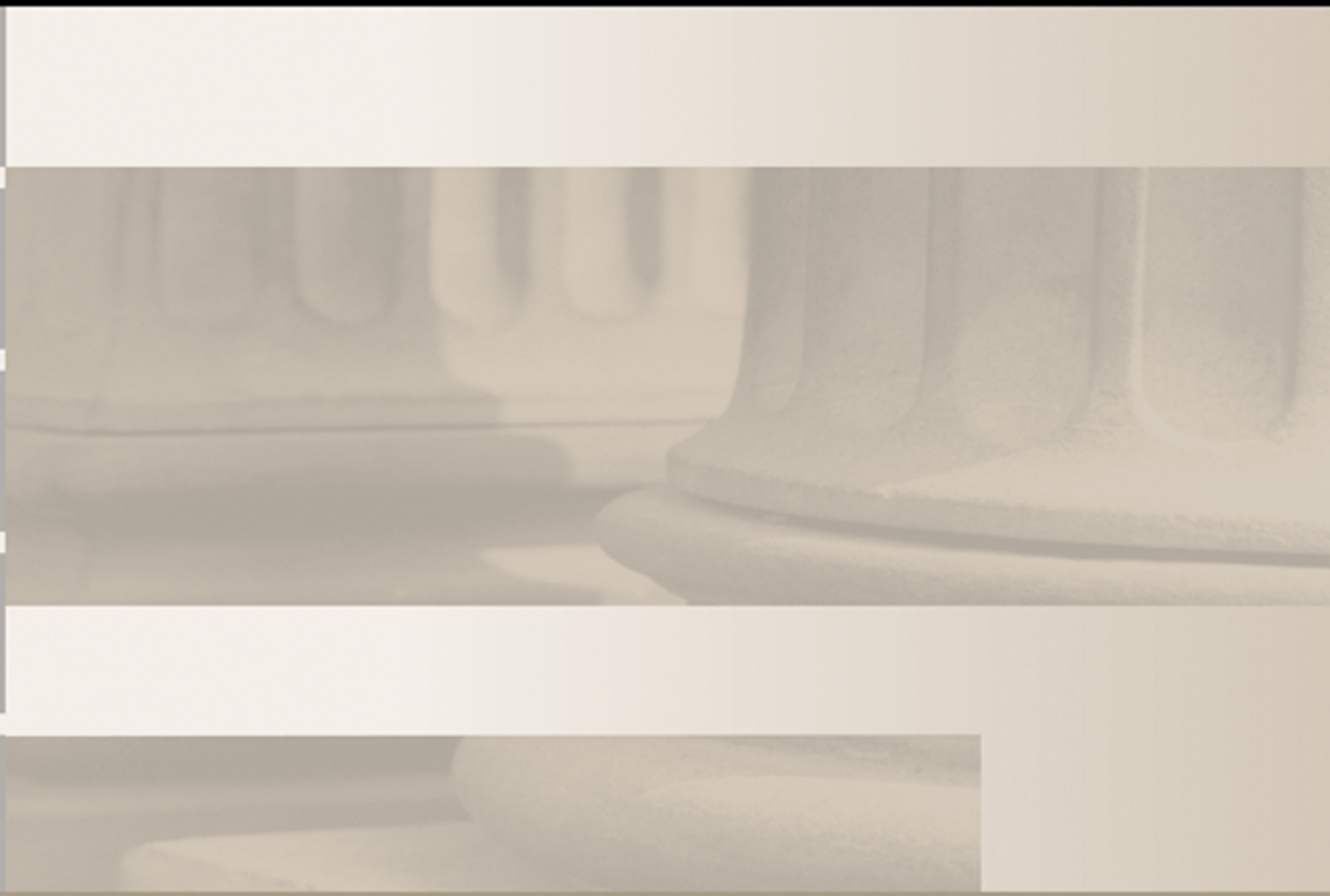
Local Court Bench Book



Judicial Commission of New South Wales

Local Court Bench Book

Judicial Commission of New South Wales

Published in Sydney by —

Judicial Commission of New South Wales
Level 5, 60 Carrington Street
Sydney NSW 2000

GPO Box 3634
Sydney NSW 2001
www.judcom.nsw.gov.au

ISBN 978-0-7313-5624-9

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Currency

Update 151, March 2024

Update 151 amends the Bench Book to update and revise various chapters and incorporate recent case law and legislative developments. The following chapters have been revised:

Specific penalties and orders has been updated as follows: the maximum fine for a Table 2 offence listed in the SPO chapter, not specified in s 268(2) of the *Criminal Procedure Act* 1986, has been amended to 50 penalty units following the insertion of s 268(2)(h) by the *Crime and Criminal Procedure Legislation Amendment Act* 2024.

Sexual offences

- **[5-000] Directions** updated to include further cross-references to *Criminal Trial Courts Bench Book*.

Domestic violence offences

- New Chapter **Domestic violence offences** at **[5-500]**ff added. This Chapter includes commentary on the new offence of abusive behaviour towards intimate partners created by the *Crimes Legislation Amendment (Coercive Control) Act* 2022 (commencing between 1 February 2024 and 1 July 2024) and cross-references to other relevant resources.

Interpreters

- **[14-180] Guidelines for magistrates/judges on working with interpreters in court** revised and updated.

Apprehended violence orders

- **[22-060] Interim and provisional orders** updated to incorporate amendments made by *Crime and Criminal Procedure Legislation Amendment Act* 2024 to ss 29 and 32 of the *Crimes (Domestic and Personal Violence) Act* 2007.

The **Index**, **Table of Cases** and **Table of Statutes** have been updated to Update 151.

Update 150, December 2023

Specific penalties and orders has been updated to incorporate:

- **Crimes Act 1900** amendments:
  (a) *Criminal Legislation Amendment (Knife Crimes) Act* 2023 (No 12) to include new offences ss 93IB (Custody of knives in public places or schools) and 93IC (Using or carrying knives in public places or schools) replacing repealed offences in the *Summary Offences Act* 1988, ss 11C, 11E
  (b) *Voluntary Assisted Dying Act* 2022 (No 17) to include new offences ss 41C (Inducing another person to request or access voluntary assisted dying), and 41E (Advertising Sch 4 or 8 poison as voluntary assisted dying substance)
  (c) *Crimes Amendment (Corrupt Benefits for Trustees) Act* 2023 (No 21) amends s 249E to remove the requirement that proceedings are not to be commenced without consent of Attorney General,
- **Protection of the Environment Operations Act 1997** to include the Local Court may make additional orders on sentence under s 250(1)(a), (b), (f), (g) relating to publicising the offence or undergoing training.

[4-000] Defended hearings is revised at [4-060] to incorporate *Darlington v DPP* [2023] NSWSC 1139 where the magistrate failed to give adequate reasons and made no real attempt to deal with the accused's arguments.

[20-000] Bail is revised at [20-300] to remove repealed knife offences under ss 11C and 11E *Summary Offences Act* 1988 by the *Criminal Legislation Amendment (Knife Crimes) Act* 2023. The table of bail conditions that can be imposed is revised at [20-360] to include the accompaniment requirement (a form of pre-release requirement) under the new s 28A *Bail Act* 2013.

[28-000] Committal proceedings incorporates:

- *Belkheir v DPP* [2023] NSWSC 1233 regarding whether a brief of evidence is "complete" or "compliant" at [28-080]; and service of a charge certificate at [28-100]
- *Tuxford v DPP* [2023] NSWSC 1300 regarding failure to ascertain a plaintiff's plea at [28-160].

[40-000] Children's Court — Care and Protection Jurisdiction has been amended by *Children and Young Persons (Care and Protection) Amendment (Family is Culture) Act* 2022 parts of which were proclaimed on 15 November 2023 and applies to care applications made on or after that date. Amendments incorporate changes in relation to:

- principle of making "active efforts" under s 9A at [40-000]
- additional requirements for permanency plans for Aboriginal and Torres Strait Islander children and young persons under s 83A at [40-000]
- evidence of active efforts to take alternative action under s 63 at [40-020]
- care plans for an Aboriginal or Torres Strait Islander child or young person under s 78(2A) at [40-080]
- providing reasons under s 83(3A) why there is no realistic possibility of restoration within a reasonable period, and details of active efforts made to restore at [40-080]
- permanency planning and Aboriginal and Torres Strait Islander considerations under s 83A at [40-080], and
- special circumstances that warrant allocation of parental responsibilities to Minister for more than 24 months under s 79AA at [40-100].

[52-000] Review and appeals incorporates *Darlington v DPP* [2023] NSWSC 1139 and *Selkirk v DPP* [2020] NSWSC 1590 at [52-040] which held that appeals to the Supreme Court against a conviction include a finding of guilt without formal order of conviction.

[70-000] Legal Profession Uniform Conduct Rules includes links to:

- Legal Profession Uniform Conduct (Barristers) Rules 2015,
- Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

[74-000] Local Court Practice Notes Practice Note Specialist Family Violence List Pilot has been included. It applies to family violence related proceedings listed at the pilot locations (Sydney Downing Centre, Blacktown, Newcastle, Gunnedah circuit (excluding Tamworth), and Moree circuit) for offences commenced on or after 25 September 2023.

The **Index**, **Table of Cases** and **Table of Statutes** have been updated to Update 150.

Foreword

The *Local Court Bench Book* is a comprehensive guide for magistrates for the conduct of civil and criminal practice and procedure in the Local Court of New South Wales. The members of the Local Court Bench Book Subcommittee and Judicial Commission of New South Wales staff who produced the work, and who have kept it up to date, are to be congratulated.

Previous editions of the *Bench Book* were available only to magistrates. To coincide with the commencement of the *Local Court Act* 2007 on 6 July 2009, which established the Local Court as a single constituted court sitting at 153 locations across the State, it was decided to make the *Bench Book* more widely available. It is hoped that this will further enhance the contribution of the Bench Book to the efficient administration of justice in New South Wales. The Local Court of New South Wales is the largest and busiest court in Australia and finalises 96 per cent all criminal matters and 90 per cent of all civil matters within New South Wales.

The Judicial Commission has always welcomed criticism and suggestions from magistrates about the contents of the *Bench Book*. Now that the *Bench Book* will be more widely available, the invitation to make suggestions and advance criticisms is extended to the broader legal community, with the hope that this will ensure the maintenance of a *Bench Book* of the highest quality and authority over the long term. It is appropriate to reiterate that the *Bench Book* does not contain an authoritative statement of the law.

His Honour Peter Johnstone
Chief Magistrate
2021

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Comments and Contacts

The *Local Court Bench Book* has been designed to assist magistrates to conduct proceedings in the Local Court of New South Wales. The material has been developed under the direction of the Local Court Bench Book Subcommittee as part of the Local Court Education Committee.

The *Local Court Bench Book* will be progressively updated in accordance with legislative changes and court decisions.

Although considerable care has been taken in the preparation of these materials, the content should not be regarded as a substitute for the actual text of legislation or court decisions.

As we wish to produce materials which are of benefit to judicial officers, the Judicial Commission welcomes any criticisms or suggestions as to the form or content of the *Local Court Bench Book*. We encourage you to contact us should any errors or omissions be found —

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Introduction

Note: Some of the tables of maximum penalties are populated using Lawcodes data. For more information, see **Changes to Specific Penalties and Orders** at the end of this introduction.

The **Specific Penalties and Orders** chapter is only available in html. For the html version, please click here.

The purpose of this section is to set out the most common offences dealt with, and orders made by, the Local Court under NSW Acts and regulations.

There are two types of offences dealt with in the Local Court — summary offences and indictable offences dealt with summarily.

The maximum penalties that the Local Court may impose for these offences under particular Acts and regulations are set out in the penalties tables below. A number of Acts contain provisions that set maximum penalties that may be imposed by the Local Court. Where as a consequence of the application of such a provision, a penalty is lower than that provided for under the particular offence provision, an asterisk appears next to the penalty and there is a reference to the limiting provision below the penalties table.

The distinction between the maximum penalty for an offence and the jurisdictional limit of the Local Court for a particular offence is important when the court is dealing with an indictable offence summarily. An appropriate sentence, taking into account any discount for the guilty plea, assistance etc, is to be assessed by reference to the maximum penalty for the offence. The relevant jurisdictional limit is applied after the appropriate sentence for the offence has been determined: *Park v The Queen* (2021) 273 CLR 303 at [2], [19]–[23]; see also *Park v R* [2020] NSWCCA 90 at [22]–[35]; [182]; *R v Doan* (2000) 50 NSWLR 115 at [35].

Indictable offences

Subject to any law or practice that provides for an indictable offence to be dealt with summarily, indictable offences are punishable by information (an indictment) in the Supreme Court or the District Court, on behalf of the Crown, in the name of the Attorney General or the Director of Public Prosecutions: s 8 *Criminal Procedure Act* 1986 (CP Act).

Where the penalty for an indictable offence is a term of imprisonment only, a court may impose a fine not exceeding 1000 pu on an offender whom it convicts on indictment and the fine may be imposed in addition to, or instead of, any other penalty that may be imposed for the offence: s 15(2), (3) *Crimes (Sentencing Procedure) Act* 1999.

In many instances, indictable offences may be dealt with summarily. For the purposes of comparison, in a number of the penalties tables below the maximum penalties for offences dealt with on indictment have been included in square brackets below the maximum penalty for those offences which may be dealt with summarily.

Summary offences

A summary offence is an offence that is not an indictable offence: s 3 CP Act. Subject to a contrary provision, an offence that is permitted or required to be dealt with summarily is to be dealt with by the Local Court: s 7(1).

The following offences must be dealt with summarily (s 6):

- an offence that under this or any other Act is required to be dealt with summarily
- an offence that under this or any other Act is described as a summary offence
- an offence for which the maximum penalty that may be imposed is not, and does not include, imprisonment for more than 2 years, excluding the following offences:
  - an offence that under any other Act is required or permitted to be dealt with on indictment
  - an offence listed in Table 1 or 2 to Sch 1.

Time limit

Subject to the provisions of any other Act which specify another period within which proceedings for summary offences may be instituted, such proceedings must be commenced not later than 6 months from when the offence was alleged to have been committed: s 179 CP Act.

Indictable offences dealt with summarily

Chapter 5 CP Act requires that the indictable offences listed in Tables 1 and 2 of Sch 1 CP Act be dealt with summarily by the Local Court unless:

- in the case of Table 1 offences — the prosecuting authority or person charged elects to have the offence dealt with on indictment
- in the case of Table 2 offences — the prosecuting authority elects to have the offence dealt with on indictment: s 260 CP Act.

Section 259 CP Act provides that all the offences listed in Tables 1 and 2 are indictable offences, subject to the provisions in Ch 5.

Time limit

There is no time limit for offences dealt with summarily under Ch 5: s 270 CP Act.

Table 1 offences

Section 267 CP Act prescribes the maximum penalty that may be imposed for an indictable offence listed in Table 1 dealt with summarily under Ch 5 in any case where the maximum penalty (when the offence is dealt with summarily) is not provided for:

- the maximum term of imprisonment is 2 years or the maximum term provided by law for the specific offence, whichever is the shorter term: s 267(2)
- the maximum fine is 100 pu or the maximum fine provided by law for the specific offence, whichever is the smaller fine: s 267(3)
- instead of imposing a term of imprisonment, the Local Court may impose a fine not exceeding 100 pu for a Table 1 offence in any case where a fine is not otherwise provided by law for the offence: s 267(5)
- any option provided by law to impose a term of imprisonment, or a fine, or both continues to apply: s 267(6).

The maximum penalty the Local Court may impose for:

- attempting to commit an offence
- being an accessory before or after the act

- aiding, abetting, counselling or procuring the commission of an offence that is a misdemeanour
- conspiring to commit an offence
- inciting the commission of an offence

is the same as the Local Court may impose for the offence concerned: s 267(4B) CP Act.

Table 1 offences are included in the penalties tables below.

Table 2 offences

Section 268 prescribes the maximum penalty that may be imposed for an indictable offence listed in Table 2 dealt with summarily under Ch 5 in any case where the maximum penalty (when the offence is dealt with summarily) is not provided by law:

- the maximum term of imprisonment is, subject to this section, 2 years or the maximum term of imprisonment provided by law for the offence, whichever is the shorter term: s 268(1A)
- maximum fines which the Local Court may impose for a range of offences under particular Acts are set out: s 268(2)
- a fine may be imposed as referred to in s 268(2) for an offence in addition to or instead of any term of imprisonment that may be imposed by law for the offence: s 268(2A).

The maximum penalty the Local Court may impose for:

- attempting to commit an offence
- being an accessory before or after the act
- aiding, abetting, counselling or procuring the commission of an offence that is a misdemeanour
- conspiring to commit an offence
- inciting the commission of an offence

is the same as the Local Court may impose for the offence concerned: s 268(2A) CP Act.

Table 2 offences are indicated in the penalties tables below under the relevant provision.

Changes to Specific Penalties and Orders

Lawcodes will be utilised to generate penalties in the Specific Penalties and Orders tables for all Acts except the ones listed at the end of this notice.

The Lawcodes database provides unique codes for all NSW offences and Commonwealth offences dealt with in NSW, recording their respective maximum penalties, and is maintained by the Judicial Commission of NSW. The provision and use of these codes enables NSW justice sector agencies to exchange information and improve the integrity of information about offences.

This change will result in efficiencies to the currency of the penalties, as they will be automatically updated at the same time as the legislation in Lawcodes. Further, the sentencing statistics for each offence (if available) can be viewed by clicking on highlighted penalties in the tables. These statistics are updated each quarter and may provide useful information when sentencing.

Higher court penalties are generally displayed in a separate column to clarify the different penalties between the Local Court and the higher courts (or are indicated in square brackets) where applicable. The tables will continue to have a column specifying whether the offence is a Table 1 or Table 2 offence.

The sentencing statistics on JIRS will be used to generate the offence description in the tables which will result in more concise descriptions. The links to the legislation will remain in the event more in-depth information regarding the provision is needed.

- Crimes Act 1900
- Child Protection (Offenders Prohibition Orders) Regulation 2018
- Drug Misuse and Trafficking Act 1985
- Explosives Regulation 2013
- Firearms Regulation 2017
- Law Enforcement Conduct Commission Act 2016
- Mandatory Disease Testing Act 2021
- Pawnbrokers and Second-hand Dealers Regulation 2021
- Poppy Industry Act 2016
- Rail Safety (Adoption of National Law) Regulation 2018
- Rural Fires Regulation 2022
- Security Industry Regulation 2016
- Workplace Surveillance Act 2005.

Road transport legislation

[2-000] Road Transport Act 2013 No 18: some key provisions

Currency

As amended to *Road Transport Amendment (Demerit Point Reduction Trial) Act* 2023 (No 14). Commenced 11 August 2023. Current to 11 August 2023.

Jurisdiction

Section 200(1): Proceedings for an offence against the road transport legislation are to be dealt with summarily before the Local Court or the Supreme Court in its summary jurisdiction.

Section 200(2): The maximum monetary penalty that may be imposed by the Local Court for an offence against a provision of the road transport legislation is 100 pu or the maximum monetary penalty provided for the offence (whichever is less). However, for an offence against s 188(1) or (2), or s 189(4) (failing to nominate or verify, or falsely nominating, person in charge of vehicle for camera recorded offence), the maximum monetary penalty is 200 pu or the maximum monetary penalty provided for the offence (whichever is less): s 200(3).

Time to commence proceedings

Section 202(1), and cl 165 of the *Road Transport (General) Regulation* 2021, indicate the offences which, notwithstanding the *Criminal Procedure Act* 1986 or any other Act, may be commenced no later than two years after the date the offence was alleged to be committed. This provision only applies to an offence alleged to have been committed after 27 October 2020: Sch 4, Pt 10(5).

Definition of "road transport legislation"

Section 6 provides:

(1) In this Act, "**road transport legislation**" means the following:
  (a) this Act and the statutory rules,
  (b) (Repealed),
  (c) the *Motor Vehicles Taxation Act* 1988 and the regulations under that Act,
  (d) any other Act or statutory rule made under any other Act (or any provision of such an Act or statutory rule) prescribed by the statutory rules,

Road Rules 2014

All offences under the rules carry a maximum pecuniary penalty of 20 pu except for the following:

- Rule 10–2(3): "Exceed speed by more than 45 kmh" — maximum pecuniary penalty: 50 pu for a heavy motor vehicle or coach; 30 pu in any other case [see r 10-2(1) for the definition of a heavy motor vehicle. "Coach" is defined in s 4];
- Rule 102(1): "Drive past *clearance sign* or *low clearance sign* if the vehicle or a connected vehicle is higher than the height indicated by the sign" — maximum pecuniary penalty 34 pu;
- Rule 104(2): "A driver (except the driver of a bus) must not drive past a *no trucks sign* indicating a length if the length of the driver's vehicle (or the total of a combination) is longer than that length unless permitted to do so under another law of this jurisdiction" — maximum pecuniary penalty 34 pu; and
- Rule 106(2): "The driver of a bus must not drive past a *no buses sign* indicating a length if the bus is longer than that length" — maximum pecuniary penalty 34 pu.

Definition of "major offence"

Section 4(1) provides:

> ***major offence*** means any of the following crimes or offences:
>
> (a) an offence by a person (the offender), in respect of the death of or bodily harm to another person caused by or arising out of the use of motor vehicle driven by the offender at the time of the occurrence out of which the death of or harm to the other person arose, for which the offender is convicted of:
>
> (i) the crime of murder or manslaughter, or
>
> (ii) an offence against ss 33, 35, 53 or 54 or any other provision of the *Crimes Act* 1900,
>
> (b) an offence against section 51A, 51B or 52AB *Crimes Act* 1900
>
> (c) an offence against section 110(1), (2), (3)(a) or (b), (4)(a) or (b) or (5)(a) or (b),
>
> (d) an offence against section 111, 112(1)(a) or (b), 117(2), 118 or 146,
>
> (d1) a combined alcohol and drug driving offence against s 111A(1), (2) or (3),
>
> (e) an offence against section 117(1) of driving a motor vehicle negligently (being driving occasioning death or grievous bodily harm),
>
> (f) an offence against cl 16(1)(b), 17 or 18, of Sch 3,
>
> (g) an offence of aiding, abetting, counselling or procuring the commission of, or being an accessory before the fact to, any crime or offence referred to in paragraph (a)–(f),
>
> (h) any other crime or offence, that, at the time it was committed, was a major offence for the purposes of this Act, the *Road Transport (General) Act* 2005, the *Road Transport (General) Act* 1999 or the *Traffic Act* 1909.

Disqualifications

Under s 204(1) a court that convicts a person of an offence against the road transport legislation may, at the time of conviction, order the disqualification of the person from holding a driver licence for such period as the court specifies. Section 204 is subject to any provisions for the imposition of minimum or mandatory disqualifications under the Act: s 204(3A). In determining a disqualification period, the court is to consider whether or not to vary an automatic disqualification period in accordance with the relevant provisions. Not doing so is a failure to exercise jurisdiction: *Pearce v R* [2022] NSWCCA 68 at [56]–[57] in respect of s 205(3)(d)(ii).

Automatic disqualifications for prescribed concentration of alcohol ("PCA") and other major driving offences are provided for in s 205.

Section 205A sets out the disqualification periods for particular offences of driving while disqualified, cancelled or suspended, or unlicensed driving in ss 53 and 54 including for disqualified driving offences arising from the non-payment of fines. None of these are "major offences" under the Act.

Mandatory disqualifications for speeding offences are dealt with in the Road Rules 2014 including offences involving speeds of more than 45 kms and 30 kms per hour over the limit: r 10-2(3), (5).

A second or later consecutive disqualification period is brought forward if an earlier disqualification period is annulled, quashed, set aside or varied so that there is no hiatus period: s 206.

Where a driver licence has been suspended, the court is required to take into account the period of suspension when deciding the period of disqualification: s 206B(2); see **Police suspension of driver licence — ss 224 and 206B**, below.

A disqualification to hold a driver licence in another Australian jurisdiction operates as a disqualification in NSW: s 207(2).

A disqualification period commences on the date of conviction unless the court orders a later date: s 207A.

Note: This means disqualification periods for a number of offences are not cumulative unless ordered by the court. The Second Reading Speech for the *Road Transport Amendment (Driver Licence Disqualification) Act* 2017 which introduced this amendment provides that this will "provide for multiple disqualifications … to operate concurrently … unless otherwise ordered".

Disqualification for certain offences where sentence of full-time imprisonment imposed

Section 206A applies to an offender who is disqualified from holding a driver licence and is sentenced to full-time imprisonment for:

- a major offence
- a road racing offence under ss 115 or 116(2).

Under s 206A, unless the court orders otherwise, when an offender is sentenced to imprisonment for a "major disqualification offence" the relevant period of licence disqualification (whether an automatic disqualification period or some other disqualification period ordered by the court) is extended by the period of imprisonment served for that offence after the commencement of the disqualification, so that in effect the offender is subject to the period of licence disqualification upon release. If a "major disqualification offence" is one of a number of offences dealt with by imposing an aggregate sentence, the sentence for the purpose of determining the period by which the disqualification is extended is the aggregate sentence: *Gray v R* [2018] NSWCCA 39 at [43]–[44].

The section operates automatically. Accordingly there is no need to pronounce a commencement date for the disqualification period.

Police suspension of driver licence — ss 224 and 206B

Where a notice of suspension by police has issued under s 224, the court must take into account the period of suspension when deciding whether to make any order under s 206B(2). Section s 206B(4) provides that the period of suspension together with the period of disqualification can be taken together to satisfy all or part of any mandatory minimum period of disqualification required to be imposed on conviction. Therefore, when varying an automatic disqualification period, the period of suspension must be counted towards any disqualification imposed: *Pearce v R*, above, at [55]; see also s 206B(2), (4).

Also see Road Rules 2014, r 10-2(4), (5A) for taking a suspension into account when imposing a disqualification for speeding offences >30kms/hr and >45kms/hr.

Appeal to Local Court against suspension of driver's licence by police officer

Section 224 provides that a police officer may suspend immediately, or within 48 hours, the driver's licence of a defendant charged with specified offences.

The driver may appeal to the Local Court: ss 266, 267. However, lodging an appeal against such a notice does not stay the suspension: s 63(2A) *Crimes (Appeal and Review) Act* 2001.

The Local Court may hear and determine the appeal and may vary or revoke the suspension. Section 268(5) provides that in determining such an appeal, the Local Court is not to vary or set aside such a suspension unless it is satisfied that there are exceptional circumstances justifying a lifting or variation of the suspension. The court is not, for the purposes of any such appeal, to take into account the circumstances of the offence with which the driver is charged.

Note: Section 207(3) requires the disqualified person to surrender his/her licence to the court if in his/her immediate possession, or to Transport for NSW as soon as practicable. The court should direct the surrender, or notify the defendant of his/her obligation. It should also be made clear to him/her that a new licence must be applied for before he/she drives again at the expiry of the disqualification period as the disqualification operates to cancel permanently any driver licence held by the person.

Limitations on use of s 10 *Crimes (Sentencing Procedure) Act* 1999 — s 203

Section 10 *Crimes (Sentencing Procedure) Act* is *not available* to a defendant for an "applicable offence" if, at the time of or during the 5 years before the court's determination, a previous s 10 has been applied in relation to another "applicable offence". Applicable offences are set out in s 203(2) and include:

- certain drink/drug driving offences
- furious, reckless or menacing driving (s 117(2) or s 118)
- offences of failing to stop and assist (s 146 or s 52AB *Crimes Act* 1900)
- an offence of negligent driving causing death or GBH.

Multiple major offence convictions

Section 205(4) — where multiple major offences arise out of the one incident, to determine whether the conviction is a first or second conviction, the other conviction(s) shall be disregarded and the maximum automatic disqualification in respect of all offences shall be 3 years for a first conviction and 5 years for a second conviction. The court may determine a longer period or a shorter period of not less than 12 months and 2 years respectively.

Section 205(4A) — where multiple major offences arise out of the one incident and include a combined alcohol and drug driving offence under s 111A(1), (2) or (3), to determine whether the conviction is a first or second conviction, the other conviction(s) shall be disregarded and the maximum automatic disqualification in respect of all offences shall be 4 years for a first conviction and 6 years for a second conviction. The court may determine a longer period or a shorter period of not less than 18 months and 3 years respectively.

In making this determination, alcohol or other drug related driving offences dealt with by way of penalty notice are included: s 9(2A).

Habitual traffic offender may apply to have declaration quashed

Part 7.4, Div 3 concerning habitual traffic offenders was repealed with effect from 28 October 2017.

However, a person declared to be a habitual traffic offender under s 217 (rep) before the scheme was abolished may apply to have that declaration quashed. Section 220 as in force immediately before 28 October 2017 continues to apply (set out below). The Local Court may determine the application even if it was not the court that convicted the person of the relevant offence: Sch 4, cl 65(2A).

A declaration that a person is an habitual traffic offender may be quashed if the court determines the disqualification imposed is a disproportionate and unjust consequence having regard to the person's total driving record and the special circumstances of the case: s 220(1).

If the declaration is quashed, the court must give reasons: s 220(2).

Removal of licence disqualifications

An eligible person subject to a licence disqualification may apply to the Local Court to have their driver licence disqualification removed provided they have been offence free for the specified period (s 221B) (and are otherwise eligible):

Convictions for (see s 221A)	Offence free period
Major offence (defined in s 4) Exceed speed >30kmh Road racing offence ss 115(1), 116(2) Negligent, furious or reckless driving s 117(2), or Any other offence prescribed by the rules	4 years
Habitual offender	2 years
All other cases	2 years

The "offence-free period"

The "offence-free period" is calculated by reference to the date a relevant offence was committed, as opposed to the date of conviction: s 221A(2).

Persons convicted of certain offences ineligible to apply

Certain persons are ineligible to apply for the removal of licence disqualifications, including if *at any time* they have been convicted of a "never-eligible offence" under the Act or the *Crimes Act* 1900 as defined in s 221A: see s 221D.

Content of application

The application must include:

- an up-to-date statement of the applicant's driving record
- particulars of any pending proceedings against the applicant for an alleged driving offence, and
- any relevant matter the applicant requests the court to take into account in determining the application: s 221C(2).

To ensure the accuracy and currency of information available to determine the application, the court may require reports be provided in relation to the applicant or that earlier reports be updated including:

- police reports with respect to the applicant's criminal record
- reports from RMS with respect to the applicant's driving record, and
- reports from the Commissioner of Fines Administration with respect to any penalty notices that are pending proceedings against the applicant for alleged driving offences: s 221C(3).

Note: There will be *no contradictor* in these applications.

Determining an application

Section 221B(1) provides that the court may order the removal of licence disqualifications if the following 2 conditions are met:

(a) the disqualified person has not been convicted of any driving offence during the relevant offence-free period: s 221B(1)(a), and

(b) the court considers it appropriate to do so: s 221B(1)(a).

In addition, given the limitations provided by s 221D, before exercising the s 221B power, the court must be satisfied the applicant was entitled to make the application: *Roads and Maritime Services v Farrell* [2019] NSWSC 552 at [14].

When considering whether it is appropriate to grant such an application the following must be taken into account: see s 221B(2):

(a) public safety

(b) the applicant's driving record (including the record before the relevant offence-free period and the record for driving offences and other offences under the road transport legislation and for pending proceedings for alleged driving offences) [*reports from police, RMS and State Revenue should be provided to the court on the first listing date to assist with establishing this requirement: s 221C(2)*]

(c) whether the applicant drove or was in a position to drive a vehicle during the relevant offence-free period

(d) any relevant conduct of the applicant subsequent to the licence disqualifications

(e) the nature of the offence or offences giving rise to the licence disqualifications

(f) any other relevant circumstances (including, without limitation, the impact of the licence disqualifications on the applicant's capacity to carry out family or carer responsibilities or on the applicant's capacity to travel for the purposes of employment, business, education or training, the applicant's health and finances and the availability of alternative forms of transport)

(g) any other matter prescribed by the statutory rules.

Effect of order granting application

If the application is granted all disqualifications cease to have effect as at the date of making the order, or on a later date as specified by the court: s 221B(4).

Note: the court must be satisfied the information relating to the applicant's driving record is as current as practicable: s 221B(3).

Note: magistrates must explain the effect of the order and, in particular, that the applicant must apply for a new driver's licence before driving: s 221B(5).

Requirement for reasons

The court must provide reasons for the orders made. The reasons may be short but must:

- explain the basis for satisfaction that the court has jurisdiction to entertain the application, given what is provided in s 221D,
- reveal that the mandatory considerations under s 221B(2) have been considered in light of the evidence, and
- explain why the court's discretion to grant (or not grant) the application has been exercised in the circumstances: *Roads and Maritime Services v Farrell* [2019] NSWSC 552 at [32]–[33].

Other provisions relevant to conduct of applications

The court may adjourn proceedings so the applicant may participate in a driver education course or other program the court considers appropriate: s 221B(7).

An applicant for the removal of a licence disqualification may apply for the annulment of the dismissal of the application if they were not in attendance when the application was dismissed: s 221B(9). The procedure to be followed when an annulment application is made in these circumstances is set out in s 221B(10).

The procedure to be followed for rehearing an application where the court is advised by Transport for NSW that a person may have committed an offence during the relevant offence-free period, or a "never-eligible offence", which would have precluded the making of an order removing licence disqualifications is set out in ss 221E and 221F.

Compensation for damages and other losses and loss of time

Sections 227–228 provide for the making of such orders.

Guideline judgment on high range PCA

A summary of this judgment, delivered by the Court of Criminal Appeal on 8 September 2004 appears toward the end of this chapter: *Application by the Attorney General Under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* (2004) 61 NSWLR 305.

Mandatory alcohol interlock program for high range drink drivers, second offence drink drivers and certain other specified offences

Part 7.4 Div 2 *Road Transport Act* provides for a mandatory alcohol interlock program for offenders convicted of certain alcohol-related offences. When Pt 7.4 was introduced on 1 February 2015, s 203 relating to limitations on the application of s 10 *Crimes (Sentencing Procedure) Act* 1999 to certain offences under the *Road Transport Act* 2013 was not amended.

Section 210: A court that convicts a person of a "mandatory interlock offence" **must**, at the time of conviction, make one of the following orders in respect of the person:

(a) a mandatory interlock order

(b) an interlock exemption order.

Section 209 contains all definitions relevant to Pt 7.4 Div 2. In particular, a "mandatory interlock offence" is an offence against s 110(1)–(3) (driving with the novice, special or low range prescribed concentration of alcohol), that is a *second or subsequent offence* by the offender for any other alcohol-related major offence. Further, s 209 defines first, second and subsequent offences of high and middle range drink driving (s 110(4) and (5)), combined alcohol and drug driving (s 111A(1), (2) and (3)), driving under the influence of alcohol or any other drug (s 112), and refusing breath analysis or to provide samples (cll 16 and 17, Sch 3), as mandatory interlock offences.

Mandatory interlock orders

Section 211: A "mandatory interlock order" disqualifies a person from holding a driver licence for the minimum disqualification period for "that kind of mandatory interlock offence", or any longer period of disqualification (not exceeding the maximum disqualification for that kind of offence — see PCA, other alcohol related offences and mandatory interlock order disqualification table, below) specified by the court, *and* disqualifies the person from holding

a driver licence during the period of 5 years commencing on the day of the conviction *unless* the person has first held an "interlock driver licence" for a period equivalent to the "minimum interlock period".

An "interlock driver licence" means a conditional licence that restricts the holder of the licence to driving a motor vehicle fitted with an approved interlock device: s 209. The interlock period means the period starting on the day the person is issued with an interlock driver licence and ending at the expiry of the interlock period applicable to the person (s 215(1) — see s 211 and PCA, other alcohol related offences and mandatory interlock order disqualification table, below). Section 211(4): A mandatory interlock order ceases to have effect if, before the person completes the applicable interlock period, another mandatory interlock order is made in respect of the person.

