-Policy.pdf

[60] See *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125 at [57] per Kirby J.

opening and a notice of pre-trial admissions: s 182. Substantial departure at trial from those documents must be communicated to the defence and the Court: s 184.

There is a statutory obligation to provide the previous convictions of witnesses at the request of the accused: s 187(1). However, if those prior convictions are irrelevant, the prosecution is not obliged to provide particulars of them but must advise the accused of their existence: s 187(2).

Finally, s 188 obliges the prosecution to give notice of additional evidence it seeks to lead.

The consequences of a failure to disclose

In *Mallard v R*,[61] Gummow, Hayne, Callinan and Heydon JJ stated (at [17]) that:

> … the prosecution must at common law also disclose all relevant evidence to an accused and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty.

See, also: *Grey v The Queen* [2001] HCA 65; 184 ALR 593.

Kirby J expressed the test slightly differently. Having reviewed the approach of jurisdictions which adopt an adversarial approach to criminal law, his Honour identified (at [88]):

> … the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the

[61] [2005] HCA 68; (2005) 224 CLR 125.

material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

The test is an objective one of unfairness: has the non-disclosure resulted in some unfairness in the trial?

In *Mallard* the accused was not provided with material in relation to various experiments that were conducted by police in relation to the nature of injuries that might have been inflicted by the alleged murder weapon (amongst other things, see [20] – [22]).

In *Kev v The Queen*,[62] the Court of Appeal considered the consequence of a failure to comply with the duty. The Court (Weinberg and Santamaria JJA), when discussing *Mallard,* said at [72]:

> *The issue, primarily, is not whether there has been prosecutorial misconduct. It is, rather, whether the non-disclosure or suppression of material evidence, which fairness suggests ought to have been provided to the defence, has occasioned a miscarriage of justice.*

It is not necessary to identify the conduct of a particular person that results in the non-disclosure. An accused need only show that the "totality of the acts of those concerned on behalf of the Crown in the preparation and conduct of the prosecution has operated unfairly against him."[63]

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[62] [2015] VSCA 36.
[63] *R v Lucas* [1973] VicRp 68; [1973] VR 693, per Smith ACT at 696. Approved in *Subramaniam v The Queen* [2004] HCA 51; (2004) 219 CLR 165 at [54].

However, there will not be a substantial miscarriage of justice when the evidence is so overwhelming that a conviction is inevitable: *Kev* at [83], citing *Lawless v The Queen* (1979) 142 CLR 659; *Wilde v R* (1988) 164 CLR 365, 372.

Because the duty is also embodied in the relevant professional rules, a failure to comply with the duty may result in disciplinary proceedings.[64]

Defence disclosure obligations

Traditionally an accused has had no obligation to disclose his or her case to the prosecution. Part of the right to silence includes the right not to disclose your defence.

However, there are an increasing number of disclosure obligations on an accused, which are seen as qualifications on the right to silence.[65]

Obligations on an accused

For many years, accused have been obliged to provide notice of the intention to adduce evidence of an alibi, and from whom that evidence will come, see *Criminal Procedure Act 2009* s 51 (in relation to summary hearings) and s 109 (in relation to trials). Both sections are based on former s 47 of the *Magistrates' Court Act 1989* and s 399A of the *Crimes Act 1958*.

Sections 50 and 189(1) of the *Criminal Procedure Act 2009* impose disclosure obligations in relation to expert evidence sought to be led by an accused, at least 14 days prior to the hearing, or as soon after it becomes available, if it is not yet available.

[64] See, for example: *Legal Services Commissioner v Shulsinger (Legal Practice)* [2010] VCAT 965, where failure to disclose materials in family court proceedings resulted in disciplinary offences.

[65] See *Lee v New South Wales Crime Commission* [2013] HCA 39; (2013) 251 CLR 196 at [153], per Crennan J.

Other disclosure obligations on an accused include:

- The obligation to provide the names and addresses of witnesses to be called, and the order in which those witnesses will be called, when asked by a Magistrate (s 70) or a Judge (s 230);
- the obligation on an accused charged with a "course of conduct" offence to indicate if he or she would plead guilty to a date range within the range alleged in the indictment: s 181A;
- the obligation to file and serve a response to the summary of prosecution opening and notice of pre-trial issues: s 183(1). That document must "identify the acts, facts, matters and circumstances with which issue is taken and the basis on which issue is taken" (s 183(2))

Consequences of a failure to comply

The stakes are lower for an accused who fails to comply with her or his disclosure obligations.

The failure to provide information as to an alibi within the prescribed period is not generally sufficient to warrant the Court exercising its discretion to disallow the evidence. The more likely course is that the trial might be adjourned to provide the prosecution with sufficient time to enable it to investigate the alibi and the identified witnesses. See *R v Cooper* (1979) 69 Cr App R 229. That course is specifically contemplated by s 190(8).

Conclusion

Although the prosecution has far greater disclosure obligations, both the prosecution and defence need to be aware of their obligations, which continue to be developed by way of enactment and at common law. As can be seen from the obligations discussed in this section, the consequences of

non-disclosure will vary, but may result in an adjournment of the trial; a quashing of a guilty verdict; or disciplinary action against the practitioner who failed to disclose.

Chapter 12

Subpoenas in Criminal Cases

Written by James Westmore

What is a subpoena?

A subpoena is a court order, which compels the attendance of a person in a proceeding to give evidence, produce documents or do both.[66] Once properly served and provided with conduct money, a person must comply with a subpoena unless the subpoena is set aside.[67]

This chapter will discuss the use of subpoenas by the defence to compel the production of documents in criminal matters.[68]

Because of the disclosure obligations incumbent on the prosecution in criminal matters, subpoenas in criminal cases are generally used to compel production from third parties.[69] Subpoenas are also used to compel production of documents from the prosecution where there is a refusal to voluntarily disclose the documents.[70]

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[66] Supreme Court: *Supreme Court (Criminal Procedure) Rules 2008,* r 1.12; *Supreme Court (General Civil Procedure Rules)* Order 42. County Court: *County Court Criminal Procedure Rules 2009*, r 1.09; *County Court Civil Procedure Rules 2008,* Order 42. Magistrates' Court: *Magistrates' Court Act 1989,* s 43. Note that in the Magistrates' Court, a subpoena is called a witness summons.

[67] *Rochfort v Trade Practices Commissioner* (1982) 153 CLR 134 at 143 per Mason J ('*Rochfort'*).

[68] This chapter will not cover the regime relating to subpoenas of 'confidential communications' in the context of sexual offences – see division 2A of Part II of the *Evidence (Miscellaneous Provisions) Act 1958*.

[69] See *R v Mokbel (Ruling No. 1)* [2005] VSC 410 at [39]-[41] ('*Mokbel'*).

[70] See *Ragg v Magistrates' Court and Corcoris* [2008] VSC 1 at [84] ('*Ragg*').

To subpoena or not to subpoena?

A subpoena compels the production of documents to the Court, not to the issuing party.[71] Subject to objections to the validity of the subpoena itself or to the production of the documents, a Court may allow all parties to the litigation, including the prosecution, to inspect the documents.[72] Accordingly, strategic questions arise as to whether to issue a subpoena or not.

Defence practitioners need to carefully consider the forensic advantages or disadvantages of issuing a subpoena. A poorly aimed subpoena may have the unintended consequence of arming the prosecution with documents prejudicial to the defence. Accordingly, an assessment of the likely contents of the documents the subject of the subpoena and their forensic value is critical before issuing.

Prior to issuing, efforts should be made to obtain the documents without resort to a subpoena. A simple request of the third party, may in some situations secure the documents sought without the risk that they will end up in the hands of the prosecution. Such an approach also avoids unnecessary costs.

Drafting of subpoenas

The importance of drafting subpoenas with precision cannot be understated. The schedule of documents needs to be drafted in such a way as to capture the documents sought but avoid arguments seeking to set aside the subpoena on the basis of oppression or fishing (see below).

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[71] *Mokbel* at [33]-[38].

[72] ibid at [37].

A subpoena also needs to be directed to the correct person. A person is only required to comply with a subpoena to produce documents if he or she has physical custody, possession or control of the relevant documents.[73] The subpoena does not compel the respondent to obtain the material from another or indicate the current owner of the documents.[74]

Objections to subpoenas

A subpoena may be opposed on two bases:[75]

a) On the basis that the subpoena is invalid and should be set aside; or
b) On the basis that the subpoena is valid but objection is taken to the production of some or all of the documents sought.

A subpoena may be set aside on the basis that it is oppressive, is nothing more than a fishing expedition or that it has no legitimate forensic purpose.[76]

Bases for objection to the production of documents include public interest immunity, privilege against self-incrimination and client legal privilege.[77]

The validity of a subpoena

a. Oppression

A subpoena will be oppressive if it subjects the respondent to expend excessive time and expense in complying with it. Subpoenas drafted too widely or imprecisely may be the subject of criticism for oppression particularly where compliance with the subpoena requires the respondent to sift through documents in order to determine whether or not there are any

[73] *Rochfort*.
[74] ibid.
[75] *Mokbel* at [42].
[76] *Mokbel* at [42]; *Ragg* at [7].
[77] *Mokbel* at [42].

that fall within the schedule of documents sought.[78] Accordingly, the precise drafting of the schedule of documents is of critical importance.

b. Legitimate Forensic Purpose

A party who issues a subpoena must 'identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought.'[79] A failure to establish a legitimate forensic purpose will result in the subpoena being set aside. A more liberal approach is afforded in criminal cases where 'special weight has to be given to the fact that documents or information gleaned from them may assist an accused person.'[80] The test is whether the Court is satisfied that there is a 'reasonable possibility' that the documents would materially assist the defence.[81] A 'legitimate forensic purpose' will include matters going only to the credibility of prosecution witnesses.[82] A document may materially assist the defence even if it is not admissible in the proceeding if it would assist cross-examination or reveals information that may be admissible in another form.[83]

A subpoena, which is issued for the purpose of discovering whether or not certain documents exist or may be useful, will be considered a 'fishing expedition' and will fail to establish a 'legitimate forensic purpose'.[84]

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[78] See *R v Robertson* (1983) 21 NTR 11. See also *Mokbel* at [44].
[79] *Commissioner of AFP v Magistrates' Court in Victoria & Ors* [2011] VSC 3 at [28] ('*Commissioner of AFP'*). See also *Mokbel* at [45]; *R v Saleam* (1989) A Crim R 406 at 409 ('*Saleam'*).
[80] *Commissioner of AFP* at [30]; *Mokbel* at [45]; *Saleam* at 16; *Alister v The Queen* (1984) 154 CLR 404, 414, 454-456 ('*Alister'*).
[81] *Ragg* at [94]-[96]; *DPP v Selway (No. 2)* (2007) 16 VR 508 at [10]. This is the restatement of the 'on the cards' test.
[82] *Mokbel* at [46].
[83] *Carter v Hayes* (1994) 61 SASR 451.
[84] *Ragg* at [86].

Objections to the production of documents

A subpoena meeting the 'legitimate forensic purpose' test may nevertheless subject to objection to the production of some or all of the documents. A number of bases for such an objection are discussed below.

a. Public Interest Immunity

A common basis for the respondent to a subpoena to object to the production of some or all of the documents named in the subpoena is on the grounds of public interest immunity. This is typically so where the respondent to the subpoena is associated with the prosecution, such as the police; is a statutory body empowered with investigative functions, such as the Office of the Chief Examiner, the Australian Crime Commission or the Office of Police Integrity; or is otherwise associated with the Government.

Public interest immunity is now enshrined in section 130 of the *Evidence Act 2008* which is headed 'Exclusion of Matters of State' and has application to the production of documents under a subpoena.[85] The introduction of section 130 of the *Evidence Act 2008* was not intended to introduce any significant changes to the common law of public interest immunity.[86]

Under the *Evidence Act 2008*, the test is: 'If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.'[87] Accordingly, the test requires a balancing exercise between competing public interests; that of

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[85] *Evidence Act 2008*, s 131A.

[86] ALRC Report 26, *Evidence(Interim)*, 1985, [864].

[87] *Evidence Act 2008* (Vic), s 130(1).

admitting the evidence and that of preserving the confidentiality of matters of state.

An inclusive list of matters that are to be taken into account in determining whether a document relates to a matter of state are listed in subsection 130(4) of the *Evidence Act 2008*. In criminal matters, in claiming public interest immunity, the respondent to a subpoena will commonly rely on paragraphs 130(4)(c) & (e). These provisions reflect the common law and allow claims for public interest immunity on the basis of protecting police methodology or the identities of informers.

In performing the balancing exercised required by subsection 130(1), the Court is required to take into account an inclusive list of matters under subsection 130(5). Importantly, the Court must have regard to the public interest in affording an accused person the fullest opportunity of testing the Crown case and presenting his or her defence against a criminal charge.[88]

In the course of opposing a subpoena on the basis of public interest immunity, the respondent to the subpoena will often seek to rely upon a confidential affidavit and/or make submissions in camera and in the absence of the defence. In *R v Mokbel (Ruling No 1)* [2005] VSC 410, Gillard J criticised the use of confidential affidavits except in rare cases on the basis that it denied the issuing party the opportunity of attacking or testing the basis of the claim for public interest immunity.[89] Defence practitioners encountering a respondent to a subpoena who files a confidential affidavit in support of the claim for public interest immunity should, at the least, seek an open affidavit worded in such a way as to make clear the basis on which the

[88] *Mokbel* at [71] & [81]; *Evidence Act 2008,* s 130(5)(b).
[89] *Mokbel* at [24]-[29].

public interest immunity is claimed so that the claim for immunity can be opposed.[90]

b. Self-Incrimination

Another basis on which a respondent to a subpoena may object to the production of documents is privilege against self-incrimination. Objection to the production of documents on the ground of self-incrimination is governed by the common law and section 128 of the *Evidence Act 2008* has no application to subpoenas.[91] It is important to note that the privilege is against *self*-incrimination and cannot be claimed by the respondent to a subpoena on basis that production of the documents may tend to incriminate another.[92]

c. Client Legal Privilege

The respondent to a subpoena may also object to the production of documents on the ground of client legal privilege. Such an objection is now governed by Division 1 of Part 3.10 of the *Evidence Act 2008.*[93] Given that the objections to the production of documents on the basis of client legal privilege are less common in response to subpoenas issued on behalf of an accused in criminal proceedings, and the topic of client legal privilege deserves a chapter worth of discussion itself, this basis for objection will not be discussed further.

Appearing on the return of a subpoena

In appearing on the return of a subpoena, the following matters need to be prepared:

[90] Mokbel at [26].
[91] *Evidence Act 2008* (Vic), s 131A.
[92] *Rochfort*.
[93] *Evidence Act 2008* (Vic), s 131A.

a. **Be prepared to make submissions as to the legitimate forensic purpose of the documents sought**

Practitioners need to able to succinctly articulate the legitimate forensic purpose of the documents sought under subpoena and counsel appearing on the return of the subpoena need to be prepared to make submissions on this issue.

b. **Liaise with the respondent to the subpoena to ascertain whether there are objections to the validity of the subpoena itself or to the production of documents**

Liaising with the respondent to the subpoena in relation to such objections will allow counsel appearing on the return of the subpoena to prepare arguments to meet the respondent's opposition.

c. **Remember that the documents are to be produced to the Court not to the issuing party**

Whilst discussions with the respondent to the subpoena are useful in determining whether and on what basis there will be opposition to the production of the documents sought, practitioners need to always bear in mind that the subpoena compels production of documents to the Court and not the issuing party. As explained by Gillard J in *Mokbel,* 'It would be contrary to the [subpoena], the Rules of Court and the ethical obligations of members of the legal profession to take possession of the documents from the subpoenaed person or organisation before they were produced to the Court.'[94]

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[94] *Mokbel* at [33].

d. The appearance itself

Gillard J sets out the procedure for appearing on the return of a subpoena as follows:[95]

> *When the subpoena is called on, the person to whom it is directed is required to produce the documents to the Court unless the subpoena is set aside. Once the documents are produced to the Court they are marked for identification. They do not become evidence. They remain with the Court until the determination of the proceeding or further order. If any party wishes to inspect the documents, application must be made to the Court for permission to have access to the documents. If no objection is raised, permission is granted to the parties to have access. Whether or not the Court will permit the parties to take copies of any of the documents will depend upon the circumstances. The usual order is that the documents are released to the lawyers acting for a party and are to remain in the possession of the lawyers until returned to the Court. Of course, the Court may grant permission to the lawyers to show any of the documents to a client or a prospective witness.*

Conclusion

In the armoury of the defence practitioner, the subpoena is a powerful weapon, but a weapon that needs to be used with discretion. Care needs to be taken in deciding whether to issue the subpoena and in drafting the subpoena.

In appearing on the return of a subpoena, a practitioner needs to be well prepared to counter any application to set aside a subpoena or to oppose the production of the documents sought. To that end, they need to have a good

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[95] *Mokbel* at [37].

understanding of the legitimate forensic purpose test and the privileges that are often invoked in opposition to the production of documents under the subpoena.

Part 7:

Committals

Chapter 13

Committal Mentions: Form 32 and Identifying Issue, Relevance and Justification – *Written by Rahmin de Kretser*

Chapter 14

Role and Purpose of the Modern Committal– *Written by Amanda Burnnard*

Chapter 13

Committal Mentions: Form 32 and Identifying Issue, Relevance and Justification

Written by Rahmin de Kretser

Introduction

Whilst administrative in nature, the committal mention hearing is integral to successfully defending criminal trials or resolving matters favourably to an Accused person in the indictable stream.

A combination of case management pressures with the Court being overseen by increasingly vigilant Magistrates and a number of recent Court of Appeal decisions have reinforced the need for practitioners to carefully prepare for the committal mention hearing.

Pre-Hearing

Trial strategy and preparation needs to commence as soon as the hand up brief ("HUB") is served. For ordinary matters there is a six week period between the service of the HUB and committal mention.[96]

If possible the instructing solicitor should have counsel they wish to brief for the committal hearing peruse the HUB and draft and/or settle the case direction notice which is known as a Form 32.

[96] *Criminal Procedure Act 2009* s108.

Whilst practitioners who regularly have matters in the indictable stream have developed their own pro forma, pursuant to section 119 of the *Criminal Procedure Act 2009* the case direction notice:

(a) must be in the form prescribed by the rules of court;

(b) must specify the procedure by which it is proposed that the matter be dealt with or indicate whether an adjournment of the committal mention hearing would assist the parties in determining how the matter should be dealt with;

(c) must state the names of any witnesses that the accused intends to seek leave to cross-examine, and for each witness the accused must specify—

(i) each issue for which leave to cross-examine is sought; and

(ii) the reason why the evidence of the witness is relevant to the issue; and

(iii) the reason why cross-examination of the witness on the issue is justified;

Practitioners should strictly adhere to the 14 day and seven day rules that apply to committal mentions, detailed below.

Practice Direction

The Magistrates' Court has issued a Practice Direction which stipulates that at least 14 days prior to the committal mention, the legal practitioners with conduct of the file representing the Accused and the DPP respectively, will engage in discussion to explore resolution of the case.[97]

[97] Magistrates' Court of Victoria, Practice Direction 6 of 2013.

Practitioners must also ensure that the Form 32 is filed within the prescribed time period- at least seven days prior to the committal mention hearing.[98] Whilst ensuring timeframes are adhered to, time must be given to the OPP and informant to consider the Form 32. Accordingly a draft should be served well before the seven day deadline.

If witnesses are opposed by the Crown then Defence may seek clarification as to the grounds of opposition and whether some agreement can be reached.

Even when the document has been filed within the seven day timeframe it often does not find its way onto the Court file. Practitioners should check with the committal co-ordinator pre-hearing to confirm it has been received and is on the Court file.

If negotiations are taking place and offers are being considered then a Form 32 should be filed seeking a short adjournment to allow discussions to continue. Similarly a short adjournment should be sought if there has been a recent change in representation or there are funding issues. Turning up on the morning of Court without any notice being filed and seeking an adjournment is fraught with danger.

All items that Defence seeks disclosure of should be listed in the Form 32. Depending on the type of offending and the solicitor you are dealing with from the OPP, the Crown may agree to providing all items you request which will obviate the need for subpoenas to be issued.

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[98] *Criminal Procedure Act 2009* s118.

Defence practitioners should identify whether any notices need to be filed (such as a s342 notice in a matter involving an alleged sexual assault) and include this in the Form 32. In a committal hearing involving sexual offending against child and cognitively impaired witnesses the legislation does not allow for cross-examination at committal.[99] However consideration should be given on whether to seek leave to cross-examine complaint witnesses to try and establish any inconsistencies with the version given in the VARE and the version given to police/ family members/ health professionals / friends.

If the Defence is seeking to challenge the admissibility of certain evidence at trial (eg. illegal search or defective chain of custody) then leave should be sought to cross-examine relevant witnesses at committal and the issue should be identified in the Form 32.

Logistical difficulties (eg. a video link to a witness in a different time zone) and whether Crown witnesses will require advice in respect of self-incrimination should also be noted. If these issues are identified in advance the committal will run more efficiently and the bench will be grateful for the parties' assistance.

Timing of the Committal Hearing and Outstanding Material

Despite the arbitrary time limits prescribed in the legislation, consideration must be given as to whether the matter is ready for a contested committal. If there is outstanding material (eg. an expert report, drug analysis, telephone intercept or surveillance material etc) then Defence should identify what is outstanding and whether the matter can be booked in for a contested committal.

[99] *Criminal Procedure Act 2009* s.123

If the outstanding material is crucial to an effective committal proceeding being run then Defence should seek an adjournment. Further firm timelines of when the material will be available should be sought from the Crown.

If the outstanding material does not prevent a committal being listed then the Accused should still seek leave to cross-examine the related witness/es at the committal mention or reserve their right to seek leave to cross-examine that witness at committal. Defence should also seek concessions from the Crown that leave will not be opposed and have the Crown document the concession in the Form 32.

If there are Co-accused who are unavailable at the time of the Form 32 being filed but have made statements contained in the HUB and may become available prior to committal, then Defence should also document this in the Form 32 and again seek the position of the Crown as to whether leave will be opposed. The addition of extra witnesses to the committal can add extra hearing time and the Court should be advised of this possibility in advance.

Appearance at Committal Mention

Where Seeking Contested Committal

At the committal mention hearing practitioners appearing for an Accused seeking a contested committal will be asked by the Magistrate to justify the witnesses they are seeking to cross-examine at the committal. This is even so when the Crown does not oppose leave being granted.

In deciding whether leave should be granted a Magistrate is to consider the following criteria set out in section 124 of the *Criminal Procedure Act 2009*:

> *(a) the prosecution case is adequately disclosed; and*

(b) the issues are adequately defined; and

(c) the evidence is of sufficient weight to support a conviction for the offence with which the accused is charged; and

(d) a fair trial will take place if the matter proceeds to trial, including that the accused is able adequately to prepare and present a defence; and

(e) matters relevant to a potential plea of guilty are clarified; and

(f) matters relevant to a potential discontinuance of prosecution under section 177 are clarified; and

(g) trivial, vexatious or oppressive cross-examination is not permitted; and

(h) the interests of justice are otherwise served.

It is preferable if counsel briefed for the committal can appear at the committal mention as there tends to be less resistance from the bench when leave is sought. Alternatively an instructor who is familiar with the file should appear.

If an issue arises post filing of the Form 32 and prior to committal mention (eg. the further disclosure of material) then leave should be sought at committal mention to amend the application and seek to cross-examine any additional witness or extend the breadth of the cross-examination.

Special Categories of Witnesses

Particular care must be given about whether to seek leave to cross-examine the following types of witnesses:

a. elderly witnesses; and/or

b. witnesses with significant health (physical or mental) issues; and/ or

c. overseas witnesses.

Further the scope of the leave to cross-examine sought may also be of crucial importance with these types of witnesses. Witnesses in this class may become unavailable through death, problems with capacity or not being in the jurisdiction. In these circumstances the Accused may be severely disadvantaged if the Crown seeks to have a witness statement or VARE tendered and the witness was available to be cross-examined at committal and wasn't cross-examined. Alternatively the witness was not cross-examined or challenged in any great detail about the allegations or important aspects of their evidence.

Orders should also be sought for disclosure of material by a certain date and if there is a doubt over whether a forensic procedure will be complete before committal a special mention should be listed.

Resolution

If the matter resolves and is to remain in the indictable stream then at the committal mention pleas of guilty will be entered to the appropriate charges with alternative and other charges withdrawn. The matter is then booked off for a plea date in the County or Supreme Court. In these circumstances the Accused should receive the maximum discount for an early plea.

The Accused may also seek summary jurisdiction and the Crown may or may not oppose this course as part of a resolution. The parties can seek for the summary jurisdiction application to be adjourned for determination or if it is not controversial or complicated a Magistrate may determine the application at the committal mention and adjourn the matter for a summary plea. If the Crown does not oppose summary jurisdiction, work should be undertaken to settle an agreed summary for the purpose of the application and/or plea.

Even if the matter remains contested the Accused may apply for summary jurisdiction. Whilst an application can be made at any time before the Magistrates' Court commits the Accused to stand trial[100] it is preferable that the Court be notified of the application at the committal mention stage.

Straight Hand up Brief

There are occasions where an Accused will not seek a contested committal yet will maintain a plea of not guilty to some or all of the charges. This may be for tactical reasons (eg. not to expose an available defence to the prosecution or not to give a witness a dry run prior to trial) or because there are funding issues. In these circumstances the matter will proceed by way of straight HUB at the committal mention. A Magistrate will then commit the Accused to stand trial, pleas of not guilty will be entered and the matter will be adjourned for an initial directions hearing in the County or Supreme Court.

Post Committal Mention Hearing

If relevant evidentiary material remains outstanding or the Crown is not adhering to their disclosure obligations a special mention should be listed well in advance of the committal. Orders that the Crown provide material by a certain date may need to be sought or an application for the committal to be adjourned may have to be made.

Alternatively a subpoena should be issued that gives the Defence enough time to have the material released and to take instructions prior to committal. The Crown has developed a habit of serving large volumes of material on Defence on the morning of committal. If repeated requests have been made by Defence for the material and the Court has made orders that

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[100] *Criminal Procedure Act 2009* s.30(3).

have not been complied with, then the likelihood of an adjournment with costs against the Crown increases.

If leave is refused outright at committal mention to cross-examine a particular witness or to cross-examine on a particular topic, this is not necessarily the end of the issue. The Magistrate hearing the committal still has the discretion to allow leave to cross-examine additional witnesses or to expand the scope of questioning. This commonly occurs at committal hearings with multiple co-accused or where the committal Magistrate takes a different view to the Magistrate who presided over the committal mention.

Also, the fact that the Defence sought to cross-examine a witness at committal mention and was refused may give grounds for a Basha hearing prior to any trial in the County or Supreme Court.

Chapter 14

Role and Purpose of the Modern Committal

Written by Amanda Burnnard

Introduction

A contested committal is a pre-trial hearing in the Magistrates' Court during which the magistrate determines whether the evidence is of sufficient weight to support a finding of guilt in a higher court. The magistrate acts in a ministerial or executive rather than a judicial capacity.[101] His or her role is 'essentially to sift the wheat from the chaff: cases so weak that a jury properly instructed could not possibly convict the defendant and cases where it could.'[102]

The *Criminal Procedure Act 2009* (Vic) places the contested committal within the 'committal proceeding' stage of an indictable matter, alongside the filing hearing, committal and special mentions, committal case conference and compulsory examination hearing.[103] It states that the purposes of the committal proceeding are:

> *(a) to determine whether a charge for an offence is appropriate to be heard and determined summarily;*
>
> *(b) to determine whether there is evidence of sufficient weight to support a conviction for the offence charged;*
>
> *(c) to determine how the accused proposes to plead to the charge;*
>
> *(d) to ensure a fair trial, if the matter proceeds to trial, by—*

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[101] *Grassby v R* (1989) 168 CLR 1.
[102] *Thorp v Abbotto* [1992] 59 A Crim R 208 at 214.
[103] Section 100 *Criminal Procedure Act 2009* (Vic).

(i) ensuring that the prosecution case against the accused is adequately disclosed in the form of depositions;

(ii) enabling the accused to hear or read the evidence against the accused and to cross-examine prosecution witnesses;

(iii) enabling the accused to put forward a case at an early stage if the accused wishes to do so;

(iv) enabling the accused to adequately prepare and present a case;

(v) enabling the issues in contention to be adequately defined. [104]

These various purposes served by the contested committal are also recognised by the courts.[105] From the defence perspective, the committal is particularly important. It enables practitioners to see for the first time how witnesses perform and has several other forensic benefits. The decision to proceed to committal should, however, be made with a clear view as to what is sought to be gained from the process, and the client's overall trial or plea strategy.

Committal procedure

The decision to proceed to contested committal is made at the committal mention stage of proceedings. Practitioners are required to identify the issue/s in dispute, and then leave is granted to cross-examine witnesses in

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[104] Section 97 *Criminal Procedure Act 2009* (Vic).

[105] *Grasby v R* (1989) 168 CLR 1 at 14, per Dawson J.

relation to those issues.[106] The matter is then booked in for a contested committal hearing.

A committal usually commences with an order for the recording of the proceedings and for witnesses other than the informant to remain outside the court. Witnesses then give evidence. In more complex matters the parties may be permitted to give a short opening. The prosecutor usually conducts evidence-in-chief by asking the witness to adopt his or her statement/s as true, and asking if there are any amendments to be made. Defence counsel then cross-examines the witness on one or more issues in accordance with the leave granted at committal mention.[107] The accused must be present unless excused for a period, but even then must be present at the close of the prosecution case.[108]

At the conclusion of the prosecution case, the prosecutor tenders the balance of the hand-up brief. The court must then enquire as to whether the accused intends to call evidence (although this rarely occurs) or make any submission.[109] If the accused is not represented, the court must inform the accused of his or her right to answer the charge, and the ability to call any witnesses, and ask what the accused wants to do.[110]

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[106] Leave is granted in accordance with section 124 of the *Criminal Procedure Act 2009*, on the basis of a Form 32 or Case Direction Notice filed seven days prior to the Committal Mention.

[107] Leave may also be granted to the prosecution to call oral evidence in chief from a witness if this is in the interests of justice: see Section 130 *Criminal Procedure Act 2009* (Vic). Although witnesses are usually called and cross-examined at trial, this is not mandatory – the legislation provides only that the court may hear evidence: section 128(b) *Criminal Procedure Act 2009* (Vic). In rare cases, it may be appropriate for the committal to proceed on the basis of submissions only, such as where the actions attributed to the accused are not in question but it is not conceded that they amount to a particular offence.

[108] Sections 100, 135, 137 *Criminal Procedure Act 2009* (Vic).

[109] Section 141(1) *Criminal Procedure Act 2009* (Vic).

[110] Section 141(3) *Criminal Procedure Act 2009* (Vic); *Strangio v Magistrates' Court of Victoria* [2013] VSC 396 at [56]- [66].

After all evidence and submissions, the court must either discharge the accused if the evidence is of insufficient weight to support a conviction for any indictable offence, commit the accused for trial to either the County or Supreme Court, or adjourn the proceeding to enable the informant to file substitute charges and then commit the accused on those charges.[111] If the accused is committed to stand trial, any related summary offences will be transferred to the same court to which the accused is committed.[112]

It is rare that a magistrate will not commit an accused – the test is not whether a jury *would* find the accused guilty, but whether the evidence is capable of supporting such a finding. A magistrate must not discharge just because there exists a hypothesis or inference that might ultimately lead a jury to acquit.[113] If an accused is discharged, the Director of Public Prosecutions may nevertheless decide to proceed to trial by way of direct indictment.[114]

Upon committing the accused to stand trial, the magistrate gives what is known as the 'committal caution': asking whether the accused intends to plead guilty or not guilty to the charge and informing the accused that the sentencing court may take into account a plea of guilty and the stage in the proceeding at which the plea was indicated.[115] If applicable, the magistrate must give other warnings or cautions, such as the alibi caution or a reminder that the complainant in a sexual offending case must not be cross-examined as to other sexual activities of the complainant without leave.[116]

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[111] Sections 141(4), 128 *Criminal Procedure Act 2009* (Vic). The accused must be committed to stand trial, and cannot be committed to face a summary contested hearing: *Gild v Magistrates' Court of Victoria* [2015] VSC 84 at [41]-[45].
[112] Section 145 *Criminal Procedure Act 2009* (Vic).
[113] *Thorp v Abbotto* [1992] 59 A Crim R 208
[114] Section 161 *Criminal Procedure Act 2009* (Vic).
[115] Section 144(1) *Criminal Procedure Act 2009* (Vic).
[116] Section 144(2)(b) *Criminal Procedure Act 2009* (Vic).

If the accused is unrepresented, the magistrate must also explain the importance of seeking representation, advise the accused of a right to apply for legal aid and warn the accused that such an application is his or her responsibility.[117]

The magistrate will then remand the accused in custody or grant bail to attend the County or Supreme Court.[118] Even if the accused is originally charged on summons, he or she will not be able to continue on summons once committed. An accused who is in custody at the time of the committal may make a fresh application for bail at its conclusion.

Questioning of witnesses

Civilian witnesses usually attend a committal having been served with a summons by the police informant. They may give their evidence via video link.[119] If a witness does not attend a committal, the court may adjourn the hearing, cause a summons to be issued to compel the attendance of the witness or continue the hearing if satisfied that it would not be unfair to the accused to do so.[120] If the hearing continues in the absence of that witness, his or her statement is inadmissible,[121] and is usually removed from the hand-up brief.

Questions that relate to issues other than those on the basis of which leave was granted to cross-examine may be disallowed,[122] unless leave is granted

[117] Section 144(2)(a) *Criminal Procedure Act 2009* (Vic).
[118] Section 144(2)(c) *Criminal Procedure Act 2009* (Vic). In the case of corporate accused, the court will make an order ordering the accused to appear by representative or by a legal practitioner on a particular date.
[119] Section 42E *Evidence (Miscellaneous Provisions) Act 1958* (Vic).
[120] Section 134(1) *Criminal Procedure Act 2009* (Vic).
[121] Section 134(2) *Criminal Procedure Act 2009* (Vic).
[122] Section 132 *Criminal Procedure Act 2009* (Vic).

to cross-examine on a different issue.[123] Re-examination is then permitted. The court may rule any non-oral evidence, such as statements or exhibits, inadmissible, whether in whole or part.[124]

A complainant in a sexual offending case who has made a statement, and who was a child or was cognitively impaired when the proceeding commenced, cannot be cross-examined at committal.[125] If the complainant in a sexual offence matter is giving evidence, only certain persons may be present in court.[126]

Witnesses giving evidence about matters that may tend to incriminate them may seek a certificate pursuant to section 128 of the *Evidence Act 2008.* The prosecution will usually arrange for independent advice to be given by a duty barrister.

Evidence given during the committal proceeding is recorded and transcribed.[127] The transcript, together with the statements and balance of the hand-up brief, becomes the trial depositions. The depositions are prepared by the OPP and served on the defence some weeks after the committal.

If a witness gives evidence at committal and later becomes unavailable, his or her committal evidence may be admissible at trial as an exception to the

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[123] Section 132A *Criminal Procedure Act 2009* (Vic).
[124] Section 139 *Criminal Procedure Act 2009* (Vic).
[125] Section 123 *Criminal Procedure Act 2009* (Vic).
[126] Section 133 *Criminal Procedure Act 2009* (Vic).
[127] Admissions of fact made by the accused are also recorded: see Section 140 *Criminal Procedure Act 2009* (Vic). However, any discussion or ruling by the magistrate, including as to the discharge of any offences, is not. Practitioners therefore wishing to rely upon the magistrate's view in order to formulate a plea offer or discontinuance application ought to take careful notes.

hearsay rule.[128]

Resolution at committal

Some matters resolve just prior to or during the running of a committal. If an accused decides to enter a plea of guilty, the prosecution will withdraw any charges not proceeding and tender the hand-up brief. The magistrate will administer the committal caution, to which the accused will respond 'guilty.' The accused will then be bailed or remanded to a plea or mention date in the County or Supreme Court.

At a committal hearing, the court may also offer a summary hearing or determine an application for one.[129] An application for a summary hearing of the offences may be made by the accused right up to the moment where he or she is committed for trial. [130] If an application is made and granted for summary jurisdiction, and the accused enters a plea of guilty, the matter usually proceeds as a summary plea hearing before the committal magistrate.

Post-Committal Directions

Where an accused has pleaded not guilty and is committed to stand trial in the County Court, both practitioners who appeared at committal are required to attend the County Court at 9.00am the following day for an Initial Directions Hearing ('IDH').[131] Both parties are expected to be fully familiar with the matter and to be able to provide answers to a comprehensive list of questions that may be asked by the judge.[132] In matters involving allegations

[128] Section 65(3) *Evidence Act 2008* (Vic)
[129] Section 128 *Criminal Procedure Act 2009* (Vic).
[130] Section 30(3) *Criminal Procedure Act 2009* (Vic), *Williams v Hand* [2014] VSC 527 at [48].
[131] County Court Criminal Division Practice Note, PNCR1-2015, 21 October 2015.
[132] ibid.

of sexual offending upon child or cognitively impaired complainants, the IDH will be listed within 14 days, and in circuit matters, on the next Directions Hearing date for that circuit.

Where an accused is committed to the Supreme Court, the matter will likewise be listed for a Directions Hearing within 24 hours. Both counsel will be required to appear and be able to advise the court of a number of matters.[133]

Benefits of proceeding to committal

The committal can be immensely beneficial in relation to both matters proceeding to trial and matters which are likely to resolve.

In matters proceeding to trial, the committal provides an opportunity to test the reliability and credibility of witnesses, lock them into their statements and adduce any facts from them which may not be apparent on the brief, but which are essential to running a particular defence at trial (for example, evidence supporting a motive to lie).

The committal enables practitioners to ascertain whether disclosure requests have been fully effected, and to make further applications for disclosure or materials if required (for example, seeking to issue a confidential communications subpoena if a complainant discloses having told a psychologist about the allegations). It provides an opportunity for practitioners to develop pre-trial arguments about the admissibility of evidence, and may suggest other potential arguments or defences not previously considered.

[133] Supreme Court of Victoria Practice Note No. 6 of 2014: Criminal Division: Case Management by Post-Committal Directions Hearings.

A case at committal is often revealed to be vastly different to the picture presented on the materials alone. Witnesses are often cross-examined about the quality of their observations, factors relevant to their memory or comprehension, the circumstances in which their statements were made, whether they made any other statements (including drafts, statements of no complaint or victim impact statements) and whether they recounted the events to anyone else or gave different versions at different times. If they have prior convictions, particularly for dishonesty, these are usually explored.

Experts may be asked about the data upon which their opinions are based and the methods by which they arrived at those opinions. Police witnesses may be asked about other suspects, the compilation of photo boards, the circumstances of a search, the chain of custody of an exhibit, materials shown to an accused during interview, the circumstances of arrest, the circumstances in which admissions were made, the taking of statements, persons who didn't make statements, and other matters relevant to the conduct of the investigation. They may also be asked to adopt their notes for ease of use during the trial.

A committal may also be of assistance to the resolution process, for example, by providing a less aggravating basis for a plea of guilty. Questioning may reveal that an incident took place over a shorter period of time, that an injury suffered was not as serious as initially appeared, that an assault consisted of fewer blows than stated or that the role of a particular accused in a multi-header matter was limited to particular actions. The evidence given at committal may also form the basis for a request for a discontinuance of prosecution, or may assist in persuading the prosecution to accept an earlier rejected plea offer to lesser charges.