Interlock exemption orders

Such an order is available but only in **very limited circumstances**. If such an order is made, disqualification will be mandatory.

Section 212(1), (2):* An "interlock exemption order" exempts an offender from the operation of s 211 but the relevant disqualification period set out in s 205 will apply.

* The note following s 212(2) suggests that only the relevant "automatic" disqualification period will apply, however the wording of the sub-section still appears to permit a court to reduce such a disqualification period in accordance with the normal operation of s 205. See also s 206B which permits a licence suspension period to be taken into account for the purposes of determining a disqualification under s 211.

Section 212(3): A court may make an interlock exemption order **only** if the offender proves to the court's satisfaction:

(a) that the offender does not have access to a vehicle in which to install an interlock device, or

(b) that the offender has a medical condition diagnosed by a registered medical practitioner that prevents the offender from providing a sufficient breath sample to operate an approved interlock device and it is not reasonably practicable for an interlock device to be modified to enable the offender to operate the device, or

(c) if the offender is convicted of a first offence against ss 110(4)(a), (b), (c) or 111A(2), making the mandatory interlock order would cause severe hardship to the offender and making an interlock exemption order is more appropriate in all the circumstances.

Section 212(4): A person has "access" to a vehicle if the person is the registered operator, owner or part owner of the vehicle or shares the use of the vehicle with the registered operator, owner or part owner of the vehicle, and it is reasonable in the circumstances to install an interlock device in the vehicle.

Section 212(5): An interlock exemption order **must not** be made (except in relation to a conviction for an offence against ss 110(4)(a), (b), (c) or 111A(2) that is a first offence) merely because an offender:

(a) cannot afford the cost of installing or maintaining an approved interlock device (s 48 provides for financial assistance in certain cases), or

(b) will be prevented from driving a vehicle in the course of his or her employment if the interlock order is made, or

(c) has access to a vehicle but the registered operator of the vehicle refuses to consent to the installation of an interlock device.

Section 214: A person convicted and disqualified for a prescribed dangerous driving offence pursuant to s 52A *Crimes Act* 1900 while under the influence of intoxicating liquor or with the prescribed concentration of alcohol present in the accused's breath or blood may be disqualified by the court from holding a driver licence unless the person has first held an interlock driver licence for a period specified by the court of not less than 36 months.

Section 215(1): Participation in an interlock program commences on the date on which a person is issued with an interlock driver licence.

Section 215(2): A person ceases to participate in an interlock program if convicted of a major offence during the interlock period, or if the person ceases to hold and an interlock driver licence before the expiry of the interlock period or, if and when the person is issued with a licence without an interlock condition.

Section 215A(4): Any period during which a person holds an interlock driver license in another jurisdiction is to be taken into account in determining whether the person has completed the interlock period applicable under the NSW Act.

[2-020] Major offences

"Major offences" are defined in s 4 (set out above).

Any period of disqualification commences on the date of conviction but the court may order that the disqualification begin on a later date: s 207A(1).

Note s 206A which addresses the effect on a licence disqualification when a person is also sentenced to a term of imprisonment.

PCA, other alcohol related offences and mandatory interlock order disqualification tables

"Mandatory interlock order" is defined in s 209 (set out above).

Prescribed concentrations: s 108	**Penalty** [s 110]		**Disqualification** [s 205]		**Mandatory interlock** [s 211]		
					Initial disqual		**+ man inter**
	Fine	**Impris**	**Auto**	**Min**	**Min disq**	**Max disq**	
High, 0.15 or >							
First offence	$3300	18 mths	3 yrs	12 mths	6 mths	9 mths	24 mths
Second offence	$5500	2 yrs	5 yrs	2 yrs	9 mths	12 mths	48 mths
Mid, 0.08 – < 0.15							
First offence	$2200	9 mths	12 mths	6 mths	3 mths	6 mths	12 mths
Second offence	$3300	12 mths	3 yrs	12 mths	6 mths	9 mths	24 mths
Low, 0.05 – < 0.08							
First offence	$2200	Nil	6 mths	3 mths			
Second offence	$3300	Nil	12 mths	6 mths	1 mth^	3 mths^	12 mths^
Special, 0.02 – 0.05							
First offence	$2200	Nil	6 mths	3 mths			
Second offence	$3300	Nil	12 mths	6 mths	1 mth^	3 mths^	12 mths^
Novice, nil permitted							
First offence	$2200	Nil	6 mths	3 mths			
Second offence	$3300	Nil	12 mths	6 mths	1 mth^	3 mths^	12 mths^
Combined high-range PCA and prescribed illicit drug in oral fluid/blood/urine: s 111A(1)							
First offence	$5500	2 yrs	4 yrs	18 mths	6 mths	9 mths	24 mths

Prescribed concentrations: s 108	Penalty [s 110]		Disqualification [s 205]		Mandatory interlock [s 211]		
					Initial disqual		+ man inter
	Fine	Impris	Auto	Min	Min disq	Max disq	
Second offence	$11000	2 yrs	6 yrs	3 yrs	9 mths	12 mths	48 mths
Combined mid-range PCA and prescribed illicit drug in oral fluid/blood/urine: s 111A(2)							
First offence	$3300	18 mths	2 yrs	12 mths	3 mths	6 mths	12 mths
Second offence	$6600	2 yrs	4 yrs	2 yrs	6 mths	9 mths	24 mths
Combined novice, special or low-range PCA and prescribed illicit drug in oral fluid/blood/urine and convicted of s 111A(1), (2) or (3) offence in previous 5 yrs: s 111A(3)							
Offence	$5500	18 mths	2 yrs	18 mths	1 mth	3 mths	12 mths
Driving under the influence of alcohol or drug: s 112(1)(a), (b)							
First offence	$3300	18 mths	3 yrs	12 mths	6 mths*	9 mths*	24 mths*
Second offence	$5500	2 yrs	5 yrs	2 yrs	9 mths*	12 mths*	48 mths*
Refuse breath, oral, fluid test, sobriety assessment: Sch 3 cl 16(1)(a), (c), (d)							
First offence	$1100	Nil	No specific penalty: s 204 general penalty applies				
Second offence	$3300	18 mths					
Refuse breath analysis/blood sample under cl 5A: Sch 3 cll 16(1)(b) or 17(1)(a1)							
First offence	$3300	18 mths	3 yrs	12 mths	6 mths	9 mths	24 mths
Second offence	$5500	2 yrs	5 yrs	2 yrs	9 mths	12 mths	48 mths
Refuse breath sample under cll 12 or 15/urine sample: Sch 3 cll 17(1)(a) or 17(1)(c)							
First offence	$3300	18 mths	3 yrs	6 mths			
Second offence	$5500	2 yrs	5 yrs	12 mths			

Prescribed concentrations: s 108	Penalty [s 110]		Disqualification [s 205]		Mandatory interlock [s 211]		
					Initial disqual		+ man inter
	Fine	Impris	Auto	Min	Min disq	Max disq	
Refuse blood sample under cl 9/oral fluid sample: Sch 3 cll 17(1)(a), 17(1)(b)							
First offence	$3300		3 yrs	6 mths			
Second offence	$5500	18 mths	5 yrs	12 mths			

^ Only where the first offence was any other alcohol-related major offence.

* Alcohol only

Note:

- **Second offence**: where previously convicted of this offence or any major offence (s 4), or dealt with by penalty notice for an alcohol or other drug related driving offence, within 5 yrs: s 9. "Dealt with" is defined as it being paid or partly paid, or if not paid that no election has been made to court and the time for such election has lapsed: s 4(5).
- **Alternative verdicts**: For PCA offences and combined drug and alcohol driving offences, alternative verdicts are available to certain lesser offences: ss 110(6), (7) and 111A(5).

Other major drug-related offences

Major offences	First offence [s 205]				Second offence [Previously convicted of offence or *any* major offence or dealt with by penalty notice for an alcohol or other drug related driving offence within 5 yrs]			
	Fine	Impris	Disqualification		Fine	Impris	Disqualification	
			Auto	Min			Auto	Min
Presence of prescribed illicit drug in oral fluid/ blood/urine: s 111(1)	$2200	Nil	6 mths	3 mths	$3300	Nil	12 mths	6 mths
Presence morphine/cocaine in blood/urine: s 111(3)	$2200	Nil	6 mths	3 mths	$3300	Nil	12 mths	6 mths
Arrested person refuse to supply blood sample: Sch 3 cl 17(1)(a)	$3300	Nil	3 yrs	6 mths	$5500	18 mths	5 yrs	12 mths
Arrested person refuse to provide an oral fluid sample: Sch 3 cl 17(1)(b)	$3300	Nil	3 yrs	6 mths	$5500	18 mths	5 yrs	12 mths
Alter, etc, amount of drug before oral fluid test: Sch 3 cl 18(1)(c)	$3300	Nil	3 yrs	6 mths	$5500	Nil	5 yrs	12 mths
Driver/supervising driver involved in fatal accident fail to supply blood/urine sample: Sch 3 cl 17(2)	$3300	18 mths	3 yrs	6 mths	$5500	2 yrs	5 yrs	12 mths

Major offences	First offence [s 205]				Second offence [Previously convicted of offence or *any* major offence or dealt with by penalty notice for an alcohol or other drug related driving offence within 5 yrs]			
	Fine	Impris	Disqualification Auto	Disqualification Min	Fine	Impris	Disqualification Auto	Disqualification Min
Fail on demand to provide sample of blood/urine, or alter the result of drug in blood/urine before test: Sch 3 cl 17(1)(c)	$3300	18 mths	3 yrs	6 mths	$5500	2 yrs	5 yrs	12 mths

Other serious driving offences

Major offences	First Offence [s 205]				Second Offence [Previously convicted of this offence or *any* major offence or dealt with by penalty notice for an alcohol or other drug related driving offence within 5 yrs]			
	Fine	Impris	Disqualification Auto	Disqualification Min	Fine	Impris	Disqualification Auto	Disqualification Min
Negligent driving occasioning death: s 117(1)(a)	$3300	18 mths	3 yrs	12 mths	$5500	2 yrs	5 yrs	2 yrs
	s 117(1)(a)		s 205(2)(d)		s 117(1)(a)		s 205(3)(d)	
Negligent driving occasioning grievous bodily harm: s 117(1)(b)	$2200	9 mths	3 yrs	12 mths	$3300	12 mths	5 yrs	2 yrs
	s 117(1)(b)		s 205(2)(d)		s 117(1)(b)		s 205(3)(d)	
Driving furiously, recklessly or speed/manner dangerous: s 117(2)	$2200	9 mths	3 yrs	12 mths	$3300	12 mths	5 yrs	2 yrs
	s 117(2)		s 205(2)(d)		s 117(2)		s 205(3)(d)	
Menacing driving with intent: s 118(1)	$3300	18 mths	3 yrs	12 mths	$5500	2 yrs	5 yrs	2 yrs
	s 118(1)		s 205(2)(d)		s 118(1)		s 205(3)(d)	
Menacing driving possibility of menace: s 118(2)	$2200	12 mths	3 yrs	12 mths	$3300	18 mths	5 yrs	2 yrs
	s 118(2)		s 205(2)(d)		s 118(2)		s 205(3)(d)	
Failure to stop and render assistance: s 146	$3300	18 mths	3 yrs	12 mths	$5500	2 yrs	5 yrs	2 yrs
	s 146		s 205(2)(d)		s 146		s 205(3)(d)	
Aid/abet/accessory before the fact to major offence: s 4 definition of **Major offence**	Liable to same penalty as principal offender							

[2-040] Other offences

Disqualified, suspended or cancelled driving license — Road Transport Act 2013

	First offence				Second offence [Previously convicted of an offence under ss 53(3), 54 or *any* major offence or dealt with by penalty notice for an alcohol or other drug related driving offence, within 5 yrs: s 9(5)]			
	Fine	Imprisonment	Automatic disqualification*		Fine	Imprisonment	Automatic disqualification**	
			Auto	Min			Auto	Min
Disqualified: s 54(1)	$3300	6 mths	6 mths	3 mths	$5500	12 mths	12 mths	6 mths
Suspended: s 54(3)	$3300	6 mths	6 mths	3 mths	$5500	12 mths	12 mths	6 mths
Cancelled: s 54(4)	$3300	6 mths	6 mths	3 mths	$5500	12 mths	12 mths	6 mths
Suspended/cancelled under s 66 *Fines Act*: s 54(5)	$3300	Nil	3 mths	1 mth	$5500	6 mths	12 mths	3 mths
Unlicensed: s 53(1)	$2200	Nil	**	**	No provision	No provision	**	**
Never licenced:*** s 53(3)	$2200	Nil	**	**	$3300	6 mths	12 mths	3 mths

* Without any specific order, the period of disqualification commences on the date of conviction: s 207A.

** General disqualification provisions apply: s 204(1). Disqualification in another Australian jurisdiction operates as disqualification in NSW: s 207(2).

*** No licence of any kind in Australia for 5 years preceding conviction: s 53(5).

Note: There is no mandatory disqualification (only discretionary) for a second offence of driving without a licence if the driver has held a licence within the past five years: see s 53(1).

Offences against statutory rules; unlawfully obtain/use licence — Road Transport Act 2013

SECTION	DESCRIPTION	PENALTY (MAX)
26(1)–(3)	The statutory rules may create offences and provide for disqualifications up to 6 mths	50 pu
49	Obtain/renew/possess driver licence by false statements	20 pu
50	Unlawful possession/alter/produce altered/forged licence	20 pu
52(2)	Failure to provide a specimen of signature	20 pu
53(1)	Drive without being licensed for purpose, employ/permit any person not licensed to drive	20 pu

Speeding offences — Road Rules 2014

Currency

As amended to *Road Transport Legislation Amendment (Electric Skateboards and Bicycles) Regulation* 2023 (No 74). Commenced 24 February 2023. Current to 24 February 2023.

Speeding*	Fine Rule 10-2 Road Rules	Mandatory disqualification
exceed speed by more than 45 km/h	Heavy motor vehicle/coach 50 pu; Other 30 pu	6 mths min: r 10–2(3)**
exceed speed by more than 30 km/h	20 pu	3 mths min: r 10–2(5)^

Speeding*	Fine Rule 10-2 Road Rules	Mandatory disqualification
exceed speed by 30 km/h or less	20 pu	no automatic disqualification

* Rule 10–2(7) and (8) provides for alternative verdicts if the court is satisfied that the speed falls within a lesser range than that charged.

** Rule 10–2(3)(b), (4) provides for the imposition of a period of less than 6 months if the driver had been suspended for this offence and the total period of suspension and disqualification is not less than 6 months.

^ Rule 10–2(5)(b), (5A) provides for the imposition of a period of less than 3 months if the driver had been suspended for this offence and the total period of suspension and disqualification is not less than 3 months.

Testing for alcohol and drug use — Sch 3 offences — Road Transport Act

CLAUSE	DESCRIPTION	PENALTY (MAX)
3(4)	Disobey request/signal to stop for breath test	10 pu
16(a)	Refuse/fail to undergo breath test, oral fluid test or sobriety assessment	10 pu
16(b)	Refuse/fail to undergo breath analysis	1st off: 30 pu and/or 18 mths; 2nd off: 50 pu and/or 2 yrs
19	Hinder/obstruct police officer in administering oral fluid test or sample taker in attempting to take a sample of blood or urine	20 pu
20	Authorised sampler must not refuse or fail to take blood or urine sample as required	20 pu
29	Authorised sampler must comply with the provisions of Sch 3	20 pu
39	Accident research which identifies blood or saliva providers	20 pu

Street racing, negligent driving, unsafe loads — miscellaneous offences — Road Transport Act

SECTION	DESCRIPTION	PENALTY (MAX)
115	Organise/promote/take part in races etc without permit	1st off 30 pu + 12 mths automatic disq 2nd off 30 pu and/or 9 mths + 12 mths automatic disq
115(3)	Take part in race and not comply with conditions	20 pu + 12 mths automatic disq
116(1)	Operate motor vehicle on road or road related area to cause sustained loss of traction by one or more of the driving wheels	10 pu
116(2)	Operate motor vehicle contrary to s 41(1) knowing that petrol, oil, etc has been placed on surface of the road or road related area or commit aggravated levels of subs (1) off	1st off 30 pu + 12 mths automatic disq 2nd off 30 pu and/or 9 mths + 12 mths automatic disq
116(4)	Operate motor vehicle contrary to prescribed competitive activity	5 pu
117(1)(c)	Negligent driving (for driving not occasioning death or grievous bodily harm)	10 pu
123(1)	Install/display/interfere with/alter/remove prescribed traffic control device w/o authority	20 pu
123(2)	Install/display sign resembling prescribed sign w/o authority	20 pu
124(2)	Fail to remove contravening sign	20 pu
145(1)	Unsafely loaded vehicle causing death/injury/damage — liability driver	Corp 100 pu; Indiv 50 pu and/or 12 mths
145(2)	Unsafely loaded vehicle causing death/injury/damage — liability responsible person	Corp 100 pu; Indiv 50 pu and/or 12 mths
145(3)	Unsafely loaded vehicle causing death/injury/damage — liability director/manager of responsible person	Corp: 100 pu; Indiv 50 pu and/or 12 mths
151(2)	Vehicles not fitted with monitoring devices, devices not in working order	50 pu
152(2)	Vehicle movement record not preserved	50 pu
153(3)	Vehicle movement record not carried by driver	50 pu
154(6)	Hinder/obstruct inspection of monitoring devices, etc by police/not comply with requirement	50 pu
155(4)	Hinder/obstruct seizure of monitoring devices, etc by police	50 pu
156(4)	Not comply with notice to produce vehicle movement records	50 pu

SECTION	DESCRIPTION	PENALTY (MAX)
157(1)	Tamper with monitoring device	50 pu
157(2)	Falsify vehicle movement record	50 pu
162(1)	Vehicle not speed limiter compliant when driven on road, etc	Corp 150 pu; Indiv 30 pu
188(2)	Failure to nominate driver of vehicle committing camera related offence	Corp 200 pu; Indiv 100 pu

Vehicle registration — Road Transport Act

SECTION	DESCRIPTION	PENALTY (MAX)
68(1)*	Use unregistered registrable vehicle	20 pu
69(1), (2)	Obtain/renew registration or unregistered vehicle permit by fraud, etc	Corp 100 pu; Indiv 20 pu
71	Person other than manufacturer commit offence relating to identification numbers of engines and other parts of motor vehicles/trailers	20 pu and/or 6 mths
77	Use registrable vehicles contrary to conditions or prohibitions	20 pu

* The offences of "Use uninsured motor vehicle on road" under s 2.1(1) *Motor Accident Injuries Act* 2017 and "Unregistered vehicles and vehicles upon which tax has not been paid" under s 9 *Motor Vehicles Taxation Act* 1988 often arise with this offence and they carry maximum penalties of 50 pu and 10 pu respectively.

Law Enforcement (Powers and Responsibilities) Act 2002 (No 103)

Currency

As amended to *Law Enforcement (Powers and Responsibilities) Amendment (Digital Evidence Access Orders) Act* 2022 (No 47). Commenced 1 February 2023. Current to 1 February 2023.

Note: The Act is dealt with in more detail under a separate entry in **Specific Penalties and Orders**.

SECTION	DESCRIPTION	PENALTY (MAX)
15(1)	Driver fail/refuse to disclose identity	50 pu and/or 12 mths
15(2)	Driver not disclose identity any driver/passenger	50 pu and/or 12 mths
16(1)	Passenger fail/refuse to disclose identity	50 pu and/or 12 mths
16(2)	Passenger not disclose driver's/other passenger's identity	50 pu and/or 12 mths
17(1)	Owner not disclose identity of driver/passenger	50 pu and/or 12 mths
18(a)	Give false name of driver/passenger	50 pu and/or 12 mths
18(b)	Give false/misleading address information for driver/passenger	50 pu and/or 12 mths
39(a)	Not stop vehicle when directed to do so	50 pu and/or 12 mths
39(b)	Fail/refuse to comply with direction given by police officer	50 pu and/or 12 mths

Crimes Act 1900 (No 40)

Currency

As amended to *Statute Law (Miscellaneous Provisions) Act* 2023 (No 7). Commenced 14 July 2023. Current to 14 July 2023.

Serious driving offences

Note: Where applicable, the maximum penalty for an offence dealt with on indictment is indicated in square brackets in the Penalty (Max) column.

For the definition of "major offence", see s 4.

For licence disqualifications for major offences, see s 205.

Section	Description	Penalty	Disqualification				Table
			First offence		Second offence*		
			Min	Auto	Min	Auto	
51A	Predatory driving — while in pursuit of or travelling near another vehicle, cause or threaten impact intending to cause actual bodily harm	100 pu or 2 yrs [5 yrs]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
51B	Drive from police pursuit, not stop and drive recklessly/in manner dangerous	1st off 2 yrs [3 yrs] 2nd off 2 yrs [5 yrs]	12 mths	3 yrs	2 yrs	5 yrs	2
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
52A(3), (4)	Dangerous driving occasioning gbh	100 pu or 2 yrs [7 yrs; with aggravation 11 years]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
52AB(1)	Driver of car knowingly involved in impact causing death fail to stop and give assistance necessary or within power of driver	100 pu or 2 yrs [5 yrs]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
52AB(2)	Driver of car knowingly involved in impact causing gbh fail to stop and give assistance necessary or within power of driver	100 pu or 2 yrs [7 yrs]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
53	Injuries caused by furious riding or driving or other misconduct	100 pu or 2 yrs [2 yrs]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	
54	Cause gbh by unlawful act or omission	100 pu or 2 yrs [2 yrs]	12 mths	3 yrs	2 yrs	5 yrs	1
				drug/alcohol^			
			18 mths	4 yrs	3 yrs	6 yrs	

* Previously convicted of, or dealt with by penalty notice for, this offence or *any* major offence within 5 yrs: s 205(3)(d).

^ Licence disqualification where multiple offences including combined alcohol and drug driving offence pursuant to s 111A(1), (2) or (3).

Heavy Vehicle (Adoption of National Law) Act 2013 (No 42)

Currency

As amended to *Heavy Vehicle Legislation Amendment (National Regulator) Act* 2021 (No 9). Commenced 1 August 2022. Current to 24 August 2022.

This Act makes provision for a national scheme for facilitating and regulating the use of heavy vehicles on roads. Section 4 applies as a law of NSW the Heavy Vehicle National Law, as amended from time to time, set out in the schedule to the *Queensland Heavy Vehicle National Law Act* 2012. The contents of that schedule are to be referred to as the *Heavy Vehicle National Law (NSW)* and apply as if an Act of the NSW Parliament. The National Heavy Vehicle

Regulator is responsible for the conduct of prosecutions relating to heavy vehicles under the *Heavy Vehicle National Law*. The *Heavy Vehicle National Law — Guide for judicial officers and legal practitioners*, updated to April 2023, is available on JIRS.

Jurisdiction

The Local Court is declared by s 14 to be the relevant tribunal or court for NSW. Penalties in the *Heavy Vehicle National Law (NSW)* (hereinafter referred to as the "National Law") are expressed in monetary maximum amounts. Section 596 of the National Law states that where a maximum fine appears, it shall only be taken to be the maximum fine for an individual. The maximum fine for a "body corporate" found guilty of the offence will be 5 times the maximum fine for an individual.

Section 27F prohibits the application of s 10 of the *Crimes (Sentencing Procedure) Act* 1999 if that section has been applied to an applicable heavy vehicle offence during the period of 5 years immediately before the court's determination.

Each of the following is an applicable heavy vehicle offence:

(a) an offence against the *Heavy Vehicle National Law (NSW)* that involves a severe risk breach of a mass, dimension or load restraint requirement under that Law

(b) …

(c) an offence against Ch 6 (Vehicle operations—driver fatigue) of the *Heavy Vehicle National Law (NSW)*

(d) an offence referred to in s 203(2)(e) or *Road Transport Act* 2013 (as in force immediately before its amendment by the *Heavy Vehicle (Adoption of National Law) Amendment Act* 2013) or a former corresponding offence

(e) an offence of aiding, abetting, counselling or procuring the commission of an offence referred to in paragraph (a), (b), (c) or (d).

Heavy Vehicle National Law (NSW) (No 42a)

Currency

As amended to *Heavy Vehicle National Law and Other Legislation Amendment Act* 2019 (No 29) of Queensland. Commenced 28 February 2019. Current to 17 November 2021.

Jurisdiction

Section 707: Proceedings for offences against the *Heavy Vehicle National Law* are to be dealt with summarily before a court of summary jurisdiction and must be commenced either within 2 years of the commission of the offence or within 1 year after the offence comes to the complainant's knowledge (but within 3 years after the commission of the offence).

Penalties court may impose

Section 593: Courts may impose any one or more of the penalties in Pt 10(3). The court must take into account the "combined effects" of the penalties imposed.

Section 594: In deciding sanctions, including the level of fine, mass, dimension or loading requirement matters the court is required to consider risks of accelerated road wear, damage to road infrastructure, increased traffic congestion, diminished public amenity and unfair commercial advantage.

Section 597: Commercial benefits penalty order — an amount, as a fine, not exceeding 3 times the court's estimate of the gross commercial benefit receivable from the commission of the offence.

Section 598: Power to cancel or suspend vehicle registration.

Section 600: Supervisory intervention order — requiring the convicted person, at their own expense, and for a stated period of not more than 1 year to do things the court considers will improve compliance with the law, or provide reports etc.

Section 607: Prohibition order — preventing the convicted person, for not more than one year, from having a stated role or responsibility associated with road transport.

Section 611: Compensation order — an amount the court considers appropriate for damage to road infrastructure.

Categories of breaches

The National Law categorises breach as minor risk breaches, substantial risk breaches, severe risk breaches or in relation to maximum work or minimum rest standards, critical risk breaches. Penalties are escalated accordingly.

Defences

Statutory defences are set out in Div 3 of Pt 10.4.

Offences by corporations or other bodies

Note: Section 596 states that where a maximum fine appears, it shall only be taken to be the maximum fine for an individual. The maximum fine for a "body corporate" found guilty of the offence will be 5 times the maximum fine for an individual. (Note definition of "operator" s 5) Monetary penalties are *not* expressed in penalty units.

The *Heavy Vehicle National Law (NSW)* is a complex and detailed code containing 759 clauses and a large number of specific strict liability offences. It is not practical to reproduce all penalty provisions in this chapter. What follows is designed to provide an indication of the typical structure of penalties with particular regard to those matters that may be heard in NSW Local Courts. The *Heavy Vehicle National Law: Schedule of Infringement Penalties and Demerit Points 23/24 FY* can be accessed at https://www.nhvr.gov.au/files/media/document/262/202306-1363-hvnl-penalties-and-infringements.pdf.

SECTION	DESCRIPTION	PENALTY (MAX) (Body Corporate penalties are 5 times those set out below)
26F	Fail to comply with s 26C — reckless conduct exposing an individual to risk of death/serious injury/illness (category 1)	Indiv 5 yrs imp and/or $377,639; Corp $3,546,390
26G	Fail to comply with s 26C duty — expose individual/class of individuals to risk of death/serious injury/illness (category 2)	Indiv $189,321; Corp 1,773,210
26H	Fail to comply with s 26C duty (category 3)	Indiv $59,108; Corp $591,080
81	Contravene condition of vehicle standards exemption	$5,020
85	Modifying heavy vehicle requires approval	$3,770
91	Tampering with heavy vehicle emission control system	$12,600
93	Tampering with heavy vehicle speed limiter	$12,600

SECTION	DESCRIPTION	PENALTY (MAX) (Body Corporate penalties are 5 times those set out below)
96	A person must not drive a heavy vehicle that, together with its load, does not comply with mass requirements applying to that vehicle:	
	– minor risk breach	$5,020
	– substantial risk breach	$7,580
	– severe risk breach	$12,600
	Plus further $570 for every 1% over a 120% overload but penalty not to exceed	($22,790)
111	A person must not drive on a road a heavy vehicle that does not, or whose load does not, comply with the loading requirements applying to the vehicle	
	– minor risk breach	$3,770
	– substantial risk breach	$6,310
	– severe risk breach	$12,600
228	Duty of driver to avoid driving while fatigued	$7,580
250	Driver work more than maximum work time or rests for less than minimum rest time stated in standard hours	
	– minor risk breach	$5,020
	– substantial risk breach	$7,580
	– severe risk breach	$12,600
	– critical risk breach	$18,940
293	Driver of fatigue-regulated heavy vehicle must carry work diary	$7,580
513(4)	Contravene s 513(1) direction to stop vehicle without reasonable excuse	$7,580
516(3)	Contravene s 516(1) direction to move vehicle without reasonable excuse	$7,580
517(4)	Contravene s 517(2) direction to move vehicle to avoid harm	$7,580
522(5)	Person must not fail to produce a heavy vehicle for inspection	$7,580
524(5)	Contravene direction to leave heavy vehicle	$7,580
542	Contravene notice to rest in Pt 9.3 Div 8	$12,600

Court of Criminal Appeal — guideline judgment

Sentencing — guideline judgment — offence of high range PCA — check list

Ordinary offence	If it is an ordinary offence
– drove avoiding inconvenience or not believing over limit – random breath test – prior good character – nil or minor traffic record – licence suspended on detection – plea of guilty – little or no risk of re-offending – significant inconvenience by loss of licence	• Section 10 — rarely appropriate in ordinary offence • Not just because of driver education • Usual penalty is fine and auto disqualification
Good reasons include	**Where good reasons**
– nature of employment – absence of viable alternative transport – sickness or infirmity of offender or other person	• May reduce automatic disqualification

Moral culpability

- the degree of intoxication above 0.15
- erratic or aggressive driving
- a collision between the vehicle and any other object
- competitive driving or showing off
- the length of the journey at which others are exposed to risk
- the number of persons actually put at risk by the driving

Where moral culpability

- Section 9 or 10 — very rarely appropriate
- Where number of aggravating factors present to significant degree sentence of less than imprisonment is generally inappropriate

Second or subsequent offence

› If *ordinary* s 10 very rarely appropriate, s 9 rarely appropriate, where prior is high range, less than CSO generally inappropriate

› If *moral culpability increased* imprisonment of some kind generally appropriate

› If *moral culpability increased* and if number of aggravating factors present to significant degree, or where prior is high range PCA, a sentence of less severity than full-time imprisonment is generally inappropriate.

Traffic offender intervention program

The *Criminal Procedure Regulation* 2017 (commenced 1 September 2017) provides for the participation by traffic offenders in approved traffic courses: cll 100–103. The program commenced on 28 March 2008 (under the former *Criminal Procedure Regulations* 2005, cl 19B, Sch 6). The Secretary may approve a course of study or training for all Local Courts or for only such Local Courts as may be specified in the order approving the course: cl 104(3). The Traffic Offender Intervention Program provides details of the approved course providers. Approved traffic courses must comply with specified guidelines.

Under the regulations, the court may, prior to sentencing, refer a traffic offender to participate in the traffic offender intervention program if the offender consents: cl 99(1). A traffic offender is a person who has pleaded guilty to, or has been found guilty of, a traffic offence under the road transport legislation (as defined in s 6 *Road Transport Act* 2013) before the Local Court and has not been sentenced: cl 99(1)(b).

The objective of the program is to provide a community based road safety educational program for referred traffic offenders:

(a) to provide offenders with the information and skills necessary to develop positive attitudes to driving and to change driving behaviour, and

(b) to develop safer driving behaviour in offenders: cl 100.

The Local Court is to have regard to the following matters in determining whether a traffic offender is suitable for participation in the program:

(a) the extent to which the offender's character, antecedents, age, health and mental condition would be likely to prevent the offender's participation in the program or disrupt the conduct of the program

(b) the nature of the offence committed by the offender

(c) any extenuating circumstances in which the traffic offence was committed

(d) the impact of the offence on the community and the victim of the offence (if any)

(e) the offender's history of convictions for traffic offences (if any)

(f) the offender's previous participation in an approved traffic course (if any),

(g) any other matters the court considers relevant: cl 99(2).

The court is also to consider:

(a) whether this is the traffic offender's first offence

(b) if it is not the traffic offender's first offence, the nature and seriousness of any previous offence or offences: cl 99(3).

The approved traffic course provider must provide the court with a report on the extent to which the offender has complied with the requirements of the course at no later than the date fixed by the court for the offender's re-appearance to finalise the matter: cl 102.

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Alcohol, speed and driving

[3-000] Alcohol and road accidents

Drink driving is a factor in about 18 per cent of all fatal crashes in NSW. Seventy per cent of all fatal drink drive crashes occur in country NSW. The majority of drink drivers in fatal crashes are male (90 per cent) and one third of all drink drivers in fatal crashes are aged 17–24 years (despite making up only about one seventh of all licensed drivers). Thirty per cent of all fatal drink drive crashes occur between 9 pm and 3 am on Thursday, Friday and Saturday nights.

See: Transport for NSW, *Road User Handbook.*

[3-020] Increased risk with alcohol

A driver's risk of being involved in a crash increases with the amount of alcohol in the blood stream. At .05 the risk of a crash for the average driver is about twice that of zero blood alcohol. The risk keeps getting higher as the blood alcohol level rises:

- at .05 is double that at zero
- at .08 it is about 7 times higher than at zero
- at .15 it is 25 times higher than at zero.

On Thursday, Friday and Saturday nights about 50 per cent of crashes involve alcohol. Crashes involving alcohol are generally more serious.

[3-040] Measuring your blood alcohol concentrate (BAC)

Measuring your BAC is impossible without an Australian standards approved breath testing machine.

Guessing your BAC is inaccurate because:

- alcohol concentration of the drink may vary from 2.5 per cent (light beer), 5 per cent (eg full strength beer) to over 40 per cent (eg, vodka, whisky)
- beer may be served in schooners, middies, etc. Wine glasses vary from 100 to 280 mls
- in many situations, drinks are topped up making it difficult to know how many standard drinks are consumed
- many drinks come in non-standard sizes — eg, pre-mixed drinks in cans and bottles may contain more than one standard drink.

Factors such as your gender, size, weight, health and liver function will affect your BAC:

- size and weight — a smaller person may have a higher BAC from the same amount of alcohol
- liver function — an unhealthy liver processes alcohol more slowly
- gender — a woman of the same height and weight as a man drinking the same amount may have higher BAC
- consumption of food — lack of food in the stomach means faster absorption of alcohol into the blood stream. Eating after drinking will not reduce the BAC

- general health condition and level of fitness can affect a person's ability to process alcohol. A person's BAC can be higher if they are not feeling well, or are tired or stressed
- consumption of other drugs affects a person's ability to process alcohol.

[3-060] How alcohol affects driving

- brain function (alcohol being a depressant drug) so you can't respond to situations, make decisions or react quickly
- reduces ability to judge speed and distance
- gives false confidence
- makes it harder to do more than one task
- makes you sleepy or fatigued.
- affects your sense of balance and coordination.

[3-080] Staying under the limit guidelines no longer apply

The Road and Traffic Authority no longer suggests guidelines as to the number of standard drinks per hour because of the variations in alcohol content and factors that are referred to above that may affect the BAC.

[3-100] Speed and driving

Speeding was a factor in 43 per cent of all fatalities and approximately 17 per cent of all crashes. Twenty nine per cent of all speeding drivers and motor cycle riders involved in fatal crashes were males aged 17–25 years.

Defended hearings

[4-000] Introduction

Last reviewed: November 2023

The following discussion provides a brief overview of a magistrate's role in a defended hearing in the Local Court. The general procedural principles and provisions are derived from the common law and the *Criminal Procedure Act* 1986, especially Ch 4. Unless otherwise stated, the section numbers below refer to the provisions of the *Criminal Procedure Act* .

The Local Court's overriding duty in a defended summary hearing is to ensure a fair trial and to determine a case on its merits in accordance with the law. A magistrate's role in adversarial proceedings is to act as an independent judicial officer affording procedural fairness to both parties and making impartial, transparent decisions. For a decision to be transparent, a magistrate must provide reasons to explain how they came to their decision. The scope and extent of reasons varies according to the circumstances, including a consideration of the pressures under which magistrates are placed by the volume of cases coming before them.

These foundational principles are discussed in *DPP v Wililo* [2012] NSWSC 713 at [41], [52], [55]–[57], [150] together with the relevant authorities. The principles concerning a magistrate's role in a defended hearing and the relevant authorities are further discussed below.

[4-020] Summary procedure

Last reviewed: November 2023

Some key provisions in chapter 4 of the Criminal Procedure Act

- proceedings are generally open to the public: s 191
- an accused person may plead to offence/s in writing or at court: s 182 (this does not apply to a person who been granted or refused bail, or who has had bail dispensed with). In some circumstances a court may proceed to hear and determine the matter in an accused person's absence: ss 190(3), (4), 196(1), (3), 199, 200; see **[16-080] Offences dealt with in the absence of the accused person**
- under s 194(1) if an accused person pleads not guilty, fails or refuses to enter a plea, or the court does not accept their guilty plea, the matter will proceed to a defended hearing as follows:
  - (i) on the date set for hearing the court must proceed "to hear and determine" the matter. The magistrate may also adjourn the matter: s 192
  - (ii) the court must hear the prosecutor, their witnesses and other evidence, and must hear the accused person, their witnesses and other evidence: s 194(2)
  - (iii) the prosecutor and accused person may both give evidence, examine and cross-examine witnesses: s 195(1), (2). For domestic violence offence proceedings, see also **[8-000] Evidence by domestic violence complainants**. Where a child or cognitively impaired person is a witness in proceedings, see also **[10-000] Evidence from vulnerable persons**

(iv) the prosecutor may call and examine witnesses in reply to the accused's case: s 195(3)

(v) a court must determine the matter after hearing the accused person, prosecutor, witnesses and evidence: s 202(1). A court may determine the matter by convicting the accused person or making an order as to the accused person, or by dismissing the matter: s 202(2); see **[16-020] Dismissal**

- If an accused person pleads guilty or the offence is found proven, the matter will proceed to sentence: see **[16-120] Sentencing orders generally**.

Procedural requirements are not mere formalities, they often mark points in proceedings where issues arise for the magistrate to determine. For example, as discussed in **[16-020] Dismissal** and authorities such as *DPP v Merhi* [2019] NSWSC 1068 at [41], a two-stage process applies after the formal closing of the prosecution case. First, the magistrate considers whether a prima facie case has been established. If so, the accused person has an opportunity to give evidence, call witnesses, or submit that the court should not be satisfied of their guilt beyond reasonable doubt. The magistrate then considers whether the matter is established beyond reasonable doubt.

In *DPP v Wililo*, above, a "rushed decision-making process" and failure to draw the "line in the procedural sand", resulted in the dismissal of the matter prior to the formal closing of the prosecution's case and the magistrate applying an incorrect test as to a prima facie case: at [101]–[103], [122]–[124]. In *DPP v Merhi*, above, the magistrate moved immediately from finding a prima facie case, to give further very short reasons dismissing the matter. This denied the prosecutor an opportunity to make submissions regarding whether the evidence established the matter beyond reasonable doubt: at [40], [43].

[4-040] Procedural fairness

Last reviewed: November 2023

A fundamental requirement of procedural fairness is that both parties are given the opportunity to be heard. An aspect of procedural fairness in criminal matters is that an accused person knows the case against them. This is reinforced by case management provisions including the requirement, subject to s 187, for the prosecutor to serve a brief of evidence where the accused person pleads not guilty to an offence: ss 183–186. Procedural fairness also requires the magistrate to act impartially.

A court's procedural fairness obligations will depend upon the circumstances. For example, under ss 36 and 37, an accused person may conduct their own case, and the court may need to provide them with information about court procedure to ensure fairness: *Hanna v O'Shane* [2003] NSWSC 1055 at [10]–[11]. Care must be taken to balance any assistance provided to an accused person with the magistrate's obligation to remain impartial and not appear to be biased: see *Criminal Trials Courts Bench Book*, **Self-represented accused** at **[1-800]**.

There are limited exceptions permitting proceedings to occur in the absence of the parties: s 182 (written pleas), s 190(3), (4) (with reasonable notice to the accused of the first return date), ss 196–200 (ex parte proceedings), s 201 (both parties not present); see also **[16-080] Offences dealt with in the absence of the accused person**. Generally, however, procedural fairness will not be afforded to a party when they are absent. In *DPP v Peckham* [2022] NSWSC 713, after adjourning following a busy list and with the police prosecutor in her office nearby, the magistrate heard and "finalised" a domestic violence offence allegedly committed earlier

that day: at [22], [26]. This occurred without the court having the relevant papers (including the facts and criminal history), an explicit plea of guilty, or the magistrate providing reasons for disposing of the matter under s 10A of the *Crimes (Sentencing Procedure) Act* 1999: at [2]. In *DPP v Gatu* [2014] NSWSC 192, the magistrate erred by dismissing a matter "in chambers", after the court had adjourned for the day and in the absence of the prosecutor: at [9], [26]. This also breached the open court requirement in s 191.

A court is to ensure each party has a reasonable opportunity to present their case. In *DPP v Yeo* [2008] NSWSC 953, at the first return following a plea of guilty, the magistrate formed the view the statement of facts did not disclose a prima facie case and dismissed the matter. The magistrate denied the prosecutor procedural fairness by refusing an adjournment to enable witnesses to be called and submissions made: at [52], [56]. Also, if the magistrate did not accept the applicant's plea (which was unclear), the matter should have been set down for hearing: ss 193–195, 202. In *Transport for NSW v Chapoterera* [2022] NSWSC 976, during a busy list, the magistrate dismissed a matter after accepting an unsworn explanation from the accused person. The magistrate refused the prosecution's request to hold a hearing because it was not justified and would waste the court's time. Justice Walton held the magistrate denied the prosecutor procedural fairness, and failed to comply with requirements to conduct a hearing (s 194(1)), give the parties the opportunity to present evidence, and to examine or cross-examine any witnesses (s 195): at [15]–[19].

A magistrate must be impartial, taking no part in the contest. The parties frame the charges and select the witnesses, with the magistrate having a limited capacity to intervene during the hearing and only to the extent they preserve their neutrality: *Crampton v The Queen* (2000) 206 CLR 161 at [19]; *DPP v Wililo* [2012] NSWSC 713 at [41]–[47]. A magistrate is not prohibited from undertaking appropriate case management, questioning witnesses to clarify matters, or expressing tentative views during the proceedings: *FB v R* [2011] NSWCCA 217 at [90]–[97], [100], [102]; *Duncan v Ipp* [2013] NSWCA 189 at [151]. However, excessive intervention may result in an unfair trial. In *DPP v Wililo*, the magistrate was found to effectively take control of the hearing, refusing to allow the prosecutor to call material witnesses and tender relevant evidence, denying the prosecutor a fair trial and breaching requirements in s 194(2) to hear both parties and their evidence: at [84], [90].

In addition to both the prosecution and the accused person having a fair chance to present their case and make submissions, they must also have a fair chance to rebut each other's arguments. Further, parties should be afforded an opportunity to make submissions on matters unlikely to be foreshadowed. For example, in *Lutz v JK* [2016] ACTSC 200, the magistrate did not indicate at the sentencing proceedings that they were contemplating not recording a conviction for an offence of negligent driving causing death. This was an exceptional outcome and the failure to invite submissions amounted to a denial of procedural fairness: at [25].

[4-060] Reasons for decision

Last reviewed: November 2023

Providing reasons for a decision is an "essential incident of the judicial function": *Wainohu v NSW* (2011) 243 CLR 181 at [58]. The Hon A M Gleeson AC in "The role of a judge in a representative democracy" (2008) 9 *TJR* 19, cited in *DPP v Wililo* [2012] NSWSC 713 at [62], elaborated on the significance of reasons:

> Reasons serve a number of purposes. They promote good decision-making by requiring a decision-maker to explain and justify an outcome. They inform a losing party of the reason for

> failure. They allow an appellate court to identify possible error and correct possible injustice. They inform the public of the way judicial power is exercised. The adequacy of a statement of reasons for a decision is judged by reference to these purposes.

In *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 at 442, Meagher JA also noted providing reasons may guard "against the birth of an unconsidered or impulsive decision".

The scope and extent of the duty to give reasons depends on the circumstances of the case, including the practical realities of giving ex tempore reasons in a busy court. Reasons should not be picked over, with appropriate allowance given to the pressures on magistrates due to their heavy case load: *DPP v Illawarra Cashmart Pty Ltd* (2006) 67 NSWLR 402 at [15].

A magistrate's reasons may not be long, but must include findings of fact on critical issues and the legal principles applied to those facts. In *DPP v Tilley* [2016] NSWSC 984, the magistrate's reasons to dismiss a matter indicated a failure to engage with and properly determine issues arising at the summary hearing: at [50]. In particular, the magistrate did not identify the offence's elements including specifying the elements about which they were not satisfied beyond reasonable doubt: at [48]–[49]. The magistrate only made passing references to some witnesses and evidence, without indicating factual findings, and made no reference at all to either party's submissions: at [49]–[50]; see also *DPP v Merhi* [2019] NSWSC 106 at [33], [37].

Where self-defence is raised, particular care must be taken to make clear factual findings and provide adequate reasons. In *DPP v Evans* [2017] NSWSC 33, the magistrate dismissed assault and resist police charges without making findings about the critical issue as to whether the accused person punched the officer: at [42]. The magistrate said that even if the officer's evidence was accepted, self-defence would be made out, however, until the magistrate made precise factual findings about what occurred, they were not in a position to consider self-defence, particularly as it involved the question of what constituted a reasonable response by the accused: *DPP v Evans* at [36], [42]. The failure to make a finding on the central factual issue was so fundamental it undermined the whole process: *DPP v Evans* at [42].

In *DPP v Tiller* [2023] NSWSC 187, the accused was a teacher who struck a seven-year-old student claiming it was necessary to protect another student. The magistrate erred by dismissing the assault proceedings without resolving key factual conflicts about what the accused observed the victim doing near the other student and whether she had asked the victim to "stop" either before or during the assault: at [51], [56]–[58].

In *Darlington v DPP* [2023] NSWSC 1139, the magistrate erred in failing to apply the correct test for self-defence and to give adequate reasons, making no real attempt to deal with the accused's arguments as to why the prosecution had not proved its case: at [29], [56], [60]; see also *Criminal Trial Courts Bench Book* **[6-450] Self-defence**.

For clarity and certainty, a magistrate's reasons must not be buried in exchanges between the bench and counsel during submissions: *DPP v Illawarra Cashmart Pty Ltd*, above, at [18]–[19]. Also, reasons that set out all of the evidence and submissions with little consideration or analysis may fail "to distil the issues in a way that is helpful": *Garay v R (No 3)* [2023] ACTCA 2 at [34], [150]. The language used when delivering reasons also matters. In *DPP v Tiller*, above, the court commented that while the pressures faced by magistrates "with their heavy caseload and the parade of human difficulties which they face day in and day out" should not be underestimated, it was regrettable the magistrate delivered his reasons using emotive language and personalised examples: at [64].

While this discussion has focused on a magistrate's determination of whether an offence is proven, the obligation to provide reasons may also apply to other decisions and is, at times, mandated by legislation. In *Downes v DPP* [2000] NSWSC 1054, the accused person sought to have evidence of their admissions excluded under ss 85 and 90 *Evidence Act* 1995 on the basis they were induced and unreliable. The magistrate's reasons for allowing the evidence, after a voir dire, failed to include a "finding on the critical conflict in the evidence as to whether any promise or inducement was made": at [17].

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Sexual offences

[5-000] Directions

Last reviewed: March 2024

Part 5, Div 1, Subdiv 3 *Criminal Procedure Act* 1986 (ss 292A–292E) contains directions regarding misconceptions about sexual consent which may be given in certain hearings for particular sexual offences. These provisions apply to the Local Court (see ss 274, 275) and to the "hearing of the proceedings" that commence on or after 1 June 2022: Sch 2, Pt 42, cl 117 *Criminal Procedure Act*. This is consistent with a reference to the hearing of the particular trial or hearing proceedings: *GG v R* (2010) 79 NSWLR 194 in relation to an amendment to the *Evidence Act* 1995 with similarly worded transitional provisions.

The offences in the Local Court where consideration of whether a direction is necessary are:

- sexual touching: s 61KC *Crimes Act* 1900
- aggravated sexual touching: s 61KD
- sexual act: s 61KE
- aggravated sexual act: s 61KF,
- attempts to commit the above offences.

The magistrate, as the trier of fact, should consider whether they need to give themselves such a direction. The timing of a direction may also be an important consideration. For commentary and suggested directions, see *Criminal Trial Courts Bench Book*, **Directions — misconceptions about consent in sexual assault trials** at **[5-200]**ff.

Sections 61HF–61HK of the *Crimes Act* address proof of consent for offences committed on or after 1 June 2022. For commentary and suggested directions regarding consent, see *Criminal Trial Courts Bench Book*, **Sexual intercourse without consent – from 1 June 2022** at **[5-900]**ff.

For commentary and suggested directions regarding specific offences, see *Criminal Trial Courts Bench Book*:

- **Sexual touching** at **[5-1100]**ff
- **Sexual act** at **[5-1200]**ff.

For a discussion of the amendments and the context for these reforms, see P Mizzi and R Beech-Jones, "The law on consent in sexual assault is changing" (2022) 34(1) *JOB* 1.

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Domestic violence offences

[5-500] Introduction

Last reviewed: March 2024

A "domestic violence offence" is defined in s 11 *Crimes (Domestic and Personal Violence) Act* 2007 (the Act) as an offence committed against a person with whom the offender has (or has had) a domestic relationship (see s 5 the Act), being:

(a) a personal violence offence (see s 4 the Act), or

(b) an offence (other than a personal violence offence) that arises from substantially the same circumstances as those from which a personal violence offence has arisen, or

(b1) an offence under the *Crimes Act* 1900, s 54D(1) (see below at **[5-600] Abusive behaviour towards intimate partners**, an offence expected to commence between 1 February and 1 July 2024), or

(c) an offence, other than a personal violence offence, in which the conduct that constitutes the offence is domestic abuse.

Section 6A of the Act provides the definition of "domestic abuse", and what may constitute domestic abuse. Section 6A was introduced, and s 11(1)(c) replaced, by the *Crimes Legislation Amendment (Coercive Control) Act* 2022, and apply to behaviour (or alleged behaviour) that occurred, or an offence (or an alleged offence) that was committed, on or after 1 February 2024: *Crimes Legislation Amendment (Coercive Control) Act*, s 2; Sch 2[6].

For commentary regarding evidence from a domestic violence complainant, see **[8-000] Evidence by domestic violence complainants**.

For commentary regarding sentencing for domestic violence offences, see:

- **[16-140] Sentencing provisions concerning domestic violence offences**
- *Sentencing Bench Book* at **[63-500] Domestic violence offences**
- M Zaki et al, "Sentencing for domestic violence in the Local Court", *Sentencing Trends and Issues* No 48, Judicial Commission of NSW, 2022, and
- M Zaki et al, "Sentencing for domestic violence in the Local Court" (2023) 35(3) *JOB* 23 (which contains a snapshot of the significant findings from *Sentencing Trends and Issues* No 48).

For commentary regarding apprehended violence orders, see **[22-000]**.

See also Local Court Practice Note: **Specialist Family Violence List Pilot**.

[5-600] Abusive behaviour towards intimate partners

Last reviewed: March 2024

The *Crimes Legislation Amendment (Coercive Control) Act* 2022 relevantly amends the *Crimes Act* 1900 to create a new offence of abusive behaviour towards intimate partners.

The offence involves engaging in a course of conduct consisting of abusive behaviour (violence, threats, intimidation, or coercion or control of a person) against a current or former

intimate partner, with the intention of coercing or controlling that person: s 54D(1). Sections 54F and 54G provide definitions for "abusive behaviour" and "course of conduct" respectively. Section 54E provides for a defence to the new offence.

The new offence provisions are expected to commence between 1 February and 1 July 2024 and will only apply to conduct occurring on or after the commencement of the amendments: *Crimes Legislation Amendment (Coercive Control) Act* 2022, s 2; Sch 1[2].

The maximum penalty for the new offence is 7 years imprisonment: s 54D(1). It is a Table 1 offence and may be dealt with summarily.

A suggested direction and accompanying notes regarding the new offence are provided in the *Criminal Trial Courts Bench Book* at **[5-2010]**, **[5-2020]** respectively.

For a discussion of the reforms and the new offence, see R Hulme and E Sercombe, "Introducing the NSW coercive control reforms" (2023) 35(10) *JOB* 101.

See also the Judicial Information Research System's Coercive control resource (for JIRS subscribers and judicial officers only).

Evidence Act 1995

[6-000] Evidence

For a link to commentary and the principal case law on the *Evidence Act* 1995, see the **Civil Trials Bench Book** at **[4-0000]**ff.

The **Criminal Trial Courts Bench Book** also contains commentary on evidence including:

- Privilege against self-incrimination at **[1-700]**
- Tendency, coincidence and background evidence at **[4-200].**

See **Criminal Trial Courts Bench Book** Table of Contents for further chapters on evidence as it pertains to the criminal law.

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Evidence by domestic violence complainants

[8-000] Evidence by domestic violence complainants

The *Criminal Procedure Act* 1986 (the Act) makes provision for special procedures for domestic violence complainants to give evidence.

From 25 November 2020, following commencement of Ch 6, Pt 4B, Div 5 of the Act (Giving of evidence by domestic violence complainants – other provisions), the court should be closed when a domestic violence complainant in domestic violence offence proceedings gives evidence, including when a recording of their evidence is played in court. Division 5 extends the protections available for such witnesses permitting them to give evidence remotely.

Further, from 1 September 2021, in domestic violence offence proceedings where a defendant is self-represented, a complainant cannot be questioned directly in evidence by the defendant, but must be examined through a court appointed questioner, or through the use of court technology.

A recorded video or audio statement of a domestic violence complainant is admissible as evidence in chief in criminal proceedings for domestic violence offences and in concurrent or related proceedings for applications for apprehended domestic violence orders under the *Crimes (Domestic and Personal Violence) Act* 2007. The recorded video or audio statement may also be used in committal and summary proceedings instead of a written statement.

[8-020] Domestic violence complainant and proceedings

A domestic violence complainant is defined in s 3 of the Act as a person against whom the domestic violence offence is alleged to have been committed, but does not include a person who is a vulnerable person within the meaning of Pt 6 of the Act. A domestic violence offence is an offence within the meaning of the *Crimes (Domestic and Personal Violence) Act*.

Chapter 6, Pt 4B, Div 5 of the Act (ss 289T–289VA) applies to domestic violence offence proceedings, and also apprehended violence order proceedings involving a defendant charged with a domestic violence offence and a protected person who is the alleged victim of the offence: s 289T.

[8-030] Close court when domestic violence complainants give evidence

A domestic violence complainant's evidence, including a recording, must be given in closed court: s 289U(1). However, if their evidence also relates to a prescribed sexual offence, the media may be permitted access to that part of the proceedings pursuant to s 291C.

Section 289U(4) makes clear that the obligation to close the court in domestic violence proceedings extends to:

- a complainant who gives evidence in a way provided for by other provisions in Pt 4B or one who is a vulnerable person and entitled to give evidence in the way provided for by Ch 6, Pt 6 (s 289U(4)(a)); and
- does not affect the complainant's entitlement to:
  - (i) give evidence in a way permitted by other provisions in Pt 4B, or Pt 6 (if the complainant is a vulnerable person); or
  - (ii) have a support person present when giving evidence under s 306ZQ.

A complainant's evidence may only be heard in open court if a party requests and the court is satisfied there are special reasons in the interests of justice, or the complainant consents: s 289U(2). The principle of open justice does not, of itself, constitute special reasons in the interests of justice: s 289U(3).

A court may direct that the court may be closed for other parts of the proceedings: s 289UA. A direction may be made on the court's own motion or at the request of one of the parties. In making such a direction, s 289UA(3) requires the court to consider:

- the complainant's needs to have any person excluded from, or present in, the proceedings: s 289UA(3)(a), (b)
- the interests of justice: s 289UA(3)(c), and
- any other matter the court considers relevant: s 289UA(3)(d).

Section 289UA operates in addition to s 289U: s 289UA(4).

A person may be exempted from a direction under s 289UA to allow them to be present to support a person giving evidence, or for any other purpose the court thinks fit: s 289UA(5).

[8-040] Ways in which evidence of a domestic violence complainant may be given

The *Criminal Procedure Act* provides that the evidence of a domestic violence complainant may be given:

(a) By "alternative means" — from a place other than the courtroom by audio visual link or two way communication technology, or using "alternative arrangements" to restrict visual and other contact with the defendant or other persons in the courtroom using screens or planned seating arrangements: s 289V(1). The complainant is entitled to give their evidence in this way but may choose not to. Part or all of the proceedings may be adjourned to another court or place to enable this, and the court may order a court officer be present at the place: s 289V(2), (7). A court may order that alternative means of giving evidence are not to be used if there are special reasons in the interests of justice: s 289V(3), (4). The prosecution must provide the court with a "Notice: Evidence of domestic violence complainant in criminal proceedings" at the first mention indicating whether the complainant wishes to give evidence by alternative means or using alternative arrangements (Attachment E of PN 1/2012).

(b) In the form of a recorded statement. This is an audio recording or a video and audio recording of a representation made by a complainant when the complainant is questioned by a police officer in connection with a domestic violence offence. The recording must be made by a police officer with the complainant's informed consent as soon as practicable after the commission of the offence: ss 289C(1), 289D, 289F(1).

(c) In the form of a recorded statement if the evidence is given in any concurrent or related proceedings for an order under the *Crimes (Domestic and Personal Violence) Act*: s 289H.

(d) If the evidence is given in prescribed sexual assault proceedings, then the evidence may be given in accordance with alternative arrangements made under s 294B: s 294B(2A). (See **[10-140]**).

(e) The evidence may be given in accordance with existing alternative arrangements provided for such as by audio visual link (AVL) under the *Evidence (Audio and Audio Visual Links) Act* 1998: s 289F(6).

(f) In the form of a recorded statement instead of a written statement for the purposes of summary proceedings: s 185A(1). When a recorded statement has been served, the brief of evidence is not required to also include a written statement from the complainant: s 185A(4); *DPP v Nagler* [2018] NSWSC 416 at [28].

(g) In the form of a recorded statement instead of a written statement for the purposes of committal proceedings: s 283D(1).

[8-060] Form and requirements for a recorded statement to be given as evidence

For proceedings for domestic violence offences the main provisions in the *Criminal Procedure Act* are as follows:

(a) A domestic violence complainant (who is not a vulnerable person) is entitled to give evidence in chief by a recorded statement. The recorded statement is viewed or heard by the court: 289F(1). Once the recording is "viewed" or heard it becomes evidence in the proceedings, regardless of whether it forms part of the transcript: *DPP v Al-Zuhairi* (2018) 98 NSWLR 158 at [40]. There is no requirement to formally tender the recording. It is sufficient that it be marked for identification: *DPP v Al-Zuhairi* at [53].

(b) A recorded statement may be in the form of questions and answers, that is, an interview conducted by a police officer: ss 283E(1); 289F(2); 289D.

(c) The complainant must state in the recorded statement his or her age, a statement as to the truth of the representation, and any other matter prescribed by the regulations: ss 283E(2); 289(3).

(d) If the representation in the recorded statement is wholly or partly in a language other than English, the recorded statement, or part thereof, must contain an English translation or be accompanied by a separate written English translation: ss 283E(3); 289F(4).

(e) Except for committal proceedings, the domestic violence complainant must be available for cross-examination and re-examination, either orally in the courtroom, or by way of alternative arrangements such as closed circuit television if applicable: s 289F(5).

(f) In determining whether the complainant gives evidence orally or in the form of a recording, the prosecutor must take into account the complainant's wishes, any evidence of the defendant intimidating the complainant, and the objects of the *Crimes (Domestic and Personal Violence) Act*: s 289G.

(g) The recorded statement may be given wholly or partly in concurrent or related proceedings for applications for apprehended domestic violence orders under the *Crimes (Domestic and Personal Violence) Act*: s 289H.

(h) A complainant's failure to give evidence by way of a recorded statement or a police officer's failure to record a representation in accordance with Pt 4B do not affect the validity of any criminal proceeding: s 289N.

(i) On application, the court must order the return of the recorded statement to the prosecutor: s 289O(1).

[8-080] Admissibility of a recorded statement and relationship with Evidence Act 1995

Section 289I(1) of Pt 4B provides that the hearsay rule and the opinion rule do not prevent the admission or use of evidence of a representation in the form of a recorded statement. The operation of the *Evidence Act* is not affected by the operation of Pt 4B unless a contrary intention

is shown: s 289E. Section 289F does not displace the operation of the *Evidence Act*: s 289F(6). Therefore, where the maker of the recording is not available, s 65 (exception to hearsay rule) *Evidence Act* is not affected by s 289F(5).

A recorded statement is not admissible unless the defendant was given, in accordance with the service and access requirements of Ch 6 Pt 5 Div 3, a reasonable opportunity to listen to, and, in the case of a video recording, view the recorded statement: s 289I(2).

The court may admit the recorded statement if the Div 3 requirements have not been complied with if:

(a) the court is satisfied that the parties consent to the recorded statement being admitted, or

(b) the defendant or his or her Australian legal practitioner (if any) have been given a reasonable opportunity otherwise than in accordance with Div 3 to listen to or view the recorded statement and it would be in the interests of justice to admit the recorded statement: s 283D(1), (3); s 289I(3).

If a magistrate is asked to determine the admissibility of a recorded statement by a domestic violence complainant, given the time pressures in the Local Court, a degree of flexibility and informality in terms of conducting a voir dire may be appropriate. However, the minimum requirement is that the magistrate be aware of the content of the evidence he or she is being asked to exclude, otherwise the magistrate is not in a position to assess the probative value of the evidence or the extent to which it might create unfair prejudice: *DPP v Nagler* [2018] NSWSC 416 at [20]–[22].

[8-100] Service of and access to recorded statement

If the defendant is represented, a copy of the recorded statement must be served on the defendant as soon as practicable after the proceedings commenced or the prosecutor determines that evidence will be given in that form, whichever is later: s 289L(2).

If the defendant is not represented, only an audio copy of the recorded statement must be served on the defendant soon as practicable after the proceedings are commenced or the prosecutor determines that evidence is to be given in the form of the recorded statement, whichever occurs later: s 289M(2). However, s 289M(2) requires the prosecutor to provide the defendant with an opportunity to view a recorded statement in the form of a video recording at a police station on one or more of the following occasions:

(a) when the defendant is being questioned in relation to the alleged domestic violence offence

(b) at the request of the defendant, on a day arranged with the defendant

(c) on another day specified by notice in writing given to the defendant by the prosecutor before committal proceedings or the trial commences.

If the prosecutor cannot comply with these requirements, the prosecutor must provide the defendant with an opportunity to view the video recorded statement on a day when proceedings relating to the offence are held.

Evidence may not be adduced in any proceedings of the behaviour or response of an defendant when viewing a recorded statement at a place specified for that purpose under this section, unless:

(a) the viewing took place while the person was being questioned in relation to an alleged domestic violence offence, or

(b) the proceedings relate to the behaviour.

Court may adjourn proceedings

A court may adjourn proceedings relating to a domestic violence offence for not more than 14 days to enable a defendant to view or listen to a recorded statement on the ground that the defendant has not had a reasonable opportunity to view or listen to the recording: s 289Q(3).

[8-110] Court appointed questioners for self-represented defendant

Last reviewed: March 2024

Where a defendant is not represented by an Australian legal practitioner, a complainant in domestic violence offence proceedings cannot be directly examined by the defendant, but must instead be examined by a court appointed questioner (CAQ), or through the use of court technology: s 289VA(1) and (2).

A CAQ is to ask the complainant only the questions that the defendant requests be put to the complainant, and must not independently give the defendant legal or other advice: s 289VA(4) and (5).

The court does not have a discretion to decline to appoint a CAQ or use court technology under s 289VA(2), despite anything to the contrary in s 306ZL (see **[8-140] Giving evidence by a domestic violence complainant who is also a vulnerable person**) or another Act or law: s 289VA(6).

The requirement in s 289VA(2) applies whether or not the complainant gives evidence via AVL or other similar technology, or other alternative arrangements: s 289VA(7).

Suggested procedure

The following procedure is suggested:

(a) At the earliest possible opportunity in domestic violence offence proceedings (ideally at first mention), the court should inform a self-represented defendant that they are prevented by law from personally questioning the complainant, and that the court must appoint a person to ask questions on their behalf. The court should advise the defendant they will need to prepare a list of questions they wish for the complainant to be asked in cross-examination (for the suggested form of words, see **Suggested information and advice**, below).

(b) Once it is known a hearing is proceeding with a self-represented defendant, the court should appoint the CAQ as soon as possible, and in sufficient time for them to be present in court/by AVL to hear the complainant's evidence in chief: *Clark v R* [2008] NSWCCA 122 at [45], [55]. If it not known until the hearing that a defendant is self-represented, the matter may need to be stood down to allow time for the court to make the necessary arrangements.

(c) At the commencement of the hearing, the court should confirm whether the defendant has prepared a list of questions sought to be asked of the complainant in cross-examination. Consistent with a magistrate's obligations with respect to a self-represented defendant, the magistrate should explain the proposed procedure for cross-examination of the complainant to the defendant and advise of the nature and form of questions that are not permissible.

There is no requirement that the draft questions be made available to the prosecution, or the court for its approval as: "any question to be asked of a witness in cross-examination may ride upon the answer just given. The requirement to frame all questions in advance may impart a rigidity which robs a cross-examination of its effectiveness": *Clark v R*, above, at [48].

(d) The magistrate will explain to the CAQ their role, that is, that they are only to ask, verbatim, the questions sought to be put by the defendant (for suggested form of words, see **Suggested information and advice**, below).

(e) If the defendant is not literate, the CAQ or, if necessary, an interpreter, may write out the questions sought to be put by the defendant.

(f) Once the complainant has given evidence in chief, the defendant should be given the opportunity to add to and/or re-formulate the list of questions they've prepared.

(g) The CAQ will then ask the complainant only the questions that the defendant has requested be asked.

(h) If necessary, during cross-examination, the defendant will be given an opportunity to reformulate the questions in accordance with the court's rulings on objections and admissibility.

(i) After the complainant has answered the questions, the magistrate will ask the defendant if they have any further questions arising from the complainant's answers, or any questions previously overlooked.

(j) If the defendant has further questions, the procedures set out in paras (d)–(e) and (g)–(i) should be repeated.

Suggested information and advice

Suggested information and advice to self-represented defendant at first mention

As you are representing yourself in these proceedings, I must inform you that you cannot directly ask the complainant questions once the prosecutor has finished asking [*his/her*] questions. I will appoint a person, who I will refer to as a court appointed questioner, to ask the complainant questions in cross-examination for you.

At your hearing, you will need to provide a list of the questions you want the court appointed questioner to ask the complainant. The court appointed questioner will only be able to ask the complainant the questions you have prepared. They cannot give you legal advice or help you decide what questions to ask.

You should start thinking about these questions now. Bring any questions you think of with you to the hearing.

My court officer will hand you a document containing further information about the court appointed questioner.

Suggested information and advice to self-represented defendant at commencement of hearing

As you are representing yourself in these proceedings, I must inform you that you cannot directly ask the complainant questions once the prosecutor has finished asking [*his/her*] questions. I [*have appointed/ will appoint*] a person, who I will refer to as a court appointed questioner, to ask the complainant questions in cross-examination for you.

You need to provide a list of the questions you want the court appointed questioner to ask the complainant. I suggest that you start preparing those questions now, if you have not already done so.

The court appointed questioner is only here to help you by asking the complainant the questions you have prepared. [*He/she*] cannot give you legal advice or help you decide what questions to ask. Before the court appointed questioner cross-examines the complainant, I will give you the opportunity to review your questions. You can add, remove or change any of your questions at this time if you need to.

The prosecutor will not see the questions before they are asked, but if [*he/she*] objects to any of the questions when the court appointed questioner asks the complainant, then I will deal with that objection in the usual way. If you need more time to prepare additional questions, or reconsider the wording of some of your questions because of rulings I have made, then I will give you some time to do so.

Note: to address the possibility or difficulty of the defendant communicating with the intermediary (court appointed questioner) during the course of cross-examination, see *Clark v R* at [47].

When the cross-examination is finished, and before I give the prosecutor the opportunity to re-examine the complainant, I will ask you if you have any other questions arising from the cross-examination of the complainant and, if you need more time to prepare additional questions, I will give you some time to do so.

Suggested information and advice to defendant's court appointed questioner

You have been appointed by me to assist the defendant in this case. That assistance is limited to asking the complainant the questions appearing on the list the defendant has prepared. You cannot give the defendant legal advice or other advice.

You must read the questions the defendant has prepared verbatim. Any issue as to whether or not the question can be asked or its interpretation will be determined by me.

Suggested information and advice where s 294CB(4) does not apply

There are some questions that by law you cannot ask the complainant. You cannot ask the complainant questions about what the law refers to as [*his/her*] "sexual reputation". This means you cannot ask any question which suggests that the complainant:

- has or may have had sexual experience, or
- lacks sexual experience, or
- has taken part in sexual activity, or
- has not taken part in sexual activity.

[8-120] Warning to jury and provisions of transcripts to jury

Sections 289J–289K, 289VA(8) and 306ZR are concerned with jury trials but may be instructive to magistrates in evaluating evidence. If a complainant gives evidence wholly or partly in the form of a recorded statement in proceedings in which there is a jury, the judge must warn the jury not to draw any inference adverse to the defendant or give the evidence any greater or lesser weight because of the evidence being given in that way: s 289J. This warning also applies when a complainant gives evidence by alternative means or using alternative arrangements, or is examined by a CAQ: ss 289V(5), 289VA(8).

Further, in a trial for a domestic violence offence if it is suggested there was an absence of, or a delay in, complaint of the offence, the judge must warn the jury that there may be good reasons for the delay and it does not necessarily mean the allegation is false, but must not warn them that the delay is relevant to the complainant's credibility unless there is evidence sufficient to justify such a warning: s 306ZR.

The warnings pursuant to ss 289V(5) and 306ZR do not apply to hearings which commenced before 25 November 2020.

In a jury trial, the court may order that a transcript of all or part of the evidence given in the form of a recorded statement be supplied to the jury if it appears to the court that a transcript would be likely to aid the jury's comprehension of the evidence: s 289K.

[8-140] Giving of evidence by a domestic violence complainant who is also a vulnerable person

Where a domestic violence complainant is a child or cognitively impaired person (that is, a vulnerable person within the meaning of Pt 6 of the Act), the provisions of Pt 6, Div 4 continue to apply as the definition of a domestic violence complainant specifically excludes a vulnerable person: s 3.

Support persons

If the domestic violence complainant is a child or cognitively impaired person (that is a vulnerable person), s 294C applies rather than s 306ZK regarding entitlements to one or more support persons: s 294C(7).

Evidence from vulnerable persons

[10-000] Children and cognitively impaired — competence to give evidence

Except as provided in ss 13 to 19 inclusive of the *Evidence Act* 1995 (the Act) every person is competent to give evidence and a person who is competent to give evidence about a fact is compellable: s 12 of the Act.