In multi-header matters, even in those capable of early resolution, it may be advantageous for an accused to join a committal alongside co-accused rather than conceding serious charges at an earlier stage. In some cases, the Crown will offer a practical, more favourable resolution to all accused either at or just after the committal hearing.

There are, however, risks involved in proceeding to committal, which must be given consideration. Evidence of further offences might emerge and lead to further charges. Fairly basic facts might become more aggravating. Listing a committal instead of proceeding to a plea might mean that a young offender is not sentenced until after he or she turns 21, when a Youth Justice Centre Order is no longer available as a sentence.[134]

In many cases, the benefits may outweigh the risks, such as when a plea is not entered at the earliest possible opportunity, but the facts are better, and the client has used the additional time to attend to his or her rehabilitation. Practitioners will need to consider all relevant factors and take instructions accordingly.

Getting the most out of a committal

The decision to proceed to committal requires, therefore, a thorough analysis of the materials, early identification of the issues, and the development of a considered plea or trial strategy. Practitioners should carefully examine the evidence and its potential uses both during the committal and subsequently. Early conferences with a client should be directed to the process as a whole, not just the committal stage.

It is important that the decision to proceed to committal is made early, and

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[134] See sections 3, 32 *Sentencing Act 1991* (Vic).

that preparation for the committal itself is done in a timely fashion. Counsel will require sufficient time to review the materials, consider the trial or plea strategy and how best to approach each witness, and develop any submissions. Time may also be required to conduct research, or seek advice from experts.

Practitioners should also ensure, wherever possible, that all outstanding materials have been provided by the Crown well in advance of the committal. It may be appropriate to ask the committal mention magistrate to set a due date for the provision of disclosure material, or to list the matter for special mention prior to committal if significant materials have not been provided.

For many clients, the committal is the stage where the process suddenly becomes very real. It is recommended that practitioners prepare their clients carefully for the committal and facilitate a conference with the client, instructor and defence counsel in the days leading up to the hearing.

Finally, things can happen quickly and unexpectedly at committal – the matter may suddenly become capable of resolution, witnesses may not attend or give different versions, or new materials and new issues may be revealed. Sudden changes to the landscape will be managed more easily by counsel, instructor and the client with the benefit of adequate prior preparation.

Part 8:

Mental Impairment and Fitness to Plead

Chapter 15

Fitness to Plead and Mental Impairment: The Essential Concepts – *Written by Simon Moglia*

Chapter 15

Fitness to Plead and Mental Impairment: The Essential Concepts

Written by Simon Moglia

Mental impairment and unfitness to be tried are two interesting areas where criminal law interacts with medicine. In Victoria, the field is governed by the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997.* (The Act). The purpose of this chapter is to introduce the main concepts and procedures that arise and to suggest ways in which lawyers can best prepare for the conduct of a case.

Commonwealth matters

Largely, the tests and procedures in the Commonwealth sphere reflect the Victorian scheme. However, care needs to be taken to determine the specific requirements depending on the jurisdiction.

The relevant Commonwealth provisions are spread across the *Crimes Act 1914* (Cth) (the Cth Crimes Act) and the *Criminal Code Act 1995* (the Code). As to unfitness to be tried, the provisions are in Division 6 of Part IB of the Cth Crimes Act. As to mental impairment, Division 7.3 of Part 2.3 of the Code applies. If a person is acquitted because of mental impairment, then Division 7 of Part IB of the Cth Crimes Act applies and Division 8 applies in summary matters.

Given the greater numbers of state prosecutions, the remainder of this chapter focuses on the Victorian Act.

Basic terms and concepts

Unfitness to be tried has a special meaning under the Act and relates to the state of mind of the accused at the time of the trial. It is about whether they have the capacity to engage in several essential aspects of a fair trial. Part 2 of the Act sets out the definition (s 6) and relevant procedures. If there is a real question of unfitness, then the matter must be referred to a trial judge who will conduct an ***investigation*** before a jury.

If a person is found to be unfit, then a ***special hearing*** is conducted by a judge and a new jury under Part 3 of the Act. This is conducted like a trial in the ordinary sense with specified differences. The jury determines whether the person is not guilty, not guilty because of mental impairment or has 'committed the offence' (rather than 'guilty').

Mental impairment has a special meaning under the Act and relates to the state of mind of the accused at the time of the alleged offending. It is about whether they appreciated the nature of what they did or the wrongfulness of it, to the required standard. Part 4 of the Act sets out the definition (s 20) and how the defence is to be dealt with at trial.

Expert evidence is invariably required for any determination of a mental impairment or unfitness issue. The type of expert will be determined by the nature of the client's condition, but usually the expert will be a forensic psychiatrist or psychologist. Second opinions are commonly required.

The ***consequences*** of being found to have 'committed the offence' or being 'not guilty because of mental impairment' are either that the person is unconditionally released or made subject to a supervision order. Of course, a person found 'not guilty' (rather than not guilty because of mental impairment) is acquitted and free.

Supervision orders are made under Part 5 of the Act and can either be custodial or non-custodial. These orders are indefinite and only end if and when the court revokes them.

The Act also provides for a range of powers that may be exercised by various bodies, including the Forensic Leave Panel, about such things as leave of absence from a custodial place, extended leave from custody, interstate transfer of supervised persons, powers to arrest persons in Victoria from interstate, suppression orders and appeals. These topics are beyond the scope of this chapter.

Experts and disclosure

Questions of unfitness and mental impairment require expert evidence. The issues invariably give rise to the need to deal with medical diagnoses, explanations of the effect of the condition, the signs of the condition and whether they were present at the relevant time. These are all issues that lie beyond the common experience of a juror.

The type of expert required to assess a mental impairment or unfitness will depend on the nature of the person's condition. It should not be assumed that a psychiatrist is the only appropriate person. Commonly, a mental impairment arises due to a diagnosed mental illness, such as paranoid schizophrenia. In cases of mental illness, a psychiatrist is indeed the

appropriate expert. However, mental impairment may arise because a person's cognitive ability is hampered by a disability of some kind, such as a developmental disability or brain injury. If the issue relates to the functioning of the brain (rather than a mental illness), then a psychologist, preferably a neuropsychologist, is best placed to conduct relevant tests. In some cases an expert assessor may need to rely on further experts such as radiologists who can interpret brain scans, or a gerontologist who can comment on dementia.

The timing of an expert assessment is also important. For mental impairment cases, as time passes, the more difficult it will be for an expert to assess a person's state of mind during the alleged offence. For unfitness cases, the crucial time is close to trial.

However, fitness of a client to instruct might necessitate an assessment earlier in the proceeding, including around the time of committal in order to get instructions. It is not unusual to obtain multiple assessments of fitness over time – particularly if the condition giving rise to the unfitness is dynamic (including because of treatment).

In mental impairment cases, 'case management' and other concerns (such as a desire to minimise the impact the proceeding has on a sick person's health) will result in pressure on lawyers to disclose the defence and expert reports early in the proceeding. While it is true that this defence is like any other and can be raised for the first time at the trial itself, the obligation to tender expert evidence and the desire to avoid adjournments of trials means that early disclosure is the better way. However, this does not mean disclosure should be premature. As a matter of good practice, lawyers should be in a position to advise their client properly of all defences and possible trial

strategies before obtaining instructions to disclose expert material. Plainly, these kinds of judgements are likely to require the advice of trial counsel.

In unfitness cases, lawyers are obliged to advise the court of the existence of a fitness issue. Again, this does not require disclosure of the mere possibility of an issue or premature disclosure. Care should be taken to gather material, including expert assessment and to seek advice from trial counsel about disclosure of the issue and any reports.

Unfitness to be tried

The criterion for determining a person's fitness to be tried is found in section 6 of Part 2 of the Act. They include the accused's ability to understand the nature of the charge, to enter a plea, to challenge jurors, to understand the nature of the trial, to follow the course of the trial, to understand the substantial effect of any evidence and to give instructions to his or her lawyer. Clearly, these are all questions that relate to the time of the trial itself – not earlier stages in the proceedings when, for example, there might be a reasonable expectation that the client's condition might improve.

If there is a real and substantial question about the accused person’s fitness to stand trial, then the court must conduct an investigation (s 9). Usually, a real and substantial question is made out on the basis of an expert report, but this is not always necessarily filed – a judge might find there is a real question on the basis that both parties agree.

The investigation is conducted like a trial – a jury is empanelled, evidence is called about the person’s ability to satisfy the section 6 criteria, the judge gives the jury directions about the law and the jury returns a finding that the person is fit or unfit, similar to a verdict (s 11).

Unlike mental impairment, whether a person is unfit to be tried can arise long after the alleged offence and can arise more than once. Being alive to a fitness issue means lawyers must pay attention to a client's capacities and communications on an ongoing basis. A person who was lucid and rational at the time of an offence can become unfit to be tried at any time up to and during the trial process itself. A person's fitness can be determined at one point during the trial (and they can be found to be fit) only to be raised again at another stage because of a deterioration in their condition.

Similar to questions of mental impairment, a person is usually found to be unfit because of a mental illness or some other disability that affects the mind. However, it should not be forgotten that a person may not be able to satisfy each of the tests in section 6 because of a physical disability or a combination of conditions.

If a person is found to be fit, then the case is no longer subject to the provisions of the Act and proceeds according to the usual case management and hearing processes.

If a person is unfit, then the judge must determine (on the basis of expert evidence) whether on the balance of probabilities the person is likely to become fit within 12 months. If so, the case is adjourned for up to 12 months to see if s/he becomes fit. This usually requires further assessments and reports. If immediately or at the end of an adjournment the person is not fit then the matter proceeds to a special hearing under Part 3 of the Act. It is important to note that a case against an unfit person is not permitted to be held over indefinitely to be tried if and when they become fit – this would be oppressive. The time limits in the Act are intended to protect people from 'getting lost in the system'.

Special hearings are, like an investigation, conducted like a normal trial before a jury – but not the same jury that determined the investigation. Recognising that the accused person cannot protect himself or herself, the Act permits a lawyer to conduct the trial and to raise any defence that is open, including a mental impairment defence (s 16).

The findings open to a jury are ‘not guilty’, ‘not guilty because of mental impairment’ and ‘committed the offence’. A further recognition that the person has not been fit to protect himself of herself is that there is no ‘guilty’ verdict available and even if the person is found to have ‘committed the offence’, they are not subject to sentencing in the usual way (see below about consequences).

Mental impairment

The mental impairment defence is like any other factual defence. The test for mental impairment is whether (a) he or she did not know the nature and quality of their conduct, or (b) they did not know their conduct was wrong (that is they could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong)(s 20). Assuming an accused person is fit, then they can choose to pursue this defence, like any other, or not. Unlike questions of unfitness, there are no obligations on the person or their lawyer to disclose the defence or any material relevant to it.

Historically, only a recognised mental illness has been capable of founding a defence of mental impairment. However, growing recognition of other conditions such as intellectual disability, brain injury, dementia, etc, has seen the defence arising in a wider variety of circumstances. The one exception is an impairment resulting from a temporary self-induced state

such as a drug-induced psychosis. Care should be taken, however, to differentiate between a client who is psychotic purely because of drugs (or withdrawal from drugs) and a client who has a vulnerability to mental illness and whose drug-taking triggers or promotes an underlying condition. The second example is entitled to pursue the defence.

Whether a person has a mental impairment defence must be determined by a jury on the balance of probabilities along with any other factual matters to be determined – unlike fitness, which is determined by a separate jury. The party raising the defence has the onus of rebutting the presumption that the accused was not suffering from a mental impairment (s 21). Invariably, the question relies on expert evidence.

Section 21(4) provides an exception. If the prosecution and defence agree that the expert material establishes the defence, then the trial judge alone can direct that a verdict of not guilty because of mental impairment be recorded (s 21(4)) – commonly called a 'consent mental impairment'. The consent procedure is not available to an unfit person (*SM v The Queen* (2011) 33 VR 393). Care should be taken, however, not to be blind to other factual matters that should be tried, even if the mental impairment defence is certain.

The consequences of being found not-guilty because of mental impairment are either unconditional release or being placed on a supervision order (s 23). In fact, the judge must tell the jury this before they consider their verdict so that they don't think such a verdict will result in unconditional release without any control of risks the person may pose to the community.

Evidence about a mental impairment might become apparent at any time in a lawyer's relationship with a client. So, it is important that lawyers (particularly when dealing with clients known to have an impairment of some kind) are attuned to the issues and whether the client is showing signs of a mental impairment that should be assessed. For example, when attending a client in the cells soon after an offence or arrest, it is important to pay close attention and take notes of the client's demeanour, presentation, words, phrases, explanations, et cetera, to ascertain whether there should be an expert assessment of whether a mental impairment was operating at the time of the alleged offence. Such observations and notes might even become important to an expert who has to conduct an assessment much later and has to look back in time to determine the client's likely state of mind.

Committal hearings can be very important in the conduct of a mental impairment case, even if the evidence of the impairment is already strong. In short, a mentally impaired person is as entitled to proper disclosure of all factual matters as a non-impaired person. Every effort should be made to pursue other avenues for acquittal or to limit the factual circumstances of the offence. Sometimes, evidence disclosed at committal can assist an expert to determine more accurately the person's state of mind at the time of the offence.

Further, an accurate factual account of what happened will often be important if the court has to determine what kind of supervision is appropriate and what kind of risk the client poses to the community.

The defence of mental impairment applies to summary offences and to indictable offences heard and determined summarily before a Magistrate

(s 5) and similarly in the Children's Court (s 5A). If the defence is made out, the Magistrate must discharge the person (s 5; 5A).

Consequences - unconditional release and supervision orders

An unfit person found to have 'committed the offence' or any person (fit or unfit) found to be not guilty because of mental impairment, rather than facing a sentence, may either be unconditionally discharged or made the subject of a supervision order under Part 5.

Unconditional release is understandably uncommon. The bulk of cases under the Act seem to be about violence. So, the court is particularly concerned about the risk of further incidents and the likely effect on others. Unconditional release might be ordered, for example, where the person is already the subject of other orders and treatment regimes that adequately cover any further risk. Alternatively, and perhaps tragically, a person may have become so debilitated by their condition such that the risk of further incident is substantially reduced. Each case will depend on its own facts.

If the court determines that the person is liable to supervision (s 18 or 23) then Part 5 of the Act applies and the court has a range of powers. It can order assessments, grant bail on conditions or remand the person in an appropriate place, such as Thomas Embling Hospital (a specialist secure forensic hospital). The person is in a very real way under the supervision of the court.

Usually after some weeks, during which time the court has received reports (s 41) and a certificate of available services (s 47), it will determine the nature and conditions of the supervision order. During this time, a person is

entitled to gather their own information to assist the court to make a suitable order. In this way, the hearing is not unlike a plea.

In making decisions about supervision, including whether to make a supervision order, the fundamental principles in section 39 of the Act must be applied. It provides that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community. In making this principle the focus of the court's intervention into a person's life, Parliament has sought to protect people from 'getting lost in the system' (a real concern with the old 'Governor's pleasure' regime: see Second Reading Speech, Hansard, Legislative Council, 15 October 1997, p 188).

A supervision order may be either custodial or non-custodial (s 26). They are indefinite orders but are subject to reviews by the court (s 27). The court sets a nominal term for the order, but this should not be mistaken as equivalent to a term of a sentence (s 28). At the end of the nominal term of a supervision order, there must be a major review of the order, but the order will continue beyond that point if the risks require it (s 35). The indefinite nature of a supervision order is a feature that sometimes discourages people from pursuing unfitness or a mental impairment defence. The discretion to impose conditions is wide, but guided by mandatory considerations that relate the conditions to the needs of the person in the context of the risks demonstrated by the offending conduct (s 40).

Reviews of supervision orders are conducted by way of hearing where a person can test the evidence and seek variations of the order or ultimately, its revocation (s 31-33). The structure of the Act is intended to ensure a

graduated approach to unconditional release into the community after risks have been managed.

On review, usually, the Attorney-General and the Secretary to the Department of Health and Human Services appear and make their own submissions. The DPP is a party but usually appears at hearings only to indicate that the victim and family members have been made aware of the hearing and any applications being made.

Importantly, lawyers preparing cases under the Act that might result in a supervision order ought obtain all relevant material from family, GPs, school records, hospitals and other services that have been involved with the person at relevant times. This material can be important not only in determining the type of supervision they need but it may also assist the assessor in determining whether the defence is available in the first place.

Appeals

The Act provides for a range of appeals. A person can appeal against being found to be unfit (s 14A), a 'mental impairment verdict' (s24AA), the making of a supervision order (s 28A) and, the confirmation or variation of the supervision order (s 34). Like a DPP appeal against sentence, the DPP can appeal against the making of an order for unconditional release (s 19A and 24A) and the revocation of a supervision order (34A).

Further appeals are available against orders relating to granting a person custodial order leave.

Children's Court

Since 1 November 2015, the Act empowers the Children's Court to deal with unfitness to plead and mental impairment. Section 5A and Part 5A governs such proceedings. While this chapter does not deal with those provisions in detail, they reflect the law and practice in the higher courts with necessary adjustments.

Part 9:

Trials

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Chapter 16

Role of Instructing Solicitors in Criminal Trials: Preparation and Client Management

Written by Erin Ramsay

Introduction

This chapter is a guide to the preparation of criminal trials and client management.

The key themes are early preparation and effective communication. The preparation for trial begins the moment you take instructions from the client.

Diligent early preparation can materially affect the outcome of a trial and should not be glossed over. Each matter is different and not everything in the chapter will be relevant to all trials. The following is intended as a guide to steps that should be taken in preparation for trial and is divided into the following three topics:

1. Preparation of trial briefs
2. Document management
3. Client management

Preparation of Trial Briefs to Counsel

Preparation of the trial brief is a continual process beginning with the service of the hand up brief. These days continuing disclosure is usually done electronically and you may not need to deliver a paper brief to counsel if one already exists from committal.

However, it is the role of the instructing solicitor to ensure the documents are received and managed in a way that makes it easy for anyone to find. Remember that the pages in the depositions are numbered differently from the hand up brief so counsel must have the depositions in the brief even though they contain largely the same material.

At a minimum the trial brief should contain the following documents:

1	Indictment
2	Crown Opening
3	Defence Response
4	Depositions
5	Client instructions
6	Defence witness statements
7	Material disclosed by police (LEAP, interpose, etc)
8	Prior history for accused and witnesses
9	32C material
10	Court forms and correspondence
11	Memos and file notes from all court attendances

Everyone has their own way of organising material, do what works for you. The important thing is that you are able to quickly locate all the material during the trial.

Most practitioners, both instructors and counsel, find it useful to prepare a table of evidence which summarises the key evidence in the case and cross-references what each witness or exhibit says about that piece of evidence.

Document Management

A good way to manage documents is to maintain a running index of all the material that has been received from the very beginning. This allows you to easily identify any missing documents and ensure counsel receives everything provided during disclosure. Records should also be kept of requests made for documents and the dates documents are provided. A single document can change the outcome of a trial and it is vital to ensure counsel receive all the available material.

A common occurrence at committal hearings is cross-examination by defence of an informant traversing all the documents they have failed to disclose pursuant to request, either on the form 32 or under a subpoena. The response of the informant is often "I provided that to the OPP" at which point the prosecutor jumps up and an argument ensues about whether these documents have in fact been provided.

It is vital that instructing solicitors manage the receipt of documents in the disclosure phase to ensure counsel briefed for committals have all the relevant material and the material missing is clearly identifiable. Documents like LEAP reports can be difficult to catalogue as they usually do not have page numbers so it assists if you record the number of total pages in each document as well.

Follow through with your requests for disclosure and ensure that all material received is catalogued in the brief. Perusal of the additional material may warrant further requests for disclosure and/or subpoenas.

Ideally all requests for disclosure will be made and received prior to committal but this is often not the case. After the committal is finished it is

important to liaise with counsel about the status of any undisclosed material and the potential for further requests or subpoenas to be issued.

The use of technology is rapidly increasing in criminal trials. The courts are working towards a future where trials will be virtually paperless. Whilst this is clearly not happening in the near future, keeping up with technology is vital. There are many benefits if technology is harnessed and used appropriately.

Many practitioners are now using applications like Dropbox to keep documents in a folder shared between solicitor and barrister. Do that from the start and everything is there ready to go whenever a new person becomes involved in the matter. Whilst most people are still reluctant to solely rely on electronic documents, if they are all in one accessible file everyone at least knows what has and has not been provided.

Client Management

Clients come in all sorts of different characters, each presenting a new challenge in working out how to establish a rapport and manage their expectations. Building a trusting and professional relationship with the client early in the piece is important. The more information you can extract from the client the better prepared for trial you will be. Putting in the effort to build a trusting relationship with the client at the outset will pay dividends when it comes to trial.

The trial process is complex and utilises specialised language that is not readily understood by lay people. If the client is unfamiliar with the criminal justice system it is important to walk them through the process at the outset

so they can make informed decisions along the way. Make sure they know what the process from arrest to trial encompasses so they are prepared.

Involve the client. They can be a valuable resource if they are able to assist in the preparation of their own case. Provide a copy of the brief as soon as it is received and encourage the client read it thoroughly.

Taking Instructions

Instructions should be obtained from the client as early as possible, preferably at the time of arrest and then again after receipt of the hand-up brief. In some circumstances it may not be necessary, or appropriate, to take detailed instructions. Indeed in some cases the only instructions provided are to plead not guilty, in which case it may be appropriate to seek a response from the client to the hand-up brief rather than full instructions.

In other cases, for example if the client positively raises self-defence, it is important to have their version of events recorded as early as possible. Solicitors need to adapt to the circumstances of each particular case to determine which instructions are necessary at each stage.

Depending on the client and the nature of the allegations topics to cover can include:

- Circumstances of the alleged offence
- Events occurring around the same time that might have relevance to the allegations
- Relationship of the client to any of the witness
- Potential witnesses who are not listed on the brief
- Relationship between the client and any co-accused
- Background and personal circumstances of the client

If the client nominates potential defence witnesses the solicitor should speak with them as soon as possible and if appropriate take a proof of evidence. By the time the trial rolls around they will not have a great memory of what occurred and it is important to have their version of events noted early. The decision whether to take a formal statement rather than a proof of evidence will be dependent on the circumstances of the case. Consideration should be given to the possibility the witness may not be available at trial.

Clients in Custody

Communication is much more difficult when clients are in custody. Even more so when compounded by the high incidence of intellectual disability and literacy difficulties in the prison population. Try and be creative in how these can be overcome. The client needs to be aware of the evidence contained in the brief in order for them to assist in determining which witnesses are required for committal. In some cases this will be obvious from the outset but in others seemingly innocuous witnesses can become quite important.

Always remind clients that their phone calls are recorded and that there are many examples of people who end up facing extra charges because of things they have said on the phone, usually involving a perceived attempt to pervert the course of justice. It is also advisable to give a warning about the use of covert operatives in custody to elicit confessions, and advise clients not to discuss the circumstances of the case with anyone.

Make use of the (limited) support services available in prisons if you have a client with special needs. For example the Koori Liaison Officers and Salvation Army Chaplains can provide some support to people in custody. Regular communication is even more important for clients in custody.

Always ensure that they are receiving the mail you send them and that you have regular phone or video calls to update on the progress of the case.

Physical Appearance

Some clients may require assistance ensuring they are well presented for the trial. Ensure the client has adequate clothing to wear and an appropriate hairstyle.

Conclusion

Preparation for trials involves a significant amount of work on the part of the instructing solicitor, the magnitude of which is not always reflected in the funding available for preparation. However the importance of early preparation of the tasks outlined in this chapter cannot be stressed enough. Early and thorough preparation will ease the burden as the trial approaches and ensure the client is involved throughout the process.

Chapter 17

Proofing Witnesses

Written by Stewart Bayles

Preparing a witness for giving evidence in court

Calling evidence in chief from your client or any other witness is an under-practiced skill for most criminal defence lawyers. It is a difficult task that should not be underestimated. If you elect to call evidence in a criminal trial, that evidence may win or lose the trial for you.

It is imperative that you prepare thoroughly for the process of leading evidence in chief. It is equally imperative that your client, or any other witness, is prepared for the experience of giving evidence in court.

But there is a line between legitimate preparation and the unethical coaching of a witness. The following is an attempt to provide guidance to criminal defence lawyers on how to prepare a witness – whether your client or another witness –to give evidence, within the boundaries of a lawyer's ethical obligations and duty to the court.

Ethical considerations

Rules 24-26 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules* 2015 deal with *Integrity of Evidence.* They provide that –

Integrity of Evidence – Influencing Evidence

a. A solicitor must not:

i. advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so; or

ii. coach a witness by advising what answers the witness should give to questions which might be asked.

b. A solicitor will not have breached Rule 24.1 by:

i. expressing a general admonition to tell the truth;

ii. questioning and testing in conference the version of evidence to be given by a prospective witness; or

iii. drawing the witness's attention to inconsistencies or other difficulties with the evidence, but the solicitor must not encourage the witness to give evidence different from the evidence which the witness believes to be true.

Integrity of Evidence – Two Witnesses Together

a. A solicitor must not confer with, or condone another solicitor conferring with, more than one lay witness (including a party or client) at the same time:

i. about any issue which there are reasonable grounds for the solicitor to believe may be contentious at a hearing; and

ii. where such conferral could affect the evidence to be given by any of those witnesses,

unless the solicitor believes on reasonable grounds that special circumstances require such a conference.

b. A solicitor will not have breached Rule 25.1 by conferring with, or condoning another solicitor conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

Communication with Witnesses Under Cross-Examination

a. A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:

   i. the cross-examiner has consented beforehand to the solicitor doing so; or

   ii. the solicitor:

      (i) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;

      (ii) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and

      (iii) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.

One of the most fundamental duties the lawyer has is not to knowingly mislead the court. This duty extends to the process of calling evidence and preparing a witness for giving evidence in court. Always be aware that an unexpected turn of events could lead to your conduct being scrutinized, and a situation arising where your interests are in conflict with your client's.

Avoid the risk of this occurring by making sure that your conduct is beyond reproach at all times.

An effective way to do this is to make sure that your client understands your role in the process and the boundaries of the lawyer-client relationship. Explain to your client the effect of the above rules. Explain to them that your role is not to tell them what to say, or to influence the content of their evidence, but to assist them to prepare for the process of giving evidence in court.

Tell your client that they must tell the truth. Tell them that they will be under an oath or affirmation in court and that they will be under an obligation to tell the truth.

Taking instructions

If the proposed witness is your client, he or she is entitled to receive advice about the charges, the nature of the allegations and the strength of the prosecution case, including any legal and factual issues, before being asked to provide instructions. The final decision whether to call evidence should come at an advanced stage of preparation of the case. Any accused person who gives evidence in their own trial needs to have an appreciation of the nature of the prosecution case and the significance of the evidence against them.

If the decision is made to call evidence, take detailed instructions from your client. Elicit instructions through non-leading questions. Give careful consideration to the nature of the case against your client, and what allegations and evidence need to be met by your client's evidence.

Be aware of complexities in the evidence and any difficulties that may arise from the giving of particular evidence. In order to do this, make sure you have a thorough grasp of the legal and factual issues involved in the case.

Explore the client's instructions in detail. Anticipate lines of cross-examination that your client will likely be subjected to, and try to deal with these proactively. You need to have a thorough grasp of everything your client is likely to say about relevant matters before they get in the witness box. You want to avoid the situation where you hear evidence from your client about a matter for the first time in court – either in evidence in chief or under cross-examination.

Take the client through the evidence

Once instructions have been taken, and a proof of evidence obtained, take your client through their evidence in conference. Explain that the evidence has to come from the client, and not from you, and that this is done through non-leading questions. Demonstrate and practice this with the client.

Test the evidence

Your client is entitled to be prepared for the reality of giving evidence in court, and that includes the fact that their evidence will be tested under cross-examination. You are not doing your client any favours if you uncritically accept instructions without challenge, particularly if those instructions are implausible or if there are inconsistencies or other difficulties with the evidence.

But there is a line to be drawn between properly preparing your client for the experience of being cross-examined, and the training or coaching of your client.

You should draw your client's attention to points in their evidence that appear problematic or implausible. You should also draw your client's attention to points that are likely to be raised in cross-examination. You are entitled to bring to their attention the way in which they will be cross-examined, and how the objective of cross-examination will be to test their evidence, and the likely effect of such cross-examination.

However, you must not coach or encourage your client to give evidence different from the evidence that they believe to be true. You should refrain from engaging in prolonged or repetitive cross-examination of your client in conference, as this may have the effect of influencing the content of their evidence, and may lead to them giving evidence in court that appears rehearsed or unnatural.

Be aware that the process of preparing your client to give evidence in court, and testing their evidence in conference, may lead to the ultimate decision *not* to call your client to give evidence. You may discover difficulties in the evidence that can simply not be addressed by calling your client into the witness box. Such a position is better discovered before calling your client to give evidence, rather than brought out under cross-examination.

Prior statements

If your client has made any prior statements that may become relevant, go through these with your client. Such statements will usually include a record of interview with police, or any other statement made to police. Consideration should also be given to any statement that your client may have made in the past, that the prosecution could have access to, that could bear upon the issues in the trial.

Take detailed instructions about whether such statements were accurate, truthful and complete. If your client instructs that such statements were not accurate or truthful, in whole or in part, then you need to take detailed instructions about which parts and why the client made inaccurate or untruthful statements on a previous occasion.

Your client should be advised that any prior inconsistent statements are likely to be put to them in cross-examination, and that they may be criticized about the inconsistency.

If your client has made prior statements that you know will be inconsistent with the evidence they will give in court, then this needs to be explained and dealt with in evidence in chief, and accordingly you need to take detailed instructions about such matters in advance.

A client is entitled to be provided with a copy of any prior statements and they should familiarize themselves with what they said on the prior occasion.

Character

If your client has no prior convictions then you will most likely be leading evidence of good character. Always check this with the prosecutor and informant to confirm that your client has no prior convictions, and that there are no matters that will be led in rebuttal if you put character in issue. If you are leading evidence of good character, lead from your client that he or she has never been in trouble with the police, regardless of whether there are other witnesses from whom you will also lead evidence of good character.

If your client has prior convictions, it is imperative that your client, or any other witness you call, does not put character in issue. Explain to them what it means to put character in issue so that they understand the kinds of statements that may inadvertently put their character in issue. This could include statements such as "I would never do that", "It's not in my nature to do that", and “I'm not the sort of person who would do that".

Your client should not admit to any other criminal offending not before the court. They should understand that they will be giving evidence only about matters relevant to the charges the subject of the trial. Often a criminal trial will be a discrete set of charges within a matrix of allegations. This will often be the case where there has been an order for severance of charges. Unless such matters are relevant to the evidence they give, your client should be told to avoid commenting on matters that fall outside the scope of the charges that are before the court.

Practical tips

a. Rules of Evidence

You are not going to give your client a tutorial on the *Evidence Act* before giving their evidence. But a lay person who gives evidence may come unstuck if they have no preparation for the rules of evidence. There are two fundamentals of evidence that a witness needs to have some understanding of before getting into the witness box.

The first is that they need to be aware of the difference between their own evidence and hearsay evidence. A witness can only give evidence about matters that they observed themselves. They cannot give evidence about a factual matter their knowledge of which comes from something someone else has told them.

The second is that where a witness is giving evidence about factual matters that occurred in the past, they must understand the difference between giving evidence from their actual memory, and making a guess or assumption about what happened. An example of this is where the witness gives answers such as “I would have said this...” or “When I said that I would have meant this…” Such answers suggest that the witness does not have a complete memory of the events and is putting the evidence together from a combination of memory and assumption. This kind of evidence can come unraveled in the witness box.

b. Answering the question

Advise your client to listen carefully to the whole question; try to answer the question directly and concisely; give yes/no answers where appropriate; elaborate in more detail where this is appropriate and necessary to give full meaning to the answer.

Advise your client that during evidence in chief – the evidence must come from their mouth, not yours. Give them examples of non-leading questions so they understand that they cannot rely on you for the important parts.
Advise your client that cross-examination is also a process of question and answer – they should listen carefully to the question, and answer it, but not become argumentative with the cross-examiner or indignant that their evidence is being challenged.

c. Emotion

An innocent person who denies a heinous allegation might be expected to do so with some force and conviction. On the other hand, overly theatrical displays of emotion are likely to be viewed skeptically by a jury. An accused person who gives evidence should be natural and honest in any

emotion they express and they should not restrain the expression of natural emotion that arises from the circumstances and the subject matter.

At the same time, it is important that your client does not react negatively to being cross-examined. A prosecutor might use as a tactic questions designed to make your client angry and aggressive. It is important that your client anticipates this possibility and does not become angry, aggressive or argumentative with the cross-examiner. Advise your client to answer the questions politely and respectfully with verbal responses and not with emotional reactions.

d. Mechanics of the trial process

Inform your client about how the trial will unfold and where their evidence will fit in the sequence of events. Inform them about the process of evidence in chief, cross-examination and re-examination.

e. Proof witnesses alone

The proofing of any witness should be done with the witness alone so that their evidence is not influenced by any other person. There is a practical, as well as an ethical, basis for this point. A witness whose evidence is influenced by another is more likely to come unstuck under cross-examination if they do not have a proper basis for the evidence they give.

c. It's harder than it looks!

Most witnesses will find the experience of being the centre of attention in the courtroom harder than they realise. Encourage your client to anticipate this by observing other witnesses give their evidence and undergo the process of cross-examination. Encourage your client to relax, to focus on each question they are asked, and if they don't understand the question they

should ask for it to be clarified, and then they should try to answer the question as directly as possible. You can assist them to prepare for this by taking them through their evidence in conference prior to them getting into the witness box.

Chapter 18

Jury Selection in Criminal Trials

Written by Jason Gullaci

Introduction

Jury selection in criminal trials is an inexact science. It also can be overthought and overcomplicated. An accused person has very little information, on which to base a decision, whether or not to challenge prospective jurors. Many practitioners have 'golden rules' for selecting juries, however in truth, most decisions to challenge jurors are based on speculation and prejudice – as there is not much else available to go on.

Short overview of the law and process for empanelment

In a criminal case a jury is made up of 12 people. The process of empanelling a jury is as follows:

- A jury pool is summoned by a trial judge, after all necessary pre-trial argument has concluded.[135] As both prosecution and defence can prevent members of the jury panel becoming jurors, a substantial number of people are required to form each jury panel;
- When the jury panel first enters the court they are provided information by the trial judge about the case and the parties involved. At this time any member of the jury panel can make an application to be excused from serving on the jury;[136]

[135] S.29 of the *Juries Act 2000*.
[136] ibid, s.32.

- The accused is then arraigned before the jury panel and enters their plea of not guilty to the charges;[137]
- The accused is then told that they have the ability to challenge jurors before any prospective juror takes a seat in the jury box. At this time counsel for the accused will ask that their instructing solicitor be permitted to assist the accused. Once this permission is granted the instructing solicitor will then enter the dock to assist the accused during the empanelment;
- Each potential juror is then called, and if they are not challenged, they enter the jury box and take a seat until 12 jurors have been selected;
- When each potential juror is called, during the empanelment process, the only information provided is:
    - The name of the person or alternatively a number for that person instead of their name; and
    - Their occupation;
- Based on the above information, and the appearance of the prospective juror, an accused must decide whether to challenge a potential juror. A challenge must occur before any person takes a seat in the jury box. An accused has a brief period of time to consider each potential juror as they must walk past the dock, or otherwise turn and face the accused, and then proceed to the jury box;
- Where an accused person is tried alone they have the right to challenge six jurors without providing any reason for the challenge.[138] This is called a peremptory challenge. If there are two accused on trial each has the right to challenge five jurors without

[137] S.210 of the *Criminal Procedure Act 2009*.
[138] S.39(1) of the *Juries Act 2000*.

providing a reason, this reduces to four challenges each if there are more than two accused on trial;

- The accused exercises their right to challenge a juror, without giving a reason, by saying the word ‘challenge’ before any prospective juror has taken a seat in the jury box;
- An accused person can also challenge for cause. This may arise where, for example, a person known to the accused is in the jury panel but the person has not recognized the accused during the empanelment process. If such a challenge is raised the accused must satisfy the trial judge it is appropriate to exclude that person on the basis of the ‘cause’ alleged. There is no restriction on the number of times an accused can challenge for cause.

Explaining the process to your client

Prior to the jury being empanelled, it is crucial that you take the time to thoroughly explain the empanelment process to your client. This should be done in conference well before the time when the jury is to be selected.

It is also useful to repeat the information when inside the court room so you can actually show your client where this will occur. The accused must understand that they have to exercise the challenge by saying the word ‘challenge’ prior to a prospective juror taking a seat in the jury box.

If there are certain types of jurors you don’t want in your jury this must be clearly discussed with the accused so they understand the reasons why such classes of people should be challenged.

Do you need more than 12 jurors?

If the trial is going to be particularly lengthy then consideration should be given to asking the trial judge to empanel more than 12 jurors. A court has the power to empanel up to 15 jurors to sit on a criminal trial.[139] Prior to deliberations a trial judge must conduct a ballot, if there are still more than 12 jurors, to reduce the remaining members of the jury to no more than 12.

Tactics in jury selection

As indicated above, an accused has limited information on which to base a challenge. That information includes:

- Possibly the name of the potential juror – although this is not always the case as some judges empanel by number rather than name. If a name is provided it may tell you something about the background of the person;
- The occupation of the prospective juror;
- The appearance of the prospective juror.

The information on which a challenge is based is relatively limited. Nonetheless a number of 'golden rules' appear to have developed among the profession about certain types of jurors that should be avoided in certain cases. Some of those 'rules' include the following:

- In a sexual abuse case involving a child complainant the following types of jurors should be avoided:
    - School teachers – especially primary school teachers;
    - Kinder teachers;
    - Nurses;
    - Social workers;

[139] ibid, s.22 & 23.

- In cases involving serious assaults or murder the following types of jurors should be avoided:
    - Nurses;
    - Paramedics;
- In complex fraud cases the following types of jurors should be avoided:
    - Accountants;
    - Book keepers.

These are general rules that appear to have developed over time. While understandable, they are based on gross generalizations and may not in fact be accurate. For example – in a complex fraud case it may be useful for the defence to have an accountant on the jury who can scrutinize the prosecution case and understand the complicated financial dealings involved.

Advice should be provided to an accused person as to the type of jurors you both want and don't want on their jury. Ultimately the challenge, and the decision, is up to the individual accused person.

Challenging jurors who have sought to be excused unsuccessfully

It is important to pay attention to applications from members of the jury panel to be excused. If an application is refused, by the trial judge, you may obtain useful information during the application, which further informs you whether that potential juror ought be challenged if their name is called during the empanelment process.

Recent decision dealing with jury empanelment

In *Theodoropoulos v. R*[140] the Court of Appeal dealt with a series of questions concerning the proper form of jury empanelment in Victoria.