So far as "vulnerable persons" are concerned, there may be an issue as to competence to give evidence. Section 306M(1) *Criminal Procedure Act* 1986 defines a "vulnerable person" as a child or cognitively impaired person. Section 306M(2) provides that "cognitive impairment" includes:

- an intellectual disability
- a developmental disorder, (including an autistic spectrum disorder)
- a neurological disorder
- dementia
- a severe mental illness, and
- a brain injury.

The first step is to establish that a witness who is a vulnerable person is competent to give evidence, whether sworn or unsworn, about a fact. The next step is to establish whether that witness is competent to give sworn evidence about that fact.

Competence generally

Section 13(1) says, a person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

(a) the person does not have the capacity to understand a question about the fact, or

(b) the person does not have the capacity to give an answer that can be understood to a question about the fact

and that incapacity cannot be overcome.

Competence to give sworn evidence

Section 13(3) says that a person who is competent to give evidence about a fact is not competent to give sworn evidence about the fact if the person does not have the capacity to understand that they have an obligation to tell the truth. A person who is not competent to give sworn evidence about a fact, may be competent to give unsworn evidence if the court has told the person.

(a) that it is important to tell the truth, and

(b) that he or she may be asked questions that he or she does not know, or cannot remember, the answer to, and that he or she should tell the court if this occurs, and

(c) that he or she may be asked questions that suggest certain statements are true or untrue and that he or she should agree with the statements that he or she believes are true and should feel no pressure to agree with statements that he or she believes are untrue: s 13(5).

The logical starting point of s 13 is the presumption, established by s 13(6) that a person is "not incompetent" unless the contrary is proved: *RJ v R* (2010) 208 A Crim R 174 at [16].

See the *Criminal Trial Courts Bench Book* at **[1-105]–[1-118]** for a discussion of the relevant case law concerning competence and sworn and unsworn evidence.

Generally, unsworn evidence is not given less weight than sworn evidence: *The Queen v GW* (2016) 258 CLR 108 at [56]. Different considerations may apply where the witness is not a young child: *GW* at [57].

A person who is competent to give evidence about a fact is nonetheless not competent to give sworn evidence if that person is incapable of understanding that he or she is under an obligation to give truthful evidence. The test formulated in this section focuses on the capacity to understand the duty to tell the truth: *R v JTB* [2003] NSWCCA 295; *RJ v R* (2010) 208 A Crim R 174. A court should not presume a child is not competent to give sworn evidence only because of the age of the child without making an inquiry.

Establishing competence

Even if a person is not competent to give evidence about a particular fact, that person may be competent in the terms of s 13(1) of the Act to give evidence of other facts: s 13(2) of the Act. For example, a child might be able to respond to simple factual questions, but not to questions that require inferences to be drawn. Accordingly, rulings as to competence may be made not only before the witness gives evidence, but also as the evidence proceeds.

In determining competence, the court may inform itself as it thinks fit, including by reference to expert evidence: s 13(8) of the Act. Mostly, the parties will alert the court to a competence issue. With a young child or cognitively impaired witness, it is prudent for the court to enquire of the parties, if represented, whether there is any issue as to the competence of the witness to give evidence generally and, more specifically, to give sworn evidence. If the response is suggestive of an issue or is equivocal, or if a party is unrepresented, the court should satisfy itself as to the competence of the witness. That issue should be explored in a voir dire: s 189(1)(c) of the Act.

The questions to establish competence to give sworn evidence, (that is, to establish that the witness understands the obligation to give truthful evidence), will often also assist in establishing the competence to give evidence generally, (that is, the capacity to understand a question and give an answer that can be understood). There should, however, be some questions separately concerned with those respective tests.

For example, the court might ask the following series of questions, depending on whether the witness is a young child, an older child or cognitively impaired:

- how old are you?
- who lives with you?
- do you have a pet? What is its name?
- when is your birthday?
- do you go to school/work?
- what class are you in?
- what is the the name of your teacher/boss?
- what things do you like doing when you are not at school/work?
- do you like to watch television?

- do you have a favourite television show?
- do you know that you are going to be asked some questions today about something from a while ago?
- do you understand that you have to tell the truth here today, *or*
- do you know that a court room is a special place where people must tell only the truth?

If it is established that the witness is competent to give sworn evidence, the witness can then be sworn as a witness. An oath or affirmation can then be given. If you are not so satisfied, but you are satisfied that the witness is competent generally, then the requirements of s 13(5) of the Act for the witness to give unsworn evidence must be satisfied. These requirements are that the court must tell the witness that:

(a) it is important to tell the truth,

(b) if you are asked a question and you don't know the answer, then you should say, "I don't know",

(c) if you are asked a question and you can't remember the answer, then you should say, "I can't remember",

(d) it does not matter if you don't know the answer or cannot remember something; the important thing is that you tell the truth,

(e) if you are asked something that you do believe is true, then you can say, "That's right", and

(f) if someone asks you a question you don't agree with, you can say, "I don't agree", or, "That is not true".

Even despite reaching this point, there may be an issue as to whether a person is competent to give evidence about a particular fact. Those particular questions could be asked on a voir dire. It is best to have the witness informed as required in s 13(5) of the Act to give unsworn evidence before the particular questions are asked. This is because if the witness is found to be competent to answer these particular questions, the answers given in the voir dire can be imported into the substantive hearing.

Compellability to give evidence

Furthermore, s 14 of the Act provides that a person is not compellable to give evidence on a particular matter if:

(a) substantial cost and delay would be incurred in ensuring that the person would have the capacity to understand a question about the matter or give an answer that can be understood to a question about the matter, and

(b) adequate evidence on that matter has been given, or will be able to be given.

[10-020] Unreliability of evidence

Sections 165–165A of the Act are concerned with warnings about unreliable evidence. While the sections are concerned with jury trials, it is instructive to magistrates in evaluating evidence.

The types of evidence which may be unreliable include, "evidence the reliability which may be affected by age, ill health (whether physical or mental), injury or the like": s 165(1)(c).

Children, as a class, are not to be regarded as unreliable witnesses: s 165A. A child's evidence might be regarded as unreliable because of their age, but only if there are circumstances

particular to that child in those proceedings that affect the reliability of the child's evidence that warrant a warning. It is for the party requesting such a warning to satisfy the court that such circumstances exist and warrant such a warning to the tribunal of fact: s 165A(2).

[10-040] The ways in which evidence of a vulnerable person may be given

The *Criminal Procedure Act* provides that the evidence of a vulnerable person (that is, a child or cognitively impaired person within the meaning of s 306M) may be given wholly or partly:

(a) in the form of a sound and/or visual recording of an interview of the witness by an investigating official: s 306S,

(b) orally in the courtroom: s 306S,

(c) if the evidence is given in any proceeding to which Pt 6 Div 4 applies, then the evidence may be given in accordance with alternative arrangements made under s 306W: s 306S,

(d) by closed circuit television for certain proceedings, such as personal assault offences and AVOs: see s 306ZA, or

(e) a written statement for the purposes of committal proceedings: Ch 3 Pt 2 Div 3.

[10-060] Evidence by way of pre-recorded interview

Last reviewed: March 2024

The main features of the provisions in the *Criminal Procedure Act* are as follows:

1. Vulnerable persons of any age are entitled to give evidence in chief by pre-recorded interview. This applies if a person is no longer a child and is not cognitively impaired, but his or her interview was recorded when that person was younger than 16 years: s 306U.
2. The court may only order that the evidence not be given by means of a pre-recording if it is not in the interests of justice to have the evidence given by pre-recording: s 306Y.
3. A vulnerable person must not be called to give evidence in chief by means other than a pre-recording, unless the person calling the witness has taken into account the wishes of the vulnerable person. The vulnerable person is not required to express his or her wishes: s 306T.
4. If evidence is given by way of a pre-recording, then, except for committal proceedings, the vulnerable person must be available for cross-examination and re-examination, either orally in the courtroom or by way of closed circuit television if Pt 6 Div 4, (for personal assault offences, AVOs, etc), applies: ss 306U(3) and 306ZA.
5. Subject to the vulnerable person wishing to be in court when the pre-recording is played, that person must not be present in or visible or audible to the court, while the recording is being played to the court: s 306U.
6. Such pre-recorded evidence is only admissible if:
   (a) the defendant and his or her lawyer, (if any), have had a reasonable opportunity in accordance with the regulations to listen to or to view the pre-recording, or
   (b) the parties consent to the pre-recording being admitted, or
   (c) the defendant and his or her lawyer, (if any), were given a reasonable opportunity otherwise than in accordance with the regulations to listen to or to view the pre-recording and it would be in the interests of justice to admit the pre-recording: s 306V.

See the discussion of *Tikomaimaleya v R* (2017) 95 NSWLR 315 at [54], [56] in the *Criminal Trial Courts Bench Book* at **[1-372]** concerning the proper approach to s 13(1) *Evidence Act* 1995 if an issue is raised about a vulnerable person's competence during a recorded interview.

See also *Criminal Trial Courts Bench Book* at **[5-400] Pre-recorded evidence in child sexual offence proceedings — Child Sexual Offence Evidence Program (CSOEP)** for District Court proceedings.

[10-080] Evidence by way of closed circuit television (CCTV)

The main features of the provisions in the *Criminal Procedure Act* are as follows:

1. The entitlement to give evidence by CCTV applies to personal assault offences (as defined), AVO proceedings and other matters referred to in s 306ZA.
2. The entitlement applies to a witness under 16 years at the time of giving evidence, or where the witness is 16 or 17 years at the time of giving evidence and the witness was under 16 years at the time the relevant charge was laid: s 306ZB.
3. The court may order that a vulnerable person not give evidence by way of CCTV if satisfied there are special reasons in the interests of justice for the evidence not to be given by such means: s 306ZB.
4. A vulnerable person may choose not to give evidence by means of CCTV: s 306ZB.
5. Where the defendant is a vulnerable person, the court may order that the defendant's evidence is given by way of CCTV. Such an order may only be made in respect of a child defendant if:
   (a) the child may suffer mental or emotional harm if required to give evidence in the ordinary way, or
   (b) the facts may be better ascertained with use of CCTV: s 306ZC.
6. Where identification is a fact in issue, identification evidence is not permitted using CCTV. If a vulnerable person is otherwise giving evidence by CCTV, that person may refuse to give identification evidence until after the completion of the person's evidence, including cross-examination and re-examination: s 306ZE.
7. If a vulnerable person chooses not to use CCTV or the facilities are not available, alternative arrangements must be made to restrict contact between the vulnerable person and any other person, unless the vulnerable person chooses not to have such arrangements. Those alternative arrangements may include:
   (a) screens
   (b) seating arrangements in the courtroom, and
   (c) the adjournment of the proceedings to other premises: s 306ZH.

[10-100] Support persons

A vulnerable person (including a defendant), who gives evidence in proceedings named in s 306ZK *Criminal Procedure Act* (criminal proceedings, AVOs, civil proceedings arising from a personal assault offence etc), is entitled to choose a person to be present nearby when giving evidence. More than one support person may be permitted.

Note that s 306ZK does not apply if the vulnerable person giving evidence is a complainant in proceedings for a prescribed sexual assault or a domestic violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act* 2007. In that case, s 294C applies in respect of the entitlements to one or more support persons.

[10-120] Questioning by an unrepresented defendant

In criminal proceedings arising from a personal assault offence, where the defendant is not represented by a lawyer, a vulnerable person (other than the defendant), is to be asked questions by a person appointed by the court instead of by the defendant. In cases involving prescribed sexual offences, this obligation is mandatory: s 294A *Criminal Procedure Act*. In other cases, the court may choose not to appoint a person if it is not in the interests of justice to do so: s 306ZL.

[10-140] Publication of evidence and evidence in camera

A complainant in a prescribed sexual assault offence is to give evidence in camera, even if the evidence is given by way of CCTV or another alternative arrangement, unless the court otherwise directs: see s 291 *Criminal Procedure Act*. Section 294D extends the operation of the provision to any witness against whom a prescribed sexual offence is alleged to have been committed by the accused person.

Media representatives are entitled to enter and remain in the courtroom during proceedings or any part of proceedings held in camera where the complainant gives evidence via CCTV. Arrangements may also be made to allow media representatives to view or hear evidence given by a complainant during in camera proceedings from another place, so that they are not present in the courtroom or place from which the evidence is being given: see s 291C. However:

- An automatic statutory restriction applies in relation to the identification of complainants and children involved in prescribed sexual offence proceedings. Section 578A *Crimes Act* 1900 prohibits the publication of any matter that identifies, or is likely to lead to the identification of, a complainant in proceedings for a prescribed sexual offence. It is also an offence to publish or broadcast the name of a child defendant or a person giving evidence who is, or was at the time of the offence, a child: see s 15A *Children (Criminal Proceedings) Act* 1987.
- The *Court Suppression and Non-Publication Orders Act* 2010 empowers the court to make a suppression or non-publication order in respect of evidence given in criminal or civil proceedings, on the basis of any of the grounds set out in s 8 including that "the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency)". See the discussion of what may satisfy the requirement of necessity in the *Criminal Trial Courts Bench Book* at **[1-354] Grounds for and content of suppression or non-publication orders**.

[10-160] Children's evidence in committal proceedings

If the complainant in a child sexual assault offence is under 16 years when the offence is allegedly committed and currently under 18 years, a direction to attend to give evidence in the committal proceedings may not be given: see s 91(8) *Criminal Procedure Act* as in force before 30 April 2018 for proceedings which had commenced before that date; s 83(2) for proceedings commenced on or after 30 April 2018.

Remote witness video facilities

[12-000] Operational guidelines for judicial officers

Background information

Vulnerable persons (children and people with a cognitive impairment), complainants and sexual offence witnesses in prescribed sexual offence proceedings are entitled to give their evidence from a place other than the courtroom by means of closed circuit television facilities or other technology that enables communication between that place and the courtroom, if they choose to do so. For the purposes of these guidelines, that place is referred to as the remote witness room.

The witness is also entitled to have a support person(s) with them in the remote witness room, sitting near or in sight of them.

The remote witness room is part of the court. For the safety of witnesses their location is confidential.

Procedures

1. There are two screen monitors in the courtroom: one large screen monitor (visible to the court) and one small screen monitor on the Bench table (visible to the judicial officer and/or court officer only). Any camera is located above or in close proximity to the large screen monitor.
2. The accused person should be seated out of the range of any camera but in a position to see the large screen monitor in the courtroom.
3. The witness and any support person/s should be advised that they may be visible to the judicial officer at all times, even when the transmission of the audio and/or video to the witness room is muted or otherwise turned off.
4. The examining legal representative is required to position themselves at the appropriate bar table position. In this position, the witness will be able to view an image of the legal representative when the representative addresses the large screen monitor.
5. An unrepresented accused person should be seated out of sight of any camera and the person appointed by the court to examine the witness on the unrepresented accused's behalf will be required to position himself or herself at the appropriate bar table position. In this position, the witness will be able to view an image of the appointed person when the person addresses the large screen monitor.
6. During the witness testimony, the view on the large screen monitor should be the head and shoulder image of the witness. Note that in older (pre-2005) courts the image on the large screen monitor and/or the small screen monitor on the bench table may be switched between the full room view of the remote witness room and a view of the witness. In post-2005 courts, only a view of the witness is available.
7. The judicial officer should introduce himself or herself to the witness by addressing the witness on the large screen monitor. It is important that users in the courtroom address the large screen monitor so that the witness can see their face. The tendency to concentrate on the small screen monitor on the Bench when addressing the witness should be avoided to ensure that the judicial officer is visible to the witness.
8. Objections: Once the objector has stood up to make his or her objection, the judicial officer should inform the witness that the audio will be turned off temporarily (AUDIO

MUTE) so that the objection can be dealt with. The AUDIO MUTE should be activated using the controls on the PC, touch screen controller or Bench. The audio and video transmission should only be muted (SYSTEM MUTE) in circumstances where it would normally have been appropriate to remove the witness from the courtroom, and/or where a lengthy objection is taken and/or a lengthy legal discussion occurs.

9. When electronic evidence is played in the courtroom, no image of the witness should be available on the large screen monitor. This should occur automatically via the control system in the courtroom.
10. Use of the remote witness facility may be tiring for witnesses and it may be necessary to schedule breaks accordingly, particularly for vulnerable people.
11. If the witness is required to indicate a part of the body, she or he can be asked to stand and/or move back from the camera.
12. A tape measure or ruler may be provided in the remote witness room to assist the witness to indicate the size to scale as dimensions may be lost on the screen.
13. Always inform the witness about what is happening to avoid confusion.

Notes

1. The cameras should not be interfered with. If you encounter any difficulties with equipment, Courtroom Technology Group should be contacted on (02) 9287 7870.
2. The AUDIO MUTE and SYSTEM MUTE controls are located on the PC, touch screen or Bench.
3. The audio is transmitted to the witness room via the court audio-visual system and the level will be pre-set to the optimum level. However, the level can be adjusted by the PC or the touch screen controller.
4. The court staff will have set up the facilities in readiness for the proceedings. The audio-visual facilities will be on standby. When ready to take evidence from the witness, the court officer in the remote witness room should select the appropriate court on the control panel on the side of the remote witness cabinet. The courtroom staff should then select the REMOTE WITNESS icon on the PC in the courtroom. Once the court officer in the remote witness room has selected the appropriate court, the CONNECT icon on the PC screen will turn green. At this stage, the courtroom staff should select the CONNECT icon, thereby activating the connection between the courtroom and the remote witness room. Just prior to this occurring, the judicial officer should ask the Sheriff's/Court Officer to telephone the remote witness room to ensure that the witness and others in the remote witness room are seated and ready.
5. At the close of evidence from the witness, courtroom staff should select EXIT on the PC, thereby deactivating the connection between the courtroom and the remote witness room. The court officer in the remote witness room should also select the OFF button on the side of the remote witness cabinet.
6. The sheriff's/court officer should be present in the remote witness room at all times so they will be aware of what is happening in the remote witness room and can report to the court at anytime, as necessary.
7. The judicial officer and/or the court officer are able to view the remote witness on the small screen monitor on the Bench table when any electronic evidence is being given. A smaller

image of the electronic evidence will appear within the larger witness image. It is possible to toggle between the images to view a smaller image of the witness within a larger image of the electronic evidence by selecting the EVIDENCE TOGGLE icon.

8. When recording of evidence is required, the judicial officer should make an order for the witness's testimony to be recorded, and the recording equipment should be turned on at the commencement of the witness's testimony.

Tips

1. Check with the witness that they are able to hear adequately and have a good visual image.
2. Remember that any witness who is giving sworn evidence from a remote witness facility must still give an oath or affirmation.
3. It may be that it will be more difficult for the judicial officer to ascertain the need for the witness to have a break when they are located remote from the courtroom. Hence, the judicial officer should regularly check with the witness or with their support person as to their need for a break (depending on the needs of the witness such as young age or disability).
4. Support people may need to interrupt a witness's evidence (mainly in the case of a vulnerable person) if they become aware that the witness is experiencing some type of difficulty in giving evidence and the court officer in the remote witness room has not noticed this difficulty. This may need to be discussed with the support person in the absence of the jury.

Last update: March 2014

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[12-020] Operational guidelines for legal representatives

Background information

Vulnerable persons (children and people with a cognitive impairment), complainants and sexual offence witnesses in prescribed sexual offence proceedings are entitled to give their evidence from a place other than the courtroom by means of closed circuit television facilities or other technology that enables communication between that place and the courtroom, if they choose to do so. For the purposes of these guidelines, that place is referred to as the remote witness room.

The witness is also entitled to have a support person(s) with them in the remote witness room, sitting near or in sight of them.

The remote witness room is considered to be part of the court. For the safety of witnesses their location is confidential.

Procedures

1. To examine the witness, legal representatives are required to move to the appropriate bar table position. The image viewed by the witness in the witness room will be a close up image of the examiner. The accused is not to be visible to the witness in the remote witness room.
2. To address the witness, stand at the appropriate position of the bar table and direct attention to the view on the large screen monitor (above the Jury if applicable) to ensure the witness receives a close up image.

3. The judicial officer will introduce the examiner to the witness. The examiner should greet the witness by addressing the view of the witness on the large screen monitor (above the Jury if applicable).
4. The witness will not be viewed by the court while any pre-recorded electronic evidence is played to the court.

Notes

1. The legal representative, when addressing or questioning the remote witness should check regularly with the witness that they can hear and understand the questions being asked of them.
2. The legal representative should clearly communicate to the witness that they may ask for any questions to be repeated if they do not understand them.
3. The judicial officer is able to override (MUTE) the transmission of audio only (AUDIO MUTE) or both audio/video (SYSTEM MUTE) to the witness room.
4. The Bench or Sheriff's/Court Officer are able to view any electronic evidence and the remote witness at the same time. The evidence will appear as a small picture inserted in the larger remote witness image. This can be reversed by the Sheriff's/Court Officer or the Bench via the EVIDENCE TOGGLE button/icon.
5. A full remote witness room view is no longer available in remote witness facilities installed after 2005.
6. The audio is transmitted to the witness room via the court AV system and the level will be preset to the optimum level. However the level can be adjusted by the Sheriff's/Court Officer.

Last update: March 2014

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[12-040] Operational guidelines: system setup checklist

Background information

Vulnerable persons (children and people with a cognitive impairment), complainants and sexual offence witnesses in prescribed sexual offence proceedings are entitled to give their evidence from a place other than the courtroom by means of closed circuit television facilities or other technology that enables communication between that place and the courtroom, if they choose to do so. For the purposes of these guidelines, that place is referred to as the remote witness room.

The witness is also entitled to have a support person(s) with them in the remote witness room, sitting near or in sight of them.

The remote witness room is part of the court. For the safety of witnesses their location is confidential.

Procedures

The following information is provided to assist the sheriff's/court officer responsible for the set-up and operation of the remote witness facilities. The PC controls the in-court audio and video.

1. In the remote witness room, select the court to connect to, for example District Court/Local Court/Court 1 etc). This must be done first to allow the court to connect to the remote witness room.

2. In the courtroom select REMOTE WITNESS on the PC. This will bring up a list of available remote witness rooms. This should be green in color indicating the remote witness room is available. If it is grey, then remote witness room is either in use by another court or the court has not been selected in the remote witness room.
3. Select CONNECT on the PC to connect to the room..

Check of camera views

To check the system, one officer will have to be in court and the other officer in the remote witness room.

1. Check the witness head/shoulders view displays the head/shoulders of a person sitting at the witness table, on the large courtroom monitor and the Bench monitor.
2. Check to ensure that the image in the remote witness room displays an image of the Bench and Bar table as a split image.
3. Find the place at the bar table that gives the witness the best view of the legal representative, and place a mark on the table at that place and/or inform the legal representative of where they need to stand in order to be seen clearly.
4. Ensure that the camera is positioned so the accused cannot be seen by the witness. This may require particular attention if the accused person is permitted by the court to sit behind their legal representative or where they are unrepresented.
5. If Witness Testimony Recording (WTR) is required, check to make sure the image of the remote witness appears in all four (4) quadrants of the recording.
6. Check that the judicial officer's close up image view displays the full close up image of the judicial officer, on the right hand witness console monitor.

   Note: A full remote witness room view is no longer available in remote witness facilities installed after 2005.

Transmission check to and from the courtroom and remote witness room

1. Stand in front of the centre bar table microphone. Test that the volume is getting to the remote witness room with the assistance of the other sheriff's/court officer in the remote witness room.
2. Check that the judicial officer's microphone is working in the same manner as above.
3. Check that the video/audio SYSTEM MUTE mutes all video and audio to the remote witness room.
4. Check that the video/audio WITNESS MUTE mutes the audio and video from the remote witness room to the court.
5. Check that the AUDIO MUTE mutes all audio ONLY to and from the remote witness room.
6. Use the electronic document viewer or the DVD player to check that the split image of the court appears on one monitor in the remote witness room and the other monitor in the remote witness room shows the evidence.
7. Check that the recording equipment is working and is switched on at commencement of the witness giving evidence in all relevant matters.

Notes

1. The Bench or Sheriff's/Court Officer via the PC are able to view any electronic evidence and the remote witness at the same time with the evidence appearing as a small picture inserted in the larger remote witness image. This can be reversed by the Sheriff's/Court Officer or the Bench via the EVIDENCE TOGGLE button/icon.
2. Every remote witness room should have phone/intercom connection with the court and this connection should be checked prior to the witness giving evidence.

Last update: March 2014

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[12-060] Operational guidelines for Sheriff's/Court Officers

Background information

Vulnerable persons (children and people with a cognitive impairment), complainants and sexual offence witnesses in prescribed sexual offence proceedings are entitled to give their evidence from a place other than the courtroom by means of closed circuit television facilities or other technology that enables communication between that place and the courtroom, if they choose to do so. For the purposes of these guidelines, that place is referred to as the remote witness room.

The witness is also entitled to have a support person(s) with them in the remote witness room, sitting near or in sight of them.

The remote witness room is considered part of the court. For the safety of witnesses their location is confidential.

The role of the Sheriff's/Court Officer is to maintain the integrity of the court proceedings.

Procedures

The following requirements must be observed:

1. Ensure prior to the witness coming into the remote witness room and prior to the start of proceedings that the equipment is checked and fully operational. You must also ensure that the witness can clearly see and hear the transmission and that the accused person will not be visible to the witness.
2. The phone connection from the remote witness room to the main courtroom should be checked and be fully operational prior to the witness commencing giving his or her evidence.
3. Ensure at the commencement of the witness's evidence and after any interruptions or break that the witness is positioned so that he or she will be clearly visible to the courtroom.
4. Ensure recording equipment is functioning and turned on.
5. Support person(s) and other people in the remote witness room may be visible to the judicial officer at all times, even if the video and audio is muted temporarily.
6. The Sheriff's/Court Officer should ascertain who will be in the remote witness room and their role, and alert the court.
7. The support person/s should sit in a position so that they are near to and within the sight of the complainant or vulnerable person.

8. Interpreters should sit next to but slightly forward of the witness to have the prominent microphone position, but not to obstruct the witness's view of the monitors nor the court's view of the witness. Note that for Auslan interpreters they need to face the witness but still be visible to the court.
9. Inform the witness and the support person/s prior to the proceedings that they may be visible to and be able to be heard by the court while they are in the witness room, even if the system is shut down (MUTED) temporarily and the courtroom is not visible to them.
10. A Sheriff's/Court Officer should be present in the remote witness room with the witness throughout the time that she or he is required to be there.
11. The Sheriff's/Court Officer must ensure the security of the witness and the witness room. That is, ensure that no other person enters the room, and that the witness does not leave the room without authorisation of the judicial officer.
12. The Sheriff's/Court Officer will assist with the swearing in of the witness where appropriate as per normal court procedures.
13. The Sheriff's/Court Officer must pay full attention to the proceedings at all times.
14. The Sheriff's/Court Officer should inform the court (via phone/intercom connection to the court) if there is any malfunction of the equipment in the remote witness room, for example the examiner cannot be seen clearly, the accused is visible, the sound quality is poor or air conditioning is not working.
15. The Sheriff's/Court Officer should inform the court (via phone/intercom connection to the court) of any problems for the witness, for example the witness's need for a break to go to the toilet or if she or he is experiencing a health problem/emergency or critical incident of any sort. The support person may bring these issues to the attention of the Sheriff's/Court Officer.
16. The Sheriff's/Court Officer should inform the relevant legal officer if the witness complains of ill health or if he or she is distressed during an adjournment.
17. The Sheriff's/Court Officer must not coach or intimidate the witness.
18. The Sheriff/Court Officer must not interrupt or intervene during the giving of evidence by, or cross examining of the witness unless it is to report to the judicial officer that some attempt at interruption, intervention or intimidation is taking place, there is concern for the wellbeing of the witness, or there are technological problems affecting the system. In which case the Sheriff's/Court Officer must re port their concern to the court immediately.
19. The Sheriff's/Court Officer must not prompt the witness in any way, offering her or him any explanations, interpretations or guidance and must not make any comments or signals to the witness except to ensure the witness follows any direction of the judicial officer.
20. Any exhibits should be conveyed promptly by the court officer and handed to the witness without comment.
21. In the event of an interruption in transmission from the courtroom or failure of the equipment, the Sheriff's/Court Officer must remain with the witness.
22. The Sheriff's/Court Officer should not speak to the witness about the case or her/his evidence during any adjournment or interruption in the proceedings.

23. Take care not to confuse the role of Sheriff's/Court Officer with that of a support person. For example, do not comfort the witness if she/he becomes upset while giving evidence and do not discuss the circumstances of the case with the witness or anyone else prior to or during the proceedings.
24. If, for instance, the witness is required to indicate a part of the body that is not visible to the court, it may be necessary for the Sheriff/Court Officer to assist the witness to reposition such as moving back from the camera.
25. On termination of the witness's evidence, the Sheriff's/Court Officer must ensure that the witness is escorted safely from the remote witness room and that for a child witness she or he is in the care of a responsible adult or support person.

Last update: March 2014

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[12-080] Operational guidelines for support persons

Background information

Vulnerable persons (children and people with a cognitive impairment), complainants and sexual offence witnesses in prescribed sexual offence proceedings are entitled to give their evidence from a place other than the courtroom by means of closed circuit television facilities or other technology that enables communication between that place and the courtroom, if they choose to do so. For the purposes of these guidelines, that place is referred to as the remote witness room.

The witness is also entitled to have a support person(s) with them in the remote witness room, sitting near or in sight of them.

The remote witness room is considered part of the court. For the safety of witnesses their location is confidential.

Procedures

1. Any interpreter with the witness will sit next to the witness so as to have the prominent microphone position, and also be visible to the court. Auslan interpreters will sit facing the witness but also need to be in view of the court.
2. The witness is entitled to have a support person(s) present in the room, seated near the witness, and within the witness's sight, when the witness is giving evidence. This person(s) should also be visible to the court.
3. The support person can assist the witness with any difficulty in giving evidence associated with a disability, as agreed to by the court.
4. Support person(s) and other people in the remote witness room may be visible to the Judicial Officer at all times, even if the video and audio is muted temporarily.
5. The support person should quietly inform the Sheriff's/Court Officer of any problems such as difficulties with hearing what is being asked or if the witness is having any difficulties requiring a break (for example, witness needing to go to the toilet, witness distressed, witness having breathing difficulties, or witness indicating ill health during an adjournment).
6. In the event of an adjournment, interruption in transmission from the courtroom o r failure of the equipment, the support person(s) should not speak to the witness about the case or her/his evidence, although the support person(s) is permitted to comfort the witness during the interruption.

7. The support person should not discuss the evidence with the witness at any time.
8. The support person must not coach the witness, or influence the witness in any way while they are giving evidence (including during breaks).

Last update: March 2014

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Interpreters

[14-000] Right to an interpreter

Last reviewed: March 2024

A right of a witness to give evidence through an interpreter has been given statutory recognition in s 30 *Evidence Act* 1995:

> A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

Whether an interpreter will be used is a matter for the discretion of the court.

Refusal to grant an adjournment in order that an interpreter be provided could amount to a denial of procedural fairness. *Cucu v District Court (NSW)* (1994) 73 A Crim R 240 at 243, 244 and 250.

The material consideration is whether, without an interpreter, the witness (whether a party or not) is likely to be unfairly handicapped in giving evidence. In the case of a party, the test is whether he or she cannot sufficiently understand what others are saying without the assistance of an interpreter and adequately reply. The court would bear in mind that the use of an interpreter by a witness who in fact understands the language of the court could provide an unfair advantage. Against that, regard must be had to the critical importance of a party and a witness being able to comprehend what is happening and what they are being asked:

> The linguistic skills adequate for work and social intercourse frequently evaporate in stressful, formal and important situations: *Cucu v District Court (NSW)* (1994) 73 A Crim R 240.

[14-020] Legislation and the use of interpreters

Last reviewed: March 2024

A variety of legislation raises the issues of language and interpreters:

(a) The *International Covenant on Civil and Political Rights* (1966) (which Australia has signed and ratified), Article 14(3) states, that in criminal cases all should:

> … be informed promptly and in detail, in language which he understands of the nature and cause of the charge against him. [Art 14(3)(a)]
>
> …
>
> have the free assistance of an interpreter if he can not understand the language used in court. [Art 14(3)(f)]

(b) Section 41 *Evidence Act* provides that a court may disallow a question in cross examination if the question is, inter alia, "misleading" or "oppressive" and may take into account "any relevant condition or characteristic of the witness including age, personality and education": s 41(2). Linguistic or cultural difficulties experienced by a witness in answering any questions could fall within the scope of s 41 where the line of questioning is confusing (misleading or oppressive).

(c) Section 22 provides that an interpreter must either take an oath or make an affirmation in accordance with the form in Sch 1 or in a similar form. Note that the oath/affirmation requires the interpreter to "well and truly interpret" — query though whether this requires a strict verbatim account.

(d) Section 24 provides that it is not necessary that a religious text be used and an oath is effective whether or not the person has any religious belief (or belief of a particular kind) or did not understand the nature and consequences of the oath.

(e) Pursuant to s 138(3)(f) *Evidence Act*, the courts have a discretion to exclude improperly or illegally obtained evidence where an impropriety or contravention of the law is contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights* (1966).

(f) Section 139(3) *Evidence Act* requires that any caution be given, or translated into, a language in which the person is able to communicate with reasonable fluency, but need not be given in writing unless the person cannot hear adequately.

(g) Section 219ZD *Customs Act* 1901 requires an officer of the Australian Customs Service or a police officer when detaining a person who is not fluent in English to have an interpreter present when communicating with a detainee.

(h) There are numerous provisions that govern the right to an interpreter for a person in custody prior to charge. For example s 128 *Law Enforcement (Powers and Responsibilities) Act* 2002 states:

> (1) The custody manager for a detained person must arrange for an interpreter to be present for the person in connection with any investigative procedure in which the person is to participate if the custody manager has reasonable grounds for believing that the person is unable:
>
> (a) because of inadequate knowledge of the English language, to communicate with reasonable fluency in English, or
>
> (b) because of any disability, to communicate with reasonable fluency.

Reference is also made to cl 28 *Law Enforcement (Powers and Responsibilities) Regulation* 2016 which prescribes categories of persons to be referred to as "vulnerable persons":

> **28 Vulnerable persons**
>
> (1) A reference in this Division to a vulnerable person is a reference to a person who falls within one or more of the following categories:
>
> (a) children,
>
> (b) persons who have impaired intellectual functioning,
>
> (c) persons who have impaired physical functioning,
>
> (d) persons who are Aboriginal persons or Torres Strait Islanders,
>
> (e) persons who are of non-English speaking background …

[14-040] Determining the need for an interpreter

Last reviewed: March 2024

Situations where an interpreter might be used:

- Unable to communicate in English. No understanding or effective use of English.
- Able to communicate but in a limited capacity. Conversational English may not mean competence with more formal English. "Normally where a witness has a difficulty speaking English and requests the assistance of an interpreter this will be permitted": *Cucu v District Court (NSW)* (1994) 73 A Crim R 240 at 250 per Sheller JA.

- Although able to communicate, may not be comfortable in using it: *Adamopoulos v Olympic Airways SA* (1991) 25 NSWLR 75.
- The risk that some parties may seek to take improper advantage of the facility of a court interpreter, "must be weighed against the serious injustice, and breach of fundamental human rights, which is involved by denying that facility to a person who reasonably requests it and who may need it in the peculiar setting of a court proceeding": *Cucu v District Court (NSW)* (1994) 73 A Crim R 240 at 244 per Kirby J.
- Where awareness is required of cultural factors: see *R v Anunga* (1976) 11 ALR 412.
- Where a judicial officer is not satisfied that the accused person understands the substance of the proceedings: see *R v Kun* [1916] 1 KB 337; *Kunnath v The State* [1993] 4 All ER 30.

[14-060] Provision of an interpreter

Last reviewed: March 2024

The provision of an interpreter is not the function of a court. It is generally the duty of the parties to request an interpreter if needed and, if so, to ensure the presence of an interpreter at the commencement of and throughout the proceedings until further attendance is excused by the presiding officer. However, in the case of criminal proceedings, this obligation is often assumed by the prosecuting authority or by the Criminal Listing Authority.

[14-080] Interpreter qualification

Last reviewed: March 2024

The principal provider of interpreting services for the court system is Multicultural NSW. Most of the members of the panel of interpreters hold NAATI accreditation (National Accreditation Authority for Translators and Interpreters).

First preference Interpreter (formerly Level 3). This is the first professional level and represents the minimum level of competence for professional interpreting.

Second preference Paraprofessional interpreter (formerly Level 2). This is a paraprofessional level and represents a level of competence in interpreting and translation for the purpose of general conversations only.

Third preference Practitioner with recognition. Whilst recognised as competent have not sat for accreditation.

It is generally accepted that the interpreter who officiates in court should not have made his services available to any party on any prior occasion out of court, for example, conference with lawyers, medical examination.

[14-100] Procedure

Last reviewed: March 2024

When the court is satisfied that an interpreter should be used, the following steps should be considered:

1. The accreditation of the interpreter should be perused and the name, qualification and chosen language should be recorded on the transcript.
2. The oath (or affirmation) to the interpreter should be administered.

3. When the non-English speaking witness is called, the form of oath (or affirmation) must be translated, and the response by the witness ("So help me, God" or "I do" or whatever is appropriate) should be uttered by the witness in his or her native tongue and *not* in English.
4. Ascertain whether the interpreter is satisfied that the witness is of the same language or dialect and whether there are any other requirements that need to be met for a successful session.
5. Generally in cases of consecutive interpreting it should be appreciated by all participants (that is, presiding officer, counsel and witness) that the speed and volume of delivery need to be accommodated to the capacity of the interpreter. Directions may need to be given from time to time. These may include permitting the interpreter to make written notes.
6. Care should be taken to ensure that the interpreter is adequately interpreting the evidence during the course of a hearing. On occasions particularly when a defendant has some understanding of English the tendency is for interpreters not to simultaneously interpret. Complaints can subsequently be made that the evidence was not sufficiently interpreted and that a fair trial was not afforded to the defendant.
7. Sometimes more than one interpreter is requested for the same language when the defendant requires an interpreter and a prosecution witness requires an interpreter. In determining whether to request more than one interpreter for the same language you should be mindful of the availability of interpreters in that particular language and the extent of use of the interpreter by the defendant. If the defendant needs an interpreter to provide instructions to his solicitor it may be appropriate to order two interpreters so there is no perceived "conflict of interests". Having said that, court interpreters are professionals whose code of conduct requires them to protect confidentiality. Holding up, or adjourning a hearing to obtain a second interpreter in such circumstances should only occur after careful consideration of the interests of all parties.

[14-120] Other forms of interpreting

Last reviewed: March 2024

The guidance material contained in this section applies equally to other forms of interpreting, for example, the deaf and hearing impaired. It is understood however there are some persons who are so profoundly and peculiarly affected that a very limited number of persons (and even only one person) has the capacity to communicate. In these rare cases, a court will need to give such directions as are necessary to adapt to the circumstances, but it is recommended that a proper record of the circumstances and the reasons which led to any departure from usual procedures be made so as to avoid any later attack on the integrity of the hearing.

[14-140] Hearing impaired

Last reviewed: March 2024

When booking an interpreter for the hearing impaired the judicial officer should find out how the person communicates:

- Australian Sign Language (Auslan)
- Oral
- Cued Speech
- Signed English (SE).

[14-160] Problems with interpretation

Last reviewed: March 2024

Whenever an interpreter is being used, it should be kept in mind that interpreting is not an exact science. Interpreting from one language to another always involves the interpreter making a decision as to how best to convey the sense of what has been said rather than just a word for word translation.

Whenever evidence is being given by a person whose command of English is clearly limited or where it is being given through an interpreter, care should be exercised over the answers given. It may be worthwhile before allowing an interpreter to begin, to instruct them to raise with the court any point of difficulty while interpreting, such as where the interpreter finds that a clear explanation is not possible.

[14-180] Guidelines for magistrates/judges on working with interpreters in court

Last reviewed: March 2024

Professor Sandra Hale, Interpreting and Translation, UNSW

- Ask interpreters to introduce themselves and state their level of NAATI accreditation and their formal qualifications (eg, Degree or TAFE qualification in Interpreting)
- Ask them if they have worked in court before. If not, explain their role: "To interpret everything faithfully and impartially in the first/second grammatical person"
- Remember that interpreting faithfully does not mean interpreting 'literally' — word-for-word translations normally produce nonsensical renditions
- Ask them what resources they will be accessing in court (eg, online glossaries and dictionaries can now be accessed on smart phones and tablets. Interpreters may need to consult them at different stages of the hearing or trial)
- Tell the interpreter to feel free to seek clarification when needed, seek leave to consult a dictionary or to ask for repetitions. (Note: It is a sign of a good interpreter to take such actions when needed, to ensure accuracy of interpretation)
- Explain the interpreter's role to the witness/defendant/accused/jury
- Ask the interpreter when s/he would like to take their breaks — ideally breaks should be provided at least every 45 minutes (Interpreting requires a very high cognitive load and is mentally very taxing)
- Ensure that the interpreter is comfortable and is provided with a chair, a jug of water and glass, a table to lean on to take notes and a place to put their belongings (such as a bag and umbrella)
- Instruct lawyers and witnesses to speak clearly and at a reasonable pace, and to pause after each complete concept to allow the interpreter to interpret (Note: If you cannot remember the question in full or understand its full meaning, it is very likely the interpreter will not either)
- If there is anything to be read out, provide the interpreter with a copy of it so s/he can follow. If it is a difficult text, give him or her time to read through it first
- Stop any overlapping speech or any attempts from lawyers or witnesses to interrupt the interpreter while s/he is interpreting

- Do not assume that the witness will understand legal jargon when interpreted into their language. Interpreters must interpret accurately, and cannot simplify the text or explain legal concepts. If there are no direct equivalents, the interpreter may ask for an explanation which can then be interpreted
- Interpreters are required to interpret vulgar language, including expletives
- Interpreters are required to interpret everything for the defendant or accused, to make them linguistically present. This includes the questions and answers during evidence, any objections, legal arguments and other witness testimonies. The consecutive mode will be used when interpreting questions and answers. The whispering simultaneous mode (AKA chuchotage) will be used for all other instances (if the interpreter is trained in this mode of interpreting)
- If anyone questions the interpreter's rendition, do not take their criticism at face value. Bilinguals who are not trained interpreters often overestimate their competence. Compare qualifications and give the interpreter the opportunity to respond to the criticism

For more information on Interpreting issues, refer to: S Hale "Interpreter policies, practices and protocols in Australian courts and tribunals. A national survey", *AIJA*, Melbourne, 2011..

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In addition, the Judicial Council on Diversity and Inclusion has published recommended standards for the use of interpreters: see "Recommended national standards for working with interpreters in courts and tribunals", 2nd edn, 2022.

General orders

This chapter deals with orders that can be made during the course of and following a hearing or guilty plea including sentencing orders. The first part of the chapter deals with orders (other than sentencing orders) commonly made following a hearing and verdict. The second part of the chapter deals with sentencing orders.

[16-000] Glossary

Assessment report	A report made by a community corrections officer to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender
CCO	Community Correction Order
CRO	Conditional Release Order
ICO	Intensive Correction Order

[16-020] Dismissal

Last reviewed: May 2023

No prima facie case

In matters punishable summarily, the magistrate shall dismiss the matter if, having heard all the prosecution evidence, and addresses from both parties, the magistrate is not satisfied that a prima facie case has been established: see s 202 *Criminal Procedure Act* 1986 and discussion on "no case to answer" in *Amalgamated Television Services Pty Ltd v Marsden* [2001] NSWCA 32 and *DPP v Elskaf* [2012] NSWSC 21.

Sample order

(After giving reasons)

No prima facie case.

The matter is dismissed.

May v O'Sullivan dismissal

After a prima facie case is found, the defendant may argue, without calling evidence, that the evidence founding a prima facie case is insufficient to support a conviction: *DPP v Elskaf*, above, at [48]. Before ruling on this submission it is wise to ensure that the defence does not intend to call evidence should the submission fail: *DPP v Kirby* [2017] NSWSC 1754 at [49]. If the defendant intends to call evidence, no ruling should be made on the *May v O'Sullivan* (1955) 92 CLR 654 submission and the case should be determined at the conclusion of *all* the evidence and submissions. If a ruling is to be given the prosecutor must be given an opportunity to address the court: *DPP v Kirby*, above, at [50].

Sample order

(After giving reasons)

Although there is evidence capable of establishing each ingredient of the offence, [*The court finds that the evidence is not sufficient to satisfy me beyond a reasonable doubt that the offence has been committed*] or [*The court finds that the evidence would not safely support a conviction because* …].

The matter is dismissed.

Dismissal after hearing

In matters punishable summarily, the magistrate shall dismiss the matter if, having heard all the evidence for the prosecution and defence, and addresses, the magistrate is not satisfied the offence has been proved beyond reasonable doubt.

Sample order

(After giving reasons)

The court is not satisfied beyond reasonable doubt that the offence has been proved.

The matter is dismissed.

Dismissal if matter withdrawn

If a matter is withdrawn by the prosecutor, the matter is taken to be dismissed and the defendant is taken to be discharged: s 208 *Criminal Procedure Act*.

[16-040] Traffic offence — accident/reasonable efforts

Last reviewed: May 2023

If a defendant satisfies the magistrate that any offence against the regulations was the result of an accident, or could not have been avoided by any reasonable efforts on the defendant's part, that person shall not be liable to a penalty: cl 128(3) *Road Transport (General) Regulation* 2021.

Sample order

The court accepts that the offence [*was the result of accident*] or [*could not have been avoided by reasonable efforts on the defendant's part*].

The matter is dismissed.

[16-060] Costs

Last reviewed: May 2023

Note: For costs in apprehended violence matters: see **Apprehended Violence Orders** at **[22-160]**.

Costs orders

Costs may be ordered:

- in summary proceedings upon dismissal, withdrawal, conviction, adjournment or order (including an order under s 10): ss 213–216 *Criminal Procedure Act*, or
- when a court attendance notice is dismissed, a magistrate may grant a certificate under ss 2 and 3 *Costs in Criminal Cases Act* 1967
- against a prosecutor when a defendant is discharged under ss 62 or 64 *Criminal Procedure Act*, or when committing for trial on a different offence to that charged: s 116 *Criminal Procedure Act*
- against either prosecutor or defendant if committal is adjourned: s 118 *Criminal Procedure Act*
- for costs in apprehended violence matters: see **Apprehended Violence Orders** at **[22-160]**.

Costs covered by order

Costs can include court costs, witness expenses and professional costs. They are paid to the registrar of the court for payment out to the relevant party.

In the vast majority of criminal proceedings before the Local Court, there is no requirement to order the payment of court costs. Upon conviction, most defendants are liable to pay an automatic court costs levy: s 211A(1) *Criminal Procedure Act*. Section 211A(2) sets out instances where the automatic levy does not apply, relevantly including:

- where the conviction results in the imposition of any sentence of imprisonment other than a suspended sentence
- where the court makes an order under s 10(1)(a) *Crimes (Sentencing Procedure) Act* 1999 in relation to an offence that is not punishable by imprisonment
- where the proceedings relate to a traffic offence in which the convicted person is a child who is sentenced in accordance with Div 4 Pt 3 *Children (Criminal Proceedings) Act* 1987. Note that in this instance the court has the discretion to order the payment of court costs: see s 42A(7) *Children (Criminal Proceedings) Act*. Section 42A provides generally for the discretion to order the payment of court costs by those found guilty in summary proceedings before the Children's Court.

Section 211A(3) further enables the court to direct that the levy is not payable where the convicted person is a child.

Time to pay

Costs are to be paid within 28 days: see **Fines** at **[16-120]**. A costs order in relation to proceedings for an offence brought by a law enforcement officer is included in the definition of "fine": s 4 *Fines Act* 1996.

Sample order

The [*defendant/prosecutor/complainant etc*] is ordered to pay costs in the amount of [*details*]. These costs are to be paid within 28 days.

[16-080] Offences dealt with in the absence of a defendant

Last reviewed: May 2023

Division 3

The *Criminal Procedure Act* outlines the jurisdiction to deal with matters in the absence of the defendant.

The conditions set out in the *Criminal Procedure Act* to deal with the matter under Ch 4, Pt 2, Div 3 are:

1. The defendant is not present at:
   - the first return date or a subsequent mention date, and has not lodged a written plea of not guilty in accordance with s 182: s 190(3), or
   - the day, time and place set for hearing and determination of the matter: s 196(1).
2. The court must be satisfied that the defendant had reasonable notice of the first return date, the mention date, or the date, time and place of the hearing: ss 190(4), 196(3).
3. If the matter involves an annulled penalty notice:
   - it and any annexure is taken to be a court attendance notice in relation to the offence
   - the defendant must have been given notice of the hearing, and
   - there is no appearance on the day, time and place specified by the court attendance notice: s 196(2).

Table 1 offences

Section 196(4) *Criminal Procedure Act* provides that if it is a Table 1 matter, the absence of the defendant is taken to be consent to the offence being dealt with summarily.

If the magistrate is of the opinion that the matter should not proceed, it can be adjourned: s 197 *Criminal Procedure Act* or an arrest warrant may be issued under s 181(3A) *Criminal Procedure Act*.

Proceeding ex parte — ss 199–200 Criminal Procedure Act

If the matter proceeds ex parte:

1. The magistrate may determine the matter on the basis of the court attendance notice without hearing evidence, if the matters set out in the court attendance notice are sufficient to establish the offence: s 199(1) *Criminal Procedure Act*.
2. The magistrate *must* consider any written material submitted by the prosecutor or lodged by the defendant with the written plea of guilty under s 182 *Criminal Procedure Act*: s 199(2) *Criminal Procedure Act*; *Roylance v DPP (NSW)* [2018] NSWSC 933.
3. If not satisfied that the matters in the court attendance notice are sufficient to establish the offence, the magistrate can *require* the prosecutor to provide additional evidence: s 200(1) *Criminal Procedure Act*. This additional evidence is only admissible if it complies with Ch 3, Pt 2, Div 3 *Criminal Procedure Act* (written statements) and it is served on the defendant within a reasonable time before the magistrate considers it: s 200(2) *Criminal Procedure Act*. The alternative is that the evidence can be given orally.

Determination of ex parte proceedings

The magistrate may convict the defendant, make an order as to the defendant, or dismiss the matter: s 202(2) *Criminal Procedure Act*.

Sample order

On the basis of the court attendance notice and the evidence presented to the court for the purposes of s 196 of the *Criminal Procedure Act*:

I find the offence established.

or

The court is not satisfied the offence is established.

The matter is dismissed.

The magistrate may impose a fine in the absence of the defendant or make other ancillary orders which are available when a defendant is present. This includes s 10(1)(a) dismissal, but see below for restrictions on the penalties which can be imposed in a defendant's absence.

Sample order

The defendant is convicted and fined [*specify amount*].

Penalties which CANNOT be imposed in the absence of the defendant

The following orders cannot be made in the absence of the defendant:

- imprisonment
- intensive correction order
- community correction order
- a conditional release order
- a non-association or place restriction order
- an intervention program order (which includes an order that the defendant comply with a plan arising out of an intervention program): s 25.

A warrant may be issued to bring the offender before the court for sentence (s 25(2)), but only if the penalty for the offence includes a sentence of imprisonment. In deciding whether to issue a warrant for an absent offender who has lodged a written plea in accordance with s 182 *Criminal Procedure Act*, the magistrate must consider whether it is more appropriate to adjourn the proceedings: s 25(2A).

Sample order

The defendant is convicted. A s 25(2) *Crimes (Sentencing Procedure) Act* warrant is to issue. An authorised officer may sign the warrant.

General arrest warrants

In addition to the above mentioned warrants, there is a power for magistrates to issue an arrest warrant if an accused person is not present at the day, time and place set down for the proceedings to be heard, or absconds from the proceedings. The magistrate must be satisfied there are substantial reasons to issue an arrest warrant and that it is in the interests of justice to do so: s 54(3A) *Criminal Procedure Act* for committal proceedings and s 181(3A) *Criminal Procedure Act* for summary matters.

An authorised officer can sign the warrant if the magistrate directs in writing that the warrant be issued: s 236(4) *Criminal Procedure Act*.

Sample order

The court notes there is no appearance of the defendant. An arrest warrant is to issue. An authorised officer may sign the warrant.

[16-100] Compensation and restitution

Last reviewed: May 2023

Victims Rights and Support Act 2013

The *Victims Rights and Support Act* 2013 replaced the *Victims Support and Rehabilitation Act* 1996 from 3 June 2013. All legislative references in this section are to the 2013 Act unless otherwise indicated.

Commissioner of Victims Rights

Part 4 of the Act establishes the Victim Support Scheme, under which victims of acts of violence may apply to the Commissioner of Victims Rights for the payment of victims support.

Magistrate's power to award compensation

Magistrates retain a power to award compensation under Pt 6 of the Act.

A magistrate may award compensation for *injury* or for *loss*, where that injury or loss is sustained through, or by reason of the offence, or any other offence taken into account when sentencing an offender.

"Injury" is defined to mean "actual bodily harm, grievous bodily harm or psychological or psychiatric harm but does not include injury arising from loss or damage to property": s 18.

Compensation for injury may be made in accordance with Pt 6 Div 2 and compensation for loss in accordance with Pt 6 Div 3.

Compensation

A court that convicts a person of an offence may direct, by notice given to the offender, the payment of a sum to an aggrieved person or persons by way of compensation for injury or loss: ss 94, 97.

Compensation cannot be awarded by a magistrate if, under Pt 4, the Commissioner of Victims Rights has approved the giving of financial support in respect of the injury: s 95(2).

Factors to be considered

In making an order for compensation, the court is to consider any behaviour, condition, attitude or disposition of the aggrieved person which contributed to the injury or loss, the aggrieved person's access to civil damages and other relevant matters: s 99.

Maximum award of compensation

A magistrate may order compensation for injury of up to $50,000. There are limits on the order where directions for compensation are or have been made in respect of other related offences: s 95(1).

A magistrate may order compensation for loss up to the maximum amount of the court's civil jurisdiction, that is, $100,000: s 29(1)(a) *Local Court Act* 2007. A court may not award compensation for loss for which financial support is payable under the Act or compensation is payable under the provisions relating to compensation for injury: s 98.

As to the court's power to award compensation in respect of a Commonwealth offence, see s 21B *Crimes Act* 1914 (Cth) (discussed at **[18-100]**).

Time for making order

An order for compensation may be made at the time of conviction or at any time thereafter: ss 94, 97.

Sample order

It is ordered that compensation for [*loss/injury*] in the amount of [*specify amount*] be paid.

Restitution

Any person may apply to a court for an order that property (excluding certain livestock), which is in police custody in connection with any offence be returned to the person apparently lawfully entitled to the property: Div 2, Pt 17 *Law Enforcement (Powers and Responsibilities) Act* 2002. The Local Court has jurisdiction to deal with applications for the return of property with an estimated value of up to $100,000: s 229(1)(a) *Law Enforcement (Powers and Responsibilities) Act* 2002. There is no power to award costs in these applications.

In any criminal proceedings in which it is alleged that the accused person has unlawfully acquired or disposed of property, the court may order that the property be restored to such person as appears to the court to be lawfully entitled to its possession: s 43(1) *Criminal Procedure Act*. Such an order may be made whether or not the court finds the person guilty of any offence with respect to the acquisition or disposal of the property: s 43(2). If the ownership is in dispute, the matter should proceed under Div 2, Pt 17 *Law Enforcement (Powers and Responsibilities) Act*.

[16-120] Sentencing orders generally

Last reviewed: May 2023

The following discussion deals with sentencing orders that can be made under the *Crimes (Sentencing Procedure) Act* 1999 (*Sentencing Act*).

The sentencing options available under the Sentencing Act are as follows:

1. dismissal without proceeding to conviction: s 10(1)(a)
2. order discharging the defendant under a conditional release order referred to in s 9(1)(b) without proceeding to conviction (CRO without conviction): s 10(1)(b)

3. order discharging the defendant on condition that the defendant enter into an agreement to participate in an intervention program: s 10(1)(c)
4. conditional release order proceeding to conviction (CRO with conviction): s 9(1)(a)
5. conviction with no other penalty: s 10A
6. a fine as defined in s 4 of the *Fines Act* 1996
7. community correction order (CCO): s 8(1)
8. intensive correction order (ICO): s 7(1), and
9. full-time imprisonment.

Specific sentencing provisions for domestic violence offences have been enacted (see further discussion below at **[16-140]**).

In considering an appropriate sentence for an indictable offence when dealt with summarily, the distinction between the maximum penalty for an offence and the jurisdictional limit of the Local Court is important. An appropriate sentence, taking into account any discount for the guilty plea, assistance etc, is to be assessed by reference to the maximum penalty for the offence. The relevant jurisdictional limit is applied after the appropriate sentence for the offence has been determined: *Park v The Queen* (2021) 273 CLR 303 at [2], [19]–[23]; see also *Park v R* [2020] NSWCCA 90 at [22]–[35]; [182]; *R v Doan* (2000) 50 NSWLR 115 at [35].

[16-140] Sentencing provisions concerning domestic violence offences

Last reviewed: May 2023

In addition to the purposes of sentencing found in s 3A *Sentencing Act*, if a court finds a person guilty of a domestic violence offence the court must impose on the person either: (a) a sentence of full-time detention, or (b) a supervised order: s 4A. A "supervised order" is an order (being an intensive correction order, community correction order or conditional release order) that is subject to a supervision condition: s 4A(3).

A court is not required to impose full-time detention or a supervised order if the court is satisfied that a different sentencing option is more appropriate in the circumstances of the case and records its reasons for reaching that view: s 4A(2).

The court must consider the safety of the victim of the offence before imposing a community correction order or conditional release order on a person guilty of a domestic violence offence: s 4B(3).

A court cannot make an order for an ICO unless it is satisfied that the victim of the domestic violence offence, and any person with whom the offender is likely to reside, will be adequately protected whether by conditions of the ICO or for some other reason: s 4B(1).

If a court finds a person guilty of a domestic violence offence, the court must not impose a home detention condition if the court reasonably believes that the offender will reside with the victim of the domestic violence offence: s 4B(2).

Note: For further detailed information, see M Zaki et al, "Sentencing for domestic violence in the Local Court", *Sentencing Trends and Issues* No 48, Judicial Commission of NSW, 2022; M Zaki et al, "Sentencing for domestic violence in the Local Court" (2023) 35(3) *JOB* 23 (which

contains a snapshot of the significant findings from *Sentencing Trends and Issues* No 48); or *Sentencing Bench Book* at **Domestic violence offences [63-500]**.

[16-160] Conditions of CROs, CCOs and ICOs generally

Last reviewed: May 2023

CROs, CCOs and ICOs each have standard conditions that must be imposed. Standard conditions for CROs and CCOs are that the offender must not commit any offence and must appear before court during the term of the order when called upon to do so: ss 98(2), 88(2). The standard conditions of an ICO are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(2).

A range of additional conditions may be imposed by a court depending on the sentencing option concerned (see further discussion within each option below). A CRO or a CCO may include a supervision condition involving supervision by Community Corrections. Such a condition cannot be imposed on an offender who resides or intends to reside in another State or Territory: CRO s 99(3A); CCO s 89(4B). See further **[16-320]**. The offender's obligations under a supervision condition for a CRO or CCO are set out in cl 188 *Crimes (Administration of Sentences) Regulation* 2014.

A supervision condition must be imposed for a CRO, CCO and ICO for an offender sentenced for a domestic violence offence unless the court is satisfied a different sentencing option is more appropriate in the circumstances of the case and records its reasons for reaching that view: s 4A(2).

Apart from supervision, an additional condition may include:

- a rehabilitation or treatment condition
- an abstention condition requiring abstention from alcohol or drugs
- a non-association condition
- a place restriction condition
- a community service work condition
- a curfew condition
- an electronic monitoring condition
- a home detention condition.

Not all of the above conditions are available for each order. See discussion below for additional conditions available for CROs **[16-260]**, CCOs **[16-320]** and ICOs **[16-340]**.

A court may also impose further conditions providing the conditions are not inconsistent with the standard or additional conditions: CRO s 99A(2), CCO s 90 and ICO s 73B.

The court may limit the period during which an additional condition or further condition is in force: CRO ss 99(4), 99A(3); CCO ss 89(5), 90(3); ICO ss 73A(4), 73B(3).

For CROs and CCOs the court may, at the time of sentence, or subsequently, impose, vary or revoke additional conditions or further conditions on application of a community corrections officer, juvenile justice officer or the offender: CRO ss 99(1), 99A(1); CCO ss 89(1), 90(1). Clause 13 *Crimes (Sentencing Procedure) Regulation* 2017 sets out the procedures for the imposition, variation, or revocation of additional or further conditions. The court may refuse an offender's application if it is "without merit": CRO s 100(1); CCO s 91(1).

Under the *Crimes (Administration of Sentences) Act* 1999 (the Administration Act) a community corrections officer may, by order in writing and subject to the regulations, suspend the application of conditions imposed on an offender by the court for a period or periods or indefinitely: CRO s 108E; CCO s 107E; and ICO s 82A.

[16-170] Ready reckoner table — length of orders and community service hours that can be imposed

Last reviewed: May 2023

	CRO	**CCO**	**ICO**
Maximum length order can be imposed	2 years	3 years	2 years for single offence 3 years for aggregate offence
Maximum hours of community service work (csw) that can be imposed Cl 14(1) *Crimes (Sentencing Procedure) Regulation* 2017	n/a	100 hours for offences where max penalty is 6 months imprisonment 200 hours for offences where max penalty is 6–12 months imprisonment 500 hours for offences where max penalty is over 12 months imprisonment	100 hours for offences where max penalty is 6 months imprisonment 200 hours for offences where max penalty is 6–12 months imprisonment 750 hours for offences where max penalty is over 12 months imprisonment
Minimum period the community service work (csw) must be in force for Cl 14(2) *Crimes (Sentencing Procedure) Regulation* 2017	n/a	6 months if csw hours is between 1–100 hours 12 months if csw hours is between 100–300 hours 18 months if csw hours is between 300–500 hours 2 years if csw hours exceeds 500 hours	6 months if csw hours is between 1–100 hours 12 months if csw hours is between 100–300 hours 18 months if csw hours is between 300–500 hours 2 years if csw hours exceeds 500 hours
Fine can be imposed for the same offence	No	Yes	Yes

[16-180] Multiple orders

Last reviewed: May 2023

Part 2 Div 4C provides for the scenario where multiple types of orders (ie an ICO, CCO or CRO) have been imposed on an offender. Two or more relevant orders can be in force at the same time in respect of two or more offences in relation to the same offender: s 17F(2). In this context, an ICO prevails over a CCO, and a CCO prevails over a CRO: s 17F(3). If there is an inconsistency as to how the orders operate together, a condition of an ICO prevails over a condition of a CCO, and a condition of a CCO prevails over a condition of a CRO: s 17F(4).

Where a court is considering imposing a community service work condition when the defendant is already subject to a condition of that kind, the new order may not be made if the sum of:

(a) the number of hours of community service work to be performed under the new order, and

(b) the number of hours of community service work remaining to be performed under any other relevant order (an "existing order") exceeds 750 hours if any one of the orders is a ICO or 500 hours if all the orders are CCOs: s 17G.

Section 17H addresses curfew conditions under multiple orders. Section 17H(3) applies where all of the orders are CCOs. Section 17H(4) applies if at least one order is an ICO and at least one is a CCO.

[16-200] Assessment reports

Last reviewed: May 2023

Division 4B (ss 17B–17D) makes provision for assessment reports by community correction officers. The purpose of an assessment report is to assist a sentencing court to determine the appropriate sentence options and conditions to impose on the offender: s 17B(2).

Generally, a court may request but is not obliged to request an assessment report: s 17C(1)(a).

Section 17C(1)(b) provides a request for an assessment report may be made at the following times only:

(i) after finding an offender guilty of an offence and before a sentence is imposed

(ii) during sentencing proceedings after a sentence of imprisonment has been imposed on the offender

(iii) during proceedings to impose, vary or revoke an additional or further condition on a community correction order or conditional release order that has been made in respect of the offender

(iv) during proceedings to correct a sentencing error in accordance with s 43

(v) during proceedings to re-sentence an offender after a court has revoked the offender's community correction order or conditional release order

(vi) during proceedings to determine an appeal against sentence

(vii) any other times prescribed by the regulations.

For matters addressed in assessment reports and in home detention assessment reports, see cll 2A and 12B *Crimes (Sentencing Procedure) Regulation* 2017.

Generally an assessment report will cover background, community service and supervision, however a court may request such a report also include an assessment for home detention (where a sentence of imprisonment has been imposed: s 17D(3)).

An assessment report may also be limited to a specific purpose, such as a community service work or home detention assessment only, if the court only requires that specific information (see below for special provisions regarding assessment reports and the imposition of these particular conditions).

If there is a particular issue to be canvassed by the community correction officer preparing the report, this should be specified in the request, for example, drug, alcohol, gambling, financial counselling, anger management, etc.

Assessment reports for home detention and community service work

Special provisions have been made in relation to assessment reports and the imposition of home detention conditions and community service work conditions: s 17D.

A court must not request an assessment report relating to the imposition of a home detention condition on an ICO unless it has imposed a sentence of imprisonment on the offender for a

specified term: s 17D(3). A court must not impose a home detention condition on an ICO unless the assessment report states the offender is suitable to be subject to such a condition: s 73A(3) (see further discussion of ICOs below).

A court must not impose a community service work condition on an ICO or a CCO unless it has obtained an assessment report (s 17D(4)) and that report confirms such a condition is suitable: s 73A(3) for ICOs, s 89(4) for CCOs.

Psychiatric/psychological assessment

While Community Corrections may canvass psychiatric/psychological issues in a pre-sentence report, reports from a treating specialist are best sought via the defendant or their legal representative. If a defendant is in custody and does not propose to obtain an independent specialist report, on rare occasions one may be ordered through Justice Health. It is important that any request to Justice Health be accompanied by material available to the magistrate describing the offence and any medical/psychiatric reports.

To expedite this request reaching Justice Health, it can help to have the request endorsed on the remand warrant.

Sample order

The court directs that an assessment report be prepared (particularly referring to [*specify the relevant matter/s to be addressed*])

or

A report as to the suitability of the offender to perform community service work is required.

or

A report as to the suitability of the offender for a home detention condition is required.

The offender is to report to a Community Corrections office at [*specify place*] within 24 hours.

[16-220] Deferral for rehabilitation or other purpose

Last reviewed: May 2023

Section 11 of the Act provides the court may make an order deferring sentencing similar to the common law power to remand a defendant (see *Griffiths v The Queen* (1977) 137 CLR 293 abolished by s 101 of the Act).

A court that finds a person guilty of an offence (whether or not it proceeds to conviction), can adjourn the proceedings to a specified date, to assess the offender's rehabilitation or for any other appropriate purpose. If sentence is deferred for this purpose, the adjournment from the finding of guilt to sentence, cannot be greater than 12 months in total: s 11. This provision in no way affects the court's other powers to adjourn proceedings.

For discussion of principles regarding application of s 11: see *Sentencing Bench Book*, **Deferral for rehabilitation or other purpose** at **[5-400]**ff.

During the adjournment the defendant can be granted conditional bail consistent with the rehabilitation requirements.

[16-240] No conviction recorded — s 10(1)(a) Crimes (Sentencing Procedure) Act 1999

Last reviewed: May 2023

Where a court finds an offence proved following a plea of guilty or a defended hearing, but decides not to convict the defendant, there can be an outright dismissal. Costs, compensation and restitution may be ordered: s 10(4).

Sample order

The court finds the offence proved. Because of the defendant's [*character/antecedents/age/health/mental condition*] [*trivial nature of the offence*] [*extenuating circumstances*] or [*any other matter that the court thinks proper to consider*], I deem it inexpedient to inflict any punishment. The charge is dismissed under s 10 of the *Crimes (Sentencing Procedure) Act* 1999.

Traffic offences and s 10

Section 10 orders cannot be imposed for "major" traffic offences if s 10 has been applied to the defendant within the previous five years: *Road Transport Act* 2013, s 203.

For further discussion: see *Sentencing Bench Book*, **Dismissal of charges and conditional discharge** at **[5-000]**ff. The non-suitability of the application of the section to various offences is discussed.

[16-260] Conditional Release Order (CRO)

Last reviewed: May 2023

See also Non-custodial sentences — Table at **[16-480]**.

A conditional release order (CRO) means an order referred to in s 9: s 3. Instead of imposing a fine or imprisonment (or both) a court that finds a person guilty of an offence may, make a CRO discharging the person: s 9(1).

Section 9(3) provides that:

- a fine and a CRO cannot be imposed in respect of the same offence; and
- a CRO with a conviction may be made as an alternative to imposing a fine.

The maximum term of a CRO is 2 years: s 95. A CRO commences on the date it is made: s 96.

The court may make a CRO either if the court proceeds to conviction or if it does not proceed to conviction but makes an order under s 10(1)(b): s 9(1)(b).

In determining whether to impose a CRO with conviction, the court is obliged to consider the factors outlined in s 9(2).

Section 9 is subject to the provisions of Pt 8 (Sentencing procedures for conditional release orders): s 9(4).

Conditions of a CRO

A CRO is subject to three types of conditions:

(a) the standard conditions the court must impose at the time of sentence under s 98,

(b) additional conditions which may be imposed under s 99, and

(c) further conditions which may be imposed under s 99A.

The court may limit the period during which an additional condition or further condition on a CRO is in force: ss 99(4), 99A(3).

The *standard conditions* which the court must impose on a CRO at the time of sentence are that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the CRO: s 98.

Additional conditions can include supervision and those conditions set out in s 99(2), but must not involve home detention, require electronic monitoring, impose a curfew, or require community service work: s 99(3).

If any further conditions are imposed, they must not be inconsistent with any of the standard or additional conditions of the CRO: s 99(2).

The court must ensure that reasonable steps are taken to explain to the offender his or her obligations under the order and the consequences that may follow if the obligations are not complied with: s 17I.

In this regard, best practice would be to direct the offender to attend the registry where a copy of the order will be provided and explained by registry staff. (Note: in the event the offender appears from custody via AVL (and is unable to attend the registry), a copy of the order will be provided and explained by Corrective Services) (see Sample Order — Conditional Release Order (CRO) (without conviction) s 10(1)(b)/s 9(1)(b) and Sample order — Conditional Release Orders (CRO) (with conviction) s 9(1)(a), below).

Suspension of conditions by community corrections officer

Section 108E *Administration Act* makes specific provision in relation to the suspension of a condition imposed under s 99(2) *Sentencing Act*. A community corrections officer may subject to the regulations:

- by order in writing suspend the application of a supervision condition to an offender for a period or periods or indefinitely (s 108E(2)), or
- by order given orally or in writing suspend the application of a non-association condition, or place restriction condition for a period or periods: s 108E(3).

The suspension may be unconditional or subject to conditions: s 108E(4).

Clause 189I *Administration Regulation* sets out matters that the corrections officer must take into account before deciding to make an order suspending the application of a supervision condition.

A failure to comply with a condition of the suspension is taken to be a failure to comply with the obligations of the CRO: s 108E(5). The community corrections officer has power to revoke the suspension order: s 108E(5). If the suspension order has been revoked by a juvenile justice officer and the offender has reached the age of 18 years, a community corrections officer may revoke the suspension order: s 108E(8).