In this case the trial judge adopted an unusual method of selecting the jury. The day prior to empanelment the trial judge's associate sent an email to the parties stating that Her Honour 'does not require prospective jurors to parade past the dock when their number is called. They simply stand and make their way to the jury box, unless challenged or directed to stand aside.'[141] When the empanelment occurred this procedure was followed, a prospective juror, on having their name called, got up and walked directly to the jury box without walking past the dock.[142] There was a concern that the accused was not given a proper opportunity to observe the faces of prospective jurors.[143]

Redlich and McLeish JJA made the following findings:

- '… an accused is likely to know no more about a prospective member of the jury than their name (or number), sex, address, occupation and, of course, their appearance. But the scope of that information varies between jurisdictions. In practice, the accused's opportunity to challenge jurors centres upon those whom the accused "does not like the look of" or otherwise recognises.'[144]
- 'It follows that the opportunity for the accused to view prospective jurors is essential to the accused's right to challenge: "he may prefer his own instinctive reaction to the person he sees to the experience or theories of [his counsel]. It is his peculiar right to follow his own

[140] [2015] VSCA 364.
[141] ibid at [18].
[142] ibid at [19]-[20].
[143] ibid at [21].
[144] ibid at [31].

impressions and inclinations."'[145]

- 'In Victoria, on the calling of the name (or number) and occupation of a prospective juror, there has been a longstanding practice that the prospective juror "parades" in front of the accused: the juror stands and walks before the accused and then on to the jury box, even if this requires the taking of a circuitous route.'[146]
- 'The "parade" is an instance of a longstanding historical practice of ensuring that an accused has an opportunity to inspect visually the members of the jury panel.'[147]
- 'The right of peremptory challenge requires that the accused be afforded an adequate opportunity to physically view each prospective juror's face.'[148]
- 'The practice followed by the trial judge in the present case, requiring the prospective jurors to walk directly to the jury box without passing in front of the dock, involved a significant and unexplained departure from the long-accepted process followed in criminal trials in this State.'[149]
- 'Trial judges in Victoria should follow a practice that provides the accused with a reasonable opportunity to see the prospective juror's face, before they enter the jury box. There is no prescribed practice. The opportunity may be provided by employing the traditional practice of a "parade" by the prospective jurors past the dock or by directing prospective jurors, whose name or number is called, to stand up and turn to face the accused in the dock before proceeding to enter the jury box, or by some other procedure which satisfies the

[145] ibid at [32].
[146] ibid at [37].
[147] ibid at [38].
[148] ibid at [81].
[149] ibid at [82].

objective of enabling a visual inspection of the potential jurors.'[150]

[150] ibid at [93].

Chapter 19

Good Character Evidence

Written by Colin Mandy

Evidence of Good Character

Adducing evidence of an accused's good character in a criminal trial has a long history. It probably comes from a defence called 'compurgation', where an accused could establish his innocence by swearing to it on oath, and then getting a certain number of people, usually twelve, to swear that they believed him.

Times have changed, perhaps unfortunately for some, but historical anomalies still persist in the application of good character evidence. It is usually hearsay evidence, opinion evidence, credibility or tendency evidence (and sometimes all of them); but, nevertheless, it was well-enshrined at common law and now persists in statute.

The *Evidence Act 2008*[151] expressly permits the adducing of evidence which tends to prove (either directly or by implication) that a person is of good character - it also allows evidence in rebuttal. The operation of the hearsay rule, the opinion rule, the tendency rule and the credibility rule are excluded from such evidence.

Good character evidence bears upon a) the propensity of the accused to have committed the offence; and/or b) their credibility.

[151] S.110.

Evidence of good character includes evidence as to the accused's general good reputation, or favourable disposition, either generally or (in an evolution from the common law) in a particular respect[152]; but the mere fact that someone has no prior convictions will not necessarily warrant the direction[153]. Evidence of good character may also emerge in the prosecution case, from statements made by witnesses, or the accused, to others.

Even if the accused does have prior convictions, these may be irrelevant to character, and the direction may be warranted.

If the evidence is adduced, the trial judge has to determine whether or not it should attract the benefit of the good character direction, in one or both of the relevant limbs, along the lines of the following (tailored to the facts and the issues in the case):

a. *As to propensity*: that the jury should bear the good character evidence in mind as a factor affecting the likelihood that the accused committed the crime charged[154]; and that a person of good character is less likely to have committed the crime than a person not of good character[155];
b. *As to credibility*: that the jury should bear the good character evidence in mind when assessing the credibility of any explanation, or evidence, the accused has given.

These directions can be balanced by the reminder that good character evidence cannot change proven facts or provide a defence in itself; and that

[152] S110(1).
[153] "There are logical difficulties with the proposition that an absence of previous convictions is in itself evidence establishing a person's good character. It may be a factor in assessing good character, but standing on its own it is generally neutral." *R v Falealili* [1996] 3NZLR 664 at 667, per Henry J.
[154] *R v RJC* 18/8/98 NSW CCA.
[155] *Fung v R* [2007] NSWCCA 250.

people previously of good character commit crimes for the first time. (When directing on this last matter, reference to Jack the Ripper would be inappropriate and historically inaccurate, and should be avoided[156]).

Relevance

The first question is whether or not the evidence is relevant to the issues in the trial.

In *Melbourne v The Queen*[157] the defendant admitted stabbing his neighbour, but invited a conviction for manslaughter (and not murder), on the basis of diminished responsibility. There was some limited evidence of good character. In the High Court's decision many of the relevant considerations are canvassed. (Practitioners who want a reasonably exhaustive analysis of the principles should read it.)

In *Melbourne* the defence argued that credibility <u>was</u> in issue, and the direction required, because the defendant had made many out-of-court statements whose truth may have been in issue. The judge did not give that part of the direction, but did give the 'propensity' direction. McHugh J found that the character evidence was not sufficiently probative of any issue in the trial to warrant the direction, and Gummow J agreed with Hayne J to similar effect. Kirby and Callinan JJ however would have ordered a re-trial, notwithstanding that the 'propensity' direction was given in conventional terms, they held that the 'credibility' direction was also warranted.

Practitioners should analyse the issues in the particular case, and then ask themselves whether evidence of good character will allow the jury to accept the accused's account as more credible, or whether the evidence makes it

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[156] *Wahi v The Queen* [2015] VSCA 132.

[157] Melbourne v R (1999) 198 CLR 1.

less likely that the accused could have committed the offence. Sometimes both aspects will be relevant.

If the accused gives evidence of his own good character, cross-examination on that issue by the prosecutor can only be with the leave of the trial judge, and only then when there is a 'compelling need to allow it in the interests of justice.'[158]

Proofing Witnesses

If good character evidence is to be called from witnesses, they should be carefully proofed. Good character witnesses come unstuck at times, because either they never see the accused socially, or because they frequently get drunk with the them, or because they have an intervention order out against them[159], or any of a number of other details which may undermine the evidence. If good character evidence is called it should be unmuddied for maximum effect.

Duty to seek details from the Prosecution

If it is intended to call evidence of good character, defence Counsel should indicate that intention to the prosecutor, and ask what, if anything, is known which may rebut the evidence. The prosecutor then has a duty to make inquiries and to inform the defence of any relevant considerations. It may be that there are no prior convictions, but other matters can be raised which might put the evidence in a different light.

Discretionary

Ultimately the decision as to whether or not to give a good character direction is discretionary and not mandatory. However, as Kirby J has made

[158] R v Crawford [1965] VR 586 at 591 per Smith J.
[159] A case the author was appearing in, which he won't name.

clear, “the trend of judicial authority in Australia has undoubtedly been towards upholding an accused's entitlement to have a direction where there is evidence of good character so that judicial authority and assistance are added to the pleas of counsel to the jury in that regard. What was always regarded as good practice by leading judges has increasingly settled into best practice and is now reflected in Judicial Bench Books. In this situation, omission of the direction about good character may result in a justifiable sense of grievance on the part of an accused who has demonstrated good character as that expression has come to be accepted by the courts.’[160]

McHugh J agreed, saying, ‘this Court should not depart from the rule that a judge is not obliged to direct the jury concerning the accused's good character. The preferable position is that the trial judge must retain a discretion as to whether to direct the jury on evidence of good character after evaluating its probative significance in relation to both:

a. the accused's propensity to commit the crime charged; and
b. the accused's credibility.’[161]

Although the direction is discretionary, trial judges have to consider the relevance of any allegations of bad character carefully, before concluding that the direction is not open. In *DPP v Newman*[162], the trial judge made seven errors of reasoning which vitiated her ruling. The Court of Appeal held that a good character direction should have been given.

Conclusion

For those acting for defendants with a negligible criminal record, the issue as to whether or not to call good character evidence in the trial must be

[160] *Melbourne* at [113] (citations omitted).
[161] *Melbourne* at [30].
[162] (a Psedonym) [2015] VSCA 25.

considered. It can be very powerful, with considerable effect on a jury's conclusions. It is usually the last evidence the jury hears before the Prosecution addresses them and, if it is clear and cogent, with appropriate directions it can carry the day.

Chapter 20

Role of Instructing Solicitors Post Conviction

Written by Moya O'Brien

Introduction

What role does the solicitor play post-conviction? Post-verdict, a practitioner may be tempted to slip down a gear or two following what in many cases has been a taxing period mentally and physically. Nevertheless, the practitioner must steel themselves for a number of final and very important tasks that follow any conviction.

While not often afforded time to consider post-verdict matters during the heat of trial battle, the pre-verdict wait offers just such an opportunity. Waiting for a verdict can give rise to conflicting emotions for all involved. On one hand, the trial is over (barring the verdict) and your hard work is done. On the other, waiting for the return of the jury can leave you and your client breathless with trepidation and on knife's edge. Thinking ahead to tasks beyond the verdict not only takes one's mind off the wait but ensures one is well organised and prepared in the event of a conviction.

This paper outlines the following three crucial areas to which a diligent practitioner should swiftly shift their focus at the close of a trial in place of unproductive fretting and hand-wringing. Most importantly, it's stressed that, for each of the areas identified below, successful post-verdict handling requires some degree of preparation pre-verdict.

1. Client management
2. Preparing for the plea

3. Preparing the materials to assess the merits of appeal

Client management

Pre-verdict: Firstly, it is imperative that if the client faces the prospect of being remanded, particularly if it is for the first time, they are prepared for this and provided with some simple survival suggestions for their first few weeks of imprisonment. Naturally, contemplation of incarceration can be confronting and emotional for a client, particularly where the client protests their complete innocence, so the practitioner should use their judgment and intuition as to when and in what manner raising such matters will most likely receive a productive and rationale response. The practitioner will develop their own techniques for addressing these matters. Useful suggestions for topics to raise with your client at some point prior to the verdict are:

- Encouraging the client to set their personal affairs in order before verdict. This might involve organising financial and medical powers of attorney;
- Ensuring that the client attends Court with filled prescriptions for any current medications;
- Packing a bag with essential items;
- Preparing a list of useful telephone numbers, including family, friends and the solicitor's firm;
- Putting the client and their family in contact with support groups such as VACRO;
- Impressing the importance of keeping a low profile and avoiding conflict;
- Encouraging the client to make positive use of his/her incarceration and to explore the possibilities of further studies or a job in custody.

Naturally, you may have a chance to raise and discuss some of these matters with the client immediately post-verdict. Nevertheless, common sense dictates that it is in your client's best interests to contemplate these matters well prior to conviction and you can greatly assist your client by judiciously raising these matters earlier rather than later. A client who has addressed the personal and administrative matters described above is more likely to offer greater co-operation and lucidity when it comes to preparing for the plea and discussing appeal prospects.

Post-verdict: No matter the strength or the weakness of the defence case, a guilty verdict is always a shock to the client. Up until this point, the client has been focusing exclusively on the trial process, and often has not fully considered the possibility of a guilty verdict, let alone a secondary process. The client is often bewildered and confused following a guilty verdict. Clear and concise information in both written and oral form is required to help the client understand what has happened, what the next steps are and what options for appeal are available.

It is desirable that the instructing solicitor attend on the client both immediately after the verdict and then some days later to dissect the verdict, plan the plea process and discuss the prospects if any of a successful appeal against conviction. A timely follow up conference is particularly important if the client has been remanded for the first time, as this will allow you an opportunity to assess firsthand how the client is coping in custody (as this may be relevant to matters you raise in the plea),ensure the client adequately understands the verdict (this is particularly important in cases where there has been multiple counts, and/or alternative counts on the indictment) and to provide the client with a realistic expectation of what to expect in terms of a sentence and appeal prospects thereafter.

Bear in mind that the client's family and friends will often be in a state of confusion or disbelief and may also require a post-verdict discussion regarding the verdict and next steps. You might find it useful to spend some time with counsel summarising the jury verdict, discussing and reviewing the sentencing range and brainstorming the possibilities of conviction appeal prior to embarking on these discussions.

The development of a good template pro forma letter to be given to the client is also encouraged and provides an excellent record for the practitioner and the client alike of these important discussions.

Preparing for the plea

A plea hearing is often scheduled quickly after the delivery of the verdict, unless there are solid grounds for extending that period (such as to obtain reports and documents that might otherwise not be available immediately). The short window between verdict and plea demands swift action. Immediately after a guilty verdict (or even before), the practitioner should set about obtaining and ordering any documentation required for the plea. If there are any mental health issues, it is also prudent to request an adequate period of adjournment to obtain a psychological or psychiatric assessment. If the client has been on remand in the lead up to the trial it may also be worth considering whether any of the client's Justice Health or associated files should be subpoenaed.

Preparing to assess the merits of appeal – conviction and sentence

A convicted client has 28 days from the date of sentence to lodge an appeal against sentence and/or conviction. This should not mean, however, that discussions relating to the merits of an appeal against conviction commence only after the plea hearing. A practitioner should resist the urge to offer "off

the cuff' opinions on appeal prospects as such assessments may be motivated by providing some degree of comfort to a distressed client and not have the benefit of a considered and comprehensive review of relevant factors.

Assessing the merits of an appeal can often be a time consuming process and it is important to get prepared early. Throughout the trial, a well prepared practitioner will keep a running list of possible areas of appeal. This may include;

- a list of any rulings made against your client;
- any anomalies in the trial;
- any controversial directions or failures to give requested directions;
- any interlocutory appeals;
- a summary of any no case submissions;
- any potentially questionable verdicts

Once you have a comprehensive list, make sure you have a complete transcript of the trial which includes all pre-trial arguments, applications and rulings. You may even choose to cross reference the relevant transcript to the identified areas above. You will find that organising the material in such a fashion will enable you to more efficiently discuss and consider the merits of an appeal with both counsel and the client.

Finally, it is important to remember when funded by Victoria Legal Aid there is an obligation to provide written advice as to the merits of appeal within seven days of sentence.

Conclusion

You may be exhausted and disappointed post-verdict but your work is not yet done. A number of key priorities, outlined in this paper, demand your immediate attention. If you've anticipated and started to address some of the matters pre-verdict, you will be best placed to transition yourself and your client from trial mode to plea and appeal mode.

Part 10:

Plea Hearings

Chapter 21

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Chapter 21

Preparation of the Plea in Mitigation

Written by Pardeep Tiwana

Introduction: The importance of Preparation

Criminal law solicitors and barristers are regularly involved in the preparation and the conduct of pleas in mitigation. Plea making is an integral part of a criminal lawyer's practice. The purpose of a plea in mitigation is ultimately to get your client the best possible sentencing outcome. How do you deliver in court an effective plea in mitigation? The answer is fairly simple. As with any other form of advocacy, good, solid preparation is the key.

A persuasive plea in court following detailed research and preparation out of court can be a satisfying experience, particularly in cases that sit on the cusp of imprisonment and such a sentence is avoided.

We have all on occasions, heard the sentencing judge say, "*Where is the evidence to support what you are asserting*?" A well-prepared and considered plea will hopefully eliminate that question or allow the barrister or solicitor to answer it with confidence.

Preparing a plea in mitigation involves gathering evidence that will support the submissions in court. The evidence may be in the form of character references, certificates of achievement, medical reports, psychological reports and psychiatric reports. It may involve calling evidence on the plea

from professional or civilian witnesses and even on occasions, calling your client.

The key to conducting a good plea in mitigation is early preparation. Early preparation will allow you to focus on what material needs to be gathered. It will allow identification of issues contributory to the offending and provide your client with time to partake in treatment programs and counselling. It will allow you to identify what, if any, expert evidence is needed.

Preparing a plea in mitigation involves a number of distinct stages. The stages can be divided into three.

Stage 1 - Assimilating the facts/evidence in the case.[163]

Preparation involves a mastery of the evidence that makes up the offences to which your client has pleaded guilty. This of course involves reading the statements and exhibits in the prosecution brief and taking instructions from your client. This analysis will answer a number of important questions:

a. How is the prosecution case put against your client?
b. Does your client dispute any significant aspect of the prosecution case? If yes, will the case require a contested plea hearing or can any dispute be sensibly resolved?
c. Are there matters in the brief of evidence that support your plea submissions? Finding compelling evidence of remorse is often difficult. However, a careful analysis of the brief may reveal invaluable material to confidently assert remorse. E.g. an apology to a victim in the immediate aftermath of the offending, calling of an ambulance by your client after an assault or remorse displayed to a

[163] Such analysis will of course be undertaken in order to inform the decision to plead guilty. An advocate briefed to conduct the plea will need to re-visit this analysis for the purposes of a plea in mitigation.

prosecution witness after the incident. Answers in a candid police interview may also shed light on insight and remorse.

d. There may be evidence of voluntary admissions to the police upon which the prosecution case is wholly based.[164] There may be evidence of provocation in a case involving violence. The offending may have been revealed by a confession in circumstances where it may not have come to light otherwise.[165] Without a thorough analysis of the brief, there is potential to miss important evidence to support arguments on a plea in mitigation.

e. Analysis of the evidence will also allow you to compile a list of mitigating and aggravating factors (or lack of them) relative to the offending. This process will allow you to gauge where the offending falls in terms of its seriousness.

Stage 2 - The client – knowing everything about them.

Preparing a plea in mitigation involves knowing everything about your client. Preparation is simply incomplete without a comprehensive analysis of your client's life from birth up to the date of the plea hearing.

This will involve sitting down with the client and taking detailed instructions. However, in order to assist this process and save some time, solicitors may find it helpful in devising an appropriate questionnaire that your client can complete about his life (assuming the client can read and write). This will involve effectively his life history. Such a questionnaire will allow focus on matters that need following up. Some of the topics that need to be covered in any such questionnaire and/or in conference include:

a. Personal History – age, date of birth, place of birth etc.

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[164] A case based solely on the admissions made by an accused attracts a significant reduction in sentence – see *R v Ellis* (1986) 6 NSWLR 603.

[165] See *R v Doran* [2005] VSCA 271 and *Latina v The Queen* [2015] VSCA 102.

b. Problems encountered growing up or any trauma experienced – issues relating to abuse, bullying, exposure to violence, drugs, alcohol, sexual abuse etc.
c. Any medical issues – include mental health issues, hospital admissions, physical health and any prescribed medications.
d. Education history
e. Employment history
f. Family and relationship history – details of relationships with parents, siblings, friends, marriage and children.
g. Residential status in Australia
h. Positive attributes – this may relate to charitable/voluntary work, sporting achievements, assisting a relative or an elderly neighbour etc.
i. Issues with any addictions – drugs, alcohol, gambling, viewing pornography etc.
j. Steps taken to tackle addictions and to ensure there is no re-offending – include seeking professional help, counselling, courses undertaken.
k. Reasons for the offending
l. Any evidence of remorse – apology made, compensation paid.
m. Prior and any subsequent criminal history (including any matters pending) –_reasons for prior offending, why previous orders were not complied with
n. Impact of imprisonment – loss of employment, unable to pay mortgage, sole carer for a sick child who will be deprived.

Once you are armed with all of the above material either in a document or directly elicited in conference, you are off to a solid start. This will now allow focus on matters that will assume importance in the plea and allow

you to undertake any further investigation. A plea in mitigation that deals with bare assertions is meaningless. You should now be able to discuss with your client gathering of evidence that will support the oral submissions in court.

Gathering material to support your plea in mitigation

Character references

Character references that support the submissions are an important part of any plea. It is not the quantity but the quality of the reference that matters. An impressive referee may be someone with a good standing in the community who has known the applicant for a long time. A family member (partner, sibling or offspring) who has observed your client over a lengthy period of time may be in a good position to explain the circumstances/ stressors faced by them at the time of the offending and what steps they have taken to overcome them. Continued support from family members can assist the sentencing judge in assessing rehabilitation prospects. Also, a family member may be in a good position to comment upon insight and remorse. Some of the matters to bear in mind when obtaining references:

a. A character reference must be truthful and genuine. There can be absolutely no compromise on that.
b. It must be dated, signed and addressed correctly (*The Sentencing Magistrate* or the *The Sentencing Judge* (alternatively: *Your Honour*).
c. It should identify the referee, giving his or her name and occupation.
d. It should state how long he or she has known your client and in what capacity (family, friend, work, social club etc.).
e. It should be concise. Bear in mind the sentencing judge will have a lot of material to read and digest, a concise reference (one or two

pages) identifying the main points will be much more impactful and appreciated.

f. A character reference will be meaningless unless the referee acknowledges that he or she is aware of the nature of the offending. The whole point of a reference is that, despite the offending, there are other important positive attributes that define your client. In compiling a reference, a referee may ask himself questions such as: what are the positive attributes? (e.g. the accused is generally a caring and compassionate person). What is the evidence to support the fact that he is caring and compassionate? (e.g. observed him undertaking charitable work on a regular basis raising money for sick children or has helped a sick relative by providing ongoing moral and physical support).

g. Remorse is always an important mitigating factor. An offender who learns not to repeat his misdemeanour and displays insight and genuine remorse will be well placed to receive a discount. A plea of guilty and frank admissions in interview can indicate remorse. However, it may be the case that the offender has spoken to a family member or a friend indicating his contrition. If that is the case, the referee should indicate any evidence of his observations on the question of remorse.

h. If the referee believes that the offending is out of character, he or she should explain why that is the case. Of course, as with submissions in court, all references must be genuine and realistic. There is no point in saying that the offending is out of character, if your client has been convicted of similar offending on previous occasions.

Medical/psychological/psychiatric reports

Any submissions as to your client's physical or mental health must be supported by independent reports from his doctor. In cases where your client has psychiatric issues that may have contributed to the offending, it would be sensible to instruct an expert as soon as possible. *Verdins*[166] issues can only be raised by presenting cogent evidence before the court. This may involve not only obtaining reports but calling the expert.[167]

Evidence of rehabilitation

Rehabilitation is always an important sentencing consideration. It is of particular significance in cases involving young/youthful offenders who have never experienced custody. [168] It is also an important sentencing consideration where there is evidence of meaningful rehabilitation during a period of considerable delay.[169]

Therefore, early identification of issues that may have contributed to the offending will allow you to advise your client to commence appropriate treatment at the earliest possible stage. An established and ongoing treatment regime will carry significantly more weight as opposed to simply telling the court that your client intends to undergo treatment.

An offender who has committed offences in circumstances where he has had a deep-rooted addiction to drugs may have undertaken rehabilitation in a residential drug facility or attended regular drug counselling sessions. If it is submitted that they are now clean of drugs, a bare submission will carry no

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[166] *R v Verdins* (2007) 16 VR 269 (*Verdins)*
[167] See chapters 10.3 and 10.4 on the use of psychological reports in court and the calling of evidence at the plea.
[168] See the propositions enunciated in *R v Mills* (1998) 4 VR 235.
[169] See R v Me*rrett, Piggott and Ferrari* (2007) 14 VR 392.

weight at all. Consider advising them to obtain regular drug screens that would support the submission.

In cases involving sexual offences, regular counselling with a psychologist addressing underlying issues, dealing with cognitive distortions and participating in a sex offender program will be far more powerful than a report prepared on the basis of a one-off consultation.

Therefore, early identification of matters personal to your client will assist in setting in place courses, counselling and treatment and give them an opportunity to demonstrate real change. Change for the better is a frequent theme when it comes to a plea in mitigation. Cogent evidence of change can allow a persuasive argument as to why a sentence of immediate incarceration should be avoided at this particular juncture of your client's life.[170]

Careful analysis of any prior convictions

If your client has prior convictions analysing the priors, the dates and the sentences imposed is important. Some of the important matters to bear in mind are:

- Does the new offending breach any of the previous sentencing orders imposed?
- Did the current offending take place whilst they were on parole?
- Have they previously been incarcerated?
- Have they been given the opportunity to undertake a CCO in the past?
- Are the offences on their record old?

[170] Of course rehabilitation in only one purpose of sentencing. General and specific deterrence, denunciation, just punishment and protection of the community are the others. See section 5 (1) *Sentencing Act 1991*.

- Are they relevant to the current offending before the court?
- Did the new offending occur whilst they were on bail?
- Is there any discernible pattern of offending emerging?
- Are there significant gaps in any prior offending? If yes, why were they able to stay out of trouble during that particular period?

Prior convictions will involve taking instructions from your client about the details of the offending. The police should be able to provide summaries. There should be a record of the reason for sentence in relation to any County and Supreme Court matters. Once abreast of all the above matters, it will allow you to confidently argue why your client should be given an opportunity to avoid prison on this occasion. Conversely, relevant and recent priors may mean that a sensible concession is made that custody on this occasion is inevitable.

Stage 3 - Researching the law applicable to the case.

Another fundamental aspect of the preparation of a plea is thorough research of the relevant law. The client will inevitably want to know prior to the plea hearing: “Will I be going to prison?” If yes, they may want to know “How long?” These can be difficult questions to answer, particularly the latter. In order to assist in answering these questions to the best of your ability and in order to make realistic submissions on disposition, a number of matters need to be looked at.

What are the maximum penalties attributable to the offences in your case?

Dates of the offending can be important. Aged offences may attract different maximum sentences. It may be that the abolished suspended sentences are in fact still available in your client’s case.

The on-line sentencing manual published by the Judicial College of Victoria is an invaluable source for preparing a plea in mitigation. In fact, the preparation of a plea in the County Court and Supreme Court would be incomplete without reference to this manual. It covers all the relevant law and deals with mitigatory and aggravating factors. It deals with changes in maximum penalties for offences over the years. It also considers, in detail, all the sentencing options available.

What sort of sentence does this offence usually attract?

This is an important part of the overall preparation. As the advocate, credibility with the sentencing tribunal is enhanced by making realistic submissions as to the ultimate disposition. Helpful guidance can be gained from past decisions of the County Court, Supreme Court and appellate decisions of the Court of Appeal.

The Sentencing manual referred to above, has a helpful digest of recent sentences for all categories of offences in the appellate jurisdiction. The Sentencing Advisory Council website provides statistical insight into the type and length of sentences imposed.[171] The Australasian Legal Information Institute (AustLII) also provides sentencing decisions in the County Court and the Supreme Court as well as appellate decisions in the Court of Appeal and the High Court.[172]

Guideline judgement in the *R v Boulton* [2014] VSCA 342 ('*Boulton*")

One case that we must all be well acquainted with is the guideline judgement of *Boulton* relating to Community Correction Orders (CCO). As the Court of Appeal stated, CCOs are a radical new sentencing option with

[171] See www.sentencingcouncil.vic.gov.au

[172] See www.austlii.edu.au

the potential to transform sentencing in this State.[173] The judgement highlights the disadvantages of prison and the lack of opportunities to achieve rehabilitation in that environment. The Court of Appeal stated that a CCO may be suitable in cases of relatively serious offences which previously attracted a medium term of imprisonment.[174]

Therefore, preparation of a plea will, in appropriate cases, involve structuring an argument as to why a CCO, either alone or in combination with a term of imprisonment,[175] may be appropriate in light of the guidance in *Boulton*. Preparation will involve not only the question of arguing why a CCO may be appropriate, in order to give the argument credibility, it should involve considering what conditions on any such order may be appropriate in your clients case.[176]

It is important to bear in mind that mere assertions that *Boulton* changes the sentencing landscape will not get you anywhere. It is always about presenting cogent and persuasive arguments as to why imprisonment, a sentence of last resort, should be avoided in favour of a CCO. The argument must address how a CCO can adequately meet all the sentencing objectives applicable in your case.

Other matters of law

A plea of guilty may trigger application of other mandatory and discretionary orders. With sex offences, registration under the *Sex Offenders Registration Act 2004* may be applicable. Serious offender provisions may apply. Applications for forensic sample orders, confiscation and restitution

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[173] See paragraph 4 of *Boulton*.
[174] See paragraph 131 of *Boulton*.
[175] In order to combine a CCO with a term of imprisonment, the term of imprisonment must not exceed 2 years – section 44 (1) *Sentencing Act 1991*.
[176] See Part 3 (sections 36 – 48Q) of *Sentencing Act 1991*.

may be sought. Consideration will need to be given to the admissibility of all or parts of any victim impact statement. Arguments as to concurrency, cumulation and totality of any prison sentence will need to be considered. Any pre-sentence detention will need to be agreed upon.

When dealing with Commonwealth offences, it is important to bear in mind the many sentencing differences as opposed to the state sentencing regime. As an example, a CCO can only be made with conviction. The guideline judgement in *Boulton* does not apply to Commonwealth sentencing. A sentence of imprisonment can be imposed that directs immediate release on a recognisance release order. An excellent Commonwealth sentencing resource is available on the Commonwealth Director of Public Prosecutions website[177] titled "Federal Sentencing in Victoria". This is a must read for those dealing with Commonwealth sentencing.

Conclusion

It is, therefore, plain, that delivering an effective and meaningful plea requires detailed preparatory work. Identifying the work that needs to be done as early as possible and then implementing it will allow a persuasive, meaningful and confident plea to be delivered in court.

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[177] www.cdpp.gov.au

Chapter 22

Use and Role of Psychiatric and Psychological Reports in the Plea in Mitigation

Written by Michael McGrath

Introduction

The use of psychiatric and psychological reports in plea hearings in criminal proceedings is a complex and sometimes controversial subject.

Recent Victorian Court of Appeal decisions dealing with the relevance of impaired mental functioning in the sentencing process have taken an increasingly restrictive approach to the admissibility and use of such reports. It is imperative that the solicitor who engages the expert for professional opinion has regard to the issues of admissibility, the uses to which expert opinion can be put, and the potential difficulties that can arise in the process.

Solicitor's Role in Obtaining Psychiatric and Psychological Reports

Prior to any report being prepared, a detailed history – including chronology – should be prepared.

This means a careful and critical analysis of the brief, criminal history, other available documents and client instructions. This personal history should be provided to the expert.

Time and effort on behalf of those engaging the expert will ensure that the matters put in mitigation on a plea are consistent with any report relied upon.

This may also mean providing a summary of key facts from the brief, the basis on which any matter has resolved, the transcript of the record of interview (and if necessary a summary of the key parts of the record of interview).

Be aware that any letter you write to the psychologist or psychiatrist and any questions or comments contained in such a letter could be repeated in the body of the report provided in response.

In the case of a psychiatric report, if an accused has a psychiatric history and inpatient admissions in mental health facilities, it is important that such materials be obtained and provided to the report writer. This can often take some time. Where possible, avenues such as freedom of information requests are preferable to obtaining the information through a subpoena.

Informing the Client as to how Psychological/ Psychiatric Reports Are Prepared

Often the weight attached to a psychological report can rise or fall on factual errors in the history contained within it.

Sometimes those efforts may be undone by an accused who gives the writer an implausible or erroneous account. For this reason it is important to explain to your client prior to any forensic assessment what materials the expert is being provided with.

An accused should also have explained to them that their plea in mitigation will be undermined if the information provided to the report writer is at odds with either the agreed basis of settlement in the case or simply not capable of being objectively maintained given the evidence in the brief.

The Power of Evidence from a Treating Psychologist/Psychiatrist

Often the most powerful evidence can come in sworn testimony from a treating psychologist or psychiatrist, as they often are in the position to comment on an accused's mental state prior to and at the time of the offence.

If such a witness has continued to see the accused prior to the plea evidence can be given of the ongoing treatment, diagnosis, and with some limitations, an opinion as to future behaviour (prospects of rehabilitation) and continued treatment.

Choosing The Right Expert

Different psychologists and psychiatrists have different experiences in their fields. Some might be better qualified to speak about areas of psychology or psychiatry than others.

As set out in a very useful chapter "Psychiatrists' and Psychologists' Evidence: General Principles" of "Expert Evidence (Freckleton)" the NSW Court of Criminal Appeal case of *R v Peisley* (1990) 54 A Crim R notes at 52 that "it is important that clinical psychologists do not cross the barrier of their expertise...It is not appropriate for them to enter into the field of psychiatry"

Freckleton in this chapter notes that under the Uniform Evidence scheme psychologists and psychiatrists possess specialised knowledge about persons suffering a mental illness or an intellectual disability.

The Forensic Decision not to rely on Psychiatric/Psychological reports
Before providing any report to the prosecution, you should consider carefully whether it will, or will not, assist your case. Some reports will contain information than is unhelpful. Some will do little more than set out personal history.

And not all reports will provide a basis for the criteria set out in Verdins. (*R v Verdins; R v Buckley*; *R v Vo* [2007] VSCA 102)

Of course, this does not mean you should not rely on them at all, as many reports will provide professional opinions that will be relevant to your plea even though they do not provide a basis for a *Verdins* argument.

If you receive a report that states that your client has "anti-social personality disorder" or "narcissistic personality disorder", or contains long explanations that are inconsistent with the agreed summary of facts, or shows a lack of remorse or insight, you should consider carefully whether tendering such a report on the plea will do your client more harm than good.

Section 60 of the *Evidence Act 2008* has been held to apply to a history given to a doctor by a person upon which the doctor based his or her opinion to make that history evidence of the facts asserted in it unless an order is made under s 136 of the Act limiting the use to be made of the evidence: *R v Welsh* (1996) 90 A Crim R 364

County Court Practice Notes

The County Court Practice Note that deals specifically with Expert Evidence in criminal proceedings is found on the County Court website (PNCR 1-2014).

The County Court Practice Note that deals more generally with criminal proceedings (including plea hearings) is found on the County Court website (PNCR 1-2015).

Be cognisant of these requirements – particularly related to the service of expert reports – as your expert may be required for cross-examination by the prosecution.

The Role of Lawyers in the 'Writing' of Reports

An issue often arises as to what role a solicitor should have in the preparation of a psychiatric or psychological report. Is it simply confined to provision of the 'material' and nothing further?

A illuminating case that deals with how expert reports should be prepared and how lawyer's may play a role is the decision of *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 7) [2003] FCA 893.

Although this case was a Native Title matter, Lindgren J dealt with the general principles of the admissibility of expert reports at [8] to [15]. He specified the legal requirements for the admissibility of evidence of expert opinion, the assumed factual basis for opinion and relevance at [16] to [27].

Importantly – at [19] he detailed the important 'scope' of how lawyers may assist in the preparation of an expert report. He said this:

> "Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship."

I note that Lindgren J posits an almost positive obligation – use of the word 'should' – upon lawyers in the preparation of expert reports to ensure the relevance and admissibility. Such observations are equally applicable to the preparation of psychiatric and psychological reports.

The Foundation case of *Verdins*

The seminal synthesis of sentencing principle on how mental illness can be taken into account was described in *R v Verdins; R v Buckley; R v Vo* [2007] VSCA 102.

Early in the judgment – at [8] – the Court of Appeal observed that:

> 'the sentencing court should not have to concern itself with how a particular condition is to be classified. Difficulties of definition and classification in this field are notorious…What matters is what the evidence shows about the nature, extent and effect of the mental impairment experienced by the offender at the relevant time.'

The Court then went to set out the multiple ways in which impaired mental functioning may be relevant to the sentencing of the offender – at [26]:

"Impaired mental functioning at the time of the offending may reduce the offender's moral culpability if it had the effect of –

a. impairing the offender's ability to exercise appropriate judgment;
b. impairing the offender's ability to make calm and rational choices, or to think clearly;
c. making the offender disinhibited;
d. impairing the offender's ability to appreciate the wrongfulness of the conduct;
e. obscuring the intent to commit the offence; or
f. contributing (causally) to the commission of the offence"

The Court then – after surveying many authorities – distilled the following principles – at [32]:

"Impaired mental functioning, whether temporary or permanent ("the condition"), is relevant to sentencing in at least the following six ways:

1. The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
2. The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
3. Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both.
4. Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and

severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of the sentence or both.

5. The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
6. Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment"

Jurisprudence from the VSCA on the application of *Verdins*

Since the decision in *Verdins* was handed down there have been many decisions that have considered the scope and limit of its application.

First, in *DPP v Weidlich* [2008] VSCA 203, at [17] – the Court noted that 'the measure of culpability of an offender under the criminal law rests upon the extent to which the individual can be seen to be personally responsible for both the prohibited acts and their consequences' and 'when addressing the question of the significance of the disorder for these purposes, that the nature and extent of its possible effect upon the offender's behaviour must be carefully explored'.

Second, in *DPP v Patterson* [2009] VSCA 222 – at [46] the offender's intellectual disability was said to warrant a reduction in his moral culpability for the offences committed and the Court noted that "Whether, and to what extent, moral culpability is reduced must depend on all the circumstances of the case. The Court will need to assess the expert evidence to determine

whether the mental impairment is shown to have caused or contributed to the offending and, if so, whether the offender is to be adjudged less blameworthy as a result".

Third, in *R v Vuadreu* [2009] VSCA 262, [37] – it was noted that : "The *Verdins* principles are, and should be regarded, as exceptional. They should not be invoked in what can fairly be said to be routine cases of the type presented by the appellant as outlined by (the psychologist) in their report."

Fourth, in *Tran v The Queen,* [2012] VSCA 110 at [16] the Court decided that there was nothing in the decision of *Muldrock* (2011) 244 CLR 110 had altered the principles in *Verdins* and always the relevant inquiry that "for the sentencing judge in every case is to examine what the evidence shows about the particular condition and how it affected the mental functioning of the offender, either at the time of the offending, or at the time of sentencing, or both."

Fifth, in *DPP v Sokaluk* [2013] VSCA 48 at [41] the Court referred to the issue of intellectual disability and, depending on the circumstances, determined that additional community protection may be important.

Sixth, in *O'Toole v The Queen* [2013] VSCA 62 – it was – at [51] – noted that the sentencing judge had examined the psychologists' reports and noted the general limitations and inadequacies of those reports for the purposes of satisfying *Verdins.*

Seventh, in *O'Connor v The Queen* [2014] VSCA 108 the Court stipulated - at [65]–[68] that;

“None of the *Verdins* sentencing considerations can apply unless there is specific evidence from an expert about:

a. the nature of the impairment of the offender’s mental functioning;
b. how the impairment affected, or was likely to have affected, the offender at the time of the offending; and/or
c. how the impairment was affecting the offender at the time of sentence, or was likely to affect him/her in the future.

For that reason, the Court in *Verdins* explained, sentencing courts are not concerned with diagnostic labels:

> “Where a diagnostic label is applied to an offender, as usually occurs in reports from psychiatrists and psychologists, this should be treated as the beginning, not the end, of the inquiry. As we have sought to emphasise, the sentencing court needs to direct its attention to how the particular condition (is likely to have) affected the mental functioning of the particular offender in the particular circumstances – that is, at the time of the offending or in the lead-up to it – or is likely to affect him/her in the future”

Eighth, in *Caldwell & Caldwell v The Queen* [2014] VSCA 274 there was – at [56] – further discussion of the relationship between the principles in *Verdins* and an offender’s intellectual disability:

"Like a mental disorder, an intellectual disability will not ordinarily enliven the principle in Verdins that the offender's moral culpability is to be reduced unless some causal relationship is established between the disability and the commission of the crime. Thus where there is evidence of a lack of capacity to reason as to the wrongfulness of the conduct, the offender's moral culpability for the offence will be substantially reduced as may the need for denunciation and retribution"

Ninth, *Booth v The* Queen [2015] VSCA 51 is an interesting case where there was a division between psychological experts as to the state of the applicant's intellectual capacities.

In this case the sentencing judge rejected the evidence of a neuropsychologist called by the defence as to the applicant's mental disorder and intellectual disability. The appeal concerned whether the judge misapprehended the evidence and whether it's rejection was against the evidence. The Appeal was allowed.

Tenth, in the recent – and important – decision of *DPP v O'Neill* [2015] VSCA 325 – at [36] – the Court of Appeal endorsed the comments of King J in *R v Miller* [2015] VSC 180 regarding the frequency with which the principles in *Verdins* are relied upon during a plea in mitigation, requiring judges to consider reports from psychiatrists, but more usually psychologists, who have often had only very brief interaction with that offender, who have accepted as reliable and truthful the word of that offender as to their state of mind, thought processes or abilities, and relied upon the statements by the offenders, as though sworn evidence, to then ascribe to the offender, at least one the of the six limbs in *Verdins*.

King J found over time that she was less and less satisfied with reports prepared by forensic psychologists who have often spent an hour or less, with the offender.

Further, in *O'Neill* – at [80] – the Court referred to the need of courts to give consideration to whether the evidence establishes that mental capacity has been impaired, and to which of the circumstances set out in *Verdins* are engaged.

Eleventh, in *Wright v The Queen* [2015] VSCA 333 at [39]-[53] – the Court dealt with the issue of mental illness and drug addiction and found that the sentencing judge had correctly concluded that (in this case) there was no relevant link between the offending and the schizophrenia.

Twelfth, in *Stewart v The Queen* [2015] VSCA 368 – at [19]-[20] – the Court noted that the sentencing judge had correctly rejected defence counsel's submissions that the appellant's low IQ had impaired his ability to exercise appropriate judgment and make rational choices, that there was a causal connection between his intellectual limitations and the offending and that, because of his depressive disorder, the appellant would find imprisonment more burdensome than would a person without that condition.

The Court found "this case provides a further illustration of the rigour with which sentencing judges evaluate submissions based on the principles restated in *Verdins*".

Thirteenth, in *Manariti v The Queen* [2015] VSCA 160 - the Court – at [8] – found that the sentencing judge was correct in finding that the applicant made a rational decision, unconnected with his mental illness, to cease his

antipsychotic medication and that, following cessation of the medication, he had sufficient insight to know that he was becoming unwell and was reckless for not following that up.

Finally, in *Ryder v The Queen* [2016] VSCA 3 – at [28] – the Court noted that:

> "The assumption that *Verdins* and *Muldrock* set out different legal principles is not correct. This Court has expressly held that there is no inconsistency between *Verdins* and *Muldrock* ((2011) 244 CLR 120). The principles applicable to mental impairment due to mental illness are the same as the principles applicable to mental impairment due to mental retardation. *Verdins* itself made that clear. There is no separate category of case to which *Muldrock* applies but *Verdins* does not. There is no basis for the distinction drawn by the sentencing judge. *Verdins* does apply to mental impairment by reason of intellectual disability or retardation".

Conclusion

Expert evidence relating to an accused's psychiatric or psychological condition is an important sentencing consideration.

In order to put all relevant matters on behalf of an accused at a plea in mitigation, careful attention must be given to the preparation of a report which addresses the extant and voluminous jurisprudence of when *Verdins* does, and does not, apply.

The role of the lawyer is fundamental to the production of a useful report. This includes not only the provision of information that the report is to be

based upon but also directions to the expert as to the nature of the opinion that is sought and the form in which the report takes.

Chapter 23

Calling Expert and Non-Expert Evidence on the Plea

Written by Peter Chadwick QC

Expert Evidence

Expert Report

Before an expert can give evidence at any plea hearing the expert must prepare a report. That report must be filed and served in accordance with *Supreme Court Practice Note No 11 of 2015 and County Court Practice Note No 1 of 2015.*

A Forensic Report

It has become standard practice in Victoria for defence practitioners to obtain a report from a forensic psychologist to be tendered on the plea. But the question that must first be asked is whether it will assist the court. If it will not assist the court it will not be needed. Many reports are of no assistance to the court due to their generality. In some cases they may be a disadvantage to the client.

Choosing the Forensic Expert

Forensic experts vary in qualifications, expertise and experience.

Care must be taken in selecting the appropriate expert because if you want your expert's opinion to be accepted you must choose an expert who has a

reputation for integrity and reliability, and is known and trusted by the courts. This is important because judges talk among themselves, just as barristers and solicitors do and as a consequence experts acquire a reputation. If you instruct an expert who has a reputation as a "gun for hire" your case will be not be assisted and may even be damaged.

The nature of the expert evidence you require will determine the type of expert you will need, for example, if the client displays signs of cognitive impairment or even an acquired brain injury a neuropsychologist may be appropriate, on the other hand, if the client displays signs of a mental illness a psychiatrist may be appropriate.

Briefing the Expert

There are a number of preliminary matters you should always be careful to ensure that the expert you choose to instruct complies with when preparing their report.

The first is not to express an opinion about matters about which they have no qualifications. To do so is often very tempting and easy to do.

The second is that they may not give evidence or express opinions in their report about ordinary human behaviour.

The third, and related to the first two, is that they should be warned not to go beyond their area of expertise and in particular not express any view about sentencing. If the report you receive includes such expressions as "this man meets the test for *Verdins*" (R *v Verdins* [2007] VSCA 102; (2007) 16 VR 269) or "leniency should be shown" have no hesitation in immediately requesting their deletion.

The fourth is that if called upon to give evidence they should not be reluctant to respond frankly to questions, the answers to which might be adverse to the case of the client. Failure to do so will reflect adversely on the expert and to the disadvantage of your client.

Ensure the expert you have chosen has sufficient material to properly form an opinion. Be frank with the expert and make sure the expert knows what it is that your client is pleading guilty to.

At the very least ensure the expert receives: -

- the charges;
- the prosecution summary; and
- the record of interview [if any].

It is safest to work on the presumption that everything that goes to the expert could be discoverable including correspondence between legal practitioners and the expert (*Evidence Act 2008* (Vic) *s 119, New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258).

Do not be afraid to be involved in the preparation of specific questions for the expert to reflect upon. Focusing the attention of the expert will only assist you to assist the court on the plea.

You may choose to direct the expert to the specific *Verdins* questions or to matters from a personal history such as a dysfunctional background of deprivation, alcohol abuse, violence, systemic disadvantage or social disadvantage. Expert evidence on such matters may form a submission that *Bugmy v The Queen* (1990) CLR 525 applies in mitigation of penalty.

Client's Conference with the Expert

Ensure that there is sufficient time between engaging the expert and the plea hearing for your client and the expert to properly confer. Early engagement of the expert is obviously desirable and more than one conference may be necessary. Recently in delivering sentence in *R v Miller* [2015] VSC 180 at [33] King J made the following pertinent observation concerning the frequency with which the principles in *Verdins* are relied upon during a plea in mitigation, requiring judges:

> *To consider reports from psychiatrists, but more usually psychologists, who have often had only very brief interaction with that offender, who have accepted as reliable and truthful the word of that offender as to their state of mind, thought processes or abilities, and relied upon the statements by the offenders, as though it was sworn evidence, to then ascribe to the offender, at least one of the six limbs in Verdins. I have found over time that I am less and less satisfied with reports prepared by forensic psychologists who have often spent an hour or less, with the offender before producing a lengthy report that purports to address quite particularly, and directly, the various limbs of Verdins, usually relating to either the moral culpability or the sentence weighing more heavily upon the offender.*

Her Honour's observations were approved by the Court of Appeal in *DPP v O'Neill* [2015] VSCA 325 at [36].

The Treating Expert

Unlike the forensic expert there is often not a lot of choice about from whom to obtain a report. However a report from a treating expert can often be of critical importance in establishing pre-existing conditions.

Reports need to be as expansive as possible despite the often-found reluctance of the authors to go beyond the monosyllabic and hieroglyphic.

A treating expert's report should clearly set out:

- when they were first consulted;
- for what reason or condition they were first consulted;
- how many times they have seen the client (preferably giving the dates);
- the treatment provided, including the current medication [if any & if applicable]; and
- the prognosis for the client.

If the report is to be obtained about matters psychological or psychiatric, then like the forensic expert the treating expert should also be provided with:-

- the charges;
- the prosecution summary; and
- the record of interview (if any)

Again don't be afraid to formulate specific questions for the expert to focus their attention upon.

Read the Expert's Report

Obtain the expert's report as soon as possible, even in draft form, and read it carefully**.**

Ensure the expert is aware of and has complied with the expert witness guidelines. The guidelines are called *Expert Evidence in Criminal Trials* which is *Supreme Court Practice Note No 2 of 2014* which can be found on

the Supreme Court website. The Practice Note applies to criminal trials in both the Supreme and the County Courts. As far as applicable it should be taken to apply to expert reports prepared for plea hearings.

Identify any limitations and/or qualifications expressed in the report.
These may need to be discussed with the expert. If so ascertain:

- what is needed to overcome the limitations and/or qualifications;
- whether more information is required;
- whether your client needs to be further tested; and
- what your response will be when the prosecution and the judge focuses on these limitations and qualifications as you must anticipate and expect.

Check and ensure that the circumstances of the offending described to the expert correspond with your instructions and the record of interview.
If they do not correspond find out why they do not.

This may require a very careful approach. You will need to check:

- whether your instructions are correct,
- whether the client actually said what is in the report; and
- which version is correct.

Discrepancies if not discovered and resolved before the plea hearing can be very embarrassing and will not assist your client.

If your client was on medication at the time of offending a number of matters must be considered:

- has that fact been addressed in the report;

- did it contribute to the offending;
- had your client stopped taking the medication of their own volition;
- had the medication been changed prior to the offending; and
- what medication is the client on now, if any.

Does the expert report refer to a prior criminal history that is not alleged by the prosecution?

If so, have you made the forensic decision to reveal that history?

You should not do so without first obtaining your client's specific instructions in writing and advising him/her of the implications and possible consequences of so doing.

You should be familiar with *R v Rumpf* [1988] VR 466.

Disclosing the client's criminal history may be a real issue where the prior offending is important for the expert to form his/her opinion. On the other hand, revealing the client's criminal history may be merely part of the history that was given to the expert for the preparation of the report.

What is the expert's opinion, diagnosis or prognosis?

This should be plainly stated. If you cannot easily understand it then there is a fair chance the court will not.

Under no circumstances attempt to settle the expert's report.

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd [2014] VSC 567 (John Dixon J), although a civil case, is instructive on the roles of practitioners and experts. *Harrington-Smith on behalf of the Wongatha People v WA(No 7)*[2003]FCA 893 (Lindgren J) is also most instructive.

You may indicate to the expert the matters to which their attention should be directed.

You should endeavor to assist the expert to produce a report that takes into account the rules of evidence although this is often easier said than done. You should try and view the video of the address by His Honour Judge Parsons to the CBA on 2 June 2016 on this topic.

You must not attempt to dictate what the expert's conclusion should be. Care should be taken to ensure that you do not undermine the independence of the expert *(Phosphate Co-operative Co of Australia Pty Ltd v Shears* [1989] VR 665).

If there are any errors of fact you should request them to be corrected.
We all make mistakes. However, be careful to ensure that the error is on the part of the expert before seeking to have the report corrected.

Calling the Expert

Will calling the expert over and above tendering the report advance your case?

Treating experts giving viva voce evidence may often be able to give compelling insights into the causes of offending which can enliven otherwise flat reports.

A forensic decision needs to be made about how the expert "will go" in the witness box.

Fortunately most experts have some experience as witnesses and can give their evidence competently.

The application of R v Rumpf [1988] VR 466 *may need to be considered before calling an expert.*

If the prosecution has not alleged a prior conviction, it is not essential to the formation of the expert's opinion and if a forensic decision has been made not to refer to it then the expert needs to be apprised of that decision.

Preparation is always the key to success with any expert and calling an expert on a plea is no exception.

Always have a conference before the plea hearing. This does not mean outside the courtroom five minutes before the hearing.

Go over any limitations and qualifications expressed within the report with the expert.

These will be likely matters for cross-examination. If at all possible deal with these limitations and qualifications in evidence-in-chief. Better you confront them and deal with them than the prosecutor, who you can be sure will exploit them to your disadvantage.

Non-Expert Evidence

Witness in Person

a. Selection

Be selective.

You might have a courtroom full of supporters available but don't call them all.

Choose the two or three best witnesses.

If you have an identifiable group, call a representative from each group and have them indicate that they are giving evidence on behalf of a number of named persons who are present in court.

Tender the references from the balance of the group whilst the witness is in the witness box

If you are representing a client charged with sexual offences it can be compelling evidence to have a mature woman give evidence that they trust the client and have trusted the client with their children.

It can be worthwhile to have witnesses who give evidence in person also to produce a written reference that can be tendered for the court to consider at a later time.

b. Confer

Always confer with prospective witnesses. Never call a witness on the basis of a written statement alone.

Inform all prospective witnesses about:

- the charges to which the client is pleading guilty or has been found guilty;
- the circumstances of the offending

before giving the prospective witness the opportunity to withdraw with dignity from being a witness.

Explain to the witnesses that a plea of guilty is an admission of the elements of the offence(s) and that to state that the client was not guilty or that the victim "was asking for it" in any way is potentially damaging.

Ask about:

- prior convictions (preferably call witnesses without a criminal history although this may not always be possible);
- how long the witness has known your client and in what circumstances;
- knowledge of your client's behaviour relevant to offending e.g. violence, sexual matters, dishonesty; and
- the witnesses view about the prospect of repetition.

Be prepared not to call all potential witnesses if you think they would do your client's case more harm than good. Rely on a written reference and their presence instead.

Advise potential witnesses:

- to listen to the questions being asked and only answer those questions; and
- not to express any opinion as to sentence.

Family and Friends

It is generally of no advantage to your case to call as a witness your client's doting mother to tell the sentencer that her much mis-understood son really is a good boy despite a long list of prior convictions stretching back over many years.

On the other hand a long suffering parent who is genuinely at their wits end in dealing with a child and is looking for support can be powerful evidence in support of a submission that a community based disposition is appropriate for a young offender.

The Client

It is not the usual practice in Victoria to call your client on a plea. On a rare occasion you might be tempted to do it. If you are so tempted you will have to consider the following questions:

- what do you seek to prove by calling your client?
- do you wish to counter matters the prosecution rely on in aggravation?
- do you wish to establish the matters that you rely on in mitigation?
- is there any other way to achieve the end you seek? and
- is there any other witness you could call?

Calling the client can obviously be fraught with danger, the most obvious being traversing the plea, but where a client is genuinely remorseful or had a genuine motive for offending their evidence can be compelling in mitigation. If you are to go down this path preparation of your client for examination in chief and cross examination is critical.

If you call your client immediately:

- go straight to the seriousness of the offence;
- acknowledge the impact of the offending on the victims;
- acknowledge the likelihood of a custodial sentence being imposed that day; and
- have your client express their remorse in their own words.

Letter of Apology

A practice has grown in some areas of having the client write a letter of apology to the court or the victim. Only in very rare circumstances is it effective and I do not support the practice. It is all well and good if the client

has written such a letter to the victim spontaneously and shortly after the offending. Otherwise it smacks of being contrived and insincere.

Client Giving and Undertaking

If your client is charged jointly with another or others as a co-accused and is prepared to give evidence against the co-accused or in other prosecutions in return for a discounted sentence (*Sentencing Act 1991*(Vic) s 5(2AB) and the *Crimes Act 1914* (Cth) s 16A(2)(h)) the usual procedure is that they enter the witness box and give an undertaking on oath to assist the authorities including giving evidence if required.

It is essential that your client be advised in conference before the plea hearing as to the process and the undertaking that will be required to be given. There is nothing worse during a plea than a client being called to give an undertaking who does not have a clue what is going on.

Should your client fail wholly or partially to fulfill an undertaking given to assist Victorian authorities in a future investigation or prosecution the DPP can appeal against the sentence imposed (*Criminal Procedure Act 2009* (Vic) ss 260-262).

Similarly the Commonwealth DPP can appeal against the inadequacy of the sentence or the non-parole period if they are of the view that your client has not co-operated without reasonable excuse (*Crimes Act 1914*(Cth) s 21E).

Persons present in Court who Provide Written References

Written references should preferably:

- be on letterhead or personalized paper;
- be addressed to the sentencing judge or magistrate and not “to whom it may concern;

- reflect that the author is aware of the offending that brings the client to court. A sentence stating, “I have read the prosecution summary” or “Joe’s solicitor has explained what Joe did” will suffice;
- state how long the author has known the client and in what circumstances;
- state that the author has no prior convictions;
- state plainly the author’s view of your client’s character;
- link the author’s view of your client’s character to the circumstances of the offending;
- state that they have discussed the offending before the court with your client who is sorry for their actions; and
- be in the author’s own words.

Guidance can be given to ensure that important points are covered and to ensure the reference does not refer to matters that are irrelevant.

Written references should not:

- state expressly or impliedly that the client is not guilty or did not do what he/ she is accused of doing;
- blame the victim in any way for the offending or for having brought it on themselves; and
- be one of a series obviously written by the same person in the same style.

Conclusion

The importance of careful and timely preparation of evidence on a plea hearing, whether that evidence is to come from an expert or non-expert witness, cannot be over emphasized.

Expert evidence from qualified experts when properly presented is of great assistance to those performing the difficult task of sentencing. Non-expert evidence equally provides essential material for the sentencer.

Appropriate sentences and clients who are pleased with your representation of them will reward time spent in preparation.

Chapter 24

A Model Plea

Written by George Georgiou SC

Plea Advocacy

Judges often tell us that they consider sentencing to be the most difficult aspect of their job.

At a seminar on "The Judge's Perspective on Sentencing" Osborn JA of the Victorian Court of Appeal, asked the question "what do judges really want from barristers before sentencing?" He answered as follows

"*The answer I suppose is simple, we want you to make it easy*."

A well prepared plea and a well presented plea will be of great assistance to the court. It will enhance your standing with the court. Importantly, it may also be the difference between a great outcome for your client and a poor outcome.

Make it easy for the sentencing judge – make it easy for the judge to give you the sentence you are seeking.

Getting the Basics Right

In every plea the basics are the same. Set out below are some of the fundamental issues you will need to address in your preparation of the plea.

Aim of the Plea

What is the aim of the plea?

The aim of the plea should be to obtain for your client the least penalty that the circumstances allow.

This aim is not achieved by flowery language, poorly prepared and ill-considered submissions. As an advocate, your job is to present clear, well-structured and persuasive submissions.

This can only be achieved if you have done the necessary preparation, decided the sentencing outcome you want to achieve and considered what you will say to most effectively present your plea and achieve your aim.

Preparing for the Plea

It is impossible to over-emphasise the importance of preparation.

Whether a plea takes place in the Magistrates' Court or a superior court, there is no excuse for not being properly prepared.

Pleas in the Magistrates' Court are usually of relatively short duration.

This makes it all the more important that you are well prepared because you will have the additional burden of time pressure. If you think that you will need a longer period to present your plea, for example because you are calling character or expert witnesses, you should ensure that the plea is booked in as a 'special fixture'.

Generally speaking, the expectation on counsel in the higher courts is much greater. This is because the charges are more serious, the penalties more serious, and also there is not usually the same time constraint as operates in the lower courts.

There is another reason why those contemplating plea making in the superior courts need to exercise great care and prepare well. This relates to the appeals process.

Appeals from the Magistrates' court to the County Court are hearings "de novo". The defendant has a second chance if it is considered that the penalty imposed by the magistrate is excessive. Any shortcomings in preparation and mistakes on the plea won't haunt you on the appeal.

Appeals from a superior court will only succeed if error is established.

What occurred at the plea hearing below, including what was said by counsel, what submissions were made, will be carefully scrutinized on the appeal. It is not uncommon to read CA judgments questioning the conduct of counsel on the plea below.

Redlich JA makes the point in *Romero v The Queen*[178] :

> *In sentencing appeals, this Court is reviewing the exercise of a discretionary judgment. It is not a rehearing of the plea in mitigation. It is not the occasion for the revision and reformulation of the case presented below. Given the nature of its supervisory role, this Court will not lightly entertain arguments that could have been, but were not advanced on the plea. It will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of the submissions previously made. The revivification of arguments abandoned or eschewed on the plea is highly undesirable and should not be countenanced, save where fresh evidence is adduced, or in the*

[178] *Romero v The Queen* [2011] VSCA 45.

exceptional circumstance where it can be shown that there was most compelling material available on the plea that was not used or understood and which demonstrates that there has been a miscarriage of justice arising from the plea and sentence.

This is a salutary reminder of the need for careful consideration and preparation.

The following steps in preparation are advised.

a. *Confer with your client at the earliest opportunity*

- The advantages are great.
- The sooner you obtain your client's instructions the sooner you will be in a position to determine what is required for the plea. Time is often needed to obtain medical and psychological reports, character and other references.
- With time you can advise on steps that may be taken to put your client in a more positive light. For example, suggestions as to rehabilitation programs that may be commenced; the obtaining of medical and psychological treatment; restitution or compensation paid; voluntary work performed, and so on.

b. *Review carefully the depositional material*

- It is essential to know what the witnesses say as to the events. It is essential to know what your client said in his or her interview with police. The prosecution summary is never a suitable substitute. Without such detailed knowledge your client's instructions are taken in a vacuum, and there is a danger of embarrassment to you and your client in court. A clever submission may quickly unravel if you are unprepared for the contradictory position attested to by

five other witnesses. Always operate on the basis that the judge and the prosecutor will be familiar with the depositions.

- If there are matters in the depositions with which your client disagrees and you are concerned that a judge may act on them – you must deal with them rather than hope a judge will ignore them.
- One way is to make it clear that the plea is on the basis of the matters contained in the prosecution opening. For example, you might say, "*Your Honour, Mr X pleads on the basis of the factual matters set out in the summary. There are matters in the depositions which are not part of the facts relied upon by the prosecution and with which Mr X disagrees*". Generally, the factual basis for the plea should have been identified and discussed with the prosecution before the plea was settled.

c. *Obtain detailed instructions as to the offence*

- Once you are familiar with the depositions you will then be in a position to obtain your client's instructions as to **<u>what happened</u>**.
- Compare what your client says with what the witnesses say. If there are differences are they of any consequence? Can they be explained? Can an agreement be reached with the prosecutor as to the "facts" that will be presented to the court in line with what your clients says occurred? Will it be necessary to have a contested hearing to determine the facts?
- Was the offence a carefully planned crime or did it happen in the heat of the moment without much thought? Was there much sophistication in the execution of the crime? Was detection inevitable?
- In obtaining instructions look for those matters that may reduce the extent of your client's culpability. For example, the less planning,

the less sophistication, the greater the likelihood of detection tends to operate in the defendant's favour.

- It will also be necessary to explain during the plea **why** your client became involved in the offending. What was the reason for committing the offence? Was there a motive? A higher level of culpability will attach, for example, to a person whose motive is greed, than one who commits the same offence out of a perceived need to do so. What was your client's physical, emotional, mental state at the time of the commission of the offence?
- It may be necessary to explain to the court your client's **role** in the commission of the offence. This is particularly so where there are co-accused or others involved in the commission of the offence. Detailed instructions as to role are essential. Do your instructions as to role fit with what is generally alleged? Is what your client says as to his or her role likely to be challenged? Is it credible?
- It sometimes happens that co-accused will blame each other. If this is a possibility it is important that you are prepared to argue your client's position. The answer is often found (but not always) in the depositions. Obtain the records of interview of all co-accused. You are entitled to them. Speak to the prosecutor and ascertain his or her view as to you client's role.

d. Obtain instructions as to your client's background and personal circumstances

Instructions should include -

- Age, date of birth, place of birth.
- Marital status. Details of any children.
- Family background.
- Relationship with family members.

- Are the family members still supportive?
- References and Referees.
- Educational and employment history.
- Medical, psychological and other health problems, if any.
- Treatment history.
- Drug, alcohol or gambling history, if relevant.
- Financial situation – current and at time of offence, if relevant.
- Interests, community involvement, charitable works.
- Future prospects.

e. *Instructions are also needed as to what has occurred since the commission of the offence and your client's current circumstances.*

Instructions will include:

- Consequences, if any, suffered by your client following the commission of the offence. For example, was your client remanded in custody; was there any effect on personal relationships; was there a loss of employment, accommodation or other loss? Was there any extra curial punishment?
- Have there been any expressions of remorse - such as in the police interview, a letter of apology, restitution or compensation? Look for independent evidence of remorse. [Nothing is more lame than the assertion from the bar table – *"My client is really remorseful your honour"* - without pointing to something that would indicate the genuineness of the assertion. Instead you might say "*It is clear from X's interview with police that he was sorry for what he did and expressed his unequivocal remorse to the police. At answer 20 he acknowledged his involvement in the offence and accepted full responsibility for his conduct."* Or "*Since the offence, Mr X has acknowledged his wrongdoing ... and has embarked on a number*

of courses to ensure that he does not reoffend. This speaks loudly of his concern and remorse for his behaviour and its effect on the victim.

- Have there been any efforts at rehabilitation? Can this be established with independent evidence?
- If the client was remanded in custody, how many days will he/she have served as at the date of the plea? Importantly, what has been the effect of incarceration? Did he/she undertake or try to do any work, educational or rehabilitative programs?
- Is your client currently working? What effect will the likely penalty have on his/her employment?
- Have there been any further convictions or charges since the commission of the instant offences? Are there charges pending?
- Details of when the plea of guilty was indicated and entered. Did your client make admissions to police when interviewed? Were they full admissions?
- If there are co-accused, have they pleaded and been sentenced. Are there issues of parity to be considered?

f. Prior criminal history

Obtain details of your client's prior convictions, if any, from the prosecutor and find out if there have been any subsequent convictions or whether there are any outstanding charges. Review those details with your client. Are they admitted? Are they relevant? What were the circumstances of the offence? What was the disposition? Did your client comply with the conditions of the disposition? If a disposition had a rehabilitative component why has your client re-offended?

g. Welfare Issues

If your client has a history of involvement with the Department of Health and Human Services or other similar institutions consider a request for all relevant information pursuant to the relevant Freedom of Information legislation. This is usually preferable to the alternative of subpoenaing the file (in which case the file will be produced to the court and available for inspection by all parties). Note that this should be done as soon as possible given the length of time it normally takes for the information to be provided.

h. Victim Impact Statements

If these are to be relied on by the prosecutor, obtain copies in advance. Discuss the contents with your client. Are there matters contained in the statements which are inadmissible, or which are not accurate?

It sometimes happens that a victim does not want your client to suffer any serious punishment. The wishes of a victim may, in some circumstances, be relevant in mitigation of penalty. If you know or suspect that the victim may be sympathetic ask the prosecutor to obtain the victim's instructions.

Employer and Character References and Witnesses

I think it is always a good approach, if possible, to call character witnesses on the plea.

Whether you rely on written reference or oral evidence, the referee must know with what your client is charged and the circumstances of the offence. A written reference that does not disclose this knowledge is of little or no weight.

Employer references can be invaluable. Even better if an employer is prepared to attend court on the plea and give evidence.

Speak to the proposed referees in advance of the plea. Determine whether they have sufficient knowledge of your client, the charges and the reputation of your client so as to be able to provide a worthwhile reference or to give worthwhile evidence.

If you are calling witnesses always have a conference with them well before the plea. Check with them that they have no relevant prior convictions. Advise them as to procedure and courtroom protocol. This might be their first experience of a court. Go over the questions they will be asked by you and are likely to be asked by the prosecutor. Do not call a witness unless you have had the opportunity to confer with him or her.

Establish how the witness knows your client. Check with the witness that there is nothing known by them about your client that might damage his prospects. If there is, you might consider not calling the witness.

As with all things said in court, if you are to call a witness it must be for a purpose. Identify what it is you want to establish from the witness before you decide to call that witness. Once you have your purpose – you will then be in a position to know what to ask.

There are many reasons why a witness should be called. The reason may relate to your client's hitherto good character and how the act was an aberration; it may relate to your client's commitment to rehabilitation since the offence was committed; it may relate to his or her excellent work history; it may relate to expressions and acts indicative of remorse.

Develop your questions in a way that clearly establishes the relevant proposition.

If you call a witness, ask non-leading questions. The court wants to hear from the witness, not you. Refer to your client by name, not the "defendant". Ask questions that will establish your objective in an interested and interesting way. The court wants to know about your client – what sort of person he or she is. Create a picture of your client that puts him or her in the best possible light in the circumstances.

Calling your Client to Give Evidence

In every case you must turn your mind to whether or not to call your client. Again, there must be a purpose in so doing. Commonly it relates to the issues of remorse and rehabilitation. See, for example, *Barbaro v The Queen; Zirilli v The Queen* [2012] VSCA 288 at [38]-[40].

Keep in mind that there are risks associated with calling your client, namely being cross-examined by the prosecutor and the judge. A good plea might quickly turn into a disaster.

Confer carefully with your client. Consider how he or she is likely to come across. Consider what he or she is likely to be asked by the prosecutor or judge. How will your client answer those questions? Is there other evidence that you can call to establish the point? Do you stand to gain by calling your client?

As a note of caution, I would not call a client unless I was satisfied that he or she has fully accepted responsibility for the offence and was genuinely remorseful. These are areas likely to be challenged during cross-

examination. Of course there are many other topics likely to be challenged by both the prosecutor and the judge. It is your duty to anticipate them before making the decision whether or not to call your client.

If having weighed carefully all of the risks, you are able to call your client on the plea, this can be a most effective means of achieving your sentencing aim.

Where Necessary Obtain Medical, Psychological and other Reports

It may be necessary to obtain a report relating to a condition or problem that your client may have. These may be reports from treating doctors, psychiatrists, psychologists, counsellors, rehabilitation services (for drugs, alcohol, gambling), hospitals and so on. You should also consider whether you want your client examined by a forensic psychologist, psychiatrist or other expert.

Consider always whether or not a report should be obtained. There are cases where a report is not necessary or where it may be harmful to your client's plea.

What is the purpose of the report? Why do you need it?

"Impaired mental functioning" may be relevant to sentence whether that condition existed at the time of the offence or not.

Is the report needed to explain why your client committed the offence? Is there an issue with the level of your client's intellectual functioning?

Does your client suffer a psychological or psychiatric condition that caused or contributed to the commission of the offence? Is the condition amenable

to treatment? If not, what impact is that likely to have on the sentencing considerations? If so, what is proposed for treatment and rehabilitation? Will the condition mean that a given gaol sentence will weigh more heavily on your client than it would a person in normal health? Is there a serious risk that imprisonment will have a significant adverse effect on your client's mental health? These are but some of the questions you should consider.

All practitioners should be aware of *Verdins*[179], however, it is equally important to know and understand the many decisions that further explain the principles in *Verdins*.

In requesting a report make sure the author understands its purpose and is provided with sufficient background information including the charge to which your client is pleading guilty (or of which was found guilty), the basis of the plea of guilty, the prosecution summary, relevant witness statements and record of interview.

Bear in mind that what you provide to your expert may be called for by your opponent.

Calling the Expert Witness

It is not uncommon in the higher courts for experts to give evidence about their examination and the opinions expressed in their reports. Sometimes the prosecution will want your expert called for the purposes of cross-examination.

[179] *R v Verdins; R v Buckley; R v Vo* (2007) 16 VR 269.

Before deciding whether or not to call your expert witness consider the purpose in having the expert come along to give evidence. Is it to elaborate on matters in the report? Is it to address additional matters? Is it simply to add weight to the written report?

Assuming that there is a good forensic purpose for calling the expert, confer with your expert before you do so. You need to be in a position to understand fully the contents of the report before he or she gives evidence. This will also help you to decide what questions to ask and what not to ask.

If required under the rules of the Court, ensure that the expert witness is aware of and has complied with the applicable Witness Code of Conduct.[180]

If there are co-accused, talk to their counsel. Find out what their counsel proposes to submit on penalty.

This should always be done. It sometimes happens that you and the co-accused's counsel have a different view as to the appropriate penalty. It's best to resolve this difference of opinion outside the courtroom than at the bar table before the judge. Knowing in advance what the other party is seeking will also enable you to prepare arguments for distinguishing your respective submissions on penalty.

Research

- Know the law.
- Know the relevant provisions of the *Sentencing Act*; Division 2 of the *Crimes Act 1914* (Cth); *Children Youth and Families Act 2005*.
- Know the maximum penalty applicable to the offence.

[180] E.g. Supreme Court (General Civil Procedure) Rules 2015 - Reg 44.01.

- Know what are the current sentencing practices. It is a requirement, for example, under s. 5 of the *Sentencing Act*.
- Research cases that deal with the particular offence to ascertain whether a superior court has said anything about the sentencing range. Be familiar with the cases, especially if you are seeking a disposition outside the "normal tariff". You must be prepared to distinguish your case.
- Always check the Sentencing Advisory Council's "*Sentencing Snapshots*", if they exist, for the particular offence.
- Speak to other practitioners and get their views on the likely penalty.
- Understand the principles of sentencing and how they interact with each other. How do those principles apply to your client? For example, is general deterrence or rehabilitation the dominant consideration? Is specific deterrence necessary? Do the "serious offender" provisions of the *Sentencing Act 1991* (Vic.) apply? Is your client's state of mental health a mitigating factor?
- Know the leading sentencing cases such as *Verdins* and *Boulton*[181] as well as the cases that further consider those cases.
- What sentencing options are available? How do they apply to your particular case?
- Understand sentencing concepts such as "proportionality" "parity", "totality" and "parsimony".
- If the charges are "representative" or "rolled-up" counts, understand what is meant by such counts.
- Be familiar with the leading cases concerning general sentencing principles e.g. cases relevant to disputed facts and standards of proof; delay; forfeiture and confiscation orders; parole; young offenders; mental illness and so on.

[181] *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen [2014] VSCA 342.*

- Know the details of settlement discussions and when your client's plea was indicated or entered. Your client's plea of guilty is often a significant feature of mitigation. This may be because of the plea being an indicator of remorse, utilitarian benefits or both. Be familiar with the case law concerning the mitigating effects of a plea of guilty.
- Understand your expert reports. Check the terminology. Check with the author of the report if there is anything about which you are uncertain. Check what the client has told the expert as against what he or she has told you and or the police in the interview.
- Know your Judge. Get the views of others if you don't know.

Check with the Prosecutor the type penalty he/she will be suggesting, if asked by the Judge.

This may save you from asking for a penalty higher than that which the prosecution considers appropriate. Further, it gives you the opportunity to negotiate agreement on the appropriate penalty type and the content of the summary of facts to be put before the court. If you consider the prosecutor's suggested penalty too high, check the basis on which the prosecution has arrived at the penalty. This will enable you to prepare counter submissions.

Decide on the penalty or penalties you will be seeking.

If you are going to suggest a penalty (and generally you should) be prepared to justify the appropriateness of that penalty. Know what it is about your case that makes that penalty appropriate.

Whilst it is the aim of the advocate to obtain the least possible penalty, it is the least penalty that is reasonably open. It will do little to the credibility of

your overall submissions if the penalty you seek is so clearly out of range – unless of course you are able to justify your submission.

Presentation of the Plea

There is no single right way to present your plea. There are many wrong ways.

You should adopt a style of presentation with which you feel most comfortable.

The following matters should be addressed in every case:

i. Have a case theory. The theory is the explanation of what happened; why it happened; what it is that you are seeking and why that outcome is the most appropriate outcome in the circumstances.
ii. The case theory will have regard to features of aggravation (if any); the impact of the offending upon the victim; mitigating features of the offence and of those personal to the accused; sentencing considerations including protection of the community, just punishment, denunciation, deterrence and rehabilitation.
iii. Ensure that your plea submissions are consistent with your case theory.
iv. Ensure that your plea submissions are well structured. Present the plea in a logical and consistent manner. Know where you are going with your submissions.
v. As a general rule, judges want to know at an early point in the plea the sentence you will be seeking. Some judges like to hear about your client's background before you tackle the circumstances of the offence. This approach is sometimes useful in providing the context to the offending behaviour. How the plea is best presented may

depend on the circumstances of the case, however, it must be structured.

vi. Generally an outline of plea submissions will be of assistance to a court in cases involving lengthy pleas. They may be oral or written. Written outlines are a requirement at plea hearings in the County Court.[182]

vii. Use simple language. Do not rush. Be clear.

viii. How you commence your plea is important. Create interest. The opening should be designed to capture the attention of the sentencer.

ix. A summary of your case theory might be given as an opening. Some advocates like to tell the court the disposition they are seeking at the outset. Some advocates give to the court a list of topics that will be covered in the course of the plea. Opening remarks will vary from case to case, depending on the charge, complexity and likely length of the plea, and the sentence you are seeking.

x. Avoid, commencing your plea with - "Your honour my client is an 18 year old unemployed man who …". This is hardly likely to capture the interest of the sentencer in those crucial opening moments.

xi. Present a balanced plea. You must deal with all of the difficulties that the facts and the law present. If appropriate, for example, acknowledge the prevalence of the offence; or that the victim has suffered horribly; or that your client behaved in a cowardly manner. I do not suggest that you do the prosecutor's job. The key is getting the balance right. Once you have made the acknowledgment then, if possible, qualify it. For example, "There is no doubt that the

[182] County Court Practice Note PNCR 1 – 2015.

victim suffered terrible harm as a result of X's actions. However, it is clear from the Victim Impact Statement that she has made a good recovery from her injuries with no lasting effects…". It is also a good idea to get in first before the prosecutor or judge does.

xii. Make appropriate concessions. For example, if an immediate jail term is the only sentence open, concede that fact and direct your submissions to the length of the head and minimum terms. However, be certain of the concessions that you do make. They may come back to haunt you on appeal. The only way to be certain is to have done the preparation.

xiii. Justify the submission you make as to the appropriate penalty. This is especially so if you are seeking a penalty outside of the "normal" range. For example, "It is acknowledged that *normally* an offence of this nature carries with it an immediate term of imprisonment. However, there are good reasons in the present case that would justify your Honour, in the exercise of your discretion, in imposing a community corrections order. Those reasons are …". You should <u>always</u> be able to justify the penalty you seek.

xiv. Every matter you put to the court on behalf of your client should have a purpose. Explain the relevance of the point you make or the information you provide. For example, the fact that your client is 18 may be relevant because he was the youngest of his co-accused; his relative immaturity was a factor that led him to behave in the way he did; and, of course, the law operates differently in the sentencing of young offenders. Reciting your client's excellent work history may be relevant, for instance, to "show that despite the offence, X otherwise demonstrates a very good capacity for hard work and responsibility to his family. He has never been unemployed, never sacked from a job…"

xv. Do not read your submissions to the Court. Look at your notes if you have to but then face the judge as you make the submission. This has the advantage of enabling you to gauge what effect your submissions are having.

xvi. Refer to your client by name not “the prisoner” or the “defendant”.

xvii. Avoid clichés. [Or as David Ross QC used to instruct – “Avoid clichés like the plague”]

One commonly heard submission is a request that the court impose a “shorter than usual non parole period” or a “ longer than usual parole period”.

In relation to such submissions the Victorian Court of Appeal remarked –

Much of the difficulty arises from the use of phrases such as ‘shorter than usual’ and ‘longer than usual’. As there is no ‘normal’ or ‘usual’ non-parole period, each case turning on its own facts, such phrases are at best unhelpful and at worst apt to mislead. In our view, sentencing judges and counsel should avoid using such phrases. By contrast, there is no difficulty in stating that a non-parole period is or should be ‘shorter than it otherwise might have been’, for example, because of the offender’s rehabilitation prospects and any other relevant matters informing the fixing of the minimum term of imprisonment which justice requires in the circumstances.[183]

xviii. Do not be unnecessarily repetitive.

xix. Avoid reading large slabs of reports. Summarise accurately what it is that the particular section of the report says.

xx. Listen carefully, and respond directly, to questions and remarks from the bench. Do not talk over the judge. Questions from the

[183] *Kneifati v The Queen*; *Taha v The Queen* [2012] VSCA 124.

bench enable you to gauge the impact of your submissions and will highlight those matters that the court wants addressed. Be prepared to be flexible in your submissions. In some cases you will need to decide quickly whether to persist with your submission or abandon it and pursue an alternative course.

xxi. Finish on a strong point.

xxii. Make it easy for the Judge. Consider preparing a written outline of your submissions (if not otherwise required) and handing it to the Judge (and prosecutor) at the time of making your plea. Do not assume that the Judge will want it but enquire "whether the court would be assisted by an outline of my submissions". However, a written outline should not be a substitute for oral advocacy and you should never simply read from your written submissions.

xxiii. Documents. Do not simply hand up loose documents. Place documents in a folder. Make them easily accessible. Similarly, if you are going to rely upon authorities, make sure you have clean copies for the judge and the prosecutor.

xxiv. Prepare for the examination of all witness to be called. The questions will depend on the purpose in calling the witness and what it is you hope to achieve. Ask non-leading questions as much as possible. However, direct the witness to the topics you want covered.