Breach and revocation of a CRO

Part 4C *Administration Act* makes provision for the breach and revocation of a CRO: s 108C. If the court suspects that an offender may have failed to comply with any of the conditions of a CRO the court may call on the offender to appear before it. If the offender does not appear the court may issue an arrest warrant or authorise the issue of a warrant: s 108C(3) *Administration Act*.

Clause 329 *Administration Regulation* sets out a procedure for breaches of CROs. If the court is satisfied that the offender appearing before it has failed to comply with any of the conditions of a CRO it may take no action, vary or revoke conditions of the order, impose further conditions or revoke the order: s 108C(5). A court may take action in relation to a CRO after the order has expired, but only in respect of matters arising during the order: s 108C(6A).

If a court revokes a CRO, it may sentence or re-sentence the offender for the offence to which the order relates: s 108D(1). The *Sentencing Act* applies to the sentencing or re-sentencing of an offender in the same way as it applies to the sentencing of an offender found guilty of the offence concerned: s 108D(2).

Sample Order — Conditional Release Order (CRO) (without conviction) s 10(1)(b)/s 9(1)(b)

Sample order

The court finds the offence proved.

[*If applicable: After consideration has been given to the safety of the victim of the domestic violence offence.*]

It is expedient to discharge you under a conditional release order without proceeding to conviction.

The term of the order is [*a period of up to 2 years*].

The standard conditions of the order apply. You must not commit any offence and you must appear before the court if called on to do so at any time during the term of the order.

The following additional conditions apply: [*Note: the court can limit the period during which an additional condition is in force: s 99(4)*].

[*If applicable: The following further conditions apply:*]

Finally, you are now directed to attend the court registry where a copy of this order will be explained and given to you. [*ss 17I and 17J*].

or

[*In circumstances where the offender appears from custody via AVL*] A copy of this order will be provided electronically by the court registry and explained to you by Corrective Services.

Sample order — Conditional Release Orders (CRO) (with conviction) s 9(1)(a)

Sample order

[*If applicable: After consideration has been given to the safety of the victim of the domestic violence offence*].

You are convicted. You are ordered to comply with a conditional release order.

The term of the order is [*a period of up to 2 years*].

The standard conditions of the order apply. You must not commit any offence and you must appear before the court if called on to do so at any time during the term of the order.

The following additional conditions apply [*Note: the court can limit the period during which an additional condition is in force: s 99(4)*].

[*If applicable: The following further conditions apply:*]

Finally you are now directed to attend the court registry where a copy of this order will be explained and given to you. [*ss 17I, 17J* and **[16-280]** *Section 10A conviction with no other penalty*].

or

[*In circumstances where the offender appears from custody via AVL*] A copy of this order will be provided electronically by the court registry and explained to you by Corrective Services.

[16-280] Section 10A conviction with no other penalty

Last reviewed: May 2023

Section 10A provides that "a court that convicts an offender may dispose of the proceedings without imposing any other penalty". It is suggested that an appropriate use of the section is where an offender is serving a sentence of imprisonment and is before the court on offences where the maximum penalty is a fine.

An order under s 10A does not operate to defeat automatic statutory periods of licence disqualification that are imposed upon conviction for certain driving offences.

For further discussion: see *Sentencing Bench Book*, **Conviction with no other penalty** at **[5-300]**.

[16-300] Fines

Last reviewed: May 2023

Means to pay

In fixing a fine, the magistrate must take into account the defendant's means to pay: s 6 *Fines Act*; *R v Rahme* (1989) 43 A Crim R 90; *Retsos v R* [2006] NSWCCA 85. The offender's capacity to pay is relevant, but not the most dominant or decisive factor: *Jahandideh v R* [2014] NSWCCA 178 at [17]. It may increase, rather than decrease, a fine in order for it to be a deterrent: *Jahandideh v R* at [17].

Time to pay

A fine imposed by a court is payable within 28 days: s 5 *Fines Act*. A person may apply to the court registrar for additional time to pay. A court may direct payment before 28 days for special reasons stated by the court: s 7 *Fines Act*.

Moiety

A magistrate may order that part of a fine, not exceeding half, be paid to the informant or other person prosecuting or suing (but not to a member of the police force): s 122 *Fines Act*.

Penalty units

A reference in an Act to penalty units means that number of units multiplied by $110 (that is, 1 penalty unit = $110): s 17.

For further commentary: see *Sentencing Bench Book*, **Fines** at **[6-100]**ff.

Sample order

The defendant is convicted and fined [*specify amount*].

(The court should also consider orders for compensation, witness expenses and other costs.) The fine should be paid to the registrar of the court.

[16-320] Community Correction Order (CCO)

Last reviewed: May 2023

See also Non-custodial sentences — Table at **[16-480]**.

A community correction order (CCO) means an order referred to in s 8: s 3. Section 8(1) provides that a court that has convicted a person of an offence may, instead of imposing a sentence of imprisonment on the offender, make a CCO. A fine can be imposed in addition to a CCO.

A CCO is not available for an offence with a maximum penalty of a fine only. It can only be imposed for an offence which carries a sentence of imprisonment.

If the offence is a domestic violence offence, the court must consider the safety of the victim of the offence before making the order: s 4B(3).

The term of a CCO is the period specified in the order: s 85(1). The maximum term of a CCO is 3 years: s 85(2).

A CCO commences on the date on which it is made: s 86.

Section 8 is subject to the provisions of Pt 7 (Sentencing procedures for community correction orders): s 8(3).

Conditions of a CCO

A CCO is subject to the three types of conditions:

(a) standard conditions which must be imposed by the court at the time of sentence under s 88,

(b) additional conditions which may be imposed under s 89, and

(c) further conditions which may be imposed under s 90.

The court may limit the period during which an additional condition or further condition on a CCO is in force: ss 89(5), 90(3).

The *standard conditions* which the court must impose on a CCO at the time of sentence are that the offender must not commit any offence and must appear before the court if called on to do so at any time during the term of the CCO: s 88(2).

Additional conditions, in s 89(2), can include:

- a curfew (not exceeding 12 hours in any period of 24 hours)
- community service work (not exceeding 500 hours or the number of hours prescribed in the regulation, whichever is lesser)
- rehabilitation or treatment programs
- alcohol or drug abstention

- non-association with particular persons
- place restrictions
- supervision.

Additional conditions cannot include home detention, require electronic monitoring, or impose a curfew exceeding 12 hours in any period of 24 hours: s 89(3).

A community service work condition must not be imposed on a community correction order made with respect to an offender to whom the *Children (Community Service Orders) Act* 1987 applies.

Community service work cannot be a condition of a CCO for an offender who resides, or intends to reside, in another State or Territory unless the offender is willing and able to travel to NSW to complete the work or the State or Territory is declared by the regulations to be an approved jurisdiction: s 89(4B).

Clause 14(1) *Crimes (Sentencing Procedure) Regulation* 2017 prescribes the maximum number of hours that may be specified for community service work in an additional condition of a CCO:

(a) 100 hours — for offences for which the maximum term of imprisonment provided by law does not exceed 6 months, or

(b) 200 hours — for offences for which the maximum term of imprisonment provided by law exceeds 6 months but does not exceed 1 year, or

(c) 500 hours — for offences for which the maximum term of imprisonment provided by law exceeds 1 year.

Section 89(4C) provides the period during which a community service condition is in force must not be less than the period prescribed by the regulations.

Clause 14(2) *Crimes (Sentencing Procedure) Regulation* 2017 prescribes the minimum period that a community service work condition of a CCO must be in force:

(a) 6 months — if the number of hours of community service work required to be performed does not exceed 100 hours or

(b) 12 months —if the number of hours of community service work required to be performed exceeds 100 hours but does not exceed 300 hours or

(c) 18 months — if the number of hours of community service work required to be performed exceeds 300 hours but does not exceed 500 hours or

(d) 24 months — if the number of hours of community service work required to be performed exceeds 500 hours.

See **[16-170] Ready reckoner table — length of orders and community service hours that can be imposed**.

If any further conditions are imposed, they must not be inconsistent with any of the standard or additional conditions of the CCO: s 90(2).

The court must ensure that reasonable steps are taken to explain to the offender his or her obligations under the order and the consequences that may follow if the obligations are not complied with: s 17I.

In this regard, best practice would be to direct the offender attend the registry where a copy of the order will be provided and explained by registry staff (Note: in the event the offender

appears from custody via AVL (and is unable to attend the registry), a copy of the order will be provided and explained by Corrective Services) (see Sample Order — Community Correction Order).

Suspension of conditions by community corrections officer

Section 107E *Administration Act* makes specific provision in relation to the suspension of a condition imposed under s 89(2) *Sentencing Act*. A community corrections officer may, subject to the regulations:

- by order in writing suspend the application of a supervision condition to an offender for a period or periods or indefinitely (s 107E(2)), or
- by order given orally or in writing, suspend the application of a curfew condition, non-association condition, or place restriction condition for a period or periods: s 107E(3).

The suspension may be unconditional or subject to conditions: s 107E(4).

Clause 189I *Administration Regulation* sets out matters that the corrections officer must take into account before deciding to make an order suspending the application of a supervision condition.

A failure to comply with a condition of the suspension is taken to be a failure to comply with the obligations of the CRO: s 107E(5). The community corrections officer has power to revoke the suspension order: s 107E(5). If the suspension order has been revoked by a juvenile justice officer and the offender has reached the age of 18 years, a community corrections officer may revoke the suspension order: s 107E(8).

Breach of a CCO

Part 4B of the *Administration Act* (ss 107C–107D) makes provision for the breach and revocation of a CCO. Clause 329 *Administration Regulation* sets out a procedure for breaches of CCOs.

If the court suspects that an offender may have failed to comply with any of the conditions of a CCO the court may call on the offender to appear before it: s 107C(1). If the offender does not appear the court may issue an arrest warrant or authorise the issue of a warrant: s 107C(2). If the court is satisfied that an offender appearing before it has failed to comply with any of the conditions of a CCO the court may decide to take no action, vary or revoke conditions, impose further conditions or may revoke the order: s 107C(5). A court may take action in relation to a CCO after the order has expired, but only in respect of matters arising during the order: s 107C(6A).

If a court revokes a CCO, it may sentence or re-sentence the offender for the offence to which the order relates: s 107D(1). The *Sentencing Act* applies to the sentencing or re-sentencing of an offender in the same way as it applies to the sentencing of an offender found guilty of the offence concerned: s 107D(2).

Sample Order — Community Correction Order

Sample order

[*If applicable: After consideration has been given to the safety of the victim of the domestic violence offence*].

You are convicted. Instead of imposing a sentence of imprisonment you are ordered to comply with a community correction order.

The standard conditions of the order apply. You must not commit any offence and you must appear before the court if called on to do so at any time during the term of the order.

The following additional conditions apply: [*Note: the available additional conditions are set out in s 89. The court can limit the period during which an additional condition is in force: s 89(5)*].

[*If applicable: The following further conditions apply:*]

If you fail to comply with the conditions of the order, further action may be taken against you. This may require you to return to court to be re-sentenced.

Finally you are now directed to attend the court registry where a copy of this order will be explained and given to you. [*ss 17I and 17J*].

or

[*In circumstances where the offender appears from custody via AVL*] A copy of this order will be provided electronically by the court registry and explained to you by Corrective Services.

[16-340] Intensive correction order (ICO)

Last reviewed: May 2023

See also Custodial sentences — Table at **[16-460]**.

Section 7(1) provides that a court that has sentenced an offender to imprisonment in respect of one or more offences may make an intensive correction order (ICO) directing that the sentence or sentences be served by way of intensive correction in the community.

If a court makes an order under s 7(1) the court is not to set a non-parole period for the sentence: s 7(2).

Section 7 does not apply to an offender who is under the age of 18 years: s 7(3).

Section 7 is subject to the provisions of Pt 5 (Sentencing procedures for intensive correction orders): s 7(4). Part 5 applies where a court is considering, or has made, an ICO: s 64.

The term of an ICO is the same as the term or terms of imprisonment in respect of which the order is made unless the ICO is sooner revoked: s 70. Unless sooner revoked, an offender's ICO expires at the end of the term of the sentence or sentences to which it relates: s 83 *Administration Act*.

An ICO commences on the date the order is made unless it is to be served consecutively (or partly concurrently and partly consecutively) with some other sentence of imprisonment the subject of an ICO: s 71(1)–(2).

Restrictions on power to make an ICO

Section 4B(1)(a) provides that an ICO must not be made with respect to a sentence of imprisonment for a domestic violence offence unless the court is satisfied the victim of the domestic violence, and any person with whom the offender is likely to reside, will be adequately protected (whether by conditions of the ICO or for some other reason).

Section 4B(1)(b) provides that an aggregate sentence of imprisonment for two or more offences, any one or more of which is a domestic violence offence, must not be made unless the court is satisfied of the matters referred to in s 4B(1)(a).

Section 66 sets out criteria relating to community safety and other matters that a court is to have regard to when deciding to impose an ICO. Community safety must be the court's paramount consideration: s 66(1).

When considering community safety the court is to assess whether making the ICO or serving the sentence by way of full-time detention is more likely to address the offender's risk of reoffending: s 66(2).

When deciding to impose an ICO the court must also consider the provisions of s 3A (Purposes of sentencing) and any relevant common law principles and any other matters that the court thinks relevant: s 66(3).

Section 67(1)(a)–(h) sets out a list of offences described both specifically and generically for which an ICO "must not be made". The offences include murder, manslaughter, a prescribed sexual offence (specifically defined in s 67(2)) or an offence involving the discharge of a firearm. Section 67(2) sets out definitions for "firearm" and "prescribed sexual offence". Section 67(1) extends to a sentence of imprisonment for 2 or more offences any one of which includes an offence referred to in s 67(1)(a)–(h) above: s 67(3).

An ICO is not available where imprisonment exceeds certain limits. An ICO must not be made in respect of a single offence if the duration of the term of imprisonment imposed for the offence exceeds 2 years: s 68(1).

An ICO may be made in respect of an aggregate sentence of imprisonment provided the duration of the term of the aggregate does not exceed 3 years: s 68(2).

Two or more ICOs may be made in respect of each of two or more offences but must not be made if:

(a) the duration of the term of any individual term of imprisonment exceeds 2 years and

(b) the duration of the term of imprisonment imposed for all the offences exceeds 3 years: s 68(3).

Section 69(1) provides that in deciding whether or not to make an ICO the court is to have regard to:

(a) the contents of any assessment report obtained in relation to the offender and

(b) evidence from a community corrections officer and any other information before the court that the court considers necessary for the purpose of deciding whether to make such an order.

Subject to s 73A(3), the court is not bound by the assessment report: s 69(2).

A court may not make an ICO in respect of an offender who resides, or intends to reside, in another State or Territory unless the State or Territory is declared by the regulations to be an approved jurisdiction: s 69(3).

A court must not impose a home detention condition or community service work condition on an ICO unless an assessment report states that the offender is suitable to be the subject of such a condition: s 73A(3).

ICOs and Assessment Reports

A court cannot impose an ICO unless it has obtained an assessment report in relation to the offender: s 17D(1).

However, a court is not required to obtain a report (except if required under s 17D(2) or (4)) if it is satisfied there is sufficient information before it to justify the making of an ICO without a report: s 17D(1A).

Section 17D(2)–(4) provide a court cannot impose a home detention condition or a community service work condition unless it has obtained an assessment report addressing those conditions and confirming the offender's suitability.

Section 17D(3) provides that in the case of a home detention condition, the court must not request an assessment report unless it has imposed on the offender a sentence of imprisonment for a specified term.

Assessment reports prepared under s 17D may be in the one report or in more than one report: s 17D(5).

Note: Where a sentencing report is requested to assess the offender's suitability for home detention, as s 17D(3) requires the imposition of a sentence of imprisonment for a specified term, the magistrate is considered part-heard on sentence.

Conditions of an ICO

An ICO order is subject to four types of conditions:

(a) standard conditions which must imposed by the court at the time of sentence under s 73

(b) any additional conditions which may be imposed under s 73A

(c) any further conditions which may be imposed under s 73B, and

(d) any conditions imposed by the State Parole Authority under ss 81A or 164 of the *Administration Act*.

The court may limit the period during which an additional condition or a further condition imposed is in force: ss 73A(4), 73B(3).

The standard conditions which the court must impose on an ICO at the time of sentence are that the offender must not commit any offence and must submit to supervision by a community corrections officer: s 73(1), (2).

In addition to the standard conditions, the court must at the time of sentence impose on an ICO at least one of the additional conditions referred to in s 73A(2): s 73A(1).

However, the court is not required to impose an additional condition if the court is satisfied there are exceptional circumstances: s 73A(1A). The court must make a record of its reasons for not imposing an additional condition but a failure of the court to do so does not invalidate the sentence: s 73A(1B).

Additional conditions can include:

- home detention
- electronic monitoring
- curfew
- community service work (not exceeding 750 hours or the number of hours prescribed by the regulation, whichever is the lesser (see below))
- a rehabilitation or treatment condition

- alcohol or drug abstention
- a non-association condition
- a place restriction condition.

A court cannot impose home detention or community service work as an additional condition unless the assessment report states that the offender is suitable: s 73A(3).

Clause 14(1) *Crimes (Sentencing Procedure) Regulation* 2017 prescribes the maximum number of hours that may be specified when community service work is an additional condition of an ICO as:

(a) 100 hours — for offences for which the maximum term of imprisonment provided by law does not exceed 6 months, or

(b) 200 hours — for offences for which the maximum term of imprisonment provided by law exceeds 6 months but does not exceed 1 year, or

…

(d) 750 hours — if the order is an ICO, for offences for which the maximum term of imprisonment provided by law exceeds 1 year.

Section 73A(5) provides the period during which a community service condition is in force must not be less than the period prescribed by the regulations.

Clause 14(2) *Crimes (Sentencing Procedure) Regulation* 2017 prescribes the minimum period a community service work condition of an ICO must be in force is:

(a) 6 months — if the number of hours of community service work required to be performed does not exceed 100 hours

(b) 12 months — if the number of hours of community service work required to be performed exceeds 100 hours but does not exceed 300 hours

(c) 18 months — if the number of hours of community service work required to be performed exceeds 300 hours but does not exceed 500 hours, or

(d) 2 years — if the number of hours of community service work required to be performed exceeds 500 hours.

See **[16-170] Ready reckoner table — length of orders and community service hours that can be imposed**.

If any further conditions are imposed, they must not be inconsistent with any of the standard or additional conditions of the ICO: s 73B(2).

The court must ensure that reasonable steps are taken to explain to the offender his or her obligations under the order and the consequences that may follow if the obligations are not complied with: s 17I.

In this regard, best practice would be to direct the offender attend the registry where a copy of the order will be provided and explained by registry staff (Note: in the event the offender appears from custody via AVL (and is unable to attend the registry), a copy of the order will be provided and explained by Corrective Services) (see Sample Order — Intensive Correction order, below).

The court may at the time of sentence, or subsequently on the application of a community corrections officer or the offender, impose further conditions on an ICO, or vary or revoke any such further conditions: s 73B(1). The court is not permitted to impose any further conditions, or vary any such further conditions, so as to be inconsistent with any of the standard conditions of an ICO or any of the additional conditions: s 73B(2).

Suspension of conditions by community corrections officer

Section 82A *Administration Act* makes specific provision in relation to the suspension of a condition imposed under s 73(2) *Sentencing Act*. A community corrections officer may, subject to the regulations:

- by order in writing suspend the application of a supervision condition to an offender for a period or periods or indefinitely (s 82A(2)), or
- by order given orally or in writing, suspend the application of a curfew condition, non-association condition, or place restriction condition for a period or periods: s 82A(3).

The suspension may be unconditional or subject to conditions: s 82A(4).

Clause 189I *Administration Regulation* sets out matters that the corrections officer must take into account before deciding to make an order suspending the application of a supervision condition.

A failure to comply with a condition of the suspension is taken to be a failure to comply with the obligations of the ICO: s 82A(5). The community corrections officer has power to revoke the suspension order: s 82A(5).

Post-sentence breach and revocation of an ICO

Section 81 *Administration Act* makes provision with respect to the conditions governing ICOs. It provides conditions on an ICO:

(a) are imposed at the time of sentence by the sentencing court under the *Crimes (Sentencing Procedure) Act* 1999, and

(b) may be imposed, varied or revoked by the Parole Authority.

The Parole Authority may, on the application of a community corrections officer or the offender:

(a) impose any conditions on an intensive correction order, or

(b) vary or revoke any conditions of an intensive correction order, including conditions imposed by the sentencing court: s 81A.

In the case of Commonwealth offences, s 20AC *Crimes Act* 1914 (Cth) requires breaches of ICOs to be dealt with by the court. It will remain the case for State offences that the Parole Authority deals with breaches and revocations of ICOs.

Section 163 sets out actions that can be taken by a community corrections officer on breach of an ICO and s 164 provides a series of actions that can be taken by the Parole Authority. Section 164AA sets out the Parole Authority's power to revoke an ICO for reasons in addition to a breach.

Section 164A deals with the effect of a revocation order. If the Parole Authority revokes an ICO, it may issue a warrant committing the offender to a correctional centre to serve the remainder of the sentence to which the order relates by way of full-time detention: s 181(1).

Sample Order — Intensive Correction order

Sample order

[*Refer to s 66: the safety of the community is the paramount consideration*].

[*If applicable: After consideration has been given to the safety of the victim of the domestic violence offence*].

You are convicted. There being no other appropriate penalty, you are sentenced to a term of imprisonment for a period of [*no more than 2 years for a single offence/no more than 3 years for multiple offences*].

The sentence imposed on you is to be served by way of an intensive correction order. The sentence will commence on [*date the order is made or on such later date if consecutive or partially consecutive orders are imposed subject to limits imposed by s 68*].

You must report to the community corrections office as soon as practicable but no later than 7 days from [*date the order is made*].

The standard conditions of the order apply. You must not commit any offence and you must submit to supervision by a community corrections officer.

The following additional conditions apply: [*Note: the available additional conditions are set out in s 73A. The court can limit the period during which an additional condition is in force: s 73A(4)*].

[*If applicable: the following further conditions apply:*]

If you fail to comply with the conditions of this order, sanctions may be imposed by the Commissioner of Corrective Services or State Parole Authority [*Commonwealth Director of Public Prosecutions (if a Commonwealth offence)*]. Those sanctions may include a formal warning, imposing more stringent conditions or it may include revocation of this order.

If the order is revoked you may be required to serve all or some of the period of your sentence in full-time custody.

Finally, you are now directed to attend the court registry where a copy of this order will be explained and given to you. [*ss 17I and 17J*].

or

[*In circumstances where the offender appears from custody via AVL*] A copy of this order will be provided electronically by the court registry and explained to you by Corrective Services.

Interaction with other sentencing options

In *Douar v R* [2005] NSWCCA 455, Johnson J at [70]–[72] described the following three-step approach to sentencing:

1. Are there any alternatives to a sentence of imprisonment?
2. If not, what should the term of the sentence be?
3. Once the length of the term has been determined, is there any alternative to full-time imprisonment available, and should it be used?

As noted above, an ICO is a form of imprisonment and is therefore not to be ordered unless and until the court is satisfied that no alternative to imprisonment is appropriate (s 5), and furthermore, the term of the sentence will be 2 years or less: s 7.

Also, see *Sentencing Bench Book* at **[3-600] Intensive correction orders (ICOs) (alternative to full-time imprisonment)** and **[10-000] Objective factors at common law**.

[16-360] Sentences of imprisonment

Last reviewed: March 2024

See the table of **Custodial sentences** at **[16-460]** and the discussion on the purposes of sentencing at s 3A in the *Sentencing Bench Book*, **Purposes of sentencing** at [**2-200]**ff.

When sentencing an offender to imprisonment the court may impose a fixed term or a term comprised of a non-parole period (NPP) and the total term. The NPP is the minimum period for which the offender must be kept in detention in relation to the offence. If the term is six months or less, a non-parole period cannot be set: s 46. If the term is greater than six months the court has a discretion to decline to set a non-parole period: s 45. The balance of the term must not exceed one-third of the NPP unless the court decides there are special circumstances: s 44. Reasons must be given for finding special circumstances. On the issue of special circumstances, see *R v Simpson* (2001) 53 NSWLR 704; *R v Fidow* [2004] NSWCCA 172.

Checklist

The following checklist sets out a step-by-step approach to sentencing an offender to a term of imprisonment.

Preliminary matters

- The defendant must have been "convicted". For the meaning of "convicted", see *Maxwell v The Queen* (1996) 184 CLR 501 at [9], [15].
- The defendant must be before the court. Imprisonment cannot be imposed in the defendant's absence: s 25 (issue a warrant if appropriate: s 25(2)).
- All alternatives to imprisonment must be considered and rejected before sentencing to full-time imprisonment: s 5. It is good practice to refer to the section when passing sentence: *R v Cousins* (2002) 132 A Crim R 444 at [33]. Note s 4A in relation to domestic violence offences.
- If the defendant is serving a sentence at present, enquire if it is a fixed term, a non-parole period, balance of parole, ICO or home detention. Confirm the existing release date.
- If imposing a sentence of six months or less, reasons must be given, including reasons for why all alternatives were not appropriate: *R v Parsons* [2002] NSWCCA 296.

Setting the non-parole period and total term

Section 44 provides:

> (1) When sentencing an offender to imprisonment for an offence, the court is first required to set a non-parole period for the sentence (that is the minimum period for which the offender must be kept in detention in relation to the offence).
>
> (2) The balance of the term of the sentence must not exceed one third of the non-parole period for the sentence, unless the court decided that there are special circumstances for it being more (in which case the court must make a record of its reasons for that decision).

A decision that special circumstances exist does have the consequence of increasing time on parole and reducing time in detention: *R v Simpson* (2001) 53 NSWLR 704 at [24].

The purpose of finding special circumstances is to benefit the offender and this is achieved by reducing the non-parole period and extending the parole period: *R v Huynh* [2005] NSWCCA 220 at [34]–[40]; *R v Ellaz* [2005] NSWCCA 350 per Hidden J at [26].

For discussion regarding the setting of non-parole periods and finding special circumstances: see *Sentencing Bench Book*, **Setting terms of imprisonment** at **[7-500]**ff.

Sentences of six months or less cannot include a non-parole period: s 46.

Commencement and expiry

- Note the starting date of the sentence, the date on which the defendant is eligible for release or, if relevant, release on parole.
- The starting date may be backdated: s 47(2)(a). While the court must take into account any pre-sentence custody when deciding whether or not to backdate a sentence, backdating is not limited to that situation. The starting date may only be a date after the sentence is imposed if it is a consecutive sentence. The starting date for a consecutive sentence is the date on which the offender is eligible for parole.
- Days of release are calculated as follows: a sentence (unless for weeks or days) imposed on (for example) the 18th of the month, will end on the 17th day of the month in which it expires.
- The Judicial Commission of NSW has online (accessible through JIRS) a sentencing calculator which will calculate the dates for release and if relevant, a date for the conclusion of the parole period.

Parole conditions

For sentences of full-time imprisonment of three years or less the court is not required to direct release of the offender on parole and s 158 of the *Crimes (Administration of Sentences) Act* 1999 provides for statutory parole orders whereby offenders are subject to the same standard conditions as a parole order made by the State Parole Authority. Part 5A provides for a back-end scheme of re-integration home detention.

[16-380] Consecutive sentences

Last reviewed: May 2023

Section 58 sets numerical limitations on consecutive sentences imposed by the Local Court. It is a very technical provision and close attention must be given to the language of the section.

Section 58 empowers magistrates to accumulate sentences to a total of five years subject to limits set out below.

Note: A court should not adjourn sentence proceedings in order to avoid the effect of s 58, and should exercise the sentencing discretion within its bounds, notwithstanding any concerns held regarding the length of the sentence which may be imposed: *Stoneham v DPP (NSW)* [2021] NSWSC 735.

The restriction to five years does not arise if the existing sentence was imposed other than by a Local Court, and the new sentence relates to escape lawful custody or an assault against a correctional or juvenile justice officer. If the existing sentence was imposed by the Local Court, the total accumulated sentence for the type of assault matters referred to is five years and six months.

When a court sentences an offender to imprisonment for an assault or offence against the person, committed while the offender was a convicted inmate of a correctional centre, the sentence must be consecutive unless the court exercises the discretion set out in s 56. This is still subject to the limits in s 58.

When a court sentences an offender to a term of imprisonment for the offence of escape lawful custody, the sentence must be consecutive: s 57. As this is still subject to the limitations in s 58 it is prudent to establish the offender's true custodial status before the prosecution elects summary jurisdiction. If not, the court will be confronted with the s 57 requirement to impose a consecutive sentence and the s 58 prohibition on imposing a consecutive sentence. If the offence is dealt with on indictment this problem will not arise in the District Court: see *Sentencing Bench Book*, **Concurrent and consecutive sentences** at **[8-260]**.

Section 58 does not apply to particular offences against the regulations under the *Crimes (Administration of Sentences) Act* 1999 (s 58(3A)), and the *Mandatory Disease Testing Act* 2021 (s 58(3B)).

Orders

Warrant to bring offender to court for sentence — s 25(2)

Sample order

The defendant is convicted.

A warrant under s 25(2) *Crimes (Sentencing Procedure) Act* is to issue for the defendant's arrest for sentencing. (The warrant may be signed by an authorised officer — if this is considered appropriate.)

Decision to sentence to imprisonment

Sample order — for use in all sentence matters

The defendant is convicted.

The court has considered as required by s 5 *Crimes (Sentencing Procedure) Act* all possible alternatives to full-time imprisonment and is satisfied having regard to [*give reasons*] no other course is appropriate.

Fixed term — six months or less

Sample order

The defendant is to be imprisoned for a fixed term of [*up to six months*] commencing today [*or specify date*]. The defendant is to be released on [*specify date*]. The reasons for imposing a sentence of six months or less are [*state reasons*].

Fixed term — greater than six months, no NPP

Sample order

The defendant is to be imprisoned for a fixed term of [*provide details*] commencing today [*or specify date*]. The defendant is to be released on [*specify date*].

I decline to fix a non-parole period because [*provide reasons*].

Term involving a non-parole period

Sample order

The defendant is sentenced to a term of imprisonment which consists of a non-parole period of [*9 months*] and a total term of [*12 months*] both to date from [*provide details*]. [*That parole is subject to the following conditions*.]

If the balance of the term exceeds one-third of the NPP

Sample order

I fix a balance of the term in excess of one-third of the NPP because of the following special circumstances [*state special circumstances which should explain why the appropriate NPP has been reduced resulting in the longer period on parole*].

Consecutive sentences

Sample order

This sentence is consecutive to the sentence of [*term*] imposed on [*date*] which expires on [*date*].

or

This sentence is consecutive to the sentence imposed on [*date*]. It is to date from [*date*] which is the date on which the non-parole period, under that sentence, is to expire.

Release date

Sample order — for use in all sentence matters

As a result of these orders the defendant is eligible to be released [*on parole*] on [*date*].

If sentence following plea of guilty

Sample order

The court takes into account the fact that the defendant has entered a plea of guilty and has reduced the sentence it would otherwise have imposed by …% [*usually from 10–25%*] in accordance with s 22 *Crimes (Sentencing Procedure) Act* and the principles laid down in *R v Thomson and Houlton* (2000) 49 NSWLR 383.

[16-400] Sentencing by reference to outstanding charges

Last reviewed: May 2023

Taking other charges into account

When imposing a sentence for an offence, other charges may be taken into account when fixing the appropriate sentence. It is at the discretion of the prosecution whether it wishes to file in the court a list of other matters with which the offender has been charged, but not convicted: s 32.

The following matters should be considered:

- at least one offence (the principal offence) must have been found proved — by plea of guilty or after hearing
- a prescribed form of list of charges must have been prepared, listing one or more further offences with which the defendant has been charged, but not convicted
- all the offences must fall within the jurisdiction of the court, either with or without the defendant's consent — the District Court and Supreme Court can take summary offences into account
- the document must be signed by the defendant, and the DPP, or a person authorised by the DPP or a prescribed person — a police officer is prescribed for this purpose
- the defendant must have been served with the document
- when dealing with the offender for the principal offence, the magistrate must ask if the defendant admits guilt for any or all of the listed offences, and wishes them to be taken into account when sentenced
- a sentence can then be imposed for the offence found proved, but taking into account the other offences
- the sentence imposed must not exceed the maximum penalty available for the offence found proved. Any penalty, including a s 10 dismissal, CRO, fine, CCO, ICO or imprisonment can be imposed: see definition of "penalty" in s 31
- no conviction is recorded for offences taken into account, but orders for restitution, compensation, costs, forfeiture, disqualification or suspension of licences can all be made in respect of such offences as if a conviction had been recorded: s 34
- the magistrate is to certify, on the form containing the additional offences, that they have been taken into account.

For a summary of the law and principles applicable to sentencing by reference to outstanding charges: see *Sentencing Bench Book*, **Taking further offences into account (Form 1 offences)** at **[13-200]**ff.

[16-420] Correcting sentencing errors

Last reviewed: May 2023

Re-opening of proceedings

The court can re-open criminal proceedings where it has imposed a penalty contrary to law, or failed to impose a penalty required by law: s 43.

Application to re-open

Proceedings can be re-opened on application by a party, or on the court's own motion. A magistrate, other than the magistrate who imposed the sentence, can re-open the proceedings or correct any error.

Right to hearing

The informant and the defendant must be given the opportunity to be heard before any correction is made. If the offender does not appear, or the court is of the view the offender will not appear for this purpose, a warrant can be issued to bring him or her to court: s 43(3).

Procedural irregularities

The provision relates to the penalty, not to the manner of imposition of the penalty. It does not authorise the re-opening of a hearing to correct some procedural irregularity.

For discussion of law and principles to be applied: see *Sentencing Bench Book*, **Correction and adjustment of sentences** at **[13-900]**ff.

[16-440] Court orders for identification

Last reviewed: May 2023

Where a court finds any of the following offences proved, it may order that the defendant attend a police station and submit to the officer-in-charge for the taking of particulars necessary for identification. This can include photographs, fingerprints and palm-prints: s 134(2) *Law Enforcement (Powers and Responsibilities) Act* 2002. The court must warn the defendant that a failure to comply could result in their arrest without warrant and being taken into custody for such time as is reasonably necessary for the taking of the particulars in accordance with the order: s 134(3) *Law Enforcement (Powers and Responsibilities) Act*.

The offences include the following:

- any indictable offence
- an offence under s 117 *Road Transport Act* 2013 of negligent driving occasioning death or grievous bodily harm, furious or reckless driving or driving at a speed or in a manner dangerous to the public
- an offence under the *Road Transport Act* 2013 of:
  - special/low/mid/high range PCA — whether driving or occupying the driver's seat and attempting to put the car in motion: s 110(1), (2), (3)(a) or (b), (4)(a) or (b), or (5)(a) or (b)
  - driving or occupying the driver's seat and attempting to put the car in motion with illicit drugs or morphine in a person's oral fluid, blood or urine: s 111(1)(a) or (b), or (3)(a) or (b)
  - driving under the influence: s 112(1)(a) or (b)
  - menacing driving: s 118

  - fail to stop and give assistance after accident: s 146
  - refuse breath analysis/wilfully alter concentration: Sch 3 cll 16(1)(b)
  - prevent taking of blood sample/urine sample, or wilfully alter blood sample: Sch 3 cll 17(1), 18(1)
- an offence under ss 5 or 6 *Prevention of Cruelty to Animals Act* 1979 of cruelty or aggravated cruelty to animals
- an offence prescribed by the regulations. None are presently prescribed.

This order can be made immediately after sentencing, or before sentencing (on finding an offence to which this section applies has been proven) if the court is satisfied it will resolve any doubt about the person's identity. See **[38-020] Criminal procedure generally** for the applicability of this order in the Children's Court.

Under s 63, a power exists for police or correctional officers (or any other person specified by court order) to take identifying particulars of an offender as soon as practicable after an offender is sentenced to imprisonment. Non-compliance with this can lead to the court revoking any related order for an ICO: s 63(2).

See s 3ZL *Crimes Act* 1914 (Cth) for similar provisions (the power to order identification) with respect to Commonwealth offences.

Sample order

You are to present yourself to the Officer in Charge of Police at [LOCATION] within [X] days and to submit to the taking of the following particulars of identification: [finger prints], [palm prints] and [photographs].

[Delete particulars which are not ordered to be taken].

[16-460] Custodial sentences — Table

Last reviewed: May 2023

See www.judcom.nsw.gov.au/publications/benchbks/local/general_orders.html#p16-460 for tables on Custodial sentences and ICO.

[16-480] Non-custodial sentences — Table

Last reviewed: May 2023

See www.judcom.nsw.gov.au/publications/benchbks/local/general_orders.html#p16-480 for table on Non-custodial sentences.

[16-500] Sentencing reforms — Table of transitional provisions

Last reviewed: May 2023

See www.judcom.nsw.gov.au/publications/benchbks/local/general_orders.html#p16-500 for table of transitional provisions.

Commonwealth offences

Note: All references to sections in this chapter are, unless otherwise stated, references to the *Crimes Act* 1914 (Cth).

[18-000] Overview

The main legislation that magistrates will encounter is the *Crimes Act*1914 (Cth) and the Commonwealth *Criminal Code Act* 1995 (Cth).

The *Crimes Act* contains matters of general application to all federal offences unless it is covered by a particular Act. It covers such matters as penalties, summary/indictable disposal, time limits, powers of arrest, search and seizure and sentencing. It covers some offences such as those related to the administration of justice and postal services but many offences are now found in the *Criminal Code*.

The *Criminal Code* contains offence provisions and general principles of criminal responsibility. The offences cover terrorism, property offences, fraud, forgery and national infrastructure. The *Criminal Code* deals with issues such as onus of proof, defences, elements of offences including the replacement of actus reus and mens rea with the concepts of physical (for example, conduct/result) and fault (for example, intention/recklessness) elements of an offence.

In summary, the *Crimes Act* is the source for sentencing. The *Criminal Code* contains most of the more common offences and is the source for how guilt is established.

Sentencing Bench Book

For further information in relation to Commonwealth sentencing, see *Sentencing Bench Book* at **Crimes Act 1914 (Cth) — sentencing Commonwealth offenders** at **[16-000]–[16-110]** and D Lane, *Sentencing of federal offenders in Australia: a guide for practitioners*, 6th edn, April 2023.

[18-020] Jurisdiction

State procedures and jurisdictions apply to Commonwealth offenders tried in State courts: s 68 *Judiciary Act* 1903.

Subject to provisions in Commonwealth law, State laws (including those relating to procedure, bail, evidence and competency of witnesses) apply to State courts exercising federal jurisdiction: s 79(1) *Judiciary Act*. Special provisions related to bail for terrorism and Commonwealth child sex offences are in ss 15AA and 15AAA of the *Crimes Act*. See **Special bail provisions for Cth child sex offences [20-820]**.

The general procedure for dealing with an indictable matter summarily is set out in s 4J(1). However, where the particular indictable offence is contained in an Act with a separate provision enabling the offence to be dealt with summarily that provision will apply: s 4J(2).

[18-040] Arrest for Commonwealth offences

A person arrested must be released (on bail or otherwise) within the investigation period, or brought before a magistrate within that period, or as soon as practicable after the end of the period.

The investigation period is two hours in the case of Aboriginal or Torres Strait Islanders and otherwise, four hours: s 23C(4). There are provisions for "dead" time: s 23C(7).

Special provision is made with respect to a person arrested for a terrorism offence: ss 23DB–23DF.

Extension for serious offences (other than terrorism offences)

An application can be made to a magistrate (if available at the time) for extension of the investigation period: s 23D(1). The application may be made before the magistrate, by telephone or in writing: s 23D(2). Information that must be included in the application is set out in s 23D(3).

An application for extension can only be granted, by signed written instrument, if the magistrate is satisfied of the following (s 23DA(2)):

(a) the offence is a serious offence (that is, carrying more than 12 months imprisonment)

(b) further detention is necessary to preserve or obtain evidence or complete the investigation into the offence or another serious Commonwealth offence

(c) the investigation is being properly conducted and without delay, and

(d) the person or his or her legal representative has been given the opportunity to make representations about the application.

Subject to s 23DA(4), the instrument must set out: the day and time the extension was granted, the reasons for granting it and the terms of the extension: s 23DA(3). The magistrate must give a copy of the instrument to the investigating official as soon as practicable after signing it: s 23DA(5)(a).

The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once: s 23DA(7).

Where an application made by telephone or other electronic means is granted, the magistrate must inform the investigating official of the matters included in the instrument: s 23DA(5)(b).

[18-060] Procedures

Summary offences

An offence is summary if imprisonment of no more than 12 months or no imprisonment is provided: s 4H.

Indictable offences

Any offence punishable by imprisonment for a period exceeding 12 months is indictable: s 4G.

Dealing with certain indictable offences summarily

Indictable offences may be heard summarily if the court is empowered to do so by a Commonwealth Act. In particular, if the maximum penalty does not exceed 10 years' imprisonment, the offence may be dealt with summarily with the consent of both the prosecutor *and* the defendant: s 4J.

Consent for summary disposition of indictable offences must be given before the hearing of evidence commences: *Perry v Nash* (1980) 32 ALR 177. This includes when an application is made for the case to be dealt with under s 20BQ: see further at **[18-140] Person suffering from mental illness or intellectual disability**.

The requirement to obtain consent is particularly important in cases often seen in the Local Court, for example, use carriage service to menace, harrass etc under s 474.17 of the Code.

It is good practice in all matters to expressly ascertain the consent of both parties upon the entry of a plea: see Practice Note Comm 3 *Procedure for committal proceedings in the Local Court pursuant to the Early Appropriate Guilty Plea Scheme* at [4.5]; Practice Note Crim 1 *Case management of criminal proceedings in the Local Court* at [5.3(c)]. A failure by the court to obtain the defendant's consent that a particular offence (in that case, use carriage service to menace) be dealt with summarily results in jurisdictional error: see *Morgan v District Court of NSW* (2017) 94 NSWLR 463 at [23].

Penalty

Subject to the Act creating the offence, if the maximum term of imprisonment provided does not exceed five years, the maximum penalty on summary disposal is 12 months and/or 60 pu ($18,780). If the maximum penalty provided exceeds five years, the summary penalty is two years and/or 120 pu ($37,560): s 4J(3). In any case the penalty must not exceed the maximum available if tried on indictment.

See s 4AA for the value of a penalty unit. For offences committed on or after 1 July 2023 a penalty unit is $313.

Note: for offences committed from 31 July 2015 until 30 June 2017, a penalty unit is $180. For offences committed from 1 July 2017 until 30 June 2020, a penalty unit is $210. For offences committed from 1 July 2020 to 31 December 2022, a penalty unit is $222.00. For offences committed from 1 January 2023 to 30 June 2023, a penalty unit is $275.00.

Value of property $5000 or less

If the property value to which the offence relates does not exceed $5000 and the prosecutor so requests, regardless of whether the defendant agrees, any indictable offence may be dealt with summarily if the court thinks fit: s 4J(4). If it does so then, subject to any lesser penalty under the relevant Act, the maximum is 12 months' imprisonment and/or 60 pu ($18,780): s 4J(5).

Multiple offences and a single penalty

Any number of charges against the same provision of a Commonwealth law can be joined in the one information, complaint or summons, provided they are founded on the same facts or form part of a series of similar offences. If a person is convicted of two or more such offences, one penalty may be imposed. It must not exceed the total of the maximum penalties that could be imposed separately: s 4K.

Time for commencement of prosecutions

If no imprisonment or if imprisonment of six months or less is provided — the time for commencement of prosecution is one year after the commission of the offence. Otherwise (subject to the particular Act, for example, s 492 of the *Migration Act* 1958), at any time: s 15B.

Amendment

The court may make at the hearing any amendments it considers desirable or necessary to enable the real question in dispute to be determined: s 15C(1). The court cannot amend if injustice would be caused to the defendant: s 15C(3). Adjournments may be granted and cost orders made in certain circumstances: s 15C(2).

Challenge regarding jurisdiction

Last reviewed: September 2023

See *Sovereign citizens — common arguments, rebuttals and caselaw* which is available through the Magistrates' Resources Section on JIRS.

[18-080] Sentencing policy

Severity

A court must impose a sentence that is "of a severity appropriate in all the circumstances of the offence": s 16A(1). Imprisonment is a sentence of last resort: s 17A(1).

Matters to be taken into account

A court must take the following matters into account where relevant (s 16A(2)):

- the nature and circumstances of the offence
- other offences to be taken into account
- any course of conduct involving the same or similar acts
- the personal circumstances of any victim
- any injury, loss or damage resulting from the offence
- any victim impact statement from a victim who has suffered harm as a result of the offence
- the degree to which the defendant has demonstrated contrition (including making reparation)
- the extent to which the person has failed to comply with any orders or obligations relating to pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence
- the fact and timing of a guilty plea, including whether these resulted in any benefit to the community, victims and witnesses
- co-operation with authorities in respect of the offence or other offences
- the deterrent effect on the person
- the deterrent effect on other persons
- the need for adequate punishment
- the defendant's character, antecedents, cultural background, age, means and physical or mental condition
- the prospect of rehabilitation
- the probable effect on the defendant's family or dependants.

It is not necessary to mention each of these considerations each time sentence is passed for a Commonwealth offence, although it is advisable to state "I take into account the provisions of s 16A that are relevant in this matter, namely [indicate matters that have been taken into account]", so as to identify those factors that have influenced the court's reasoning and conclusions: see *RCW v R (No 2)* (2014) 244 A Crim R 541 at [58].

General deterrence must also be taken into account: s 16A(2)(ja); *DPP (Cth) v Said Khodor El Karhani* (1990) 21 NSWLR 370. Any sentence currently being served, State or federal, must also be taken into account: s 16B.

Discount for guilty plea

Section 16A(2)(g) provides that the fact and timing of a guilty plea, including any resulting benefit to the community, victims and witnesses can be taken into account. It is desirable, although not mandatory, to specify the discount given in respect of a guilty plea: *Huang aka Liu v R* [2018] NSWCCA 70 at [9].

Reduction for promised co-operation

If a sentence, order or non-parole period is reduced because the offender has undertaken to co-operate with law enforcement agencies in relation to proceedings (including confiscation proceedings) for any offence, the court must state the sentence has been reduced for that reason and state the sentence, order or non-parole period that would otherwise have been fixed: s 16AC(1)–(2).

It is advisable to state "If you had not co-operated, your sentence would have been …".

Taking other offences into account

Other federal or Territory offences (including optional indictable offences) may be taken into account on sentence, subject to the procedure set out in s 16BA(1):

(a) the offences are listed in a document filed in the court, signed by the DPP and the defendant, and (a copy) given to the defendant

(b) if the prosecutor consents and the court thinks it is proper, the court asks the defendant if he admits guilt for any or all of the listed offences and wishes to have them taken into account when he is sentenced for the convicted offence, and

(c) the defendant does admit and agree.

The court cannot take into account any indictable offence it would not have jurisdiction to try: s 16BA(3A). The effect of this is that the Local Court cannot take into account any strictly indictable offence included on a s 16BA schedule.

The penalty imposed after taking the other offences into account should not exceed the maximum available for the offence or offences for which the defendant has been convicted: s 16BA(4).

Orders for reparation, costs, restitution, etc, can be made in respect of any "listed" offence, but otherwise no separate penalty can be imposed for such offence: s 16BA(5).

The court must certify on the document filed that those offences have been taken into account: s 16BA(8).

Explanation of penalty

Recognizances

Before imposing a recognizance, the court must explain to the defendant in language likely to be understood, the purpose and the effect of the order, the consequences of disobedience, and that the order may be varied or discharged upon application to the court: ss 19B(2) and 20(2).

Sentences

Where an order is made fixing a non-parole period or recognizance release, the purpose and consequences of the order must be explained to the defendant in language likely to be understood: s 16F(1)(2).

[18-100] Sentencing options

Sentencing options for federal offences are those specifically set out in Pt IB and those NSW additional options that are applied by s 20AB. Under s 20AB a sentencing option under NSW law is available for a person **convicted** of a federal offence provided it is:

- an option listed in s 20AB(1AA)
- a sentencing alternative prescribed by the *Crimes Regulations* 1990, or
- a sentencing option similar to a sentence or order contained in s 20AB(1AA).

In summary, the sentencing options available are as follows:

(a) dismissal without conviction: s 19B

(b) discharge without conviction: s 19B

(c) fine

(d) conviction and conditional release without passing sentence: s 20(1)(a)

(e) community correction order as per State legislation: s 20AB

(f) intensive correction order as per State legislation: s 20AB

(g) a residential treatment order: s 20AB

(h) imprisonment

(i) reparation orders: s 21B

(j) fingerprint orders.

(a) Dismissal of charge — s 19B(1)(c)

The provisions of s 19B are similar to s 10 of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) but, unlike the NSW section, there is no catch all provision that allows a court to take into account "any other matter that the court thinks proper to consider". It is desirable to state on which ground or grounds in s 19B the order is based.

Sample order

I find the offence proved. Because of [*the defendant's age/character/antecedents/health*] [*the extent to which the offence was of a trivial nature*] [*the extent to which the offence was committed under extenuating circumstances*] it is inexpedient to inflict any punishment and without proceeding to a conviction I dismiss the charge.

(b) Discharge without conviction — s 19B(1)(d)

The term recognizance is used instead of bond.

Good behaviour period

The period of recognizance must not exceed three years: s 19B(1)(d)(i).

Mandatory explanation

The conditions and consequences of breach, etc, must be explained before imposing a recognizance: s 19B(2).

Sample order

I find the offence proved. Because of [*the defendant's age/character/antecedents/health*] [*the extent to which the offence is of a trivial nature*] [*the extent to which the offence was committed under extenuating circumstances*] it is [*inexpedient to inflict any punishment*] [*inexpedient to inflict other than a nominal punishment*] [*expedient to release this offender on probation*] you are discharged, without proceeding to conviction, upon entering into a recognizance in the sum of [$] on the condition that you be of good behaviour for [*up to three years*] and [*state any further conditions*].

Further conditions

Other conditions may be imposed including conditions for the payment of reparation, costs or compensation.

Breaches of recognizance

Section 20A(5) provides the power to convict the person for the original offence or take no action if a s 19B(1) recognizance has been breached. Section 20A(1) requires action for an alleged breach to be initiated by information laid before a magistrate, upon which the magistrate may issue a summons or warrant. Therefore, a court cannot purport to "call up" a recognizance of its own motion.

(c) Fine

No orders for default etc need be made.

Single fine for multiple offences

Section 4K permits the imposition of a single fine for multiple offences provided the charges are against the same Commonwealth provision and are founded on the same facts or form part of a series of similar offences.

Fine in lieu of imprisonment

Unless a contrary intention appears in the legislation, when an offence is punishable by imprisonment only, a court may impose a pecuniary penalty, instead of or in addition to, a term of imprisonment: s 4B(2).

The maximum penalty is calculated by the formula:

term of imprisonment x 5 = maximum penalty units

when: "term of imprisonment" is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

See s 4AA for the value of a penalty unit. For offences committed on or after 1 July 2023 a penalty unit is $313; for offences committed on or after 1 January 2023 until 30 June 2023 a

penalty unit is $275; for offences committed from 1 July 2020 to 31 December 2022, a penalty unit is $222; for offences committed from 1 July 2017 until 30 June 2020 a penalty unit is $210; for offences committed from 31 July 2015 until 30 June 2017, a penalty unit is $180.

Fine in lieu of imprisonment for body corporate

Unless a contrary intention appears in the legislation, where an offence is committed by a body corporate, a court may impose a pecuniary penalty not exceeding five times the maximum penalty that could be imposed on a natural person convicted of the same offence: s 4B(3).

Means to pay

The defendant's financial circumstances must be taken into account, in addition to other matters to be considered: s 16C(1).

Fine, etc, under recognizance

See pecuniary penalty under recognizance below.

(d) Conviction and conditional release on recognizance — s 20(1)(a)

Section 20(1)(a) provides for the conditional release of offenders after conviction, without the passing of sentence.

Good behaviour period

The period of recognizance must not exceed five years: s 20(1)(a)(i).

Mandatory explanation

The conditions and consequences of breach, etc, must be explained before imposing a recognizance: s 20(2).

Pecuniary penalty under recognizance

A pecuniary penalty can be imposed as a condition of a recognizance: s 20(1)(a)(iii). It is important you specify a time for payment of the pecuniary penalty before the recognizance expires. If the offence carries imprisonment only, the maximum pecuniary penalty under a recognizance is 60 pu ($18,780): s 20(5)(b)(ii). Costs, reparation or compensation may be ordered separately or as a condition of the recognizance: s 20(1)(a)(ii)(B).

Do not purport to impose a "fine" (as distinct from a "pecuniary penalty") as a condition of a recognizance. The reason for using the term "pecuniary penalty", is that a fine is a sentence and a recognizance in this section is imposed without passing sentence.

Sample order

You are convicted. Without my passing sentence, I order that you be released upon entering into a recognizance in the sum of [$] on the condition that you will be of good behaviour for a period of [*up to five years*].

[*If imposing conditions, add:*] In addition, it is a condition of the order that [*state any further conditions*].

If you fail to comply with the conditions of the order, further action may be taken against you. This may require you to return to court [s 20(2)].

Breach of recognizance

Breach action is commenced by way of information laid before a magistrate upon which the magistrate may issue a summons or warrant: s 20A. Where a breach is proved the court may:

- impose a pecuniary penalty not exceeding 10 pu
- revoke the order and resentence the offender, or
- take no action.

(e) Community Correction Order

The NSW option of a CCO is available as it is listed as a sentencing option in s 20AB(1AA). See **[16-320] Community Correction Order** for the conditions that may be made and for the sample order.

Breach of CCO

There is no power to call up for a breach of a CCO. Action is commenced by way of information and summons: s 20AC(2). The information must be laid before a magistrate. Where a breach is proved, the court may:

- impose a pecuniary penalty not exceeding 10 pu
- revoke the order and resentence the offender, or
- take no action: s 20AB(6).

(f) Intensive Correction Order

The NSW option of an ICO is available as it is listed as an additional option under s 20AB(1AA) and also prescribed by the Regulations. See **[16-340] Intensive Correction Order** for the conditions that may be made and for the sample order.

Breach of ICO

Unlike a breach of an ICO for a NSW offence, which is dealt with by the Parole Board, a breach of an ICO for a federal offence is governed by s 20AC and remains with the Local Court. Action is commenced by information and summons: s 20AC(2). See **Breach of CCO**, above, for options.

[18-120] (g) Sentences of imprisonment

Restrictions on imprisonment

Imprisonment may be imposed for federal offences only if no other sentence is appropriate: s 17A(1). The reasons that no other sentence is appropriate must be stated and recorded: s 17A(2).

Restriction on sentence of imprisonment for certain minor offences

If a person is convicted of one or more s 17B offences relating to property or money, whose total value is not more than $2000, and the person has not previously been sentenced to imprisonment for any federal, State or Territory offence, imprisonment must not be imposed unless warranted by exceptional circumstances: s 17B(1). See s 17B(3) for the offences to which this section applies.

Commonwealth child sex offenders must serve actual term of imprisonment

Since 23 June 2020, s 20(1)(b) requires that a Cth child sex offender (defined in s 3(1)) serve an actual term of imprisonment unless there are exceptional circumstances: s 20(1)(b)(ii) and (iii). "Exceptional circumstances" are not defined. This requirement applies only to offences committed from 23 June 2020. Section 20(1B) requires a court making a recognizance release order for such an offence to impose the following conditions:

- supervision and a requirement to obey all reasonable directions
- not travel interstate or overseas without the probation officer's written permission, and
- undertake treatment or rehabilitation programs as directed.

Commencement of sentences

State laws relating to commencement of sentences and parole periods apply: s 16E.

Ratio head sentence/non-parole

Unlike NSW, there is no statutory ratio between the head sentence and non-parole period: *Hili v The Queen* (2010) 242 CLR 520; *Afiouny v R* [2017] NSWCCA 23 at [44].

Partial deferment of sentence

When a sentence of imprisonment is imposed, the defendant can be released on a recognizance forthwith or after having served a specified part of the sentence: s 20(1)(b). The recognizance is in the same form as s 20(1)(a) and can be subject to conditions. Note the exceptions, above, which apply if the defendant is being sentenced for a Commonwealth child sex offence.

Cumulative sentences

Generally, federal sentences can be made cumulative on existing State or federal sentences: s 19. The court must, when imposing the sentence for the relevant federal offence, direct when that sentence commences, but so:

(a) no federal sentence commences later than the end of the sentences the commencement of which has already been fixed or the last to end of those sentences; and

(b) if a non-parole period applies in respect of any State or Territory sentences — the first federal sentence to commence after the end of that non-parole period commences immediately after the end of the period.

However, a sentence for a Commonwealth child sex offence (or a State or Territory registrable child sex offence) cannot be concurrent or partly cumulative with a sentence for another offence unless there are exceptional circumstances (s 19(5)) and the court is satisfied imposing the sentence in a different manner will still result in a sentence of a severity appropriate in all the circumstances: s 19(6).

See further the *Sentencing Bench Book* at **[16-040]**.

Sentences of six months or less

If a sentence or sentences in aggregate do not exceed six months, a recognizance release order is not required: s 19AC(3).

Sentences of three years or less

If a sentence (or the aggregate of several concurrent sentences imposed at the one time) does not exceed three years, the court must fix a single recognizance release order in respect of all

sentences: s 19AC. If the defendant is currently serving a sentence, plus the further sentence and the unserved balance of sentence does not exceed three years in aggregate, a recognizance release period must be fixed.

Sentences over three years

If a sentence (or the aggregate sentence if more than one is imposed at the one time) exceeds three years, the court must fix a single non-parole period: s 19AB(1).

Sentences on prisoner serving federal sentence

If a sentence is imposed which increases the balance of the time to be served by a sentenced prisoner to more than three years, and the person is not already subject to a non-parole period or recognizance release order, a single non-parole period must be fixed: s 19AB(2).

Where a person is already subject to a non-parole period: see s 19AD.

Where a person is already subject to a recognizance release order: see s 19AE.

Declining to fix a non-parole period or recognizance release order

If a sentence is not already subject to such an order, the court may decline to make a recognizance release order or fix a non-parole period, if the person's antecedents or the circumstances of the offence make it inappropriate to do so: ss 19AB(3), 19AC(4) and 19AD(2). Reasons must be given: ss 19AB(4), 19AC(5) and 19AD(5).

Sample orders

Decision to sentence to imprisonment

You are convicted:

I have considered all the alternative sentences available and I am satisfied that no alternative to full-time imprisonment is appropriate because [*provide reasons*].

Sentence fixed term

You are convicted and sentenced to imprisonment for a period of [*specify period*] commencing on [*date*]. You are to be released on [*date*].

If greater than six months, add

I decline to fix a minimum term or recognizance release because [*provide reasons*].

Recognizance release order (where period of imprisonment to be served)

I order that you be released on [*specify release date*] after having served [*specify period*] on entering into a recognizance in the sum of [$] to be of good behaviour for a period of [*up to five years*]. The recognizance is further conditioned upon [*any extra conditions*].

If you fail to comply with the conditions of the order, further action may be taken against you. This may require you to return to court. [s 20(2)]

(h) Reparation (compensation)

Reparation for loss or expenses may be ordered on a conviction or order under s 19B: s 21B. There is no monetary limit on the amount. An order may be made in favour of a person, or the Commonwealth or a public authority. In instances of the latter, do not make an instalment order as the Commonwealth will seek to recover the amount as a civil debt.

(i) Fingerprint orders

Section 3ZL(1) provides that the court may order a convicted person attend a police station or a police officer attend a person in a place of detention, within one month after conviction, to allow fingerprints and/or photographs to be taken.

[18-140] Person suffering from mental illness or intellectual disability

Section 20BQ provides that where it appears the defendant is suffering from a mental illness or an intellectual disability, after considering an outline of the facts or other relevant evidence, the court may either:

- deal with the matter according to law, or if more appropriate,
- may dismiss the charge and discharge the defendant into the care of a responsible person, with or without conditions for up to three years; or on condition to attend on another person or at a place specified for assessment of the defendant's mental condition, or treatment, or both, for up to three years;
- or unconditionally.

If an application under s 20BQ is made for an indictable offence the prosecution proposes to deal with summarily, the defendant's consent is still required. In cases where consent cannot be obtained, the matter should be transferred to the District Court for a fitness hearing.

Features of s 20BQ

The test under s 20BQ is a different test to that applied under NSW legislation. While s 12 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 refers to mental health impairment and cognitive impairment, s 20BQ refers to mental illness within the meaning of the civil law of NSW. The *Mental Health Act* 2007 (NSW) s 4 defines mental illness as a condition that seriously impairs temporarily/permanently mental functioning and is characterised by one or more of symptoms of:

- delusion
- hallucination
- serious disorder of thought form
- severe disturbance of mood
- sustained/repeated irrational behaviour indicating the presence of any one/more of the symptoms, above.

The Commonwealth provisions leave no room for the operation of the NSW legislation: see *Kelly v Saadat-Talab* (2008) 72 NSWLR 305 at [11]. The defendant must be suffering from a mental illness/intellectual disability at the time of the hearing for the Commonwealth provisions to apply. A person having an underlying condition, but stable on medication would still be considered to have a mental illness: see *Kelly v Saadat-Talab* at [30].

The court may inform itself as it thinks fit, but not so as to require the defendant to incriminate himself or herself: s 20BR. A magistrate is therefore not required to insist upon strict compliance with requirements of expert evidence, but may form a conclusion based on the whole of the material and applying common sense: *DPP (Cth) v Mahamat-Abdelgader* [2017] NSWSC 1102 at [38]–[39].

The length of an order under s 20BQ can be up to 3 years.

There is NO legislative power to take action in the event of a breach of the order.

Such an order acts as a stay of further proceedings for the offence: s 20BQ(2).

The court may also adjourn the proceedings, remand the defendant on bail or make any other appropriate order: s 20BQ(1)(d). However, the court must not make an order under ss 19B, 20, generally 20AB or 21B, that is, must not make a recognizance, intensive correction or reparation order: s 20BQ(3). A residential treatment order is now one of the sentencing alternatives available under s 20AB, but when a court is dealing with a mentally ill defendant under s 20BQ, such an order may still be made: s 20BQ(3).

[18-160] Table of penalties

Crimes Act 1914 (Cth)

Following the introduction of the *Criminal Code*, many of the offences under the *Crimes Act* were repealed. Set out below are the more common offences remaining.

SECTION	DESCRIPTION	PENALTY (MAX)
35	Give false testimony	60 pu ($18,780) and/or 12 mths
36	Fabricate evidence	60 pu ($18,780) and/or 12 mths
36A	Intimidate witness	60 pu ($18,780) and/or 12 mths
42	Conspiracy to obstruct, prevent, pervert or defeat the course of justice	120 pu ($37,560) and/or 2 yrs
47	Escape lawful custody	60 pu ($18,780) and/or 12 mths
85U	Obstructing carriage of articles by post	60 pu ($18,780) and/or 12 mths
85W	Cause controlled drugs or controlled plants to be carried through post	60 pu ($18,780) and/or 12 mths
89	Trespass on Commonwealth land	10 pu ($3,130)

Note: the dollar value in the table is calculated on the basis of the value of a penalty unit as at 1 July 2023 ($313). The penalty unit value for offences committed before that date will be lower.

Criminal Code offences

The most common offences under the *Criminal Code* are set out below. The penalties relate to summary disposal.

SECTION	DESCRIPTION	PENALTY (MAX)
134.1	Obtain property by deception	120 pu ($37,560) and/or 2 yrs
135.2	Obtain financial advantage	60 pu ($18,780) and/or 12 mths
135.4	Conspiracy to defraud	120 pu ($37,560) and/or 2 yrs
136.1	False/misleading statement in application	60 pu ($18,780) and/or 12 mths
144.1	Forgery	120 pu ($37,560) and/or 2 yrs
145.1	Using forged document	120 pu ($37,560) and/or 2 yrs
148.1	Impersonate Commonwealth public official	60 pu ($18,780) and/or 12 mths
471.1	Theft of articles in post	120 pu ($37,560) and/or 2 yrs
471.12	Using postal service to menace/harass/cause offence	60 pu ($18,780) and/or 12 mths
471.15	Cause explosive, or dangerous or harmful substance, to be carried through post	120 pu ($37,560) and/or 2 yrs
471.26	Using a postal or similar service to send indecent material to person under 16	120 pu ($37,560) and/or 2 yrs*
474.17	Using telecommunications service to menace/harass/cause offence	60 pu ($18,780) and/or 12 mths
474.25C	Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16	120 pu ($37,560) and/or 2 yrs*
474.27A	Using a carriage service to transmit indecent communication to person under 16 years of age	120 pu ($37,560) and/or 2 yrs*
478.1	Unauthorised access to data on Commonwealth computer	60 pu ($18,780) and/or 12 mths
480.5	Dishonestly obtain personal financial information	60 pu ($18,780) and/or 12 mths

Note: the dollar value in the table is calculated on the basis of the value of a penalty unit as at 1 July 2023 ($313). The penalty unit value for offences committed before that date will be lower.

Note: Where a penalty is marked with * it is a "Commonwealth child sexual offence": *Crimes Act* 1914, s 3(1). See above at **[18-120] (g) Sentences of imprisonment** under **Commonwealth child sex offenders must serve actual term of imprisonment**: s 20(1)(b), (1B).

[18-180] Taxation offences

Note: unless otherwise specified, references to sections in this subdivision are to the *Taxation Administration Act* 1953 (Cth).

Overview

Serious taxation offences are prosecuted under Ch 7 of the *Criminal Code*. Most tax offences are dealt with under the *Taxation Administration Act* 1953. Most offences under the Act are "prescribed taxation offences" which is defined in s 8A as:

- a taxation offence (other than a prescribed offence) that is committed by a natural person and punishable by a fine and not by imprisonment, or
- a prescribed offence (other than a prescribed offence that the Commissioner has elected under s 8F(1) or s 8S(1) to treat otherwise than as a prescribed taxation offence) that is committed by a natural person, or
- a taxation offence that is committed by a corporation.

The Commissioner may elect to prosecute certain offences for a fine only, or for a fine and imprisonment: s 8F. Where an election has been made a copy of the election must be filed with the court where the proceedings were commenced: s 8F(2).

A penalty of up to three times the tax avoided may be imposed for certain offences.

Many matters involve an offence under s 8C of failing to comply with a notice to lodge a tax return, or failing to submit a business activity statement (BAS). If the return is not lodged, the court is usually asked to make an order under s 8G for the return to be furnished by a particular date. A failure to comply with the s 8G order, is itself, an offence: s 8H.

It is important to note:

- the penalties increase if the defendant has been, in the previous five years, convicted of a relevant offence
- a prior conviction need not be prior in time. The two convictions may take place before the same court on the same day: s 8B(2).

A prosecution for a taxation offence may be commenced at any time: s 8ZB. Prescribed taxation offences are summary: ss 8A, 8ZA(3) and (4). Costs to a successful party may be awarded: s 8ZN.

The prosecution may rely upon a statement contained in the information (an averment) as prima facie evidence of the matter stated: s 8ZL.

The standard of proof in prescribed taxation offences is beyond reasonable doubt. Sections 13.1 and 13.2 of the *Criminal Code*, which overrides the *Evidence Act* 1995 (NSW), provides that the burden of proof is on the prosecution unless the offence provides for some other standard.

In some cases an additional pecuniary penalty may be imposed, based upon the amount of tax avoided: ss 8HA, 8W.

Sentencing principles in taxation offences

For a consideration of the use of s 19B (similar to s 10 *Crimes (Sentencing Procedure) Act* 1999): see *Commissioner of Taxation v Baffsky* [2001] NSWCCA 332.

Common features in taxation matters referred to in *Commissioner of Taxation v Baffsky* and *Viney v Greaves* (1987) 48 SASR 169 include:

- need for deterrence
- amount of tax assessed — debt or refund expected
- whether returns have been lodged
- length and reason for delay in lodging returns
- whether failure to comply was due to actions of another
- number of notices issued
- effect of conviction.

If the Australian Taxation Office has levied an administrative penalty, this must be returned to the defendant when proceedings are commenced. It will be a starting point for any prosecution penalty: *Vlahov v Federal Commissioner of Taxation* (1993) 26 ATR 49.

[18-200] Table of penalties

SECTION	DESCRIPTION	PENALTY (MAX)
8C	Failure to comply with requirements (for example, tax return) (a) if convicted in previous 5 yrs of a relevant offence: s 8B (b) if previously convicted in previous 5 yrs of 2 or more relevant offences: s 8B and Commissioner electing under s 8F(1) to treat offence otherwise than as a prescribed taxation offence. The defendant can be ordered under s 8G to comply with the original requirement.	20 pu ($6,260) and s 8HA 40 pu ($12,520) and s 8HA 50 pu ($15,650) and/or 12 mths and s 8HA
8D	Failure to answer questions when attending before Commissioner (a) if convicted in previous 5 yrs of a relevant offence: s 8B (b) if previously convicted in previous 5 yrs of 2 or more relevant offences: s 8B and Commissioner electing under s 8F(1) to treat offence otherwise than as a prescribed taxation offence. The defendant can be ordered under s 8G to comply with the original requirement.	20 pu ($6,260) and s 8HA 40 pu ($12,520) and s 8HA 50 pu ($15,650) and/or 12 mths and s 8HA
8H	Refusal to comply with order under s 8G	50 pu ($15,650) and/or 12 mths and s 8HA
8K	False/misleading statement to tax officer (a) if previously convicted of a relevant penalty offence: s 8B	20 pu ($6,260) and s 8W 40 pu ($12,520) and s 8W
8L	Incorrectly keeping records (a) if previously convicted of a relevant penalty offence: s 8B	20 pu ($6,260) and s 8W 40 pu ($12,520) and s 8W
8N	Recklessly making false/misleading statements (a) if previously convicted of a relevant offence and election to treat other than as a prescribed offence: s 8B	30 pu ($9,390) and s 8W 50 pu ($15,650) and/or 12 mths
8Q	Recklessly/incorrectly keeping records etc (a) if previously convicted of a relevant offence and Commissioner elects to treat other than as a prescribed offence: s 8B	30 pu ($9,390) and s 8W 50 pu ($15,650) and/or 12 mths

SECTION	DESCRIPTION	PENALTY (MAX)
8T	Incorrectly keeping records with intention of deceiving or misleading	50 pu ($15,650) and/or 12 mths
	(a) if previously convicted of a relevant offence	100 pu ($31,300) and/or 2 yrs
8U	Falsifying or concealing identity with intention of deceiving or misleading	50 pu ($15,650) and/or 12 mths
	(a) if previously convicted of a relevant offence	100 pu ($31,300) and/or 2 yrs
8WA	Unauthorised requirement that tax file number be quoted	100 pu ($31,300) and/or 2 yrs
8WB	Unauthorised recording of tax file number	100 pu ($31,300) and/or 2 yrs
8WC	Conducting affairs so as to avoid tax file number requirements	100 pu ($31,300) and/or 2 yrs
8XA	Unauthorised access to taxation records	100 pu ($31,300) and/or 2 yrs
8ZF	Penalty for corporation convicted of taxation offence (other than prescribed offence) if punishable by imprisonment for natural person	5 times the maximum fine
8ZJ(4), (9)	Penalty upon conviction for court of summary jurisdiction for prescribed taxation offence	
	- natural person	$5,000
	- corporation	$25,000

Note: the dollar value in the table is calculated on the basis of the value of a penalty unit as at 1 July 2023 ($313). The penalty unit value for offences committed before that date will be lower.