Some Frequently Encountered Problems

a. Prior Convictions not alleged.

Do not mislead the court. Do not tell the court there are *no* prior convictions, or that what has been alleged is all that there is. Be careful that you do not imply it in the course of your submissions. There is no

obligation on defence counsel to inform the court of prior convictions that the prosecutor has not alleged.

The *Good Conduct Guide* by Roisin Annesley, sets out the Practice Rules of the Victorian Bar. Note the following rules;

158 *A barrister will not have made a misleading statement to a court simply by failing to disclose facts known to the barrister concerning the client's character or past, when the barrister makes other statements concerning those matters to the court, and those statements are not themselves misleading.*

159 *Where on sentence a barrister is aware of a client's previous convictions that have not been made known to the court by the prosecution, a barrister is under no duty to correct the omission of the prosecution. However, the barrister remains under a duty not to mislead the court and therefore should not make any submission capable of being regarded as an assertion that the client has no previous convictions.*

In Fox and Freiberg's S*entencing – State and Federal Law in Victoria,* 2nd edition, the authors state at p.120:

> *"Neither the accused, nor counsel on his or her behalf, is obliged to reveal previous convictions or to correct any information (or lack thereof) that might be given to the court by prosecution if the correction would be to the client's detriment"*

The rules governing solicitors are in similar terms.

Have particular regard to the submission you will be making as to the appropriate sentence. Sometimes the existence of a previous conviction, a subsequent offence or conviction or other background material will be relevant to the disposition you are seeking in the instant case and failure to mention it will be misleading. See *R v Rumpf* [1988] V.R. 466

Rumpf is a case with which all advocates should be familiar.

Whether or not to inform the court of the existence of prior convictions calls for a forensic judgment to be made in the individual case, and instructions from the client. My almost invariable practice is to inform the court of priors not alleged. Despite the rules, some judges and magistrates view it as "*sharp*" practice to not inform the court of such priors. You will need your client's instructions before doing so.

b. Subsequent Convictions

See the discussion immediately above, particularly Rule 158.

At a seminar on "Plea Advocacy", conducted at the Victorian Bar on the 7th Sept. 2004, former Chief Justice, John Phillips AC, QC, stated that in his view, "nearly always, circumstances favoured the voluntary disclosure of a conviction which is not a prior conviction". His Honour went on to say that, usually, it would be the case that what you would otherwise want to say would be so emasculated that a worthwhile plea cannot be made.

It is worth remembering that in neither case (prior and subsequent convictions) is a sentencer permitted to increase what would otherwise be an appropriate sentence. However, previous or subsequent matters may dictate the appropriateness of the penalty you seek.

c. "Evidence" from the Bar Table

Assertions are often made from the Bar table without evidence being called. These generally relate to background matters and instructions relevant to the offence. The court often accepts them. Sometimes, however, that the prosecutor will dispute the assertion or a judge will want to hear evidence on the matter. This frequently arises when matters put in mitigation appear implausible or which do not fit with the other evidence. The advocate will need to determine whether it is worth persisting with the assertion or take it no further. This will involve an assessment of the risks in calling evidence.

d. Unhelpful Expert Reports

Should you tender a report if you believe that it will harm your client's prospects on sentence? There is no obligation to do so and in my view you shouldn't without instructions. However, often the negative parts of a report are outweighed by the positives, or can be explained. Does the report really hurt your client?

If you do not tender your report you must be careful about what you say on the plea. Can you present an effective plea without the report? Will the court require a report in any event and call for one? In some cases a judge will not sentence without the aid of a report and will call for one.

There is no easy answer to this issue - which really requires that a balancing exercise be carefully conducted.

What are the disadvantages? Before deciding you should review the report carefully with your client. Obtain your client's instructions as to the whole of the contents of the report. A client may not agree with all that is contained in the report. There may be good explanations for some of the

report's more pessimistic comments. If you are uncertain seek advice from your colleagues or experienced practitioners. As with the topic of "Subsequent Convictions" (above) it may be that what you would otherwise want to say will be "so emasculated" that without the report a worthwhile plea cannot be made. If you do not tender the report, **be careful not to mislead the court**. Refer to Practice Rule 158 above.

Sometimes a judge will ask you whether you have obtained a report. If so, you must answer that you have - but that you do not intend to rely upon the report.

If the report is "neutral" it may be of assistance to the court to tender it, for example, to show that nothing of psychological significance is wrong with your client. It may contain useful biographical information.

Practitioners must be very careful in seeking to have changed the contents of a report. It sometimes happens that the expert has not dealt with an issue relevant to the plea. Sometimes the report may contain incorrect factual information. I see nothing wrong in discussing these types of issues with the expert. However, what must <u>not</u> be done is anything that may be regarded as attempting to compromise the integrity of the report. There is nothing wrong in commissioning a new report from another expert.

e. Client's Instructions

It *sometimes* happens that a client will provide you with the most implausible or embarrassing of instructions. There is no simple solution when this occurs. You will need to deal with this on a case by case basis.

It has happened on at least one occasion, in my experience, that a sex offender has instructed that a very young victim "led him on"! Often these types of problems are resolved following a detailed conference with the client. Careful questioning of the client often reveals that his/her instructions are nothing more than a distorted perception; or a lie told so as to avoid the embarrassing truth. Test, with your client, what he or she says. In the end, what your client says are your instructions. Whether you put them to the court is another matter. Naturally if the court makes a proper enquiry you are obliged to answer. Have your answer ready. You must not suggest instructions to your client. If the implausible aspect relates to a peripheral matter, can you afford to leave it out? If it relates to a central issue, you may be left with no option but to meet the difficulty head on.

You are not obliged however, and indeed you must not, make inappropriate submissions, political statements on behalf of your client, or make gratuitous attacks on the character of witnesses and other persons.

f. Agreed Statement of Facts v Depositions

Often counsel will agree on the factual scenario relevant to each count. This may differ in some respects to the material contained in the depositions. It is counsel's duty to take objection to such parts of the material that counsel knows to be before the judge and which are inadmissible against the client. A ruling may then be made and if necessary further evidence called. See *R v Bunning* [2007] VSCA 205.

g. Victim Impact Statements

Are there matters in the statements that are not admissible?

Section 8L *Sentencing Act 1991* is as follows -

(1) A victim impact statement contains particulars of the impact of the

offence on the victim and of any injury, loss or damage suffered by the victim as a direct result of the offence.

(2) A victim impact statement may include photographs, drawings or poems and other material that relates to the impact of the offence on the victim or to any injury, loss or damage suffered by the victim as a direct result of the offence.

(3) The court may rule as inadmissible the whole or any part of a victim impact statement, including the whole or any part of a medical report attached to it.

Is there to be a challenge to matters asserted in the statement?

Counsel has a duty to object to matters that are inadmissible in a Victim Impact Statement or, if admissible, to challenge that with which the client does not agree.

If the matter is inadmissible, the judge should either rule it inadmissible or make it clear during the plea or in his or her sentencing reasons that no reliance would be or was being placed on that part of the statement.

If the matter is admissible but challenged then evidence from the victim may be called. Counsel may require the attendance of the victim for cross-examination. Consider carefully whether it is in your client's interest to contest matters in the statement.

Be familiar with the many authorities regarding victim impact statements and in particular *R v Swift* [2007] VSCA 52.

h. "Verdins" Based Submissions

It would appear from a reading of any number of recent Court of Appeal decisions that the principles in *R v Verdins* are still not well understood.
If reliance is to be placed on impaired mental functioning as a point in mitigation a sound understanding of the principles is necessary.

Assistance will be derived from a reading of the many cases that have applied *Verdins* since it was decided. There are simply too many to set out here but a good example is *DPP v O'Neill* [2015] VSCA 325.

It is important to understand also that some or all of the *Verdins*' principles may apply whether or not the condition existed at the time of the offence or whether or not it contributed to the offending.

i. Disputed Facts

If you are unable to agree on the factual basis for the plea it will be necessary for the sentencing judge to resolve the issue – if possible. [184] This will usually require the calling of evidence and at times your own client.

It is for the prosecution to establish all matters adverse to the interests of your client beyond reasonable doubt. If the fact in dispute mitigates penalty it is for the defence to establish on the balance of probabilities.

If you are unable to call evidence, and if you decide not to expose your client to the risk of giving evidence, your failure to establish the point in mitigation does not make the reverse of it a fact in aggravation of penalty. For example, suppose you submit that your client is not the principal of a drug importation ring but rather a lowly courier.

[184] See *R v Olbrich* (1999) 199 CLR 270; *R v Storey* [1998] 1 VR 359

Suppose further that that submission is disputed and there is no evidence to support it. Your client does not give evidence. In that instance you will have failed to establish to the requisite standard (balance of probabilities) the point in mitigation. However, that does not mean that your client is therefore to be sentenced as the principal of the operation. A court would need to be satisfied beyond reasonable doubt before it could sentence your client on that aggravating basis. Sometimes a court cannot make a finding simply because of a lack of evidence.

j. The Interrupting Judge

If this is happening consider why it is happening. It may be that the court is not being assisted by your submissions. The court may agree with the disposition you have suggested and is inviting you to sit down. The court may be having difficulty following your submission. The court may simply wish to know more about the particular submission you are making. Or it just might be that you have drawn a particularly difficult judge.

There are any number of reasons.

The former Chief Justice of the Northern Territory, Riley CJ, in his book, "The Little Red Book of Advocacy" states that the advocate should welcome questions from the Judge. Indeed, he considers that advocates should be more concerned if the judge remains silent.

> *"Discussion with the Bench is something to be welcomed and treated as further opportunity to advance the interests of your client."* [p. 91]

Whatever the reason for the interruption, remember it happens to us all. Keep your focus. Maintain your poise. Do not get into an argument with the

judge. Do not talk over the judge. Answer the question immediately if you are able. Do not guess at the answer. If you don't know, ask for an opportunity to obtain instructions or further information.

Once the question has been answered resume where you left off.

The above are just some of the more frequently encountered problems. There will, of course, be many other problems encountered in making a plea. <u>However, a well prepared plea will anticipate the problems. A well-presented plea will deal with them</u>.

References and Suggested Reading

- "The Little Red Book of Advocacy" Chief Justice Trevor Riley, Northern Territory Supreme Court.
- "Advocacy with Honour" John Phillips, former Chief Justice of the Supreme Court
- "Aspects of Advocacy: Cross Examination and Pleamaking" George Hampel QC, former Justice of the Supreme Court.
- Advocacy Manual – Professor G Hampel, E Brimer and R Kune.
- "Advocacy" David Ross QC
- "Crime" David Ross QC – [19.800] on Sentencing
- "Sentencing – State and Federal Law in Victoria" R Fox and A Freiberg
- Victorian Sentencing Manual
- "The Judge's Perspective on Sentencing" – The Honourable Justice Osborn. Paper delivered Victorian Bar CLE, 2007
- *The Good Conduct Guide – Professional Standards for Victorian Barristers*, Roisin Annesley, 2006

Part 11:

Scope, Purpose and Admissibility of Victim Impact Statements

Chapter 25

Scope, Purpose and Admissibility of Victim Impact Statements –
Written by David Cronin

Chapter 25

Victim Impact Statements

Written by David Cronin

Victim Impact Statements (hereinafter referred to as VIS) are an important part of the sentencing process. As Vincent JA observed in *DPP v DJK*[185]**:**

> *"The statements provide an opportunity for those whose lives are often tragically altered by criminal behaviour to draw to the Court's attention the damage and anguish which has been created and which can often be of long duration. For practical purposes, they may provide the only such opportunity. Obviously the contents of the statements must be approached with care and understanding. It is not to be expected that victims will be familiar with or even attribute significance to the many considerations that a sentencing judge must have regard in the determination of a just sentence in the particular case. Nor would it normally be reasonable or practicable for a sentencing judge to explore the accuracy of the assertions made."*

Who can make a VIS?

Victim is defined in the *Sentencing Act Vic 1991* to be someone who has suffered injury, loss or damage (including grief, distress, trauma or other significant adverse effect) as a direct result of the offence, whether or not that injury, loss or damage was reasonably foreseeable by the offender[186].

[185] (2003) VSCA 109 at 17.

[186] s.3 *Sentencing Act Vic 1991.*

As well as the 'primary' victim, victim can also include family, friends and witnesses, who have suffered injury, loss or damage as a direct result of the offence[187].

Form and content of the VIS

The purpose of the VIS is to give victims an opportunity to outline to the Court the injury, loss or damage they have suffered. This is done in the form of a sworn statutory declaration. The VIS is not limited to words; it may include photographs, drawings, poems or any other material that the victim wishes to convey the impact of the offence on them[188]. This includes medical reports that are made and signed by a medical expert[189].

Presentation of the VIS

The VIS can be provided to the judge to read; or it can be read aloud by the victim, the prosecutor or any other person nominated by the victim and who consents[190]. If necessary, arrangements can be made for the victim to read the VIS by way of a remote witness facility, by utilising screens so that they cannot see the offender and/or a support person[191].

Ordinarily the VIS will form part of the Court's public record. However in certain cases where the publication would cause undue distress or embarrassment (e.g. where the victim is a child, in sexual offences), the

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[187] In *Berichon v The Queen; Houssein v The Queen* (2013) VSCA 319 at 19, per Redlich JA and Robson AJA: "*The term victim must be given the broad interpretation which the legislature clearly intended. Victims are not confined to the object or target of the crime or to those who are related to the object or target. The victim must only have suffered in one of the defined ways as a 'direct result' of the offence. Even if the person have no connection to the object or target of the offence, they may be a victim by their mere presence in the circumstances in which the crime is committed.*"

[188] s.8L(2) *Sentencing Act Vic 1991.*

[189] s.8M(2)(a) *Sentencing Act Vic 1991.*

[190] s.8Q(1) *Sentencing Act Vic 1991.*

[191] s.8R(1) *Sentencing Act Vic 1991.*

Court can close all or part of the proceedings and/or restrict publication of information contained in the VIS[192].

The author of a VIS can be requested by either the prosecutor or defence to attend court to give evidence and be cross-examined. This includes the author of any medical report attached to the VIS[193].

Admissibility of the VIS

Ordinarily VIS' are prepared by the victims themselves or with assistance from victim support agencies[194]. This can lead to a VIS that includes inadmissible material that is not relevant and at worst can wrongly infect the sentencing process.

The VIS should only include information (however conveyed) that is relevant to the injury, loss or damage the victim has sustained as a direct result of the offence. This means that the VIS should not include:

- Information regarding charges no longer part of the indictment;
- Information about the effect of the offence on any other person
- Their view on how the offender should be sentenced
- Information/background of the offender.

The Court has the power to rule inadmissible any part of the VIS including any medical report attached to the VIS. This requirement changes when the VIS is to be read aloud; s.8Q (2) places a *mandatory* obligation on the judge to ensure only admissible parts of the victim impact statement are read

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[192] *Open Court Act* s.18(1)(d-e)
[193] s.8(O) *Sentencing Act Vic 1991.*
[194] Victoria Police and the DPP do not prepare or assist victims with the preparation of the VIS other than by providing information and referrals.

aloud. The judge does not have any flexibility to waive the requirements of statute[195]. So far as relevant, s.8Q (2) provides:

> (2) If a request is made under subsection (1) and the person specified in the request is available to do so during the course of the sentencing hearing, the court *must ensure that any admissible parts* of the victim impact statement that are-
>
> (a) identified in the request
>
> (b) *appropriate and relevant to sentencing*-
>
> are read aloud.by the person or persons specified in the request in open court in the course of the sentencing hearing.

That does not derogate from the responsibility of counsel to take exception to those parts of the VIS that are not admissible:

> *"Counsel's obligations include taking objection to those parts of the victim impact statement that are said to be inadmissible. A sentencing judge is entitled to assume that objection will be taken to irrelevant or inadmissible material. Counsel do not discharge their obligation by leaving it to the sentencing judge to make the determination.[196]"*

And this obligation obviously extends to VIS', which are not to be read aloud. It is not sufficient to assume that a judge will only have regard to admissible material. There lies however, a tension between the flexibility

[195] *York (A Pseudonym) v The Queen (2014)* VSCA 224 @ 25.
[196] *Luciano v The Queen* (2015) VSCA 173 @ 10.

expected with the VIS[197] and the requirements of counsel to object to relevant inadmissible information:

> *"Even paying due heed to the notion that the admissibility of victim impact statements should be approached with a degree of flexibility, nonetheless such statements must be relevant in the manner contemplated by s8L (1) of the Act in order to be admissible[198]."*

The effect of this is that defence practitioners must ensure that objection is taken to inadmissible material in a VIS that could wrongly affect the sentencing process. The VIS are not commercial pleadings and it is expected that there may be inadmissible material. Whether that inadmissible material is worthy of an objection calls for a pragmatic assessment and forensic decision by defence counsel as to whether it is of a kind that could affect sentencing. As Beach JA stated in *Luciano*:

> *"It remains for an appellant who complains about the reading or reception of inadmissible material in a victim impact statement to establish that the judge in fact relied on that inadmissible material; otherwise there can be no error in the sentence imposed[199]"*

In practice

Although the sentencing act provides that a victim must[200] provide a copy of the VIS to the defence and the prosecutor a reasonable time before sentencing, it is often the case that this does not occur. Too often a VIS is provided to defence at the commencement of the plea hearing leaving little

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[197] In *Swift* 2007 15 VR 497, 498-99 it was said: *"It would be destructive to the purpose of VIS if their reception in evidence were surrounded and confined by the sorts of procedural rules which are applicable to the treatment of witness statements in commercial cases"*
[198] *York (A Pseudonym) v The Queen (2014)* VSCA 224 at 25.
[199] *Luciano v The Queen* (2015) VSCA 173 at 14.
[200] s.8N *Sentencing Act 1991*

time to consider the admissibility of the contents let alone raise any issues with the prosecution.

VIS are usually prepared by the victim themselves or with a victims' support agency. Given that they are not lawyers it is unsurprising that the VIS can include inadmissible material. This can particularly occur in cases where there are a number of charges and there is a plea deal with a changed factual basis that the victim is not fully aware of or understanding of.

It is therefore important to ensure that the VIS is requested at an early stage. Although the legislation provides for a magistrate/judge to only consider the admissible parts of the VIS, it is clear that objection needs to be taken to inadmissible material if an appeal is to be subsequently pursued on this point. It is therefore imperative that the defence practitioner critically assess whether the VIS information is relevant.

Although there is provision in the Act to cross-examine the victim or author of an attached medical report, it is easy to imagine a magistrate/judge taking a dim view of the decision to do so unless there is a solid forensic basis to do so. So even though the Act provides the power to do so it may be a rare situation where the decision is made to proceed in that manner and often a client may need to be reminded of this when discussing the options in relation to the VIS.

Part 12:

Sentencing

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Common Matters in Aggravation – *Written by Neill Hutton*

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Chapter 26

Common Matters in Mitigation

Written by Cecily Hollingworth

Whether you are conducting a plea in the Magistrates' or the Supreme Court you will need to address features of mitigation and aggravation.

You will therefore need to be completely on top of the facts of your case and a wide range of case law, legislation and sentencing snap shots. This chapter will detail the common and recurring matters in mitigation that often arise in pleas.

What is Mitigation?

The *Sentencing Act 1991* (Vic) requires a sentencing court to take into account mitigating factors (see sections 1 & 5).

So what is a mitigating factor? Essentially, it is feature of your case that reduces the severity or seriousness of your client's instant offending. Mitigation can attach to both the offence and the offender.

The aim of a plea in mitigation is to therefore achieve the lowest possible sanction or sentence when considering all the circumstances of the offence and offender. What that requires of the advocate is to 'draw out' all those matters of mitigation that inhere in the features of the offence as well as the factors in mitigation that arise from an offender's subjective characteristics.

Matters in Mitigation Must Be Proved on the Balance of Probabilities

The prosecution has the evidential burden of proving aggravating features of a case beyond reasonable doubt.

In contrast, where defence seeks to rely on mitigating features they have the evidential burden of establishing those 'facts' of the balance of probabilities. See *Storey* [1998] 1 VR 359 and *Oldbrich* (1999) 199 CLR 270.

Common and Recurring Matters in Mitigation

Set out below is a Table that sets out the common – and often recurring – matters in mitigation.

This is not an exhaustive list. Remembering, of course, that each offender has an individual life story and their 'own' features of mitigation. And also realising that the persuasive force of the 'common' matters in mitigation arises not simply by the 'category' or 'descriptor' attached to the matter in mitigation but how it relates to the particular features of the offender that engages that particular category of mitigation. In this manner, mitigation is highly fact specific.

Furthermore – and depending on the particular factual circumstances of the offence and the offender – the weight given to mitigating features will vary and some matters in mitigation will be given greater or lesser weight.

Mitigating Feature	Meaning	Principle
Youth	At the time of the offence: -"child" 10-18 years or < 19y at time matter commences in Court (*Children, Youth & Families Act (Vic)*, s3)	Propositions set out in *Mills* [1998] 4 VR 235 at 241. Youth & Rehabilitation is a primary consideration.

	- "young" < 21 y (*Sentencing Act,* s 3) At the time of sentencing the offender: - "youthful" can be over 21 years (*Mills [1998] 4 VR 235*)	Adult custody should be avoided if at all possible. *Boulton v The Queen* [2014] VSCA 342 at [186] also refers to the importance of rehabilitation for young offenders in sanction selection.
Mature Age	*May amount to a mitigating factor.* Gregory [2000] VSCA 212 No definition of what constitutes "mature"; but of significance that an offender has hitherto led a blameless life	*Lack of priors despite advanced age* *See* RLP v The Queen *[2009] VSCA 271* *Effect of sentence on mature or older offender but to be balanced against seriousness of the offence*
Mental Health Consideration s/ Verdin's principals	Impaired mental functioning may be a mitigating factor Refer to the principles in *Verdins* Note when a link is required between offending and the mental illness	*See Verdins v R* (2007) 16 VR 269 Principles in *Verdins* – and authorities interpreting and following that decision – comprehensively examined in *DPP v O'Neill* [2015] VSCA 325 See also *Muldrock* (2011) 244 CLR 120 regarding intellectual disability and contrast between mental illness and the enduring

		nature of intellectual disability
Poor upbringing	Social deprivation may be a factor in mitigation and does not lose its impact because of the effluxion of time *Bugmy v R* [2013] HCA 37 Indigenous background is of itself not a mitigating factor There needs to be proof of disadvantaged background and nexus made with the offence	If you seek to rely on this, it is necessary to point to material tending to establish that background. For instance, are there medical reports or expert reports proving a past history of sexual or physical abuse and/or DHS records regarding family neglect and abuse (Some judicial officers are less likely to accept an offender who self-reports a deprived background without these corroborating reports)
Character, past history and antecedents	Lack of prior convictions or relevant prior convictions Calling character evidence (written or viva voce) of past good character	Always ensure that the person giving the character evidence knows what charges the offender is pleading to, what his priors are and is aware of the nature of the allegations Always obtain detailed instructions of the offender's prior convictions
Prospects of Rehabilitation	Consider the following matters: - employment history - treatment for drug/alcohol abuse	See Sentencing Manual (Judicial College of Victoria) for further resources

	- voluntary attendance at counselling (especially in relation to sexual offending) - family support - stable accommodation - history of education & training	
Prospects of Deportation	Can be taken into account in terms of risk of not being able to permanently settle in Australia and effect upon an offender whilst in custody	*See DPP v Zhuang* [2015] VSCA 96, *Konamala v The Queen* [2016] VSCA 48, *Da Costa v The Queen* [2016] VSCA 49 — *Migration Act 1958 (Cth)*, ss 501(3A), 501CA. You may need to obtain evidence of risk of deportation from the Immigration Department. If necessary, ask the Crown to provide details/proof of Immigration status
Remorse	How has the offender shown remorse? Is it genuine?	Require evidence of remorse. For instance, in the ROI or as detailed to psychologists or family members or to the victim.

		Also examine witness statements to establish whether there is any exhibiting of remorse proximate to the offence. Restitution may be used as evidence of remorse.
Plea of Guilty / Cooperation	How early is the plea of guilty? Timing can be important as to the offer to plead guilty Even if the matter proceeds to trial has the offender been found guilty to a reduced indictment that was the subject of an earlier plea offer Giving of evidence against a co-offender can often result in a significant discount on any sentence imposed	Key decision of guilty plea as a mitigating factor is *Phillips v R* [2012] VSCA 140 Look at potential undertakings to give evidence against a co-accused Ensure offender aware that they can be resentenced by the Court of Appeal if they renege on the undertaking
Intoxication	Can be a mitigating feature in some limited circumstances	Depends on whether offender knows the effect alcohol/drugs have on them So if they are aware that drugs and / or alcohol make them behave recklessly this may reduce their ability to rely on this as mitigation. See *Martin* (2007) 20 VR 1

		Compare this to someone who has never committed an offence previously while under the influence of alcohol and / or drugs
Physical Health	Is a mitigating factor in terms of effect of sentence on offender and the nature and duration of the sanction imposed	Ensure you have appropriate proof of illness or injury and how the particular illness or injury would affect an offender's experience of a sanction; especially imprisonment Depending on the condition – physical disability or chronic medical condition – expert evidence may need to be called. Poor physical health can be relevant both whether to impose an immediate term of imprisonment and the length of any non-parole period
Delay	Mitigating factor	See *Merrett* (2007) 14 VR 392; *Reilly v The Queen* [2010] VSCA 338 Delay as a mitigating factor concentrates on two aspects: anxiety and stress caused by the delay *and* prospects of rehabilitation. May have less relevance in the case

		of historical sexual abuse cases. See *R v Holyoak* (1995) 82 A Crim R 502; But where offences committed as a child delay can be important. See *R v Boland* (2007) 17 VR 300
Emotional Stress	Mitigating factor	Emotional stress that contributes to commission of offence *Neal* (1982) 149 CLR 205
Hardship to Third Parties	Mitigating only when exceptional	See *Markovic* (2010) 200 A Crim R 510 – third party hardship is irrelevant unless exceptional circumstances
Extra curial Punishment	Mitigating factor	Fact that offending has resulted in additional punishment to the offender See *R v Barci* (1994) 76 A Crim R 103

Conclusion

As can be seen from this short survey of mitigating factors, there are potentially many matters in mitigation that can arise from the circumstances of the offence *and* circumstances of the offender.

What is set out above is not a comprehensive detailing of potential matters in mitigation; rather, it is a 'listing' of the matters that commonly arise.

Make sure to identify all relevant factors in mitigation and weave those matters into the life story of your individual client.

Chapter 27

Common Matters in Aggravation

Written by Neill Hutton

Introduction

What happens after a finding of guilt (either by a jury trial or a Magistrate's Court hearing) or a plea of guilty is the plea in mitigation. How does a sentencing court decide? Why do some people get lenient dispositions such as 'proven and dismissed' or 'adjourned undertakings' while others receive Community Correction Orders or immediate jail?

The answer is in the plea in mitigation which is designed to allow the sentencing court to properly understand the facts of the case together with any factors of mitigation or aggravation. It is only by understanding the entire circumstances of a case that a sentencing court can properly come to a decision on what the appropriate sentence is in a particular case.

What is aggravation?

The purpose of this paper is to address the question 'What is aggravation'? To aggravate is defined as to '*make (a problem, injury or offence) worse or more serious*'. Aggravating factors are those which are said to make a crime or an offence worse or more serious.

In Victoria, Magistrates and Judges are bound by the provisions of the *Sentencing Act 1991* (Vic) (*the Act*). Section (1)(d)(iv)(C) of the Act provides that:

> *The purposes of this Act are-*
>
> *(d) to prevent crime and promote respect for the law by –*

(iv) ensuring that offenders are only punished to the extent justified by –

(C) the presence of any <u>aggravating</u> or mitigating factor concerning the offender and any other relevant circumstances ...

The Act also provides:

Section (5)(2) In sentencing an offender a court must have regard to –

(g) the presence of any <u>aggravating</u> or mitigating factor concerning the offender or of any other relevant circumstances.

Section (5)(3) A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.

So we can see from the Act that s.(1) mandates that a <u>purpose</u> of the Act is to ensure that an offender is only punished to the extent justified by (*inter alia*) the presence of any aggravating factors.

S.(5)(2) is the <u>mechanism</u> for taking such aggravating factors into account while s.(5)(3) reflects the common law principle of parsimony (only sentencing to the extent necessary to achieve the sentencing purposes).

Application of the Act

Some follow up questions arise:

a. Is there an evidentiary burden and who bears it?

b. Is there a difference between a plea and a trial?
c. What is the standard of proof?
d. What is an aggravating factor?

Is there an evidentiary burden and who bears it?

Given the obviously negative impact upon an accused were a court to find the existence of a particular aggravating factor or factors, the answer to the question 'Is there an evidentiary burden?' is 'Yes'. The prosecution has the burden of proving aggravating factors.

Is there a difference between a plea and a trial?

Ordinarily, the presence of aggravating factors is apparent from the circumstances of the crime as expressed in a summary. On a plea the accused has to either personally, or by counsel, accept the factual premise presented in a summary. Alternatively, one occasionally sees a 'contested plea' whereby an accused pleads guilty to a crime, accepting the elements of that particular crime, but denies the existence of a particular aggravating factor. Once a summary is accepted OR the aggravating factor proven on a contested plea the sentencing court can proceed to sentence.

In a contested Magistrates' Court hearing the sentencing magistrate will have heard all the evidence and be in a position not only to rule upon guilt (ie: the elements of a particular offence) but also to make a finding of fact as to the presence of any aggravating factors. The magistrate should make it clear (whether after submissions or not) what aggravating factors they have found to exist.

On a trial the issue is a little more complex. A jury verdict only relates to the crime alleged on the indictment. Accordingly, when a jury returns a verdict

of 'guilty' to a particular crime it is only a finding of fact in so far as it relates to the existence of the particular elements of that particular crime (unless a particular aggravating factor is alleged in the indictment[201]).

If, as suggested above, the aggravating factors are alleged in an indictment a jury will be asked to determine the existence of the particular aggravating factor[202]. Such factors may include:

a. Manslaughter in circumstances of gross violence;
b. Causing serious injury in circumstances of gross violence (either intentionally or recklessly);
c. Causing serious injury to emergency services workers on duty; or
d. (Arguably) causing serious injury offences (where a statutory alternative is the injury charge).

If the aggravating factors are not alleged in the indictment the task for determining whether or not aggravating factors are present falls to the trial judge who has to determine their existence.

What is the standard of proof?

Courts apply one of two alternative standards of proof in determining sentencing facts. At common law the standard selected depends on whether the fact in question is favourable or adverse to the accused[203]. Factors such as aggravating factors would be seen as favourable to the prosecution. Accordingly, such factors would need to be proven 'beyond reasonable doubt' at common law.

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[201] See for instance s.45 *Crimes Act 1958* where a person is charged with sexual penetration of a child under the age of 16. Different penalty sections exist for different aged complainants. Such factors of aggravation should be determined by jury verdict. A jury may return a verdict of 'guilty' but find the age of the complainant not proven.

[202] See also ss.15A and 15B of the *Crimes Act 1958* causing serious injury in circumstances of 'gross violence', ss.9B, 10, 10AA and 11 of the *Sentencing Act 1991*.

[203] *Storey* [1998] 1 VR 359 at 369 and 371; *Olbrich* (1999) 199 CLR 270 at 281.

Under the s.141 of the *Evidence Act 2008* the selection of standard of proof in criminal proceedings depends on whether the evidence is part of 'the case of an accused' or the 'case of the prosecution'. The common law test must be applied if the court has not directed pursuant to s.4 that the *Evidence Act 2008* applies to the proceedings.

While some doubt exists as to whether or not s.141 of the *Evidence Act 2008* can be applied to sentencing hearings it is likely that no practical difference will occur whether the Court applies the common law test or the s.141 test. Each refers to the need for the prosecution to prove its case 'beyond reasonable doubt'.

It is safe to say that, for the time being[204], the standard of proof for any aggravating factor is 'beyond reasonable doubt'.

What is an aggravating factor?

As referred to above, an aggravating factor is something that a sentencing court considers to be a fact makes a particular set of sentencing facts worse or more serious.

Some statutory aggravating factors have already been examined ('gross violence' 'emergency services workers' and 'age of certain complainants').

Non-statutory aggravating factors are too numerous to define and exist within the myriad of social, cultural, economic, religious and commercial factors that can make up a particular sentences factual matrix.

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[204] Pending a sentencing court ruling that the *Evidence Act 2008* applies over the common law and applying the s.141 test and an appellant later challenging that finding – which seems highly unlikely.

Furthermore, some sentencing judges and magistrates have particular factors that they consider to be more serious than others. For instance, some sentencers consider 'breachs of trust' offences particularly egregious while others express distaste/disdain for people who commit 'assaults in company' or provide 'the muscle or support' for a person who may otherwise not have had the courage to commit a particular crime.

Common aggravating factors are:

a. Breaches of trust – thefts from employers;
b. Hate crimes (racially motivated, homophobic assaults, religion based);
c. Sexual assaults by trusted family members (uncles, grandfathers etc);
d. Contravention of intervention orders or similar court orders;
e. Offending whilst on bail/parole;
f. Offending whilst intoxicated (particularly in circumstances whereby the accused knows that he/she gets violent when drunk/drugged or when the accused has taken to alcohol or drugs to 'work up the courage' to commit the crime);
g. Prevalence of a particular crime;
h. Use of a weapon[205]; and
i. Causing serious degradation or humiliation to a complainant.

Courts consider the following NOT to be aggravating factors:

a. Plea of not guilty (although intellectually difficult to separate from an aggravating factor considering a person who pleads guilty is entitled to a 'sentence discount' to which a person found guilty is not entitled);
b. Absence of remorse;

[205] NB – where that use of a weapon does not inculpate the accused in a different – more serious crime.

c. Failure to provide assistance;
d. Failure to make restitution; and
e. Intoxication may not be an aggravating feature (depending upon what the accused person knows to be their reactions to the intoxication – if they have never been drunk before or have never taken a particular drug before).

Some important principles:

a. Where factors of aggravation are alleged in an indictment the jury verdict accounts for the proof of presence or otherwise of the aggravating factor;
b. Where a plea occurs and an aggravating factor is disputed the prosecution must ask the sentencer to find the presence of the aggravating factor beyond reasonable doubt – whether that be on a contested plea or on a jury verdict;
c. On a trial the jury verdict does not (necessarily) prove the presence of aggravating features – sometimes lengthy submissions are necessary to persuade a sentencing judge that a particular factor of aggravation is present/absent;
d. Care must be taken not to assert or concede an aggravating factor where the presence of that aggravating factor leads to a more serious offence being proven (eg: presence of a weapon during a robbery – becomes an armed robbery and the more serious offence should be charged, similarly an assault with the aggravating factor of having an associate along for support becomes 'assault in company');
e. When factual disputes are settled (such as the prosecution conceding that it can't prove the accused's knowledge of the

presence of a firearm during a robbery the summary should not read as an armed robbery); and

f. Commonly, the prosecution concedes an inability to prove a small detail (knowledge of a weapon/knowledge that a car was stolen/intention to permanently deprive) that leads to a drastic re-shaping of a summary. It is necessary for both sides to carefully scrutinize the new summary in order to avoid embarrassment before the sentencer.

Chapter 28

What Amounts to 'Current Sentencing Practices'?

Written by Nadia Kaddeche

This paper will attempt to assist practitioners faced with the task of advising clients as to 'tariffs' and providing assistance to the courts[206] when requested or relying upon 'current sentencing practices'.

Definition of 'current sentencing practices'

The term 'current sentencing practices' is not defined by the *Sentencing Act 1991* but the simplest characterization of the phrase is: 'the pattern of sentences imposed for a specific offence'.

In essence, 'current sentencing practices' represent the approach presently adopted by sentencing judges when sentencing for a particular offence.

Current sentencing practices are essential to achieve consistency and uniformity in the sentencing process.

The requirement for 'current sentencing practices' is evident. The importance of 'current sentencing practices' is evident. What may not be clear to practitioners is how such practices are ascertained.
In Victoria, the requirement for current sentencing practices in the exercise of the sentencing discretion is legislated in the *Sentencing Act 1991*. [207] In

[206] Including the Appellate Jurisdiction (inadequate or manifest excess grounds).

the Commonwealth jurisdiction, considerations of sentencing practices have progressed without any legislative requirement.[208]

Sentencing Ranges and Current Sentencing Practices

The applicable sentencing range will to a substantial degree be determined by current sentencing practices. As explained by Maxwell P in *Ashdown v The Queen, "First, the sentencing judge is required by statute to have regard to current sentencing practices. Secondly, the offender's plea of guilty will have been entered on the reasonable assumption that his/her sentencing will be in line with current practice. Thirdly, as this Court has repeatedly emphasised, consistency of sentencing is a fundamental objective of the criminal law. The rule of law requires that like cases be treated alike*"[209]

Despite the change in counsel providing ranges to the court in *R v MacNeil-Brown; R v Piggot*[210], identification of an appropriate range remains essential.

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[207] Section 5 (2) *Sentencing Act 1991* "In sentencing an offender a court must have regard to-
(a) the maximum penalty prescribed for the offence; and
(ab) the baseline sentence for the offence; and
(b) **current sentencing practices**; and
(c) the nature and gravity of the offence; and
(d) the offenders culpability and degree of responsibility for the offence; and…"

[208] For instance in the case of *Pham* [2015] HCA 39, French CJ, Keane and Nettle JJ said at [29]:
Where…decisions of other courts in sentencing appeals are referred to in the context of determining whether a given sentence is manifestly excessive or inadequate, it should now be accepted that intermediate appellate courts must have regard to sentencing decisions of other intermediate appellate courts in comparable cases as 'yardsticks' that may serve to illustrate (although not define) the possible range of sentence available. A court must have regard to such a decision in this way unless there is a compelling reason not to do so, which might include where the objective circumstances of the crime or subjective circumstances of the offender are so distinguishable as to render the decision irrelevant, or where the court is persuaded that the outcome itself in the other court was manifestly excessive or inadequate.

[209] *Ashdown v The Queen* [2011 VSCA 408, (2011) 37 VR 341 at [5].

[210] *R v MacNeil-Brown;R v Piggot* [2008] VSCA 190.

Additionally, it is important to remember that any appropriate sentencing range should be a constellation of all the factors outlined in section 5(2) of the *Sentencing Act 1991*. As a consequence, a determination must therefore be made by practitioners, as to where the offence sits in the category of objective seriousness within the offence and where it sits in the range for that offence (low-mid-high level offending).

The case of *Barbaro*[211] further confirms when and how submissions for an appropriate range are permissible. In a case where defence counsel makes a submission, which quantifies the appropriate sentencing range, prosecution counsel may respond making submissions as to whether they consider the sentence is within the range open. The Prosecution can then use comparable cases to demonstrate current sentencing practices," *If the prosecution does not consider that such a sentence would be open, it may draw the sentencer's attention to 'comparable and other cases, current sentencing practices and other relevant considerations which in the Crown's submission support that conclusion"*[212].

The Use of Comparable Cases

A common tool in trying to ascertain a range in sentence is by the use of comparable cases.

As was explained by the Court of Appeal in *Hudson v The Queen*,

> "*Sentences imposed in 'like' cases provide some indication of the range that is open in the proper exercise of the discretion. They will indicate, subject to relevant discretionary considerations, the order of the sentence that might be expected to be attracted by a certain type of offender who commits a certain type of offence.*[213]

[211] *Barbaro;Zirilli* [2014] HCA 2.
[212] *Barbaro; Zirilli* [2014] HCA 2.
[213] *Hudson v The Queen* (2010) 30 VR 610.

Indeed, there is a number of Court of Appeal decisions which further assist and provide guidance in the task of recognising comparable cases as they have helpfully categorised and tabulated particular offences.[214]

Comparable cases can only be seen as an indicator of current sentencing practices.

As was observed by the Court of Appeal in *Hudson v The Queen:*

> *'Like' cases can only, at best, provide a general guide or impression as to the appropriate range of sentences. In that context it has been said on many occasions that 'comparable cases' can only provide limited assistance to this court"*[215]

There are discernable limitations with the use of comparable cases to establish a sentencing pattern.

In *Hudson v The Queen* – in dealing with the limitations of comparable cases – the Court said this:

> *'It is no part of the sentencing task, or the assessment of a sentence on appeal to embark upon that level of analysis of comparable cases. However, there has been an increasing tendency to overlook these limitations. Accordingly one must be wary of attempts to examine a comparable case in 'micro-detail' as such an approach will ordinarily be indicative of an intent to use the case as providing something more than a guide to a range*[216]

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[214] *Tognolini v The Queen* [2011] VSCA 113 (Attempt to Pervert the course of justice) and *William Reid (A Pseudonym) v The Queen* [2014] VSCA 145 (incest).
[215] *Hudson v The Queen* (2010) 30 VR 610.
[216] ibid.

Use of Sentencing Statistics

Other regularly used tools to enable practitioners to ascertain current sentencing practices are sentencing statistics and Sentencing Advisory Council published reports.[217]

Similar limitations have been identified in the use of sentencing statistics.

Priest JA explained these difficulties in *William Reid (A Pseudonym) v The Queen*:

> *"Among those difficulties are, first they provide no information as to which cases involved contested trial, and which involved pleas of guilty. Secondly, resort to representative counts is common in cases such as the present, but statistics provide no information as to those cases that involved representative counts and those involving every sexual act as a discrete offence. Thirdly, raw statistics reveal nothing about any features of aggravation or mitigation involved in any of the cases making up the sample*"[218]

Adequacy and uplifting current sentencing practices

Sentencing practices develop, evolve and will continue to do so with current pending Court of Appeal decisions considering the increase and adequacy of current sentencing practices for particular offences.

This progression has taken place in both the State and Commonwealth jurisdictions.

An appellate court has, and can by its own motion, or by invitation express a

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[217] In 2011, the Sentencing Advisory Council published a detailed report, which considered current sentencing practices for aggravated burglary.

[218] *William Reid (A Pseudonym) v The Queen* [2014] VSCA 145 (incest) paragraph 91.

view about adequacy of current sentencing practices for a particular offence.[219] To put it another way, the Court can give deliberation to express an opinion as to adequacy and then an indication to uplift sentencing practice.

In the recent decision of *Stephens v the Queen,* the Court of Appeal –after considering the adequacy of sentencing practices for the offence of dangerous driving causing death – made this observation:

> *"There is considerable force in the submission that the dearth of cases in excess of five years since the increased maximum bespeaks a failure by the courts to give proper effect to the maximum term of imprisonment as a 'yardstick'. The table of cases produced by the Director also demonstrate, that as a consequence of the low sentences fixed for the upper category of offending, an artificially low ceiling exists for mid category offending".*[220]

The Court agreed that the sentencing practices for this offence ought to be uplifted.[221]

Examples of Court of Appeal Dealing with Current Sentencing Practices for Particular Offences

Cases such as *Winch [2010] VSCA 141* (recklessly cause serious injury), *Hogarth v The Queen* (2012) VSCA 302 (aggravated burglary), *Harrison v The Queen; Rigogiannis v The Queen* [2015] VSCA 349 (negligently

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[219] As said by Redlich, Santamaria and Beach JJA in *Stephens v The Queen* [2016] VSCA 121 paragraph 33 "In accordance with this Court's responsibility to provide principled guidance to courts having the duty of sentencing and to ensure that appropriate sentencing standards are maintained, we consider it is timely that we address the question raised by the Director. Notwithstanding that the appeal will be dismissed, this prisoner's appeal enables the Court to express the view that the adequacy of sentencing standards for this category of seriousness of the offence are inadequate".

[220] *Stephens v The Queen* [2016] VSCA 121 at paragraph 38.

[221] ibid paragraph 42.

causing serious injury) and *Stephens v The Queen* (2016) VSCA 121 (dangerous driving causing death) have similarly dealt with this precise issue: that is, the adequacy of current sentencing practices for particular offences and the need for there to be some 'uplift' for the those offences.[222]

Every one of these cases considered the use of 'comparable cases', sentencing statistics and Sentencing Advisory Council's reports . Nevertheless, it is worth noting that there has been judicial observations on the limitations on the use of these tools which has clearly been expressed and repeated.

As outlined by Ashley JA in *Ashdown v The Queen*,

> *"None of this is to deny that sentencing statistics throw some light on sentencing patterns for a particular offence, and thus provide some window on the accumulated experience of sentencing judges. Of course they do, to the extent that such information can be of assistance. But the assistance is limited, and too much emphasis upon statistics by sentencing judges may well lead to error."*
> Further, *"Distinct from sentencing statistics are sentences passed in so-called 'comparable cases'. This Court has had occasion, recently, to pass upon the permissible and impermissible use of such cases…In principle, it coincided with the judgment of the plurality in Hili v The Queen with the gloss that in Hili their Honours specifically pointed out whilst sentences passed in other cases provide an historical record, they do not fix sentencing boundaries*"[223]

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[222] Considerations such as an increase to the maximum penalty for the offence, evidence that the crime is more prevalent, community attitudes and concerns, objective seriousness of an offence were considered when contemplating adequacy of sentencing patterns.

[223] *Ashdown v The Queen* [2011] VSCA 408, (2011) 37 VR 341.

Conclusion

It is now clear that a consideration by the Court of Appeal of the adequacy of sentencing practices for a particular offence is becoming more regular and common.

As a consequence, it is important for practitioners to ascertain 'current sentencing practices'.

Practitioners need to keep regularly well informed of any changes, in order to best advise their clients as to 'tariffs' and assist the Courts when relying upon 'current sentencing practices'.

Chapter 29

Resisting Crown Appeals Against Sentence

Written by Dr Mark Gumbleton

There are three types of appeals against sentence that the Director of Public Prosecutions for Victoria **(the Director)** is empowered to bring in the State of Victoria **(Crown appeal)**. The Commonwealth Director of Public Prosecutions is empowered to institute the same types of appeals as the Director by reason of the *Judiciary Act 1903* (Cth).

The first is an appeal *de novo* to the County Court against a sentence imposed by a Magistrate. The second is an appeal to the Supreme Court on a *question of law* against a final order (sentence) imposed by a Magistrate. The third is an appeal to the Court of Appeal against a sentence imposed by a judge of the County Court or Supreme Court.

I will deal briefly with the first two types of Crown appeals. These types of appeals are not commonplace, at least in comparison to the third type of Crown appeal. Further, much of what might be said about resisting Crown appeals against sentence to the Court of Appeal applies equally to appeals on questions of law to the Supreme Court. It follows that the focus of this paper is resisting Crown appeals against sentence to the Court of Appeal. I do not deal with special leave applications to the High Court of Australia. That is another topic altogether.

De novo appeals from the Magistrates' Court to the County Court

A Crown appeal against the sentence imposed by a Magistrate is brought pursuant to s. 257 of the *Criminal Procedure Act 2009* (Vic) **(the CPA).** Section 257(1) states that the Crown "may appeal to the County Court against a sentence imposed by the Magistrates' Court in a criminal proceeding … if satisfied that an appeal should be brought in the *public interest*".

As with an offender, a Crown appeal is commenced by filing a notice of appeal with the registrar of the Magistrates' Court within 28 days of the sentence being imposed: s. 258(1) of the CPA. The notice of appeal must state the general grounds of appeal: s. 258(3) of the CPA. Typically, the Crown appeal against sentence will simply state that the sentence was "manifestly inadequate".

In terms of resisting the Crown appeal in the County Court, the first thing to note is that the respondent is not bound by the plea entered in the Magistrates' Court: s. 259(1) of the CPA. Thus, where the Director brings an appeal against a sentence where the respondent agreed to a plea bargain, it is important to seek instructions as to whether he or she wishes to maintain the plea entered before the sentencing Magistrate or reconsider their prospects of contesting the charge(s) before a County Court judge.

Where the appeal proceeds before the County Court, the judge hearing the appeal is required to set aside the sentence of the Magistrates' Court: s. 259(2)(a) of the CPA. The respondent may then maintain the plea at first instance or change his or her plea. The judge is empowered to exercise any power which the Magistrates' Court could have exercised: s. 259(2)(c). In this way, the respondent may plead not guilty; challenge the admissibility of

evidence; cross-examine Crown witnesses and adduce evidence in his or her defence.

If the respondent maintains the plea of guilty, the County Court may impose any sentence that the Magistrates' Court could have imposed: s. 259(2)(b). The concept of double jeopardy is not to be taken into consideration when the County Court imposes the sentence: s. 259(3).

It is important to bear in mind that the respondent is not restricted to making the same plea in mitigation. It follows that different submissions may be made and new, more up to date, plea material may be tendered and relied upon. There may have been a change in circumstances in the period between the imposition of the sentence by the Magistrate and the appeal before the County Court. These matters may justify the imposition of the same disposition or, perhaps, a better one for the respondent.

Whatever the result (if the respondent decides to change his or her plea) or sentence (if he or she maintains the guilty plea) of the Crown appeal, the prosecution is not to bring any further appeal: s. 257(2) of the CPA. The County Court appeal is the end of the road for the Director.

Another matter to consider in resisting a Crown appeal is whether the prosecution brought the appeal within time (28 days from the imposition of the sentence). If the appeal was filed after the time permitted, the notice of appeal is deemed to be an application for leave to appeal: s. 263(1) of the CPA.

If the appeal is filed out of time, the respondent must resist the County Court granting leave to appeal against the sentence imposed by the

Magistrate. The Director must show that the failure to file a notice of appeal within the period was due to "exceptional circumstances" *and* that the respondent's case would not be "materially prejudiced" because of the delay: s. 263(2) of the CPA. If the Director fails to persuade the County Court judge of those factors, the appeal is struck out and the original sentence reinstated: ss. 263(3) and (5) of the CPA.

Remember, if the respondent successfully defends the appeal against sentence, the court has the discretion to order costs against the Director. If the respondent holds on to his or her original sentence or successfully defends the charges (having decided to defend the charges), the court may order costs against the Director on an application by the respondent.

Appeals on a question of law from the Magistrates' Court to the Supreme Court

Both an offender and the Director may appeal to the Supreme Court on a question of law against a final order of the Magistrates' Court: ss. 272(1) and (2) of the CPA. A sentence imposed by a Magistrate is considered to be a final order of the court: *Freeman v Harris* [1980] VR 67. The notice of appeal must be filed within 28 days of the sentence being imposed: s. 272(3) of the CPA.

If the notice of appeal is filed outside of the 28 days, the appeal is deemed to be an application for leave to appeal: s. 272(7). Again, a respondent must check that the Director's appeal has been filed within time because, if it has not been so filed, the Director must show "exceptional circumstances" and satisfy the Supreme Court that the respondent has not been "materially prejudiced" because of the delay: s. 272(8) of the CPA.

An appeal on a question of law may result in a new sentence being imposed on the respondent, but it may also result in the matter being remitted to the Magistrates' Court for rehearing: s. 272(9). It may be beneficial where an error of law is identified, for the respondent to submit that the matter be remitted so that he or she is sentenced by the original Magistrate in accordance with the law.

As with *de novo* appeals to the County Court, the Supreme Court has a discretion to award costs against the Director. Costs may be awarded where the appeal is refused or, potentially, even where the matter is remitted to the Magistrates' Court.

Appeals from the County Court or the Supreme Court to the Court of Appeal

The Director may appeal to the Court of Appeal against a sentence imposed by the County Court (original jurisdiction) or the Supreme Court (Trial Division – original jurisdiction): s. 287 of the CPA. Previously, a Crown appeal against sentence was governed by s. 567A of the *Crimes Act 1958* (Vic). The CPA applies to all sentences delivered on or after 1 January 2010: Schedule 4, Clause 10(4) of the CPA.

The *Supreme Court (Criminal Procedure) Rules 2008* (Vic) **(the Rules)** and the *Supreme Court of Victoria Practice Direction No. 2 of 2011 – Court of Appeal: Applications for Leave to Appeal Against Conviction and Sentence* **(the Practice Direction)** are applicable to Crown appeals. Rule 2.15 of the Rules sets out the requirements for appeals by the Director under s. 287 of the CPA. The Rules and the Practice Direction apply to all appeals filed on or after 28 February 2011.

In theory, the Director may appeal against either severity or leniency. The latter is, self-evidently, more common. Unlike an offender, the Director does not require leave of the Court of Appeal to appeal against sentence (by showing the ground(s) of appeal are "reasonably arguable"): see s. 278 of the CPA and *Blick* (1999) 107 A Crim R 525. The Director may appeal against a sentence as of right, subject only to the terms of s. 287 of the CPA.

The Director must only appeal where he or she considers that there is an error in the sentence imposed; that a different sentence should be imposed; and that an appeal should be brought in the *public interest*. Additionally, the Director will only bring a sentence appeal where it is considered that there is a "reasonable prospect of success": *Director's Policy: Appeals by the DPP to the Court of Appeal*, 22 August 2014, paragraphs [27] and [37].

The public interest historically required that Crown appeals were only brought rarely and only in circumstances where some matter of principle might be established: see, for example, *Griffiths v R* (1977) 137 CLR 293, *Everett v R* (1994) 181 CLR 295 and *DPP v Bright* (2006) 163 A Crim R 538. However, with the abolition of double jeopardy, Crown appeals against sentence are not so circumscribed: see, for example, *DPP v Karazisis, Bogtstra, Kontoklotsis* [2010] VSCA 350 and *DPP (Vic) v O'Neill* [2015] VSCA 325.

The Crown appeal to the Court of Appeal is commenced by filing a notice of appeal within 28 days from the date upon which the sentence was imposed or any extension of that period by the Registrar of the Court of Appeal: ss. 288 and 313 of the CPA. The notice of appeal must be accompanied by a written case in support of the appeal: Rule 2.15(1)(c) of the Rules.

The Court of Appeal must only allow a Crown appeal against sentence where the Director satisfies the court that there is an error in the sentence *and* a different sentence should be imposed: s. 289(1). It follows that even if the sentence first imposed is the subject of an error by the sentencing judge, the Director must still satisfy the court that a *different* sentence should be imposed. If the Director fails in establishing that the sentencing judge was in error *and* that a different sentence should be imposed, the appeal *must* be dismissed: s. 289(3) of the CPA. Double jeopardy is not considered on the appeal: see s. 289(2) of the CPA and *Karazisis* (above) and *DPP v Hardy* [2011] VSCA 86.

If the Court of Appeal allows the appeal against sentence, it must set aside the sentence. It may then impose a sentence that is either more or less severe: s. 290(1) of the CPA. Again, the principle of double jeopardy has no role to play in resentencing: s. 290(3) of the CPA.

Respondents should be aware of a number of common features in resisting Crown appeals. This list does not purport to be exhaustive, but gives you a sense of where to start when resisting a Crown appeal and the “flavour” of the respondent’s written case.

First, has the appellant’s written case genuinely identified a *specific error* in the sentencing process? Where it is evident that the Crown has brought the appeal only on the basis of an alleged *manifest inadequacy* of sentence and not where a clear error of sentencing principle can be shown, it is less likely that the Court of Appeal will interfere with the sentence first imposed (although, have regard to the principles identified in *R v Clarke* [1996] VR 520 and *R v O’Rourke* [1997] 1 VR 246).

The Court of Appeal has repeatedly stated that an appellant must demonstrate that the sentence was clearly not open to be imposed or was manifestly outside the range of sentences reasonably open to the sentencing judge: *DPP v Terrick* (2009) 24 VR 457.

In *Karazisis* (see above), the Court of Appeal stated at [127] as follows:

> *... as with the ground of manifest excess,* ***the ground of manifest inadequacy is a stringent one, difficult to make good****. Error of this kind will not be established unless the appellate court is persuaded that the sentence was* ***'wholly outside the range of sentencing options available'*** *to the sentencing judge. Put another way, it must be shown that it was not reasonably open to the learned sentencing judge to come to the sentencing conclusion which he/she did if proper weight had been given to all the relevant circumstances of the offending and the offender.*

Second, where a specific error is alleged, do the sentencing remarks and the transcript of the plea (including any exhibits tendered on the plea and written submissions) reveal that the sentencing judge had regard to the very matters the appellant complains were not taken into account at sentencing? It is important to review the available material closely to identify ways in which the sentencing judge did, in fact, have regard to the matter complained of and correctly applied the facts and/or legal principle to their exercise of the sentencing discretion.

Third, did the Director make any concessions or submissions at the plea hearing that are relevant to the determination of the appeal? The Court of Appeal is very slow to allow a different submission to be put by the Director given his prosecutorial duties and obligations, underpinned by notions of

fairness. Consider whether the Director failed to make positive submissions at the plea hearing consistent with the ground(s) articulated in the appellant's written case: *Romero v The Queen* (2011) 32 VR 486.

Fourth, did the Director make submissions as to the appropriate disposition, which is now inconsistent with the appellant's position on appeal? Respondents should also consider whether an appropriate sentence was submitted by their counsel or raised by the sentencing judge during the plea and whether the Crown contradicted that submission on the plea.

Fifth, are there questions of parity and/or similar or like sentences that reveal a current sentencing practice? Regard should be had to sentences imposed on any co-offenders and like cases determined by the Court of Appeal. Consider whether the appellant's written case ignores relevant cases that would guide the Court of Appeal in its determination of the sentence appeal.

Sixth, a tip that was given to me when I first came to the Bar by my late (and great) mentor – always emphasize how "experienced" the learned sentencing judge is. It must be underscored how "careful" the sentencing judge has been and how he or she has had proper regard to the competing sentencing principles. Stress how "thorough" the sentencing remarks are and how all the relevant considerations have been taken into account (by pointing them out in detail). Repeat the high points of the plea to persuade the Court of Appeal that the correct disposition was reached by the learned sentencing judge.

Finally, don't forget costs in State appeals. Section 15 of the *Appeal Costs Act 1998* (Vic) allows for an indemnity certificate in respect of the

respondent's costs where the Director, pursuant to s. 287 of the CPA, brings an appeal against sentence. The respondent is entitled to his or her own costs of the appeal that are "reasonably incurred". The respondent should request an indemnity certificate in the written case and orally on the date that judgment is given.

Chapter 30

A New Sentencing Landscape in Victoria: *Boulton* and CCO's

Written by Richard Edney

The Dilemmas and Difficulties of Punishment

The sentencing of offenders is one of the most difficult tasks in a democracy.

The difficulty of that task derives from a number of sources.

First, punishment involves the deliberate infliction of pain upon offenders[224]. It requires proper justification and must be parsimonious in its use. The euphemistic labels that surround the discourse and practice of punishment – 'retribution', 'just punishment', 'social rehabilitation', 'deterrence' and 'reformation' – should not obscure precisely what is involved in the punishment of offenders[225]: the imposition of deprivation – be it by means of liberty, autonomy, privacy, money or time – for the achievement of what are considered socially desirable ends[226].

Second, sentencing is a sensitive topic for elected governments who may desire the judiciary to implement a particular law and order program. And, thus, attempt to achieve particular sentencing outcomes that are claimed to

[224] See generally Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.
[225] See generally Nils Christie, *Limits of Pain* (1981).
[226] So to say is not to suggest that the institution of punishment does not have a welfare or rehabilitative aspect. It does. But it must be remembered that there is still an element of coercion in requiring a person to perform activities relevant to their rehabilitation.

be of benefit to the community. Sentences imposed upon offenders tend to attract public interest. Governments, who ostensibly reflect the will of the 'community', are keen to assuage that community, not only that those who commit criminal offences are adequately punished, but that they are appropriately rehabilitated and reintegrated into the community.

Third, for those responsible for the sentencing of offenders, there is the difficulty of reconciling the manifold and, sometimes, incommensurable objectives, in the choice of a particular sentence for a particular offender for a particular offence.

The potential of the significant impact of CCO's was revealed in the Court of Appeal decision of *Boulton v The Queen; Clements v The Queen*; *Fitzgerald v The Queen* [2014] VSCA 342 (hereafter '*Boulton'*).

The aim of this article is threefold. First, I will detail the rationale and scope of CCO's. Second, I will outline what the Court of Appeal decided in *Boulton.* Third, I will consider how the Court of Appeal has subsequently interpreted and applied *Boulton.*

Rationale & Scope of Community Correction Orders

In the debates on the *Sentencing Amendment (Community Correction Reform) Bill 2011*, several references were made to the role of CCO's in replacing suspended sentences.

The then Attorney-General stated that the introduction of the CCO's were part of a concerted reform of sentencing options that included the abolition of suspended sentences:

> ‘The current range of community based sentences will be replaced with a single, flexible community correction order (CCO) that will strengthen community sentencing. The new order will deliver common sense sentences targeted directly at both the offender and the offence. The CCO will allow courts to impose core conditions and optional conditions including curfews and no-go zones. There will be new sanctions for non-compliance. In addition, courts will be given an expanded power to suspend or cancel the drivers licence or disqualify an offender found guilty of any offence.
>
> The government recognizes that the community is looking for responsive and effective community sentencing options as part of a range of measures to tackle crime.
>
> We understand the critical need for a responsive sentencing framework that builds public confidence in the justice system. We have acted expeditiously and the first stages of our reforms have already been successfully implemented. We have abolished the legal fiction of suspended sentences for a wide range of serious crimes. We also have legislation currently before Parliament that seeks to abolish home detention so that jail will mean jail.’[227]

In addition, the then Minister for Employment and Industrial Relations specifically noted that the use of suspended sentences were to be reduced by recourse to CCO’s:

> ‘Clearly the government has looked at what the impact on prisons and courts will be. In line with the recommendations of the Sentencing Advisory Council, these reforms are designed to reduce

[227] Hansard, Legislative Assembly, 25 October 2011, p 3289.

> the use of suspended sentences by providing community based alternatives. In terms of supporting these reforms the government will spend $72.4 million over four years to strengthen the capacity of Corrections Victoria to monitor and supervise offenders within the community. On the advice we have, the Victorian prison system is at capacity for those who require imprisonment. For others this will provide tough community based options designed to improve rehabilitation outcomes and reduce reoffending within the community'.[228]

In the *Sentencing Act 1991* the purpose of the CCO is described in the following terms:

> 'to provide a community based sentence that may be used for a wide range of offending behaviours while having regard to and addressing the circumstances of the offender'[229]

Community Correction Orders (CCO's) are provided for by Part 3A of the *Sentencing Act 1991.* They can be imposed for a period of up to 5 years in the Magistrates' Court as long the order is in respect of 3 or more offences. In the Supreme and County Courts, either 2 years or the maximum term of imprisonment for the offence if it is longer[230].

A single order may cover several offences and, if multiple orders are imposed, they are presumed to be concurrent[231]. A CCO can be imposed in addition to a fine or imprisonment if the sum of time left to serve is 2 years or less[232]. If the CCO is for six months or longer, the court can set an

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[228] Hansard, Legislative Council, 10 November 2011, p 4481.
[229] *Sentencing Act 1991* (Vic) s 36.
[230] *Sentencing Act 1991* (Vic) s 38.
[231] *Sentencing Act 1991* (Vic) ss 40-41.
[232] *Sentencing Act 1991* (Vic) ss 43-44.

intensive compliance period for part of the order, during which one or more of the conditions must be completed[233].

A breach of a CCO without reasonable excuse is punishable by 3 months imprisonment and the order may be varied or cancelled[234].

There are several mandatory conditions attached to a CCO[235]. A court must also impose at least one of the numerous optional conditions[236]. There is a residual discretion to impose any other condition 'the court thinks fit'[237]. The only condition that cannot be imposed is one in relation to compensation, costs or damages[238].

The Guideline Judgment in *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342

The guideline judgment by the Court of Appeal in *Boulton* was the first of its kind under sections 6AB and 6AE of the *Sentencing Act 1991* (hereafter the 'Act').

The Director of Public Prosecutions made application for a guideline judgment.

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233 *Sentencing Act 1991* (Vic) s 39.
234 *Sentencing Act 1991* (Vic) ss 83AD, 83AS.
235 *Sentencing Act 1991* (Vic) s 45.
236 *Sentencing Act 1991* (Vic) s 47. Also see *Sentencing Act 1991* (Vic) for the range of optional conditions including not only Unpaid Community Work Condition (s48C) & Treatment and Rehabilitation Condition (s 48D) but also s 48E-LA for supervision, non-association, residence restriction, place or area exclusion, curfew, alcohol exclusion, bond and judicial monitoring conditions.
237 *Sentencing Act 1991* (Vic) s 48.
238 *Sentencing Act 1991* (Vic) s 48.

The Court agreed to make a guideline judgment because of the need to give *'as much guidance as possible about how a CCO can serve the various purposes for which a sentence is imposed'* (*Boulton* at [4]).

Early in the lengthy judgment, the unanimous five-member bench of the Court of Appeal described the CCO as a *'radical new sentencing option, with the potential to transform sentencing in this State'* (*Boulton* at [4]).

As the Court of Appeal explained:

> '…the advent of the CCO calls for a reconsideration of traditional conceptions of imprisonment as the only appropriate punishment for serious offences. This in turn will require recognition both of the limitations of imprisonment and of the unique advantages which the CCO offers' (*Boulton* at [5])

Immediately it is obvious that the Court of Appeal 'framed' the issue in terms of the desirability of CCO's as against the limitations of imprisonment. The ultimate conclusion by the Court of Appeal that CCO would be appropriate, even in quite serious cases, suggests the significance of the shift of perspective that is apparent in *Boulton*.

The Court of Appeal agreed that the 'overarching principles' that were to govern CCO's were 'proportionality and suitability' (*Boulton* at [63]). Section 48A – attaching conditions to a CCO – mandates proportionality as the key determinant in the imposition of conditions.

In terms of the nature of CCO's and their punitive aspects, the Court of Appeal identified – by reference to the mandatory conditions attached to any CCO pursuant to s 45 (1) of the Act – that such conditions – even in the

absence of additional conditions – ‘do materially impinge on an offender’s liberty’ (*Boulton* at [91]) and in the event of a breach of condition of a CCO is an offence as well as leading to resentencing on the original offences (*Boulton* at [92]).

The Court of Appeal was at pains to point out the punitive nature of the CCO:

> ‘…is most clearly illustrated by the *range* and *nature* of the conditions which may be attached to such an order. The available conditions are variously *coercive, restrictive and/or prohibitive,* and the obligations and limitations which they impose will bind the offender for the entire duration of the order’ (my emphasis) (*Boulton* at [93])

The punitive nature of the CCO can also be supplemented by the power of a Court to fix an ‘intensive compliance period’ which – as the Court of Appeal observed – can ‘both increase the punitive burden and seek to maximize the benefits of compliance’ (*Boulton* at [94]).

After detailing the punitive nature of a CCO, the Court of Appeal then made a comparison of a CCO with a prison sentence. The discussion – (*Boulton* at [103]-[116]) – is perhaps the most interesting and important – save for the Guideline itself – aspect of the judgment.

Because found here is a radical reimagining of the desirability and utility of prison as the ultimate sanction. As the Court explained:

> ‘For so long as imprisonment has appeared to be the only option available for offending of any real seriousness, sentencing courts have had no occasion to reflect either on the severity of

> imprisonment as a sanction or on its ineffectiveness as a means of rehabilitation' (*Boulton* at [104])

The Court of Appeal then examined at a micro level the reality of imprisonment by punishment and its practical aspects. That is novel in sentence appeals. The Court made observations about the 'limits' of rehabilitation in the context of a custodial environment. Moreover, the Court even went so far as to recognize the psychic and social damage caused by a term of imprisonment to not only the offender but the community and observing that 'imprisonment is often seriously detrimental for the prisoner, and hence the community' (*Boulton* at [108]).

But that recognition that offences that hitherto would have received an immediate term of imprisonment may now be susceptible to being dealt with by a CCO does not mean that that will always be the outcome. As *Boulton* – at [115] – recognizes: the fact that a CCO may be imposed does not mandate that it is so and, instead, it will 'mark the beginning, not the end, of the court's consideration'.

The Court of Appeal also noted that the insertion into the Act of s 5 (4C) fortified that conclusion. That section of the Act provides that:

> 'A court must not impose a sentence that involves the confinement of an offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a community correction order to which one or more of the conditions referred to in sections 48F, 48G, 48H, 48I and 48'

According to the Court of Appeal that approach should 'assist in the reconceptualization of sentencing options' and any sentencing court – where

imprisonment may be an appropriate option – should ask itself the following question:

> 'Given that a CCO could be imposed for a period of years, with conditions attached which would be both punitive and rehabilitative, is there any feature of the offence, or the offender, which requires that imprisonment, with all of its disadvantages, is the only option?' (*Boulton* at [121])

That judicial approach to CCO's and the relationship of this new sanction to the 'old' sanction of imprisonment by the Court of Appeal flows through to the guideline judgment itself which is Appendix 1 to the judgment and is titled *'Community Correction Orders: Guidelines for Sentencing Courts'*.

There are four parts to the Guideline Judgment and they are as follows:

- Part One – General Principles
- Part Two – Imprisonment or CCO?
- Part Three – Determining the Length of a CCO
- Part Four – Determining the Conditions to be Attached to a CCO

Part One of the Guideline describes the nature of a CCO. It is described as a 'new and flexible sentencing option that can be for a term of up to the maximum term of imprisonment prescribed for the offence in question'. In addition, 'it will be appropriate to impose a CCO (with or without an added sentence of imprisonment) for relatively serious offences which would previously have attracted quite substantial terms of imprisonment'.

In approaching the question of whether a CCO should be imposed the court has to 'first assess the objective nature and gravity of the offence and the moral culpability of the offender'. Proportionality and suitability must then

be considered. And a CCO is likely to be a ‘particularly important sentencing option in the case of a young offender’.

Part Two of the Guideline deals with the issue of whether a Court should impose a term of imprisonment or a CCO. A sentencing court is required only to impose a term of imprisonment if it concludes ‘that the purposes of the sentence cannot be achieved by a CCO to which specified conditions are attached’. It then discusses the various purposes of sentencing – just punishment, general deterrence, specific deterrence and rehabilitation – and notes that in ‘many cases, therefore, a CCO will enable all of the purposes of punishment to be served simultaneously, in a coherent and balanced way’.

It notes that in the case of ‘relatively serious offences – the sentencing court may find that a properly conditioned CCO of lengthy duration is capable of satisfying the requirements of proportionality, parsimony and just punishment, while affording the best prospects of rehabilitation’.

Part Three of the Guideline deals with how a court is to determine the length of a CCO. There is no correlation between the length of the CCO and length of the prison term although the Court did make the observation that ‘because imprisonment is more punitive than a CCO, where a CCO alone is imposed it is likely to be of longer duration than the term of imprisonment which might otherwise have been imposed’.

Finally, Part 4 of the Guideline deals with the issue of a sentencing court determining what conditions to attach to a CCO. The Court noted that ‘by introducing the CCO regime, Parliament has equipped sentencing courts with an unprecedented capacity to fashion a sentencing order which will

"address the underlying causes of the offending"'. Importantly, the Guideline imposes 'limits' on the treatment conditions by emphasizing the notion of proportionality and stating that it is 'impermissible to impose for the purposes of treatment a CCO of longer duration, or with more onerous treatment and rehabilitation conditions attached if the resulting order would be disproportionate to the gravity of the offending'.

Post-*Boulton* Decisions in the Court of Appeal

Since the decision in *Boulton* was handed down on 22 December 2014, the Court of Appeal has heard and determined the following sentence appeals by reference to the decision in that case and – from my researches – they are as follows: *Sherritt v The Queen* [2015] VSCA 1; *Ellis v The Queen* [2015] VSCA 21; *Ahmad v The Queen* [2015] VSCA 23; *Marocchini v The Queen* [2015] VSCA 29; *Cole (a Pseudonym) v The Queen* [2015] VSCA 44; and *Alam v The Queen* [2015] VSCA 48; *DPP v Maxfield* [2015] VSCA 95; *Raveche v The Queen* [2015] VSCA 99; *DPP v Kemp* [2015] VSCA 108; *Hamoud v The Queen* [2015] VSCA 114; *Hutchinson v The Queen* [2015] VSCA 115; *DPP v Dix* [2015] VSCA 118; *Dyason v The Queen* [2015] VSCA 120; *Mackay v The Queen* [2015] VSCA 125; *Atanackovic v The Queen* [2015] VSCA 136; *Manariti v The Queen* [2015] VSCA 160; *Dawson v The Queen; Stewart v The Queen* [2015] VSCA 166; *McGrath v The Queen* [2015] VSCA 176; *Deng-Mabior v The Queen* [2015] VSCA 179; *Scammell v The Queen* [2015] VSCA 206; *Graeske v The Queen* [2015] VSCA 229; *Baldwin v The Queen* [2015] VSCA 299; *Ellis v The Queen* [2015] VSCA 320; *Boyton v The Queen* [2016] VSCA 13; *DPP v Natoli* [2016] VSCA 35; *DPP v Borg* [2016] VSCA 53; *DPP(Cth) & DPP(Vic) v Garside* [2016] VSCA 74; *Gul v The Queen* [2016] VSCA 82; *DPP v Grech* [2016] VSCA 98; *DPP v Basic* [2016] VSCA 99 and *Melnikas v The Queen* [2016] VSCA 112.

These decisions are important in multiple ways.

First, there is further statement of principle concerning the operation of CCO's. The approach in *Boulton* is confirmed (see, in particular, *Sherritt* at [46]-[47]; *Alam* at [20]; *McAleer* at [23]-[25]; *Dyason* at [28]; *Kemp* at [48]-[49]). In addition, *Boulton* – as explained by Whelan JA in *Mackay* – at [13] – requires 'courts to re-examine the type of offending that attracts imprisonment'.

Second – in a number of cases – the appeals were successful insofar as terms of imprisonment were overturned and replaced with CCO's or significantly reduced terms of imprisonment imposed in combination with a CCO.

Third, because there are different examples of offending covered by the decisions they are useful 'precedents' – with all the inherent limitations of using other cases – to guide submissions on behalf of offenders.

Fourth, the Court of Appeal has made it clear *Boulton* does not apply to the sentencing of Federal offences.

Fifth, the decision in *Boulton* does not require that 'explicit reference to the option of a CCO must be made in every sentence' (*Mackay* at [18] (Whelan JA).

Sixth, the fact that a sentencing judge does not refer to the fact that an appellant was assessed as suitable for a CCO in sentencing remarks – after imposing an immediate term of imprisonment – does not necessarily constitute sentencing error (*Gul v The Queen* [2016] VSCA 82).

Seventh, in appealing against a decision *not* to impose a CCO 'appellate intervention will not be warranted unless it can be shown that the only conclusion open was that a CCO without a term of imprisonment should be imposed' (*Dawson v The Queen; Stewart v The Queen* [2015] VSCA 166 at [41]). Or another way: 'the availability of the option of a CCO does not mean that the imposition of a custodial sentence is presumptively erroneous' (*McGrath* at [53]; see also *Abdou v The Queen* ; *Chebib v The Queen* [2015] VSCA 359).

Eighth, there has been a 'shift' away from the initial 'enthusiastic' embracement of *Boulton* by the Court of Appeal to a more nuanced, less 'revolutionary' approach to the sanction of the CCO. This, perhaps, reached its nadir in the statement by Priest JA in *Hutchinson* that – at [17] – 'it should not be thought that *Boulton* offers a 'Get out of Jail Free' card in sentences where a sentence of imprisonment is necessary in a given case to satisfy the various purposes for which a sentence may be imposed'. His Honour then – at [17] – made this observation:

> "*There will be cases– indeed, many cases – where, having regard to the seriousness of the offending, a CCO will be insufficiently punitive to satisfy the need to punish the offender in a manner which, in all of the circumstances, is just".*

Ninth – and this is related to the observations made by Priest JA in *Hutchinson* – *Boulton* has not been 'abandoned' as such and instead the Court of Appeal has emphasised the importance of parsimony in understanding *Boulton* (See Redlich & Beach JJA in *Dawson v The Queen; Stewart v The Queen* [2015] VSCA 166 [42]; see also *Mackay* at [13]).

Tenth, the fact that *Boulton* is a ‘guideline judgment does not fetter, or control, the individual judge’s discretion in any way’ (*McGrath* at [61]).

Finally, it is necessary to be conscious of the interaction between mandatory non-parole periods imposed by s 11 of the *Sentencing Act 1991* and the interaction between CCO’s and the parole system and s 18 of the *Sentencing Act 1991* (For a helpful discussion see *DPP v Grech* [2016] VSCA 98.

Sentencing Futures in a Post-*Boulton* World

Perhaps the lasting impact of *Boulton* will only be revealed over time when it is possible – through the use of sentencing statistics and prison numbers – to be definitive about whether or not *Boulton* has led to a reduction in the reliance on the sanction of imprisonment as the community’s best source of crime control.

Chapter 31

Sentencing Sex Offenders in a Risk Society

Written by Paul Higham

Introduction

The most cursory look at recent appellate decisions makes clear defending those accused of sexual crime is a specialist field requiring specialist practitioners. The requirement for specialist practitioners applies equally to the sentencing phase of criminal proceedings as to trial. This short paper seeks to identify key issues in the sentencing process.

Over the past decade there has been far reaching legislative change to the prosecution and defending of sexual crime, a field that has been both the express[239] and indirect[240] focus of legislative amendment. This change has been procedural, evidential and substantive.

The procedural effect of reform has been, inter alia, to:

i. Remove all complainants in sexual offences from the court room
ii. Prevent cross-examination of the child or cognitively impaired complainant at committal
iii. Introduce reverse onus provisions in cases of belief in age
iv. Mandate judicial directions where there has been delay in complaint[241]

[239] *Crimes Amendment (Sexual Offences and Other Matters) Act 2014*
[240] *Evidence Act 2008*
[241] *Juries Direction Act 2015.*

v. Restrict questioning of a complainants' prior sexual activity[242]

The substantive effect of reform has been, inter alia, to:

i. Re-cast the mental element where consent is in issue[243]

ii. Advance the counter-intuitive behavioural model for complainants[244]

iii. Afford primacy to the communicative model of consent

The evidential effect of reform has been, inter alia, to:

i. Place tendency and coincidence evidence at the centre of argument wherever there is other misconduct evidence[245]

ii. Substitute previous representation for complaint evidence with uncertain temporal connection to the offending charged[246]

The effects of the reforms are constantly agitated in the Court of Appeal[247]

The legislative framework

The sentencing of offenders convicted of sexual crime has also been the — express[248] and indirect[249] focus of legislative amendment.

In Victoria there are four major legislative sources of power post conviction to sentence, detain, supervise, monitor and control those convicted of a sexual offence.[250]

[242] *S 342 Criminal Procedure Act 2009.*

[243] *CASOOMA 2014.*

[244] *Criminal Procedure At 2009 s 388.*

[245] *S 97 & S 98 Evidence Act*;

[246] *Evidence Act s 65 & 66*;

[247] See *Velkoski [2014] VSCA 12; Clay v R [2014] VSCA 269; Pate v The Queen* [2015] VSCA 110 and many others.

[248] See *Sex Offenders Registration Act 2004; (SORA); Serious Sex Offenders (Detention and Supervision) Act 2009.*

[249] See *Sentencing Act s 5(4); s 44 etc*; *S 5A* baseline sentencing (now held to be unworkable and abandoned by the DPP) see *DPP v Walters* [2015] VSCA 303.

These are:

1. The *Sentencing Act 1991* (the Act).
2. *Criminal Code Act 1995* – primarily on-line child pornography and grooming offences, extra-territorial child sex offences (sex tourism and sex as war crime provisions, extra-territorial child sex)
3. *The Sex Offenders Registration Act 2004* (SORA)
4. *The Serious Sex Offenders (Detention and Supervision) Act 2009* (SSOA)

SORA prompts both automatic and discretionary registration post conviction of an offender depending upon the nature of the offence and the age of the offender at the time of its commission. The requirements can be onerous and failure to comply invariably leads to prosecution. The sentencing court must not have regard to the consequences of registration under the Act.[251]

SSOA empowers the Secretary of the Dept of Justice or the Director of Public Prosecutions to apply to the court for, respectively, a supervision or detention order.

The former may be in the community (albeit gated guarded and tagged), the latter maintains no such pretence. The application must be made prior to the expiration of the sentence served. The language of the statute is of unacceptable risk.[252] Conditions are attached to the order and breach of those conditions may lead to prosecution under the act and for the offence

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[250] Those offences in Division 8 Part Crimes Act and the various state and federal child pornography, grooming and virtual offences.
[251] *S 2BC Sentencing Act 1991.*
[252] For an exposition of the risk assessment see *Nigro v Sec to the Dept of Justice* [2013] VSCA 213.

itself – leading to interesting arguments as to double jeopardy and oppression.[253] A sentencing Judge is not permitted to have regard to any future executive action under this act or its predecessor, but may have regard to a current order.[254]

The legislative regime and vested judicial powers is built upon the social imperative of risk prevention or reduction. Risk prevention is in turn constructed upon the premise of a *credible model of prediction of the risk of recidivism.* The use of assessment tools to attempt to quantify sex offender risk is now common place in the criminal justice system.[255] A range of actuarial tools are used. These have been developed over a period of time and have demonstrated greater predictive accuracy than unstructured clinical judgement. It is the resulting assessment of risk from their use (which includes structured professional clinical judgement by the psychologist administering) that is the basis for orders under the SSOA and informs the sentencing purpose under the *Sentencing Act* (see below). These assessments and their methodology are difficult to challenge, particularly in light of the test of unacceptable risk.[256]

The sentencing process

Under the 1991 Act, sentencing is a three-stage process. Firstly, the court must assess the objective gravity of the offending. Secondly the court must determine the sentencing purposes that are enlivened in light of that assessment and their interrelationship. Thirdly the court must not impose a sentence that is more severe than that which is necessary to achieve those

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[253] See *Lecornu v The Queen & Anor* [2012] VSCA 137.
[254] *S 2BA & 2BD Sentencing Act 1991.*
[255] For a critique and review of the methodology and effectiveness of such tools see Clinical Psychology Review 33 (2013) p 287 -316; Aggression and Violent Behaviour 18 (2013) pp 445 -457; VLA Research Brief Sexual Recidivism November 2014.
[256] See *Nigro (supra).*

purposes,[257] and must not impose a custodial sentence unless those identified purposes cannot be achieved by a non-custodial sentence.[258]

a. The objective gravity of the offending

There is a vast range of offending and offences that attract the designation of sexual crime, unique in the categories of criminal offences. As a starting point sexual crime exists in a paradigm where, simply put, desire overcomes reason. Such a paradigm is not intended to reduce all sexual crime to one of sexual desire. The drivers of action that motivate sexual crime include, of course, desire for control, domination, power, the acting out of misogyny, and of course systemic war crime. But sexual offending is now both real and virtual. The former category can range from the premeditated sexual violation of a stranger to the misreading of signals by a friend, and a consequent examination of momentary states of mind. The latter comprehends a category of offending that is still being understood (and legislated for) as the virtual world legitimises hitherto perverse and secret desire and facilitates its expression and execution.

There must be clear and concise submissions as to the objective gravity of the instant offending, whilst recognizing that descriptors such as low level and high level may not assist.[259] This requires an understanding of the offending and, most importantly, the offender, and an identification of the constellation of factors that led to the instant offending. In some cases this will be straightforward. In others the offending may be an example of particular cognitive distortion and perverted desire. In this regard child pornography offences represent a particular challenge and require particular explication. There should be a report from a recognized specialist in the

[257] *S 5(3) Sentencing Act 1991.*
[258] S *5(4) Sentencing Act 1991.*
[259] See *Sadrani v The Queen [2015] VSCA 202.*

field identifying those drivers of offending and the risk of re-offending. If possible have both a treating clinician's and a forensic report. The court will thus have both an indication of actual response to pre-sentence treatment[260], and an independent assessment based on administering the relevant actuarial models.

b. Sentencing purposes

Deterrence (specific and general) denunciation and just punishment are always to the fore. Depending upon the nature and number of the offending, primacy may be afforded to protection of the community by virtue of the serious offender provisions of the Act.[261] Often the cries of the above four purposes drown the interest of rehabilitation particularly when there are powerful and dramatic victim impact statements read in court. [262]

A key question will be the existence of any impaired mental functioning enlivening the *Verdins*[263] principles. Is there a personality disorder (as distinct from a pathological desire) that may impact upon moral culpability? In this regard see the recent case of *O'Neill*[264] holding that for the *Verdins* principles to be engaged there must be psychiatric illness and not a 'mere' personality disorder. Further there must be cogent evidence of the connection to the offending.

In historic cases of abuse where sentence is occurring years after the event due consideration must be given to the delay. It is a powerful mitigatory

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[260] If there is to be a trial any treatment would not be offence specific, and the parameters would be clearly stated.
[261] S *6A – 6F Sentencing Act.*
[262] Such statements must conform with the provisions of S 8 of the Act (see *Luciano[2015] VSCA 69).*It is difficult to see how such conformity is to be achieved given the Director's policy of refusing to edit them!
[263] *R v Verdins and Ors [2007] VSCA 102.*
[264] See *DPP v O'Neill [2015] VSCA 323.*

factor.[265] It impacts upon fairness and permits demonstrated rehabilitation. Anecdotally, there is some judicial reluctance to accord considerations of fairness: the lesser statutory maxima generally applying and the demonstrated prospects of rehabilitation is deemed to have addressed the point.

As stated above, the prospects for rehabilitation need to be firmly identified and advanced. Has there been a guilty plea and, if so, at what stage? If a first time offender the prospects are greater than with a repeat offender. Again it is crucial to have a report that assesses the question of future risk.

c. Whether to impose a custodial sentence

In the case of an adult defendant convicted of a sexual offence, prison is almost a default position. The case of Boulton[266] has apparently created a new sentencing landscape.[267] It has sought to reaffirm the importance of the principle of parsimony and is authority for the proposition that imprisonment is truly a sentence of last resort. It foreshadowed that a C.C.O. may have a part to play, standing alone or in combination, for offences which hitherto might have attracted a medium term of imprisonment.[268] Whilst many judges react with indifference (or worse) at the mention of the name of the case, the arguments for a non-custodial disposition must be made[269]. It may be that the new landscape is available only for the offender who is transgressive rather than one whose offending is fundamentally pathological in nature.

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[265] See *R v Merrett [2007] VSCA 1; Fattah v The Queen [2015] VSCA 371*: however the very old go to prison, so too may adults who committed offences when children if the matter is sufficiently grave

[266] *Boulton and ors v The Queen [2014] VSCA 342.*

[267] *Boulton (supra) par 113.*

[268] *Boulton (supra) par 131*: some forms of sexual offences involving minors, some kinds of rape,

[269] *See Sherritt v The Queen [2015] VSCA 1; Cole v The Queen [2015] VSCA 44.*

Conclusion

There cannot be competent representation without a thorough understanding of the defendant and of the offence. Key is to understand the particular pathology that underpins the offending and an ability to speak to that pathology. In short know your client and know their drivers.

Chapter 32

Sentencing of Young and Youthful Offenders

Written by Aggy Kapitaniak

> "*The rehabilitation of youthful offenders, where practicable, is one of the great objectives of the criminal law, but it is not its only objective. It is not difficult to cite cases where other objectives have had to prevail. It is true that, in the case of a youthful offender, rehabilitation is usually far more important than general deterrence, but the word I have italicised is there to remind us that there are cases where just punishment, general deterrence or other sentencing objectives are at least equally important.*" *R v TRAN* (2002) VR 257 at p.452

Introduction

The law has long recognised that young offenders are to be dealt with differently. It recognises not only the immaturity of young offenders, but also reflects the belief that such offenders can be reformed or rehabilitated and excessive involvement in the criminal justice system – particularly adult jail – may be counterproductive. So courts have tempered justice with mercy and have deemed 'youth' a specific and significant mitigating factor.

Thus there is a cardinal principle that rehabilitation is the main sentencing objective and thus the need to moderate general and specific deterrence.

Who is a 'young offender' and 'youthful offender'?

Young offender is defined in Section 3 of the *Sentencing Act 1991*, as an offender who at the time of being sentenced is under the age of 21 years.

What a youthful offender is, is less clear cut, however it appears that from being over 21 but mid to late twenties may be considered a ‘youthful offender’; see *R v Clarke* [2006] VSCA 17.

That is, after reaching the statutory age limit of 21 a ‘youthful offender’ cannot always be wholly referential to chronological age.

The Foundational Case of *R v Mills* [1998] 1 VR 235

The case of *R v Mills* [1998] 1 VR 235 is the leading Victorian appellate authority that catalogues the principles when sentencing courts are dealing with young or youthful offenders.

The Court of Appeal held:

i. Youth of a young offender, particularly a first offender, should be a primary consideration for a sentencing court where the matter properly arises;
ii. In the case of a youthful offender rehabilitation is usually far more important than general deterrence. This is because punishment may in fact lead to further offending. Thus for example, individualised treatment focusing on rehabilitation is to be preferred); and
iii. A youthful offender is not to be sent to an adult prison if such disposition can be avoided, especially if he is beginning to appreciate the effect of his past criminality. The benchmark for what is serious as justifying adult imprisonment may be quite high in the case of a youthful offender; and, where the offender has not previously been incarcerated, a shorter period of imprisonment may be justified. (This proposition is a particular

application of the general principle expressed in section 5(4) of the *Sentencing Act 1991*)

Decisions Post-*R v Mills*

After *Mills* was decided, the Court of Appeal has also recognised that there would be cases in which factors such as youth and rehabilitation would take a 'back seat' to other sentencing considerations.

So whilst the propositions in *Mills are* applied frequently, they are not of universal or automatic application and would depend upon the circumstances of the offence as well as the offender, and may be 'trumped' by matters such as seriousness of the offence.

For instance in *R v SJK & GAS* [2002] VSCA 131 – at [66] – the court was sentencing youthful offenders for manslaughter. It recognised that youth may forfeit its primacy to the seriousness of the offence combined with lack of evidence of any real remorse and reasonable prospects of rehabilitation.

In the important Court of Appeal decision of *Azzopardi & Ors v R* [2011] VSCA 372 ("***Azzopardi***") – at [44] – the Court comprehensively surveyed the jurisprudence post-*Mills.* The case involved a sentence appeal concerning three young offenders, aged 19 at the time of offending and 20 at the time of sentencing, who had pleaded guilty to a series of serious criminal offences involving armed robberies and other assaultive offences.

The Court 'framed' the appeal as raising the question of whether the mitigating influence of their youth had been expunged because of the extent and seriousness of their criminality. It provides a useful summary and analysis of cases that have dealt with the sentencing of youthful offenders

and proffers the key principles that apply to the sentencing of young and youthful offenders.

In A*zzopardi,* the Court distilled the following three fundamental principles – at [34]-[36]:

> "Firstly, young offenders being immature are therefore more prone to ill-considered or rash decisions. They may lack the degree of insight, judgment and self-control that is possessed by an adult. They may not fully appreciate the nature, seriousness and consequences of their conduct. However it does not follow that this is always the situation or that as teenagers, offenders cannot be held appropriately accountable for their conduct.
>
> Secondly, Courts recognise the potential for young offenders to be redeemed and rehabilitated. This potential exists because young offenders are typically still in a stage of mental and emotional development and may be more open to influences designed to positively change their behaviour than adults who have established patterns of anti-social behaviour. On this basis rehabilitation is said to be one of the greatest objectives of the criminal law. There is also an added benefit of the rehabilitation of young offenders which is because of the community's interest in such rehabilitation; it protects the community from further offences being committed.
>
> Courts sentencing young offenders are cognisant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve the offenders prospects of successful rehabilitation. A young offender is likely to be exposed to corrupting influences, which may entrench a young persons

> criminal behaviour, thereby defeating the very purpose for which punishment is imposed. This has an obvious negative impact on the community and the protection that should be afforded"

The Court then went on to state this:

> "The general propositions which flow from these authorities is that where the degree of criminality of the offences requires the sentencing objectives of deterrence, denunciation, just punishment and protection of the community to become more prominent in the sentencing calculus, the weight to be attached to youth is correspondingly reduced. As the level of seriousness of the criminality increases there will be a corresponding reduction in the mitigating effects of the offender's youth. But only in the circumstances of the gravest criminal offending and where there is no realistic prospect of rehabilitation may the mitigatory consideration of youth be viewed as all but extinguished"

The Court ultimately allowed the appeal and reduced the sentences imposed on the basis of erroneous orders for cumulation and their aggregation, together with the principle of totality, and failure to adequately reflect the applicant's youth and their prospects for rehabilitation.

CCO's and Young and Youthful Offenders

The impact of the decision of *Boulton v The Queen; Clements v The Queen; Fitzgerald v The Queen* [2014] VSCA 342("***Boulton***") is particularly important as it applies a further development in the principles now applicable when sentencing young and youthful offenders.

It said the CCO could be used to rehabilitate and punish simultaneously; significantly diminishing the conflict between sentencing purposes, particularly acute in relation to young offenders.[270] That is, no longer will the court be placed in the position of having to give less weight to denunciation, or specific or general deterrence, in order to promote the young offender's rehabilitation. Rather, the court will be able to fashion a CCO, which adequately achieves all of those purposes[271].

It justified this by accepting that:

> "Firstly, research indicates that most offenders 'disengage from criminal behaviours when they are in their early 20s', with relatively few becoming 'life course persistent' offenders. Since 'offending by a young person is frequently a phase which passes rapidly', it is said, sentencing dispositions should avoid alienating a young person and diminishing 'protective factors'[272];

Secondly, time has a 'wholly different dimension' for young offenders. As a result, a longer order is likely to have a greater impact on a young offender[273].

Thirdly, young offenders may be more receptive to change and hence 'able to respond more quickly to interventions'[274].

It accepted that these were important considerations, which may justify a shorter CCO for a young offender than would be appropriate for an older offender in comparable circumstances[275].

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[270] Boulton at [186].
[271] ibid.
[272] ibid at [187].
[273] ibid at [188].
[274] ibid.

Practical Tips for Practitioners

First, practitioners need to be conscious that 21 years of age is the statutory 'cut off' for eligibility to be sentenced to a Youth Justice Centre Order. This may necessitate the need to abridge a plea where immediate confinement is expected or it is a marginal case as to whether or not adult imprisonment would be imposed.

Second, in preparing the plea it's important to take full instructions from your client in relation to any rehabilitation already commenced.

Third, matters such as employment, no subsequent offending, stable relationship and housing and family support can all be factors (supported by evidence) put before a court to enhance the ability of a sentencing court to find that prospects of rehabilitation are good.

Fourth, any compliance with bail conditions and CISP is also useful in demonstrating that a supportive regime has been complied with and has assisted your client over a period of time.

Fifth, where a client is facing charges of a violent nature, it's important to be able to evidence remorse and insight which can be in the form of counseling, programs and being able to point to how the circumstances of your client at the time of offending have changed at the time of sentence.

Finally, if your client has previous convictions, details about those matters and what factors were in play at the time need to be addressed to demonstrate why the prior criminal history doesn't 'trump' rehabilitation.

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[275] ibid at [190].

Part 13:

Compensation

Chapter 33

Applications for Compensation Pursuant to s 85 of the *Sentencing Act 1991* – *Written by Fiona Todd*

Chapter 33

Applications for Compensation Pursuant to s85 of the *Sentencing Act 1991*

Written by Fiona Todd

Introduction

If your client is found guilty of, or convicted of, a criminal offence, and a person has suffered any injury as a direct result of that offence, the injured person may make an application under s 85B of the *Sentencing Act* for compensation for those injuries.[276]

'Injury' for this purpose includes bodily harm, mental illness, pregnancy, grief, distress, trauma or a combination of these.[277] Claims for compensation for damage to *property* are excluded: these are dealt with under s 86.

The focus of this chapter is on s 85A-M: applications for compensation for *injury* as a direct result of an offence.

If you represent someone who is found guilty or pleads guilty to an offence and your client has assets, you should expect that any person injured as a result of your client's offending will be awarded compensation if they prove their injury. Clients should be advised of this before entertaining a plea. Generally such claims are not pursued when the offender has no assets (for obvious practical reasons) however that the offender will not be able to pay compensation will not necessarily prevent a court from making an order.

[276] S 85 B *Sentencing Act 1991*.
[277] S 85 A(1).

Take for example the case of DPP v *Farquharson (ex Parte Cindy Louise Gambino)* [278] where the Court ordered a total payout of $225,000 to the mother of the three deceased children notwithstanding the convicted man's assets totaled only $66,000, and he was sentenced to life imprisonment.[279]

The Sentencing Act Compensation Scheme

The *Victims of Crime Assistance Amendment Act 2000* introduced ss 85A-M to the *Sentencing Act* 1991. The purpose of the scheme is to provide victims of crime with speedy and simple access to compensation flowing from the criminal convictions of those who caused injury. Victims are provided with an avenue to compensation that does not require them to replicate proof of the offending to a lower standard in a civil court. In *RK v Mirik and Mirik* Justice Bell sets out a useful history of the scheme.[280]

The Basics

Who can Apply?

- The victim (or someone acting on behalf of the victim if the victim is a child.)
- The Director of Pubic Prosecutions (on behalf of the Victim) if the case is in a Court other than a Magistrates' Court.
- If in the Magistrates' Court, the Director of Public Prosecutions, a police informant or a police prosecutor.
- As to the Director or police applying on a victim's behalf – there is no *requirement* that the Director of Public Prosecutions or police apply on

[278] [2009] VSC 186.
[279] See also *RK v Mirik and Mirik* [2009] VSC 14 where the respondents had no assets at all.
[280] *RK v Mirik and Mirik* [2009] VSC 14 at [4] to [18].

behalf of a victim. The DPP's current policy on when the DPP will apply on behalf of the victim is published.[281]

- In that policy, the DPP sets out factors in favour of the Director applying on the victim's behalf. Two of the significant factors are (a) the financial situation of the offender and the likelihood that the order can be enforced (so - no fruitless applications) and (b) that the order is unopposed by the offender.

In practice, the injured parties themselves often make these applications. The application is generally heard by the same Judge who imposed sentence.

Time Frame for Making Application

An injured person must make the application within 12 months of the offender being found guilty or convicted of an offence.[282] In practice this takes place after sentence. However, a Court has broad powers to extend time for an application if it is 'in the interests of justice' to do so. An offender has to be given the opportunity to be heard on the question of an extension of time to apply for compensation.[283] Such extensions are routinely granted.

What This Compensation is Designed to Do?

It's important to bear in mind that the object of an award of compensation under s 85 is not to (further) punish an offender but to *compensate the victim for their suffering*. The amount of compensation is made up of compensation for any combination of:

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[281] http://www.opp.vic.gov.au/getattachment/e09c6542-38e7-41e0-95f8-b37bf153c36b/14-Victims-and-persons-adversely-affected-by-crime.aspx

[282] s85C(1)(a).

[283] s 85D (3) .

- **pain and suffering**;
- expenses incurred or likely to be incurred for **counselling;**
- **medical expenses** incurred or likely to be incurred by the victim;
- **any other expenses** incurred or likely to be incurred (excluding for damage to property).[284]

Claims for aggravated or exemplary damages are not included in this scheme: these claims must be pursued in 'regular' civil proceedings. [285] A successful applicant under the *Sentencing Act* is not precluded from pursuing another kind of claim in a civil court. In the recent case of *Rodney Kelley (a pseudonym) v R1 (a pseudonym) & Ors*[286] the Court of Appeal stated that awards under the *Sentencing Act* should not be routinely reduced by 25% to take account of the less rigorous approach to testing the claims as compared to civil litigation – this practice of reducing the quantum had evolved in the County Court. The Court did not say that no such reduction should be contemplated: only that each case should be determined on its own facts.

Considerations and General Principles

The determination of the amount of compensation is a matter entirely within the discretion of the Court. That discretion is enlivened if the claim falls within the categories set out under s 85B(2).[287] The Court of Appeal will not disturb an award unless an error of the type in *House v The King* (1936) 55 CLR 499, 504-5.) is identified.[288]

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[284] s 85B(2).
[285] *Stevens and Baxter* [2009] VSC 257.
[286] [2016] VSCA 90.
[287] *Stevens v Baxter* [2009] VSC 257.
[288] *Rodney Kelley (a pseudonym) v R1 (a pseudonym) & Ors* [2016] VSCA 90 at [19].

A Court is not obliged to reduce an amount of compensation on the basis of an offender's financial circumstances – but those circumstances are still a relevant consideration. [289] If an offender seeks to rely on a lack of assets in resisting the application, they need to file and serve affidavits setting out those circumstances.[290]

In exercising the discretion, the Court is permitted to consider the impact of such an order on the rehabilitation of an offender, including an offender who has been sentenced to imprisonment.[291]

In *DPP v Energy Brix* (where a worker died after being buried under a pile of hot ash and burning char caused by his employer's breach of work safety laws) Neave JA set out some factors to be taken into account when assessing damages for grief and trauma (of the bereaved) :

- the circumstances in which the death occurred;
- the effect on the applicant of hearing of the events causing loss;
- the closeness of the relationship between the person seeking compensation and the person who has been killed;
- the age of the person seeking compensation; and
- the extent of grief and psychological suffering experienced as the result of the loss.[292]

For a statement of general principles to be applied see also *DPP v Esso Australia* [293] - this case concerned the victims of the Longford gas explosion.

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[289] S 85H and *Stevens v Baxter*.
[290] *R v Mirik and Mirik* [2009] VCS 14 at [21].
[291] *R v Mirik and Mirik* [2009] VCS 14.
[292] *DPP v Energy Bix* 2006 14 VR 345. (Buchanan, Vincent and Neave JJA)
[293] [2003] VSC 222.

Evidence

On an application the victim can give evidence themselves and/or call another to do so. All witnesses can be cross-examined. Findings of fact that occurred in the trial (or agreed on a plea) are findings of fact that don't need to be proved again on the application.

Generally and where possible, it is the trial Judge who will hear and determine the application – he or she will already be very familiar with the relevant facts.

Offender's Right to Be Heard

A court must not make a compensation order without giving the offender a reasonable opportunity to be heard.[294]

Restraining Order

A person who considers him or herself to be a potential future victim (ie before the case is concluded) may prompt the DPP to pursue a restraining order to prevent the dissipation of assets prior to the conclusion of proceedings.[295]

VOCAT reduction

If an injured person makes a successful claim at VOCAT, the amount awarded in compensation is reduced by that amount to avoid double compensation.[296]

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[294] s 85G(2).

[295] See s 15 of the *Confiscation Act* (Vic).

[296] s 85I.

Some Case Examples – Quantum

To get a 'feel' for the kinds of amounts awarded, the following cases, taken together, may be useful. Consider also the useful tabular summary of compensation orders in the appendix of *Liang v Chalmers* [2011] VSCA 439.

Cheng v Zhuang [2016] VSC 24

> The charge was murder. The applicant for compensation was the mother of the deceased, the respondent was the applicant's mother in law. The deceased was the applicant's only child. The applicant had evidence of a 'persistent complex bereavement disorder' and recurrent major depressive episodes. Order for compensation for $110,000, less the $10,000 received from VOCAT.

AA (a pseudonym) v Cooper [2015] VCC 185

> Six counts of indecent assault. Respondent offender had 'assets of significant value'; though the Court was careful to say that the presence of significant assets does not mean the claim should be assessed more generously. The applicant had a range of psychological symptoms including major depressive disorder and PTSD. Order for $65,000.

Kaori Asana v Grima [2015] VCC 655

> The conviction was for intentionally causing serious injury, and the contravention of a Family Violence Safety Intervention Order. The applicant was awarded compensation for pain and suffering for severe and potentially life threatening injuries; she had spent ten days in hospital, had permanent scars and

significant emotional trauma. Order for $80,000 (minus $10,000 received from VOCAT.)

Shepherd & Anor v Kell and Dey [2013] VSC 24

The accused was guilty of manslaughter. The parents of the deceased were the applicants for compensation. Both parents were found to have been affected psychologically; severe and protracted grief amounting to PTSD in the mother. The circumstances of the death contributed to the parents' suffering. There were two co –accused, each of them was ordered to pay $22,500 to each parent.

DPP v Farquharson [2009] VSC 186

The Director of Public Prosecutions applied for compensation on behalf of the mother of the three deceased children. The respondent was the father, convicted of three counts of murder. The application was unopposed. An issue was not paying 'double compensation' where Ms Gambino has also received a TAC payment. Bell J awarded compensation for 'grief and grief-like suffering' in the amount of $75,000 per child to a total of $225,000.

RK v Mirik and Mirik [2009] VSC 14

Offenders convicted of intentionally causing serious injury and rape. The victim was viciously beaten with bricks and an old bicycle frame, and then anally raped with part of a plant. The applicant suffered serious physical and psychological consequences. The roles of the two co-accused were somewhat distinguished for the purposes of the compensation order.

Justice Bell ordered the amount of $113, 600 from one offender and $26,525 from the other.

Rodney Kelley (a pseudonym) v R1 (a pseudonym) & Ors [2016] VSCA 90

The offender was convicted of committing indecent assaults against four children, his nieces and great nieces. The offending took place over 18 years when the victims were aged between four and 14 years old. The conduct involved touching the girls' breasts then rubbing his erect penis on their bottoms. Each victim was awarded between $60,000 and $127,500 each. On appeal , the Court of Appeal was careful to reject the notion that any award in this jurisdiction be routinely reduced by 25% to allow for the comparative lack of rigour between this and the civil jurisdiction in terms of testing the claims.

Compensation Orders – An Unintended Consequence

The case of *Greensill v The Queen*[297] provides an interesting example of an unintended consequence of a *Sentencing Act* compensation application. Ms Greensill was a primary school teacher. Two of her former students came forward many years later as adults and complained that she had indecently assaulted them while they were in her class. The jury convicted her of some, but not all of the counts on the indictment. The only counts which the jury returned a guilty verdict on involved what became known as the 'tent incident' in the trial. In the course of his application for compensation, one of the complainants, RS, gave an account of what had happened to him in the 'tent incident' to his assessing psychiatrist for the purposes of his compensation application. That account contained significant differences to

[297] [2012] VSCA 306.

that which he gave in his evidence at trial. Ms Greensill then appealed against her conviction on the ground (amongst other grounds) that this was 'fresh evidence' that might have led the jury to acquit the accused had it been known to them. The Court found that the description of the tent incident to the psychiatrist 'significantly undermines RS's credit, in circumstances where credit was a central issue to the trial.' [298] The Court found the verdicts were unsafe and unsatisfactory (on this and other grounds), quashed the convictions and entered a judgment of acquittal on each count. The lesson: keep a close eye on the material filed by the applicants in your client's case.

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[298] [2012] VSCA 306 at [74].

Part 14:

Confiscation

Chapter 34

Defending Confiscation Applications – *Written by Elizabeth Ruddle and Simon McGregor*

Chapter 35

The Relationship between Confiscation and Sentence – *Written by Elizabeth Ruddle and Simon McGregor*

Chapter 34

Defending Confiscation Applications

Written by Elizabeth Ruddle and Simon McGregor

Introduction

When property is restrained under the Act, forfeiture of that property usually follows unless the property is excluded from the restraining order[299]. The exception to this rule is schedule 1 forfeiture where property can either be excluded[300] or the Court can exercise a discretion not to make a forfeiture order[301].

As such, exclusion from restraint is the primary method of defending Confiscation Proceedings. The process, time limits and applicable tests vary depending on the type of restraining order.

Any person with an interest in property can seek to exclude the property from the restraining order, including an accused person.

Exclusion from Restraining Orders

Time Limits

There are strict time limits within the Act. Any person who claims an interest in property, against which a RO, a FFRO and UWRO has been made, may make an exclusion application.

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[299] s.35 (automatic forfeiture), S.38 (Civil forfeiture), 40ZA (unexplained wealth).
[300] s.21.
[301] S.33(5).

An exclusion application must be made:

- Within 30 days of receiving notice that a RO or CFRO has been made, if such notice was required by s.19 and served[302];
- Otherwise within 30 days of the RO or CFRO being made[303];
- Within 90 days of receiving notice that an UWRO has been made, if such notice was required by s.40J and served [304];
- Otherwise within 90 days of the UWRO being made[305];
- The periods set out above can be extended if it is in the interests of justice[306].

The Court of Appeal in *Lemoussu v Director Of Public Prosecutions* [2012] VSCA 20 held that, in cases where the Crown seeks automatic forfeiture, an accused has an additional right to seek exclusion from an RO within 60 days of conviction (the time frame set out in section 35(2)). Amendments to the legislation (including the addition of 35(2A)) sought to overturn that provision and automatic forfeiture is not prevented by filing an exclusion application after 30 days. As such, the prudent course remains to apply within the time frames set out in section 20 (that is, with 30 days of the making of the RO).

Timing and stays of proceedings

A person making such an application needs to give notice of the application and the grounds on which it is made to the applicant for the RO and any other affected person[307]. This is subject to s.20(6), which provides in certain defined circumstances a person need not give notice of the grounds until a

[302] s.20(1A).
[303] s.20(1A) (schedule 1 and 2); 36U (civil forfeiture).
[304] s.40R(2)(a).
[305] S.40R(2)(b).
[306] s.20(1B), 36U, 40R(4).
[307] s.20(2).

charge against the person is finally determined or withdrawn. Similarly, a person in this position can apply for an order that the hearing of the application, for an order under s.21 or s.22, be stayed until the charge is finally determined or withdrawn[308].

There are certain protections for a person, who makes such an application and is facing criminal charges. There is a limit on the use of statements or evidence given by such a person; and any information, documents or things obtained directly or indirectly as a consequence of the statement or evidence[309]. Such material is admissible in proceedings for perjury or any proceeding under the *Confiscation Act*. Nevertheless, unless the property needs to be sold (potentially to fund a defence), the usual course is to defer an application pursuant to section 20(7).

Tainted and derived property – a key concept

While the test for each section is slightly different, the primary basis to exclude property from restraint is to show that it is neither "tainted" property nor "derived" property.

Derived property

Derived property is defined in section 7A and 7B of the Act:

> *In relation to civil forfeiture, a civil forfeiture restraining order, a civil forfeiture order or a civil forfeiture exclusion order or in relation to unexplained wealth forfeiture or an unexplained wealth restraining order, derived property means—*
>
> *(a) property used in, or in connection with, any unlawful activity; or*

[308] s.20(7).

[309] s.20(5) & (5A), section 40Q in relation to unexplained wealth provisions.

(b) *property derived or realised, or substantially derived or realised, directly or indirectly, from any unlawful activity; or*

(c) *property derived or realised, or substantially derived or realised, directly or indirectly, from property of a kind referred to in paragraph (a) or (b).*

In any case other than that referred to in section 7A, derived property means—

(a) *property used in, or in connection with, any unlawful activity by—*

(i) *the accused; or*

(ii) *the applicant for an exclusion order; or*

(b) *property derived or realised, or substantially derived or realised, directly or indirectly, from any unlawful activity by—*

(i) *the accused; or*

(ii) *the applicant for an exclusion order; or*

(c) *property derived or realised, or substantially derived or realised, directly or indirectly, from property of a kind referred to in paragraph (a) or (b).*

Applicants are required to demonstrate not only that the property was not used in or derived from the offence for which they are charged but also that the property was not used in or derived from any unlawful activity.

As such, evidence regarding the source of funds used to purchase property , including tax returns, bank records and wage records are vital in defending proceedings.

Tainted property

Tainted property is defined in section 3 as:

(a) in the case of civil forfeiture, a civil forfeiture restraining order, a civil forfeiture order or a civil forfeiture exclusion order, property that—

(i) was used, or was intended to be used in, or in connection with, the commission of one or more Schedule 2 offences; or

(ii) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in subparagraph (i); or

(iii) was derived or realised, or substantially derived or realised, directly or indirectly, from the commission of one or more Schedule 2 offences; or

(iv) is likely to be used, or intended to be used in, or in connection with, the future commission of one or more Schedule 2 offences; or

(b) in any other case, property that, in relation to an offence—

(i) was used, or was intended by the accused to be used in, or in connection with, the commission of the offence; or

(ii) was derived or realised, or substantially derived or realised, directly or indirectly, from property referred to in subparagraph (i); or

(iii) was derived or realised, or substantially derived or realised, directly or indirectly, by any person from the commission of the offence; or

(c) in a case specified in either paragraph (a) or paragraph (b), property that—

(i) *in the case of an offence against section 194 of the Crimes Act 1958, is proceeds of crime within the meaning of section 193 of that Act; or*

(ii) *in the case of an offence against section 195 of the Crimes Act 1958, is referred to in that section; or*

(iii) *in the case of an offence against section 195A of the Crimes Act 1958, becomes an instrument of crime within the meaning of section 193 of that Act*

When assessing whether property is "tainted", the use of the property is usually key. An obvious example is houses used to cultivate cannabis.

However, each case turns on its own facts. The Victorian Supreme Court considered the meaning of tainted property in the cases of *Chalmers v R* [2011] VSCA 436 at [77] – [91] and *R v Moran* [2012] VSCA 154 at [22]. Both cases applied a test of "the nature of the property, its precise use, the nature of the offence that was committed and the manner, if any, in which the property was used in connection with the offence".

Exclusion applications from RO granted to satisfy forfeiture orders

Where a RO has been granted in relation to a schedule 1 offence, other than for a purpose referred to in s.15(1)(b) (that is, to satisfy automatic forfeiture), a person can apply have their property excluded from the operation of the RO[310].

Property may be excluded from a RO if a person is able to establish:

a. the property is not tainted property; and

[310] S.21.

b. the property will not be required to satisfy any purpose for which the RO was made[311].

This allows an application for exclusion by all persons with an interest in the property, including an accused charged with a schedule 1 offence. s.21(1)(b) allows for exclusion applications by a person other than the accused. Pursuant to s.21(1)(b)(i) a court may make an exclusion order, even if it considers the property is tainted, in certain circumstances. Those circumstances include:

- Where the applicant was not in any way involved in the commission of the schedule 1 offence;
- Where the applicant acquired the interest before the alleged commission of the schedule 1 offence and did not know the accused would use the property in connection with the schedule 1 offence;
- Where the applicant acquired the interest from the accused and it was acquired for sufficient consideration;
- The above is not an exhaustive list of matters which must be demonstrated in satisfying the requirements of s.21(1)(b)(i).

Pursuant to s.21(1)(b)(ii) a person, other than the accused, can have their property excluded from the RO even if the court believes that property may be required to satisfy any purpose for which the RO was made.

Where an exclusion order is made, a court must make an order declaring the extent of the applicant's interest in the property[312].

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[311] s.21(1)(a).
[312] s.21(2).

Exclusion applications from RO to satisfy automatic forfeiture orders

When a RO has been granted in relation to a Schedule 2 offence for the purposes of automatic forfeiture, any person may make an application for an exclusion order if they can demonstrate the matters required in s.22(1)(a). To succeed in such an application a person must show:

- The property in which they claim an interest was lawfully acquired;
- The property is not tainted property;
- The property is not subject to a tainted property substitution declaration (see s.36F);
- The property is not derived property;
- The property will not be required to satisfy any pecuniary penalty order or order for restitution or compensation under the *Sentencing Act* 1991.

S.22(1)(b) allows for exclusion applications by a person other than the accused. Pursuant to s.22(1)(b)(i) a court may make an exclusion order, even if it considers the property is tainted or derived property, in certain circumstances. Those circumstances include:

- Where the applicant was not in any way involved in the commission of the schedule 2 offence;
- Where the applicant acquired the interest before the alleged commission of the schedule 2 offence and did not know the accused would use the property in connection with the schedule 2 offence;
- Where the applicant acquired the interest at the time of or after the alleged commission of the schedule 2 offence, they did so in circumstances which did not arouse a reasonable suspicion that the property was tainted property or derived property;

- Where the applicant acquired the interest from the accused and it was acquired for sufficient consideration;
- The above is not an exhaustive list of matters which must be demonstrated in satisfying the requirements of s.22(1)(b)(i).

Where an exclusion order is made, a court must make an order declaring the extent of the applicant's interest in the property[313].

Forfeiture Orders

Application

After an accused is convicted of a schedule 1 offence an application can be made by the DPP in relation to tainted property[314]. Such an application must be made within 6 months of the conviction – see s.3, 4 and 32(2). This period can be extended with leave of the court[315].

The applicant must give written notice of the application to the accused and to anyone they reasonably believe has an interest in the property[316]. In certain circumstances the notice requirement can be waived[317].

Determination of the Application

A court, if satisfied that the property is tainted property in relation to the offence, may order that the property, or part of the property, be forfeited[318].

S.33(5) sets out the matters a court may have regard to in deciding whether to make a FO :

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[313] s.22(2).
[314] s.32(1).
[315] s.32(3).
[316] s.32(4).
[317] s.32(5).
[318] s.33(1).

- The use ordinarily made or intended to be made of the property – s.33(5)(a);
- Any hardship caused to any person by the order – s.33(5)(b);
- The claim of any person to an interest in the property considering the matters set out in s.50(1). This provision protects the interests of parties who have an interest in tainted property but were not in any way involved in the commission of the relevant offence.

The discretion regarding whether to forfeit property is wide. The Court is required to consider the objects of the Act, including general deterrence as well as the offender's personal circumstances (including those matters advanced on the plea) and the effect forfeiture would have on rehabilitation of the offender[319].

In *R v Winand*[320] the Victorian Court of Criminal Appeal (as it then was) stated that when considering such matters a Court should take into account:

> *the value of the subject property, the nature and gravity of the offence, the use made of the property, the degree of the offender's involvement, the offender's antecedents, the value of any other property confiscated and the penalty imposed, the nature of the offender's interest in the property, the value of the drugs involved or the size of the crop, whether the property was acquired with the proceeds of the sale of drugs, the utility of the property to the offender, the length of ownership of the property, the extent to which the property was connected with the commission of the offence, the fact that forfeiture is intended as a deterrent, the interest of innocent parties in the property and the extent (if any) to*

[319] *Director of Public Prosecutions (DPP) (Vic) v Cini* [2013] VSCA 103.
[320] (1994) 73 A Crim R 497.

which the retention of the property might bear on the offender's rehabilitation.[321]

The fact that a FO has been made does not prevent the making of a pecuniary penalty order[322].

Exclusion from FO after forfeiture order made

A person, other than the accused, may apply for exclusion from a FO[323] after the property has been forfeited. The application for exclusion should be made at the time of the application for a FO or within 60 days from the date when the FO was made[324]. An applicant must give written notice of the application to other interested parties and state the grounds on which it is made[325].

A court may exclude an applicant's interest in the property, from a FO, if satisfied:

- They have an interest in tainted property but were not in any way involved in the commission of the relevant offence[326];
- Their interest is not tainted property[327].

Exclusion from AFO

The AFO process itself does not provide for any judicial discretion nor require any hearing on the merits of the order. As such, the only way to

[321] See also discussion in *Kinealy v DPP* [2013] VSC 67.
[322] s.33(7).
[323] s.49(1).
[324] s.49(3).
[325] s.49(4).
[326] s.50(1).
[327] s.50(1)(b).

defeat an AFO is at the RO stage (which can be challenged at the time of the making of the RO or at conviction[328]).

There is no power to extend time once the property is forfeit[329]. As such only third party interests can be considered after forfeiture[330].

A person, other than the accused, with an interest in the relevant property may apply for exclusion from an AFO[331]. This must be done within 60 days of the property being forfeited[332]. Written notice of the application and the grounds on which it is based must be given to interested parties[333].

The court may order exclusion if:

- The applicant has an interest in tainted property or derived property but were not in any way involved in the commission of the relevant offence and did not know (or should not have had a reasonable suspicion) that the property was used or going to be used in the offending[334];
- Their interest is not tainted property[335].

Should the application for exclusion be unsuccessful, the automatic forfeiture will take place at the end of the period in which that order could be appealed[336].

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[328] *Lemoussu v Director Of Public Prosecutions* [2012] VSCA 20.
[329] *Trajkovski v Director of Public Prosecutions* (DPP) [2012] VSC 121.
[330] See *Confiscation Act 1997,* s 51 and 52.
[331] s.51(1).
[332] s.51(2).
[333] s.51(6).
[334] s.52(1).
[335] s.52(1)(b).
[336] section 35(2)(a).

Checklist for defending confiscation proceedings

When a client provides instructions for a new matter, particularly serious drug offences, it is important to confirm:

a. What property do they own?
b. When did they buy it / acquire their interest in the property?
c. Can they prove they acquired the property well before any allegation of criminal activity?
d. Can they establish the legitimacy of funds used to acquire the property? (For example savings from work, inheritance etc.)
e. Is the property in their name only?
f. If the property is in joint names has the other person been charged?
g. If the property is in joint names what interest do they have in the property?
h. Has a RO or CFRO been placed on the property?
i. Have they received notice that a RO has been granted? Keep in mind the timeframe for exclusion runs from the date of notice.
j. Have they received notice of an impending application for a RO?
k. When was notice given?

Matters to keep in mind when managing criminal proceedings with potential confiscation consequences

The Crown can make an application for forfeiture after a plea has been resolved or a conviction obtained. Especially where a client has pleaded to a schedule 2 offence, it is important to advise on the risks of forfeiture. Where possible, deal with the question of forfeiture as part of any plea negotiations.

Timeframes in the Act for seeking exclusion are pretty tight, but have serious consequences if missed. Especially in automatic forfeiture offences, a failure to apply can have the practical effect that any chance to retain the property is lost. That said, most timeframes in the Act can be extended in the interests of justice, so make use of those provisions.

Chapter 35

The Relationship Between Confiscation and Sentence

Written by Elizabeth Ruddle and Simon McGregor

Introduction

The *Sentencing Act* specifically deals with how orders under the Act relate to sentencing in section 5(2A) and (2B).

Where forfeiture does more than strip an offender of the proceeds of any criminal enterprise, the court may take this into account. The situation in which it can be taken into account was described by Batt JA in *R v Tilev*[337][338] as "somewhat analogous to a fine paid immediately".

Forfeiture

The Court may take the fact that property has been forfeited into account on sentence if satisfied that the property was acquired lawfully – s5(2A)(a) *Sentencing Act*, but not if the property was derived or realized as a result of the commission of the offence – s.5(2A)(b) *Sentencing Act*.

Lawfully acquired property can be 'tainted' by its involvement in an offence, rather than by virtue of being 'derived property'. For example, a lawfully purchased house which is subsequently used to cultivate cannabis. Where forfeiture is going to be sought, ideally it should be dealt with as part of the plea. However, the Court may also take into account likely forfeiture

[337] 1998 2 VR 149

[338] See also *R v Wright*; *R v Gabriel* [2008] VSCA 19 at [45]

where a restraining order exists but no forfeiture has yet occurred[339]. Despite this, post-plea forfeiture has been considered "fresh evidence" for the purposes of an appeal against sentence where it has not been considered on the plea[340] but the appeal Courts will not re-sentence where the outcome is uncertain[341]. Failure to take into account the possibility of automatic forfeiture does not necessarily vitiate a sentence[342].

It is for an accused who seeks to rely on forfeiture to prove that the property was lawfully acquired and any other factors that assist in mitigation[343].

In *R v McLeod* [344], the Court of Appeal described the relationship as follows at [29]:

> *An offender who relies on forfeiture (whether it has occurred or is anticipated) as a mitigating circumstance will ordinarily bear the onus of establishing that it should be so regarded. Where lawfully acquired property has been used in the commission of the crime and is "tainted" property, the punitive element in its forfeiture must be sufficiently identified for the sentencing judge. How much of it was lawfully acquired, the offender's interest in the property and the extent to which it was used to facilitate the commission of the crime may all require proof.*

In *R v Tabone*[345], Nettle JA (as he then was) stated:

[339] *R v Yacoub* [2006] VSCA 203 at [15] – [19]; See also *R v Do* [2004] VSCA 203; *DPP v Phillips* [2005] VSCA 112; *R v Roy Le and Thang Nguyen* [2005] VSCA 284; *Mileto* v R [2014] VSCA 161 at [21].
[340] *Rajic v R* [2011] VSCA 51.
[341] *R v Tabone* [2006] VSCA 238; *R v Tezer* [2007] VSCA 123.
[342] *R v Tabone* [2006] VSCA 238.
[343] *R v McLeod* (2007) 16 VR 682; [2007] VSCA 183; See also *R v McKittrick* [2008] VSCA 69
[344] ibid.
[345] [2006] VSCA 238.

It may be added, generally speaking, that if a sentencing judge is to make anything of the effects of automatic forfeiture, it is incumbent on the offender to adduce evidence of the likely effects of the forfeiture, and, obviously, mere assertions from the bar table or otherwise are not evidence. In the absence of that sort of evidence, there will be no error in a judge declining to take the effects of forfeiture into account.

Automatic forfeiture

The Court may take automatic forfeiture into account if satisfied that the property was acquired lawfully – s. 5(2A)(ab) Sentencing Act *1991*, but must not otherwise take it into account – s.5(2A)(e) Sentencing Act 1991.

Whilst automatic forfeiture does not take place until after conviction, it is a matter that can and should be considered on plea as the upcoming forfeiture will be self-evident[346].

Pecuniary Penalty Orders

The Court:

- may have regard to a PPO to the extent to which it relates to benefits in excess of profits derived from the commission of the offence - s.5(2A)(c) *Sentencing Act 1991*
- must not have regard to a PPO to the extent to which relates to profits (as opposed to benefits) derived from the commission of the offence – s.5(2A)(d) *Sentencing Act 1991*

[346] *Rajic v R* [2011] VSCA 51 at [15].

The "benefits" received from an offence is defined in section 67 of the Act and includes all money actually received from the commission of the offence, regardless of expenditures incurred in deriving that money.

In order to for a court take a PPO into account, the accused must provide some evidence of the "costs" in order to show that the PPO "relates to benefits in excess of profits derived" - *R v El Cheikh* [2004] VSCA 146 at [13] – [14]

Remorse

The *Sentencing Act* specifically allows the Court take orders under the Act into consideration as evidence of remorse or cooperation – S.5(2B).

Part 15:

Appeals

Chapter 36

De Novo Appeals from the Magistrates' Court to the County Court – *Written by Michael Stanton and Christopher Carr*

Chapter 37

Appeals to the Court of Appeal – *Written by Michael Stanton and Christopher Carr*

Chapter 36

De Novo Appeals from the Magistrates' Court to the County Court

Written by Michael Stanton and Christopher Carr

Every person convicted and sentenced in the Magistrates' Court has a right to appeal to either the County Court or to the Supreme Court.[347]

Appeals to the County Court

An accused person can appeal to the County Court against either sentence only, or both conviction and sentence.[348]

An appeal to the County Court is commenced by filing a notice of appeal with a registrar of the Magistrates' Court.[349] A notice of appeal must be filed within 28 days,[350] and served on the informant within 7 days thereafter.[351] Any notice of appeal filed out of time is taken as an application for leave to appeal.[352] Leave to appeal out of time may only be granted if the failure to file a notice of appeal within time was due to exceptional circumstances, and the prosecution case would not be materially prejudiced by the delay.[353] That sets a deliberately high bar, which emphasises the need to file an appeal within time. Though the *Criminal Procedure Act 2009* ("*CPA*")

[347] An appeal lies to the County Court pursuant to s 254 of the *Criminal Procedure Act 2009* ("*CPA*"), and to the Supreme Court pursuant to s 272 of the *CPA*.
[348] CPA, s 254. However, CPA s 254(2) requires that an appeal should be to the Supreme Court if the Magistrates' Court was constituted by a Chief Magistrate who holds a commission as a Judge.
[349] CPA, s 255(1).
[350] CPA, s 255(1).
[351] CPA, s 255(2).
[352] CPA, s 263(1).
[353] CPA, s 263(2).

makes an appellant responsible for filing an appeal in the prescribed form, the longstanding practice is that a Registrar of the Magistrates' Court will provide a completed document in the proper form which need only be signed by the intending appellant.

Lodging an appeal to the County Court generally operates as a stay of the sentence imposed by the Magistrates' Court.[354] However, that does not apply to an order for the suspension or cancelation of a driver's licence.[355] In such a case, an application for permission to drive pending an appeal may be made to the Magistrates' Court.[356] If bail pending the hearing of an appeal is granted by the Magistrates' Court, an appeal operates as a stay of a sentence of imprisonment once bail is entered.[357] An appeal does not stay registration under the *Sex Offenders Registration Act* 2004,[358] meaning that an appellant must comply with obligations under that Act whilst the appeal is pending.

Procedure

An appeal with an estimated duration of more than one day (typically a conviction appeal) is listed for mention in the County Court in the 9.00am list, 21 days after the lodging of the appeal.[359] At that mention, the County Court expects practitioners to answer (at least) the following questions:

a. How long did the hearing in the Magistrates' Court run?
b. Did all required witnesses attend?
c. What are the factual issues in dispute?
d. What is not in dispute?

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[354] CPA, s 264.
[355] *Road Safety Act 1986*, s 29(2).
[356] *Road Safety Act 1986*, s 29(2).
[357] CPA, s 264(2).
[358] *Sex Offenders Registration Act 2004* s 6(7).
[359] County Court Criminal Division - Practice Note 1 of 2015, [31.1].

e. How can the appellant and respondent narrow the issues in dispute?
f. Have any plea offers been made or will be made?
g. Are there any co-accused, and if so what is their status?
h. If the matter will proceed as an Appeal Hearing:
    i. How many witnesses, including any expert witness issues;
    ii. Hearing estimate and how was this arrived at?
    iii. Will any Evidence Act notices be served?
    iv. Will any subpoenas be sought?
    v. Is funding in place?[360]

The *CPA* overturned the traditional expectation that even an appellant who is not on bail, and is represented by a legal practitioner, was required to personally attend his or her appeal unless excused. Under the *CPA*, an appellant is not required to personally attend unless required to do so by the Court.[361] However, the relevant practice note expressly requires that an appellant personally attend the initial mention of an appeal,[362] and orders will ordinarily be made requiring the appellant to personally attend the hearing of the appeal. An appeal may be struck out if an appellant fails to appear.[363]

Particular issues that arise on appeals against conviction

An appeal to the County Court is a hearing *de novo*, in which the appellant is not bound by the plea he or she entered in the Magistrates' Court.[364] If an accused has pleaded guilty in the Magistrates' Court, but pleads not guilty

[360] County Court Criminal Division - Practice Note 1 of 2015, [31.4].
[361] *Hamilton v Pickering* (2014) 42 VR 681, 689 [40] (Kyrou JA).
[362] County Court Criminal Division - Practice Note 1 of 2015, [31.3].
[363] CPA, s 267(1).
[364] CPA, s 256(1).

on appeal in the County Court, a question often arises as to the admissibility of the guilty plea entered in the County Court. On the one hand, to permit a guilty plea in the Magistrates' Court to be led might be thought to be inconsistent, at least to some degree, with the statute providing for a rehearing in which the appellant is not bound by the plea entered in the Magistrates' Court. On this basis, some Judges of the County Court refuse to receive any evidence of a plea of guilty in the Magistrates' Court. On the other hand, the plea of guilty in the Magistrates' Court may be treated as an inherently reliable admission of the applicant's guilt, directly analogous to a plea entered at committal. At least in Victoria, authority does not provide a decisive resolution to this issue.

In appeals against conviction, a complication often arises when a charge has been amended in the Magistrates' Court. In such a case, the amendment made in the Magistrates' Court is one of the orders that is set aside when the Judge hearing the appeal sets aside the orders of the Magistrates' Court. Accordingly, at that stage, the charge resumes the wording that it had when it was originally filed.[365] If an amendment to the charge is necessary, the application for amendment must be considered afresh by the County Court Judge hearing the appeal. Consequently, on an appeal against conviction for a summary offence, where there is a defect in the charge as originally filed, the prosecution must again persuade a judicial officer to make the necessary amendment.

A related issue also commonly arises in appeals against conviction. The orders of the Magistrates' Court that are set aside include any orders striking out alternative charges. Consequently, the County Court, just like the

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[365] *Candolim Pty Ltd v Garrett* [2005] VSC 270, [33] (Hargrave J); *Walters v Magistrates' Court & Anor* [2015] VSC 88, [117]-[119] (Zammit J).

Magistrates' Court, has power to revive those alternative charges.[366] Though there is no authority dealing directly with the issue, there seems no reason to doubt that an appellant retains the benefit of an acquittal won in the Magistrates' Court.

Sentencing Powers

Upon conviction, or on a sentence appeal, the County Court may exercise any power that the Magistrates' Court exercised or could have exercised, and may impose any sentence that the Magistrates' Court imposed or could have imposed.[367] Consequently, on appeal a County Court Judge is limited by the jurisdictional limits applying to the Magistrates' Court,[368] which are generally understood as a maximum of 2 years for any individual charge[369] and 5 years in aggregate for several offences committed at the same time. Further, the maximum period of any Community Correction Order is between 2-5 years depending on the number of offences.[370]

Other relevant powers of the Magistrates' Court that may be exercised by the County Court on appeal include the power to grant diversion,[371] and the power, in certain confined circumstances, to impose a suspended sentence.[372]

The County Court has the power to impose a greater sentence than was imposed in the Magistrates' Court. However, there are two discrete

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[366] *Quick v Creanor; Taylor v Wilkins* [2015] VSCA 273, [26] (Maxwell P, Beach and Kaye JJA).
[367] CPA, s 256(2)(b)&(c).
[368] *Sentencing Act 1991*, ss 113 – 113B.
[369] Subject to a contrary statutory provision, such as the maximum penalty for a summary offence exceeding 2 years.
[370] *Sentencing Act 1991*, s 38.
[371] CPA, s 59.
[372] For an offence committed before 1 September 2014: see *Sentencing Amendment (Abolition of Suspended Sentences & Other Matters) Act 2013*.

requirements to warn an appellant of that possibility. First, the notice of appeal includes a statement that the County Court may impose a more severe sentence than was imposed in the Magistrates' Court.[373] Each appellant must sign to acknowledge this statement. Secondly, the Court itself must also warn the appellant of the existence of that power.[374] The interrelationship of these two requirements to warn an appellant, and their respective operation, is not entirely free from doubt.

The written warning contained in the notice of appeal itself is in similar form to that which was introduced, in 1999, into the *Magistrates' Court Act 1958* (which then governed appeals to the County Court). However, that provision was introduced as a substitute, when parliament abrogated the common law requirement that a Judge who was considering increasing the sentence warn the appellant of that possibility. Hence, the purpose of the written warning in the notice of appeal, when originally introduced, was to take the place of the oral warning given by a Judge on the hearing of an appeal.

Notwithstanding the written warning in the notice, the *Criminal Procedure Act 2009* also requires that a Judge warn an appellant. Both the Explanatory Memorandum to the Criminal Procedure Bill 2008, and authority on the issue,[375] make it clear that a Judge is not to give a ritual incantation at the start of each appeal, but rather is to only give a warning when the real possibility of an increased sentence arises in a particular appeal. In this, the Act reflects the traditional common law requirement to warn an appellant of

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[373] CPA, s 255(6).
[374] CPA, s 256(3).
[375] *Firth v County Court* (2014) 43 VR 663, 668-671 [25]-[40] (T Forrest J); *cf. Harding v County Court* [2013] VSC 711, [60] (Macaulay J).

the possibility of an increased sentence when that possibility actually arises on the facts of a particular case.

Abandonment of an appeal

If an appellant has second thoughts after lodging an appeal, that appeal may be abandoned by filing a notice of abandonment with the County Court registry and, in the case of an appellant on bail, surrendering to the Registrar of the County Court. An appellant should be given the opportunity to seek to abandon the appeal after a warning of an increased sentence is given.[376] In practice, if the appellant is warned of the prospect of an increased sentence, the appellant invariably then seeks, and is permitted, to abandon the appeal.[377]

Appeals to the Supreme Court

It is important to be aware, also, of the right to appeal to the Supreme Court against a final order made in a criminal case in the Magistrates' Court.[378] The concept of a final order is important in this context. A final order is the antonym of an interlocutory order;[379] it finally determines the rights of the parties. An order permanently staying proceedings, or refusing to do so, is not a final order.[380] Nor is an order striking out a charge.[381] An appeal lies to the Supreme Court on a question of law alone.[382]

In practice, appeals to the Supreme Court are not commonly pursued by the accused, both because doing so involves foregoing the right to a complete

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[376] *Firth v County Court of Victoria* (2014) 43 VR 663, 673 [53] (T Forrest J).
[377] Given the existence of the right of the DPP to appeal against sentence, there should be no occasion for an increased sentence on an appeal by an accused person: *Neal v R* (1982) 149 CLR 305, 308 (Gibbs CJ).
[378] CPA, s 272(1).
[379] *Kinex Exploration v Tasco* [1995] 2 VR 318, 320-321 (Batt J).
[380] *DPP v Judge Lewis* [1997] 1 VR 391.
[381] *DPP v Moore* (2003) 6 VR 430.
[382] CPA, s 272(1).

rehearing on appeal to the County Court,[383] and because appeals to the Supreme Court engage a costs jurisdiction (and therefore carry the risk of an adverse costs order). However, such appeals are a useful mechanism where a case turns on a challenge to an existing line of authority, or where there was a deficiency in the evidence led by the prosecution in the Magistrates' Court, which almost certainly ought to have resulted in an acquittal, and which is unlikely to be repeated on a rehearing.

Appeals to the Supreme Court are more commonly pursued by the Crown to establish an important point of principle, particularly in cases involving technical defences to driving cases.

Where an appeal succeeds, the Supreme Court may make any order that it thinks appropriate, including remitting the matter for rehearing.[384] The Supreme Court will generally remit a matter in order to cure a defect in proceedings, if the accused seeks to take advantage on appeal of an error that the accused induced in the Magistrates' Court.[385]

Because of their relative rarity, appeals to the Supreme Court are not covered in more detail in this Chapter. However, the authors are happy to discuss in person the circumstances in which such appeals might be pursued.

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[383] CPA, s 273.
[384] CPA, s 272(9).
[385] See, eg, *Bchinnati v Connolly & Ors* [2014] VSC 623, [34]-[35] (T Forrest J).

Chapter 37

Appeals to the Court of Appeal

Written by Michael Stanton and Christopher Carr

Preparing submissions and appearing in the Court of Appeal can be a daunting experience. It will often present different challenges for advocates who regularly appear in other jurisdictions.

Court of Appeal advocacy places great significance on the written word, all the more so after the "Ashley-Venne reforms" in 2011. Determining the grounds of appeal and crafting the written case will usually determine the parameters – and indeed the prospects of success – of any oral hearing.

Advocates who prepare documents and appear in the Court of Appeal need to be familiar with the relevant legislation, rules, guiding principles and common pitfalls.

This Chapter will consider:

- The legislative context, rules, practice notes and newsletters;
- Filing documents and extensions of time;
- Some common issues;
- Key cases concerning common grounds of appeal;
- The need for an oral hearing;
- Establishing error, its consequences and new material; and
- Judgment.

The legislative context, rules, practice notes and newsletters

The relevant provisions are contained in Part 6.3 of the *Criminal Procedure Act 2009* (Vic) ("*CPA*"):

i. Appeals against conviction, ss 274-277;
ii. Appeals against sentence, ss 278- 286;
iii. Crown appeals, ss 287-294;
iv. Interlocutory appeals, ss 295-301; and
v. Cases stated, ss 302-308.

Advocates need to read the *Supreme Court (Criminal Procedure) Rules* 2008 (Vic) ("*Rules*") and the Court of Appeal Practice Notes:

i. Practice Direction No 2 of 2011 (First Revision), Court of Appeal: Criminal appeals ("*Practice Direction*");
ii. Practice Note No 8 of 2011, "No Point of Principle" Cases; and
iii. Practice Statement No 1 of 2010, Interlocutory Appeals in Criminal Proceedings.

Further, the Court of Appeal Newsletters contain information on procedural and substantive matters. For example, Court of Appeal Newsletter No 7 (August 2014) notes:

a. It will no longer be necessary to file copies of "Part A" authorities; and
b. Where an applicant elects to renew an application for leave to appeal, an applicant will ordinarily be required to file a short supplementary submission (two pages maximum), and the applicant should address why there would be error if the

conclusion that the grounds were not reasonably arguable would be allowed to stand.[386]

Filing documents and Extensions of Time

This part will focus on applications for leave to appeal against conviction and sentence. For guidance on interlocutory applications and appeals, see Richard Edney's paper.[387]

The charge and/or plea and sentence should be requested from Victorian Government Reporting Service ("VGRS") immediately (*Practice Direction*, p 4). Sometimes exhibits will need to be sought from the Crown, previous instructors, and/or judge's associate.

The time limit for an application for leave to appeal is 28 days from the date of sentence (not conviction) to file (*CPA*, ss 275(1), 279(1) and 284(1), unless there is an extension pursuant to s 313). Be aware of how time is calculated (*Rules*, r 1.07).

Ensure you file the correct notices (Form 6-2A for conviction and/or Form 6-2B for sentence) and that they have the correct particulars, which must include phone number, facsimile number and email address of instructor.

The notices must be accompanied by the signed written case(s) (*Practice Direction*, p 5). There are no more holding grounds. By signing the notices and written case(s) the legal representatives take responsibility for

[386] *Ayol v The Queen* [2014] VSCA 151, [14] (Weinberg JA), [26] (Redlich JA); *Booysen v The Queen* [2014] VSCA 150, [9] (Redlich JA and Almond AJA); *Misfud v The Queen* [2014] VSCA 160, [16] (Redlich JA).

[387] Richard Edney, "Interlocutory Appeals in Victoria: Existing Jurisprudence and Likely Future Trends", 13 February 2014, Internet reference, <http://www.foleys.com.au/resources/Interlocutory%20Appeals%20in%20Victoria_13Feb2014.pdf> at 18 May 2016.

the fact that they have sufficient merit. Having an electronic signature assists so that material can be filed over the internet.

If seeking an extension of time, ensure that a separate notice is filed (Form 6-2H) together with an affidavit from the instructor explaining the reason for delay (*Practice Direction*, p 8). That is in addition to the notice(s) of application for leave to appeal and written case(s).

The application for an extension of time can be refused by the Registrar, however an applicant can elect to renew the application to the Court (*Rules*, r 2.24).

Recently the Court of Appeal has confirmed that in general the Court will require special and substantial reasons for extending time, and its practice is not to grant any considerable extension of time unless it is satisfied that there are such merits in the proposed appeal that it would probably succeed.[388]

An applicant must also file a list of authorities comprising Part A, Part B, and Other Material (*Practice Direction*, p 6). Think carefully about which category an authority should be placed in (Part A authorities are to be read at the hearing) and what other material is necessary. It is not helpful to swamp the Court with extraneous material. An applicant no longer needs to file Part A authorities (Newsletter, August 2014). Where possible include copies of other material when filing.

[388] *Roth (a Pseudonym) v The Queen* [2014] VSCA 242, [3]-[4] (Neave and Priest JJA); *Jopar v The Queen* (2013) 44 VR 695; *R v Darby* (Unreported, Court of Criminal Appeal, Gowans, Lush and Crockett JJ, 2 May 1975).

If the application raises a question of law or matter of interpretation under the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), you need to give notice to the Attorney-General and Victorian Equal Opportunity and Human Rights Commission (s 35).

If an applicant is seeking expedition of the hearing then state that in the written case and in the email when filing the documents with the Court.
After filing, transcript will be ordered by the Court and there will be an opportunity for revision of the written case in conviction matters and exceptionally in sentence matters (*Practice Direction*, pp 8-11).

It is important that the Court is notified promptly whether an applicant wishes to appear in person or by video-court. Video-court is not always reliable, and it is important to have instructions as to whether the applicant consents for the hearing to proceed should the video-link fail.

If the matter proceeds to hearing the Court of Appeal Registry will prepare a "Neutral Summary" and index of materials for the Bench, which will be sent to the parties for any correction of factual errors. The time frame is normally very tight, so it's very important that such correspondence be forwarded to the Counsel immediately.

Some common issues

a. It is important to know the applicant/appellant distinction. An applicant is not an appellant until leave to appeal is granted. Traditionally applications are granted or refused, appeals are allowed or dismissed.
b. The written case and list of authorities should cite reported judgments (CLR, ALJR or ALR, VR, FCR, A Crim R, MVR).

Note the difference between square brackets and round brackets for the year (round brackets mean that you do not need to know the year to identify the relevant volume). For unreported VSCA judgments, note the change in 2010 in format from "*R v Smith"* to "*Smith v The Queen"*.

c. It is important to comply with formatting requirements. There is a 10 page limit for written cases (or seek extension), and the font must be 12 point in the body and 10 point in footnotes, with 1.5 spacing.

d. It is also very important that the written case properly identifies passages of the trial, plea or sentence (with recordings, identify the date and time on the DVD). Where reference is made to transcript, include the date and page and line numbers. Where reference is made to exhibits, include where in the recording or transcript the exhibit was tendered. Often Counsel will not have the transcript of the charge or plea and sentence at the drafting stage, and it can be very time consuming to have to rely on the recording.

e. Ensure the offence and maximum penalty provisions are properly referenced in tabular format (*Practice Direction*, p 5).

f. For sentence applications, provide the summary of prosecution opening and indicate whether or not it was agreed when addressing the factual background of the matter. If it was agreed it must be referenced and provided with the written case instead of repeating it in the factual summary (*Practice Direction*, p 5). That often saves significant space.

g. With regard to grounds of appeal submitting the conviction was "unsafe", the ground must have particulars (*Practice Direction*, p 5). For such grounds a schedule of evidence is required from the respondent (*Practice Direction*, p 12).

h. If verdicts are arguably inconsistent, that should be raised as a discrete ground of appeal, not under an unsafe ground.

i. For sentence applications any "manifest excess" ground must have particulars (*Practice Direction*, p 5).

j. It should not be submitted that the total effective sentence is manifestly excessive – particularise the sentences imposed on the individual charges and/or orders for cumulation and/or the non-parole period that are said to be excessive; *Ludeman & Ors v The Queen*.[389]

k. Do not submit that giving insufficient or excessive *weight* to a matter is a specific error (that the learned sentencing judge erred in failing to give sufficient weight to X). A matter of weight should usually be specified as a particular of manifest excess (*Practice Direction*, p 6).[390]

l. Do not submit that a declaration pursuant to s 6AAA of the *Sentencing Act 1991* (Vic) gives rise to a specific error.[391]

m. It is important to know whether *House v King*[392] principles apply to the application and/or appeal. For example, on an interlocutory appeal against a decision under s 137 of the *Evidence Act 2008* (Vic) (that the probative value of the evidence is outweighed by the danger of unfair prejudice), those principles apply.[393] On full appeal, it is for the Court of Appeal to determine the issue for itself.[394] Decisions under s 138 of the *Evidence Act 2008* (Vic)

[389] (2010) 31 VR 606.
[390] *R v Burke* (2009) 21 VR 471, 477 [31] (Maxwell ACJ, Redlich JA and Vickery AJA); *Saab v The Queen* [2012] VSCA 165, [49]-[60] (Buchanan, Weinberg and Mandie JJA).
[391] *R v Burke* (2009) 21 VR 471, 477 [30] (Maxwell ACJ, Redlich JA and Vickery AJA).
[392] (1936) 55 CLR 499.
[393] *Bray (A Pseudonym) v The Queen* [2014] VSCA 276, [62] (Santamaria JA, with whom Maxwell P and Weinberg JA agreed).
[394] *McCartney v The Queen* (2012) 38 VR 1, 7 [32] (Maxwell P, Neave JA and Coghlan AJA); *Dupas v The Queen* (2012) 40 VR 182, 249 [241] (Warren CJ, Maxwell P, Nettle, Redlich and Bongiorno JJA).

(exclusion of improperly or illegally obtained evidence) are discretionary even on full appeal.[395]

n. Where there is an appeal against the exercise of a discretion, then it is important that grounds are properly pleaded (the learned judge acted on a wrong principle, took into account an extraneous or irrelevant consideration, made a mistake as to the facts, failed to take into account a relevant consideration, or made a decision that was unreasonable or plainly unjust).[396]

Key cases concerning common grounds of appeal

Below we provide references for some common issues that are raised in the Court of Appeal. This may assist to provide a starting point for any research.

Applications/ Appeals Against Conviction

Issue	Case
Unsafe and unsatisfactory verdicts	*M v The Queen* (1994) 181 CLR 487 *MFA v The Queen* (2002) 213 CLR 606 *Libke v The Queen* (2007) 230 CLR 559 *The Queen v Nguyen* (2010) 242 CLR 491 *R v Klamo* (2008) 18 VR 644
Inconsistent verdicts	*Mackenzie v The Queen* (1996) 190 CLR 348 *GAP v The Queen* [2011] VSCA 173 *Aidad v The Queen* (2010) 25 VR 593 *R v JA* [2008] VSCA 169
Substantial miscarriage	*Baini v The Queen* (2012) 246 CLR 469 *Andelman v The Queen* (2013) 38 VR 659
The Jury Directions Act 2013/2015	*Xypolitos v The Queen* (2014) 44 VR 423
Tendency/ Coincidence	*IMM v The Queen* [2016] HCA 14 *Velkoski v The Queen* (2014) 45 VR 680
Hearsay	*Omot v The Queen* [2016] VSCA 24

[395] *WK v The Queen* (2011) 33 VR 516, 527 [44] (Maxwell P).
[396] *House v King* (1936) 55 CLR 499, 507 (Dixon, Evatt and McTiernan JJ).

	Luna (a Pseudonym) v The Queen [2016] VSCA 10
Fresh/ new evidence	*Director of Public Prosecutions (Vic) v Curran* [2012] VSCA 244 Gallagher v R (1986) 160 CLR 392 *R v AHK* [2001] VSCA 220 *R v Nguyen & Tran* [1998] 4 VR 394
Competence of Counsel	*Knowles (a pseudonym) v The Queen* [2015] VSCA 141 *Nudd v The Queen* (2006) 225 ALR 161 *TKWJ v The Queen* (2002) 212 CLR 124 *James v The Queen* (2013) 39 VR 149
Shifting Crown case	*Patel v The Queen* (2012) 247 CLR 531 *R v Falcone* (2008) 190 A Crim R 440

Applications/Appeals Against Sentence

Issue	**Case**
Manifest excess	*McPhee v The Queen [2014] VSCA 156* *Formosa v The Queen* (2012) 36 VR 679 *R v MacNeil-Brown* (2008) 20 VR 677
Fact finding	*R v Olbrich* (1999) 199 CLR 270 *R v Storey* [1998] 1 VR 359
Parity	*Teng v The Queen* (2009) 22 VR 706 *Nguyen v The Queen* [2010] VSCA 180 *Lowe v The Queen* (1984) 154 CLR 606
Procedural fairness	*Portelli v The Queen* [2015] VSCA 159 **R v Lowe [2009] VSCA 268** *Ucar v Nylex Industrial Products Pty Ltd* (2007) 17 VR 492 *R v Duong* (1998) 4 VR 68
Raising new issues on appeal	*Romero v The Queen* (2011) 32 VR 486
Impaired mental functioning/ disability	*DPP v O'Neill* [2015] VSCA 325 *Muldrock v The Queen* (2011) 244 CLR 120 *Tran v The Queen* (2012) 35 VR 484 *R v Verdins* (2007) 16 VR 269

Plea of Guilty/ Remorse	*Phillips v The Queen* (2012) 222 A Crim R 149 *Barbaro v The Queen; Zirilli v The Queen* (2012) 226 A Crim R 354
Fresh/ new evidence	*R v Nguyen* [2006] VSCA 184 *Spijodc v The Queen* (2014) 68 MVR 269 *Babic v The Queen* [1998] 2 VR 79
Totality	*Postiglione v The Queen* (1997) 189 CLR 295 *R v Piacentino* (2007) 15 VR 501
Proportionality	*Veen v R (No 2)* (1988) 164 CLR 465
Sentencing practices	*Hili v The Queen* (2010) 242 CLR 520 *Hasan v The Queen* (2010) 31 VR 28 *Stalio v The Queen* (2012) 223 A Crim R 261 *Russell v The Queen* (2011) 212 A Crim R 57
Cumulation	*R H McL v The Queen* (2000) 203 CLR 452
Burden of Imprisonment	*R v Van Boxtel* (2005) 11 VR 258
CCOs/Parsimony	*Hutchinson v The Queen* (2015) 71 MVR 8 *Boulton & Ors v The Queen* [2014] VSCA 342 *Atanackovic v The Queen* (2015) 45 VR 179
PSD	*R v Renzella* [1997] 2 VR 88

Crown Appeals

Issue	**Cases**
Crown appeal/ residual discretion	*DPP v Karazisis & Ors* (2010) 31 VR 634 *DPP v Hill* (2012) 223 A Crim R 285 *DPP (Cth) v Hizhnikov* (2008) 192 A Crim R 69
Does the sentence need to be manifestly inadequate?	**DPP v Ghazi (2015) 45 VR 852** *DPP v Bulfin* [1998] 4 VR 114

The need for an oral hearing

The general presumption is that applications for leave should be determined on the papers by a single judge without an oral hearing (*Practice Direction*, p 14). Victoria Legal Aid only funds such a hearing in exceptional circumstances, and at a rate that is entirely incommensurate with the work involved.

The test for granting leave to appeal is whether a ground of appeal is reasonably arguable. Note that for sentence applications, if it is not reasonably arguable that the Court of Appeal would reduce the *total effective sentence*, then leave to appeal must be refused (*CPA*, s 280(1)(b)).

As noted above, the applicant has a right to renew a refused application, although the Court now often requires short submissions addressing the reasons of the single judge.

In *Sadrani v The Queen*,[397] the Court of Appeal observed that while an election hearing is *de novo*, the reasons of the single judge refusing leave will always be relevant, and as a matter of practicality "…an applicant who renews an application for leave will need to be able to identify some quite significant matter which has either been misunderstood or misinterpreted or overlooked by the leave judge".

A refusal of leave will often have consequences with regard to the obtaining of a grant of legal assistance from Victoria Legal Aid.

[397] [2015] VSCA 202, [7] (Maxwell P, with whom Whelan JA agreed).

There are some circumstances in which an oral hearing should be sought. Often when an oral hearing is sought the Court will list the matter before two or three judges so that the appeal can be determined immediately should leave be granted.

Establishing error, its consequences, and new material

Establishing error is not enough – that is only one step towards a successful appeal.

For conviction matters, an applicant/appellant needs to address s 276 of the *CPA*. For grounds that allege something short of the verdict(s) of the jury being unsafe, that means establishing that there has been a *substantial* miscarriage of justice; *Baini v The Queen*,[398] and *Andelman v The Queen*.[399] A relevant, but not determinative, question is whether the conviction was inevitable notwithstanding the error. There are some errors that are so foundational (going to the root of the trial) that the Court of Appeal will allow the appeal even if the evidence means that a conviction was inevitable.

The Court can enter a judgment of acquittal or order a retrial (*CPA*, s 277(1)(a) and (b)). Further, the Court has the power to substitute verdicts or order a retrial for a lesser charge (*CPA*, s 277(1)(c) and (d)).

For sentence matters, the Court needs to be satisfied that a different sentence *should* be imposed (*CPA*, ss 280, 281). If the error is only in relation to an individual sentence that would not affect the total effective sentence (for example because of orders for complete concurrency), or the Court determines that notwithstanding the error no different sentence should be

[398] (2012) 246 CLR 469.
[399] (2013) 38 VR 659.

imposed (for example because the sentence was merciful), then leave to appeal will be refused or the appeal will be dismissed.
If the Court is minded to increase the sentence it must give a warning (*CPA*, s 281(3)). Counsel should ensure that he or she has instructions if that arises. Conventionally, in such a case an applicant/appellant will be granted leave to abandon.

If a vitiating (not immaterial) error is established, the Court of Appeal can have regard to new material in determining whether a different sentence should be imposed; *Kentwell v The Queen*.[400] That can be vital, particularly if the client has done well in custody or there are other relevant matters that have occurred subsequent to sentencing, and such material should be prepared and placed before the Court in the proper form (usually by affidavit).

Judgment

Where there is been an oral hearing, the Court of Appeal may give judgment on the day of the hearing (*ex tempore*) or reserve and give judgment on a later date. The process is swift, with result announced, the reasons published (usually without any oral exposition unless it is an exceptional case) and the relevant orders being made.

It is important to be aware of the pre-sentence detention ("PSD") that the applicant/appellant/respondent is eligible to receive in case he or she is re-sentenced. If the matter has been adjourned and then listed for judgment, the PSD should be agreed between the parties at Court before the matter is called on.[401] Often the Court will ask for the PSD figure and whether it is

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[400] (2014) 252 CLR 601.
[401] To that end, the online date duration calendar is a handy tool: <http://www.timeanddate.com/date/duration.html>.

agreed. It should be made clear whether or not the day of the judgment is included.

It is also important to be aware whether the client is eligible for an indemnity certificate under the *Appeal Costs Act* 1998 (Vic). Often the Court will make such an order without express application by the appellant/respondent, but sometimes that does not occur and so an oral application needs to be made.

As a general rule, a person is entitled to an indemnity certificate for the cost of the appeal and retrial on a successful appeal against conviction (s 14), for the cost of responding to a Crown appeal against sentence (State not Commonwealth) whether or not the Crown appeal is successful (s 15), and for the cost of an interlocutory appeal by the prosecution (s 15B). A person is not entitled to recover the costs of an appeal against sentence, even if successful.