[18-220] Social welfare fraud

Most prosecutions are commenced under the *Social Security (Administration) Act* 1999. The more serious fraud matters may be commenced under the *Criminal Code*.

Depending on the date of the offences, there may still be reliance upon the *Crimes Act* and the *Social Security Act* 1991, which offence provisions have now been repealed.

Offences under the *Social Security (Administration) Act* are summary — the maximum penalty is 60 pu ($18,780) and/or 12 months: s 217 *Social Security (Administration) Act* 1999 and ss 4B, 4H *Crimes Act* 1914.

The most common charge under the *Social Security (Administration) Act* is:

SECTION	DESCRIPTION
215	Obtain payment not payable

The most common charges under the *Criminal Code* are:

SECTION	DESCRIPTION	PENALTY (MAX)
135.1(5)	Dishonestly cause a loss — indictable but on summary disposal	60 pu ($18,780) and/or 12 mths
135.2	Obtain financial advantage — summary	60 pu ($18,780) and/or 12 months

Note: the dollar value in the table is calculated on the basis of the value of a penalty unit as at 1 July 2023 ($313). The penalty unit value for offences committed before that date will be lower.

For a discussion of the application of the *Criminal Code* to an offence under s 135.2: see *DPP v Neamati (Cth)* [2007] NSWSC 746. For a discussion of whether an omission can amount to an offence against s 135.2: see *DPP (Cth) v Keating* (2013) 248 CLR 459.

Sentencing in social security fraud

Common features in higher court cases include:

- the sum of money involved: *R v Hawkins* (1989) 45 A Crim R 430
- period of time over which fraud was committed: *R v Delcaro* (1989) 41 A Crim R 33

- level of sophistication of the fraud: *R v Hart* [1999] NSWCCA 204
- type of charge and maximum penalty
- general deterrence: *R v Purdon* (unrep, 27/3/97, NSWCCA)
- delay in bringing proceedings: *Winchester v R* (1992) 58 A Crim R 345
- plea of guilty: *Winchester v The Queen.*

[18-240] Offences involving border controlled drugs, plants and precursors

Expansive legislation directed to offences of exporting and importing into, and trafficking within Australia of drugs is found in Ch 9, Pt 9.1 of the *Criminal Code*.

The term prohibited imports, which was used in s 233B(1) *Customs Act* 1901 (rep), has been replaced by the terms border controlled drugs and border controlled precursors in the Code. The main offences are under Div 307 where a person imports/exports a substance and is reckless as to whether the substance is a border controlled drug, plant or precursor. Section 300.5 provides in essence, that it is not necessary for the prosecution to prove the person knew or was reckless as to the particular identity of the border controlled drug, plant or precursor.

[18-260] Money laundering offences

Division 400 *Criminal Code* contains offences of money laundering which prohibit dealing with money or other property which is either the proceeds of crime or intended to become an instrument of crime, and concealing or disguising an attribute of property which is the proceeds of general crime. While many of the offences are strictly indictable others may be dealt with summarily, including the offences under s 400.4(2)–(2B), (3)–(3B) relating to concealing or disguising an attribute of property which is the proceeds of general crime, and s 400.9(1AA)–(1A) which prohibits dealing with money or other property which may reasonably be suspected of being proceeds of crime.

[18-280] Child abuse offences

Chapter 10, Pt 10.5 Div 471 (Subdivs B-C) and Pt 10.6 Div 474 (Subdivs D and F) *Criminal Code* contain offences of using postal or telecommunications services for child abuse material. They prohibit possessing, producing, supplying or obtaining such material through use of postal or telecommunications services, as well as using these to procure a child to engage in sexual activity, or to "groom" a child. Child sex offences committed by Australians overseas are in Ch 8, Div 272 (subdiv B-C), Div 273 (Subdiv B), Div 273A. Many of these offences are strictly indictable. Additional offences involving a failure by a Commonwealth officer to report a child sexual abuse offence (defined in s 273B.1) are in Ch 8, Div 273B. These are indictable offences which may be prosecuted summarily.

It is good practice to ask the prosecutor whether the court has jurisdiction to hear a Cth child sex offence given the majority of these offences are strictly indictable.

[18-300] Customs offences

Offences under the *Customs Act* 1901 include smuggling, importing/exporting prohibited goods and evasion of duty. Also included are offences under s 233BAA of importing/exporting "tier 1" goods which include ephedrine, pseudoephedrine and certain performance enhancing drugs.

Smuggling

Section 233(1)(a) prohibits the smuggling of goods. "Smuggling" is defined as any (or any attempted) importation, introduction or exportation of goods with intent to defraud the revenue: s 4(1). The intention to defraud the revenue must be clearly made out: *R v Amenores* [1980] 2 NSWLR 34.

The effect of the penalty provisions of ss 233AB(1) and 245(4) is that when dealt with summarily, the following penalties may be imposed:

- For offences where the goods concerned had been entered for home consumption:
  - where the court can determine the duty that would have been payable on the smuggled goods, a penalty not exceeding five times the amount of the duty and not to exceed 200 pu ($62,600), or
  - where the court cannot determine the duty that would have been payable on the smuggled goods, a penalty not exceeding 200 pu ($62,600).

Importing/exporting

Section 233(b) and (c) prohibit the importation and exportation of prohibited imports/exports. Penalties will vary depending on the nature of the goods.

The effect of the penalty provisions of ss 233AB(2) and 245(4) is that when dealt with summarily, the following penalties may be imposed:

- where the court can determine the value of the goods to which the offence relates, a penalty not exceeding three times the amount of the value of those goods and not to exceed 200 pu ($62,600), or
- where the court cannot determine the value of the goods, a penalty not to exceed 200 pu ($62,600).

Evasion of duty

Section 234(1)(a) provides that a person shall not evade payment of any duty which is payable. If the duty can be determined, a penalty not exceeding five times the amount of that duty and not less than two times that amount to a maximum fine of 200 pu ($62,600). If the duty cannot be determined, the maximum fine is 200 pu ($62,600): s 234(2)(a). Section 234(1)(d) includes the offence of intentionally making a statement to an officer, reckless as to it being false/misleading. The penalty is a maximum fine of 100 pu ($31,300) and up to twice the duty payable on the goods: s 234(3).

In summary matters not punishable by imprisonment, the prosecution may rely on the averments in the information as prima facie proof of every factual element of an offence except the intent of the defendant (if that needs to be proved): s 255(1), (4).

Section 263 of the *Customs Act* gives the court power to award costs to a successful party independently of the *Criminal Procedure Act* 1986: *Commissioner of Taxation (Cth) v MacPherson* [2000] 1 Qd R 496.

[18-320] Offences under the Biosecurity Act 2015

Section 185 details the basic illegal importation offence. The *Criminal Code* applies in determining fault elements and onus of proof.

The maximum penalty when determined summarily, is a fine not exceeding 120 pu ($37,560) or imprisonment not exceeding two years: s 4J(3) *Crimes Act* 1914.

[18-340] Offences under the Migration Act 1958

Sections 229, 230 and 232 deal with the carriage of unlawful non-citizens in Australia. The offences are summary (maximum penalty 100 pu).

The offence of people smuggling under s 233A may be dealt with summarily (maximum penalty on summary conviction 2 yrs and/or 120 pu). Aggravated offences of people smuggling under s 233B (danger of death or serious harm etc.) and s 233C (at least 5 people), and the aggravated offence concerning false documents and/or false or misleading information relating to non-citizens (as least 5 people) (s 234A) are strictly indictable (imprisonment for 20 yrs or 2,000 pu, or both). Mandatory minimum penalties apply for offences against ss 233B, 233C and 234A: s 236B.

Otherwise, subject to the above, the offences of supporting people smuggling (s 233D), making false statements to officers (s 234), concealing or harbouring illegal non-citizens (s 233E), and using or possessing another person's visa (s 236), may be dealt with summarily if the informant and defendant consent and the court considers it appropriate. The maximum penalty on summary conviction is 2 years imprisonment and/or a fine of 120 pu ($37,560).

[18-360] Passport offences

Offences involving foreign travel documents are found in Pt 3 *Foreign Passports (Law Enforcement and Security) Act* 2005. Offences involving Australian travel documents are in Pt 4 *Australian Passports Act* 2005 (Cth).

[18-380] Offences under the Financial Transaction Reports Act 1988

The Act provides for the reporting of certain transactions and imposes certain obligations in relation to cash or bullion. Section 15(1) of the *Financial Transaction Reports Act* 1988 requires persons transferring Australian currency or foreign currency out of Australia or into Australia in an amount not less than A$10,000 in value to make a report. A breach of the section may be dealt with summarily or on indictment. Maximum penalty upon summary conviction where the offender is a natural person — a fine not exceeding 60 pu ($18,780) or imprisonment not exceeding 12 months or both; Body corporate — fine not exceeding 300 pu ($93,900): s 15(6).

Section 24(2) prohibits the operating of an account in a false name. Maximum penalty upon summary conviction: Natural person — fine not exceeding 60 pu ($18,780) or imprisonment not exceeding 12 months or both; Body corporate — fine not exceeding 300 pu ($93,900).

[18-400] Proceeds of Crime Act 2002

Although some of the offences in the *Proceeds of Crime Act* 2002 may be dealt with summarily, these offences usually proceed on indictment.

Following application by an "authorised officer" (defined in s 338), a freezing order under s 15B(1) may be made against the balance of an account with a financial institution provided there are reasonable grounds to suspect it:

- is proceeds of an indictable offence (s 15B(1)(b)(i)); or
- is wholly or partly an instrument of a serious offence (s 15B(1)(b)(ii)), and
- the magistrate is satisfied, unless an order is made, there is a risk that the balance will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument: s 15B(1)(c).

The determination under s 15B(1)(b) and (c) need not be based on a finding as to the commission of a particular offence: s 15B(3).

After a person is convicted of a Commonwealth indictable offence, a magistrate has proceeds jurisdiction to make a restraining order under s 17, a forfeiture order under s 48, or a pecuniary penalty order under s 116(1)(b)(i), provided the order relates to the offence: s 335(6).

The civil standard of proof applies with respect to applications made under the Act: s 317(2).

Bail

[20-000] Introduction

The *Bail Act* 2013 commenced on 20 May 2014. For a brief history of the amendments to the Act since its commencement, and their impetus, and also a discussion of issues associated with bail applications, see G Brignell and A Jamieson, "Navigating the Bail Act 2013", *Sentencing Trends & Issues*, no 47, Judicial Commission of NSW, 2020 at p 3.

[20-020] Legislative purpose of the Act — s 3

Concerning the purpose of the *Bail Act* 2013, s 3(1) provides:

> The purpose of this Act is to provide a legislative framework for a decision as to whether a person who is accused of an offence or is otherwise required to appear before a court should be detained or released, with or without conditions.

[20-040] What is bail? — s 7

Bail is defined in s 7 of the Act as "authority to be at liberty for an offence", subject to limitations in s 14: s 7(1). Bail can be granted to any person accused of an offence: s 7(2).

Section 14 limits that entitlement in the following manner:

- bail is not met until a person signs a copy of a bail acknowledgment and it is given to a bail authority *and* all pre-release requirements for bail (including character acknowledgments under s 27) are met: s 14(1)
- a person is not entitled to be at liberty on those occasions the person is required to appear before a court: s 14(2).

Under s 85(1), a court may also revoke bail when bail security deposited under a bail condition is no longer intact. The court cannot revoke bail unless the person has been given written notice (s 85(3)(a)) and 28 days to demonstrate to the court either that the bail is still intact or to arrange for the deposit of replacement security: s 85(3)(b).

[20-060] Bail decisions that may be made — s 8

[20-080] Persons for whom a bail decision may be made

A bail decision may be made in respect of a person accused of an offence: s 8(1). In particular, the bail decisions which may be made are:

- releasing an offender without bail (s 8(1)(a))
- dispensing with bail (s 8(1)(b))
- granting bail (with or without conditions (s 8(1)(c)),
- refusing bail (s 8(1)(d)).

Bail decisions may also be made in respect of persons who are *not accused of any offence*: s 8(3) and Sch 1 of the Act. This arises in two circumstances. The first is when a person is brought before the court in proceedings for the administration of sentence, defined in Sch 1 cl 1 as:

- proceedings for a failure to comply with conditions of a community correction order or conditional release order
- Children's Court proceedings for failure to comply with good behaviour bonds, probation orders or outcome plans under the *Young Offenders Act* 1997
- applications to extend/revoke community service orders for adults and children.

The second is when another Act confers power on a court to make a bail decision: Sch 1 cl 2. The following are examples:

- persons arrested by warrant for failing to comply with subpoenas or non attendance as witnesses under the following Acts: *Children and Young Persons (Care and Protection) Act* 1998, *Coroners Act* 2009 and the *Criminal Procedure Act* 1986
- persons arrested under an interstate arrest warrant, s 88 *Service and Execution of Process Act* 1992 (Cth).

Note 1. Bail decisions cannot be made if substantive proceedings for an offence have concluded and no further substantive proceedings are pending: s 8(2).

Note 2. If a bail decision has been made in relation to specific offences and additional offences are laid in court, the previous bail does not apply to those offences and is taken to be dispensed with unless an order is made: s 10(3). The prosecution is responsible for making an application concerning bail for the additional offences. A similar situation arises if charges are withdrawn and replaced with other charges. See *Iongi v R* [2022] NSWCCA 42 for a practical example.

Note 3. Section 10 enables a court to dispense with bail and s 10(3) identifies those circumstances when the court is taken to have dispensed with bail for an offence.

Note 4. The *Bail Act* 2013 does *not* apply to overseas extradition proceedings: see s 49B *Extradition Act* 1988 (Cth).

Note 5. The *Bail Act* does not apply to those offences in the Criminal Code (Cth) set out in s 15AA *Crimes Act* 1914 (Cth), which provides for a presumption against bail for particular Commonwealth offences or the Commonwealth child sex offences specified in s 15AAA of the Act (as to the latter see **[20-820]** below).

[20-100] Duration of bail — s 12

Once granted, bail is deemed to continue until either it is revoked, or the substantive proceedings are concluded: s 12(1). For that reason, there is no longer a requirement to order "bail to continue".

Section 6 defines the "conclusion of proceedings" to include:

- disposition of the proceedings
- when a person has been convicted and sentenced for an offence.

Note: Committal for trial or sentence is *not* the conclusion of proceedings in relation to bail: s 6(3). Bail continues to operate.

See also **Bail on appeal** at **[20-800]**.

[20-120] Bail applications that may be made

Only the following three applications may be made under the Act:

- a release application — which may be made by the accused under s 49 for bail to be granted or dispensed with
- a detention application — which may be made by the prosecutor under s 50 for the refusal or revocation of bail or for the grant of conditional bail, or
- a variation application — which may be made by any "interested person" as set out in s 51 for a variation in bail conditions.

Section 16 sets out the key features of bail decisions and defines:

Conditional release

- bail with conditions

Unconditional release

- release without bail
- dispensing with bail
- bail without conditions.

[20-140] Power to hear bail application:

The Act contains the following general provisions as to when a court has the power to hear a bail application:

- proceedings for the offence are pending in that court: s 61
- the court has convicted the person of the offence and an appeal against the conviction or sentence is pending in another court but the person has not yet made their first appearance before the other court: s 62
- the application is for the variation of a bail decision made by the court: s 63.

Section 64 sets out powers specific to the Local Court (which includes where relevant the Children's Court and the Drug Court) to hear:

- a release application or detention application in respect of a person who is (s 64(1)):
  - accused of an offence, where the person is brought or appearing before the court, or
  - an appellant from a decision of the Local Court to the District Court, Land and Environment Court or Supreme Court under the *Crimes (Appeal and Review) Act* 2001, where the person is not brought or appearing before the court.
- a bail application where a bail decision has been made by an authorised justice or police officer: s 64(3)
- a variation application where a bail decision has been made by a higher court (although pursuant to s 57(1), where a higher court has imposed a bail condition that it has directed is not to be varied, such a condition may only be varied with the consent of the accused and the prosecutor): s 64(4).

[20-150] Jurisdictional issues and restrictions on the Local Court

Last reviewed: March 2024

The Local Court does not have jurisdiction to hear bail applications where:

(a) a person has made their first appearance before the District or Supreme Courts: s 68(1). However, this is subject to the following exceptions:

- when a person has been arrested on a warrant or an offence has been remitted to the Children's Court or Local Court following proceedings in the District or Supreme Courts: s 68(2)

  Note: This extends to bench warrants issued by Judges of the District and Supreme Courts: s 312 *Criminal Procedure Act* 1986.

- when the accused and prosecutor consent to the Local Court hearing a variation application: s 68(2A)
- when the accused breaches bail conditions imposed/continued in the substantive offence proceedings by the District or Supreme Courts and is brought before the Children's Court or Local Court: s 78. See **Enforcement of bail requirements and breaches of bail conditions** at **[20-580]**.

  Note: The restrictions on the Local Court's powers in relation to bail in ss 59–70 are contained in Pt 6 of the Act. Part 6 does not limit the powers of a court under Pts 8 or 9 (which confer powers to vary bail decisions in connection with enforcement and security requirements and includes s 78): s 60.

(b) a person has appeared before the Supreme Court or Court of Criminal Appeal for a bail application, although the Local Court can hear a further bail application if:

- the substantive matter is still before the Local Court, and
- the person appears, and
- the court is satisfied special facts or circumstances justify hearing the bail application: s 69(1).

Note: This does not prevent the court from hearing a detention application arising from a failure to comply with bail conditions pursuant to s 78: s 69(3).

(c) a higher court bail decision directs that bail not be varied. However, in these circumstances bail may be varied by the Local Court if both parties consent: s 57(1).

[20-160] Bail decision on first appearance upon court's own motion — s 53

A court may, of its own motion, grant bail to a person on the first appearance even if a release application is not made. This power is discretionary and is only to be exercised to benefit the accused: s 53(2). However, this does not apply to show cause offences unless a bail application is made: s 53(4).

Under the *Bail Regulation* 2021, a release or variation application may be made orally by an accused: cll 16 and 20.

Note: this provision may be utilised where a self-represented person appears in custody. The court may take into account the nature of the charge, the reasons outlined by a police officer or authorised justice for refusing bail, and the presentation of the accused before the court.

[20-200] Deferral of bail decision due to intoxication — s 56

The court may defer making a bail decision where the person is intoxicated: s 56(1). Section 4 defines an intoxicated person as someone who "appears to be seriously affected by alcohol or another drug or a combination of drugs".

A court may adjourn the proceedings for no longer than 24 hours. In that circumstance, the court is to issue a warrant remanding the person to a correctional centre or other place of security until further hearing of the matter: s 56(2).

Note: It is suggested confirmation is sought with the relevant custody authority on the record that it has been appropriately investigated that the person's presentation as "intoxicated" is not due to possible medical reasons.

[20-220] Applications to be dealt with expeditiously

Section 71 requires a bail application to be dealt with "as soon as reasonably practicable".

An application by *an accused on their first appearance* for a release or variation application in the substantive proceedings for an offence *must* be heard: s 72(1).

A court is not to decline to hear the application because notice has not been given to the prosecutor, but may adjourn the hearing in order to enable notice to be given to the prosecutor if this has not occurred and *the court considers it necessary in the interests of justice*: s 72(2).

[20-230] Persons arrested for extradition proceedings or extradited persons

Bail for persons subject to extradition proceedings must also be heard as expeditiously as possible: see further, **[46-020]** and **[46-060]** in relation to interstate extradition; **[46-100]** in relation to overseas extradition and **[46-160]** in relation to extradition to New Zealand.

Note: Where a written application is received from a person in custody for a release application to be listed prior to the next adjourned date, the following should be considered:

- the length of time the application may take
- notice is required for other parties
- the availability of the parties
- available court dates and other listings
- persons in custody should take priority over other listings.

[20-240] Practical application of the Bail Act

[20-260] Rules of evidence do not apply to bail proceedings — s 31

When exercising a function in relation to bail (except criminal proceedings for failure to appear or forfeiture of security proceedings: s 31(2)) the court may:

> take into account any evidence or information that the bail authority considers credible or trustworthy in the circumstances and is not bound by the principles or rules of law regarding the admission of evidence: s 31(1).

[20-280] Standard of proof in bail proceedings — s 32

The test to be applied in bail decisions is on the balance of probabilities: s 32(1). However, this test does not apply to proceedings for an offence relating to bail: s 32(2).

[20-300] Test to be applied

Last reviewed: October 2023

The test for a bail decision is a *two-stage* process:

Step 1.

(a) certain serious offences under Pt 3 Div 1A — "Show cause requirement", or

(b) terrorism-related offences, and bail following conviction — "Special or exceptional circumstances test" — ss 22A, 22B.

Step 2. The unacceptable risk test (for all offences) under Pt 3, Div 2.

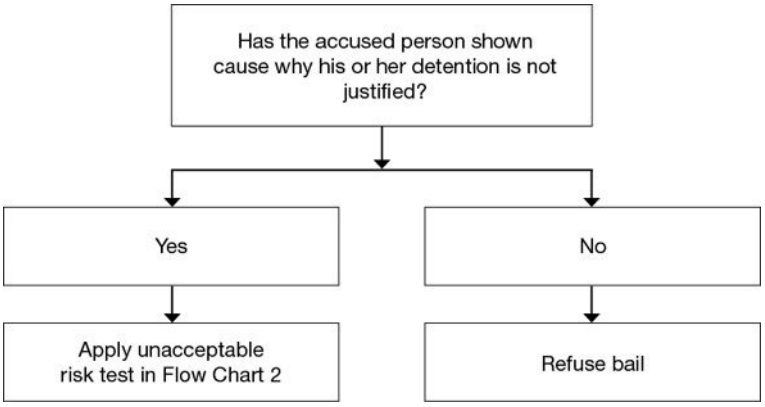
The two steps must not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test: *DPP v Tikomaimaleya* [2015] NSWCA 83 at [25].

Step 1(a) "Show cause" offences

A bail authority must determine if the person is charged with a "show cause" offence. If yes, the Flow Chart 1 from s 16 applies.

Note: If there is a dispute as to whether the offence is a show cause offence, the onus is on the prosecution to establish the criteria under s 16B.

Flow Chart 1: the statutory flow chart for the show cause requirement in s 16



Note 1. If a person is charged with an offence that is *not a show cause offence*, the bail authority determines bail in accordance with Flow Chart 2 in s 16, the unacceptable risk test (see Step 2 below).

Note 2. The show cause requirement *does not apply to a person under 18 years of age* at the time of the offence: s 16A(3).

The "show cause" requirement was described in the Second Reading Speech of the Bail Amendment Bill 2014 (see **[20-000]** above):

> Division 1A introduces a "show cause" requirement for certain offences. New section 16A provides that for show cause offences bail must be refused unless the accused shows cause where his or her detention is not justified. This shift of onus is an important change.

Section 16A(1) provides that, with regard to a "show cause" offence, a bail authority must refuse bail unless the accused shows cause why his or her detention is not justified. In making this determination, the bail authority must consider all the evidence or information the bail authority considers credible or trustworthy in the circumstances: s 31(1); *DPP v Tikomaimaleya* [2015] NSWCA 83 at [25]. *Moukhallaletti v DPP* [2016] NSWCCA 314 at [50]–[56] outlines the basic principles applying to a determination of whether an applicant has shown cause that their detention is not justified.

The Act does not specify, and provides little guidance of, what will satisfy the "show cause" test. Nor does consideration of what might have satisfied the show cause test in an individual case assist since bail decisions of single judges of the Supreme Court are often not of precedential value and are no more than the view taken by the judge in the circumstances of the particular case: *DPP v Zaiter* [2016] NSWCCA 247 at [30], [33]. In "Navigating the Bail Act 2013", these limitations were acknowledged but the discussion at pp 12–14 at least provides examples of what may satisfy the show cause requirement and demonstrates the complexities that may arise from the interplay of various factors.

If the accused can show cause, then the bail authority must apply the unacceptable risk test: s 16A(2). Section 16B exhaustively lists "show cause" offences. The list includes:

- an offence punishable by imprisonment for life: s 16B(1)(a)
- a serious indictable offence that involves an intent to have sexual intercourse with a person under 16 years old by a person aged 18 years or older: s 16B(1)(b)(i), (ii)
- a serious personal violence offence as defined in s 16B(3), or an offence involving wounding or the infliction of grievous bodily harm, if the accused has previously been convicted of a serious personal violence offence: s 16B(1)(c)
- certain serious indictable offences under Pts 3 or 3A *Crimes Act* 1900 or under the *Firearms Act* 1996 involving the use of a firearm, indictable offences involving the unlawful possession of a pistol or prohibited firearm in a public place, or serious indictable offences in the *Firearms Act* involving the acquisition, supply, manufacture or giving possession of a pistol or prohibited firearm or a firearm part that relates solely to a prohibited firearm: s 16B(1)(d)(i), (ii), (iii)
- a serious indictable or indictable offences involving a military style weapon under Pts 3 or 3A *Crimes Act* 1900 or under the *Weapons Prohibition Act* 1998: s 16B(1)(e)(i), (ii), (iii)
- an offence under the *Drug Misuse and Trafficking Act* 1985 that involves a commercial quantity of a prohibited drug or plant: s 16B(1)(f)
- an offence under Pt 9.1 of the Commonwealth Criminal Code that involves a commercial quantity of a serious drug: s 16B(1)(g)
- a serious indictable offence that is committed by an accused while on bail or parole — in either case, whether granted in NSW or another jurisdiction: s 16B(1)(h)(i), (ii)
- an indictable offence or an offence concerning compliance with a supervision order: s 16B(1)(i)
- a serious indictable offence of attempting to commit an offence mentioned in s 16B(1)(j)

- a serious indictable offence (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an offence mentioned elsewhere in this section: s 16B(1)(k).
- a serious indictable offence committed where the person is the subject of a warrant authorising his or her arrest under the *Bail Act*, Pt 7 of the *Crimes (Administration of Sentences) Act* 1999, the *Criminal Procedure Act* 1986, or the *Crimes (Sentencing Procedure) Act* 1999: s 16B(1)(l).

A "serious indictable offence" is defined in s 4 *Crimes Act* 1900 to mean "an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more". This definition includes offences such as larceny and most dishonesty offences. It also includes assault occasioning actual bodily harm (s 59 *Crimes Act*) and stalking/intimidation (s 13 *Crimes (Domestic and Personal Violence) Act* 2007).

Note: if a show cause offence is also an offence to which s 22A or s 22B applies, then the special or exceptional circumstances test applies: ss 22A(2), 22B(2) (see step 1(b) below).

Unless a person shows cause why their detention is not justified, bail must be refused in accordance with s 16A(1).

Step 1(b) Terrorism related offences, and bail following conviction

Section 22A(1): Terrorism related offences	**Section 22B(1): Bail following conviction**
Unless **exceptional** circumstances exist, a bail authority must refuse bail where an accused is charged with: (a) a terrorism offence under s 310J of the *Crimes Act* 1900, or (b) any other offence for which a custodial sentence may be imposed, if the bail authority is satisfied the accused: (i) has previously been charged with a Commonwealth terrorism offence or a s 310J offence and the proceedings relating to the offence have not concluded, or (ii) has previously been convicted of a Commonwealth terrorism offence or a s 310J offence, or (iii) is the subject of a control order made under Pt 5.3 of the Commonwealth Criminal Code. **Note:** A "Commonwealth terrorism offence" is an offence defined as a terrorism offence under the *Crimes Act* 1914 (Cth). Section 15AA of the *Crimes Act* 1914 which provides for a presumption against bail, applies to Commonwealth terrorism offences.	Unless **special or exceptional** circumstances exist, a bail authority must refuse bail, or not grant/dispense with bail, where a bail application is made during the period following conviction but before sentence for an offence/s for which the accused will be sentenced to full-time imprisonment.

If the offence charged is also a show cause offence, the special or exceptional circumstances test applies instead of the show cause test: ss 22A(2), 22B(2). If special or exceptional circumstances are established, the unacceptable risk test then applies: ss 22A(3), 22B(3). Note the additional reference to "special" in s 22B.

"Special or exceptional circumstances" — meaning

The exceptional circumstances test was described in the Second Reading Speech of the Bail Amendment Bill 2015, introducing s 22A, as follows:

> The new test provides for a higher threshold than the existing show cause test so that bail will be granted only when the circumstances are exceptional. A similar test applies under section 15AA of the *Commonwealth Crimes Act* 1914 so that bail must not be granted for a Commonwealth terrorism offence unless exceptional circumstances exist to justify bail. While the new test will be applied on a case-by-case basis, New South Wales courts may find guidance in decisions under the Commonwealth provision.

Judge Harrison discussed the meaning of "exceptional circumstances" in connection with s 15AA in *R v Naizmand* [2016] NSWSC 836 at [8]–[13]; see also *R v NK* [2016] NSWSC 498 at [26]–[28]. Whether special or exceptional circumstances exist is to be assessed independently of whether there is an unacceptable risk referred to in s 19(2), although whether there is an unacceptable risk must nevertheless be considered by reason of s 22(3): *McGlone v DPP (Cth)* [2019] NSWCCA 99. In *NK*, Hall J observed that the phrase "admits to a degree of flexibility": [31].

In the context of a bail application under s 22B, "special or exceptional circumstances" should be given the same meaning as in s 22(1) (concerning bail where an appeal is pending in the Court of Criminal Appeal) unless there is reason not to do so, and are to be determined on a case-by-case basis: *DPP v Van Gestel* (2022) 109 NSWLR 136 at [50], [52]; also see *El Hilli v R* [2015] NSWCCA 146. It is a question of fact to be determined on the balance of probabilities, with the onus falling on the convicted person: *DPP v Van Gestel*, above, at [20]–[22]; s 32(1).

Factors found to constitute exceptional circumstances in the context of a bail application have been:

- the youth of an accused: *NK* at [34], [40]
- the strength of the Crown case (where that may be sensibly assessed)
- the question of delay to committal and/or trial
- principles of parity (insofar as they are applicable to a bail application): *DPP v Cozz* (2005) 12 VR 211 at [22].

Special or exceptional circumstances under s 22B may be demonstrated:

- if the time the accused has presently served will not, or might not, be less than the sentence that might be imposed on them: *R v ET* [2022] NSWSC 905 at [6]
- by the accused's diagnosis with a serious medical condition: *DPP v Duncan* [2022] NSWSC 927 at [49]–[50].

Note: *El Hilli v R*, above, at [15]–[29] discusses "special and exceptional circumstances" in respect of the operation of s 22.

"Will be sentenced to imprisonment" — meaning

Under s 22B(1), a court will be satisfied an accused will be sentenced to full-time imprisonment if it is "realistically inevitable". Absolute certainty is not required: *DPP v Van Gestel* at [43]–[44]; see also *DPP v Day* [2022] NSWCCA 173 at [20], [23]. Even if an alternative to full-time imprisonment is lawfully available, a court may be satisfied to the degree required if, on the materials presented, no sentence other than one of full-time

imprisonment could realistically be imposed: *DPP v Van Gestel* at [46]–[47]. Proof on the balance of probabilities is not required as the assessment is an evaluative judgment of a future event, not a finding of fact: *DPP v Van Gestel* at [13]–[19].

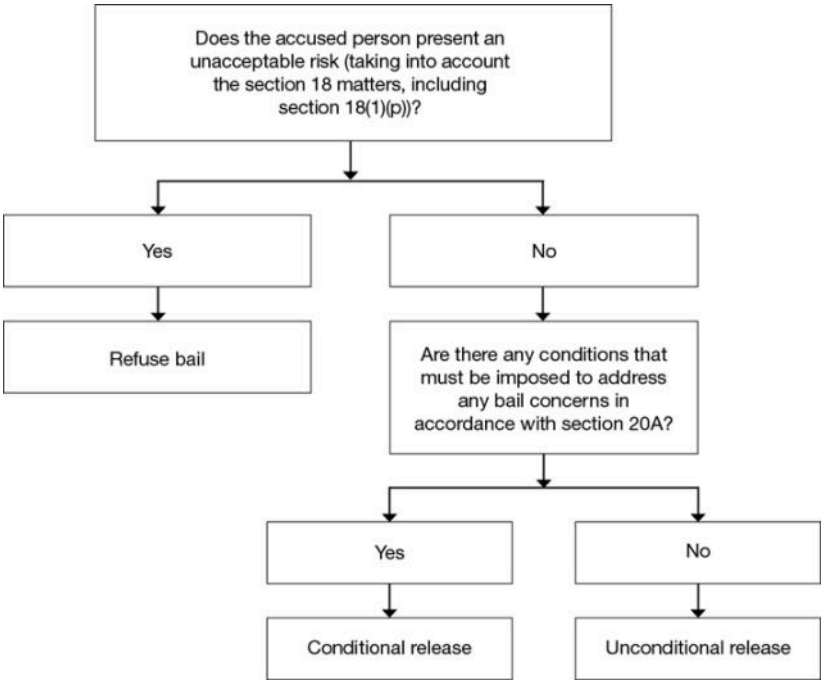
In making the assessment, the court will have regard to: the offence(s) for which the offender was convicted, applicable sentencing laws and principles; the materials and submissions relevant to the future disposition of the sentence presented to the court as the bail authority; and that the application is not a pseudo or abridged sentencing hearing: *DPP v Van Gestel* at [45].

The operation of s 22B in respect of young persons and the Children's Court is discussed in *R v LM* [2022] NSWSC 987 at [15]–[19].

Step 2

If a person charged does show cause, establishes exceptional circumstances exist, or if they are not charged with a show cause offence, the unacceptable risk test applies. See Flow Chart 2 from s 16 (below):

Flow Chart 2: the statutory flow chart for bail decisions — s 16(3)



The unacceptable risk test, contained in Pt 3, Div 2, applies to all offences. A bail authority must assess any bail concerns associated with the accused (ss 17 and 18) and, on the basis of that assessment, determine whether the accused is an unacceptable risk (s 19). *If the bail authority is satisfied the person is an unacceptable risk, bail must be refused*: s 19(1).

A bail concern is defined in s 17(2) to mean that a bail authority has a concern that the accused, if released from custody, will:

(a) fail to appear at any proceedings for the offence, or

(b) commit a serious offence, or

(c) endanger the safety of victims, individuals or the community, or

(d) interfere with witnesses or evidence.

In making an assessment of a bail concern under s 17 a bail authority is to consider only the matters listed in s 18(1). An exhaustive list of criteria includes the following:

- the accused's background (including criminal history, circumstances and community ties): s 18(1)(a)
- the nature and seriousness of the offence: s 18(1)(b)
- the strength of the prosecution cases: s 18(1)(c)
- whether the accused has a history of violence: s 18(1)(d)
- whether the accused has previously committed a serious offence while on bail: s 18(1)(e)
- the accused's history of compliance or non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders, good behaviour bonds, intensive correction orders, home detention orders, community service orders, community correction orders, conditional release orders, non-association and place restriction orders and supervision orders (s 18(1)(f)), and where a breach of bail is alleged, any warnings issued by police or bail authorities regarding non-compliance with bail acknowledgements or conditions (s 18(1)(f1))
- whether the accused has any criminal associations: s 18(1)(g)
- the length of time the accused is likely to spend in custody if bail is refused: s 18(1)(h)
- likelihood of a custodial sentence being imposed if the accused is convicted of the offence: s 18(1)(i)
- if convicted but not sentenced the likelihood of a custodial sentence being imposed: s 18(1)(i1)
- whether the appeal against conviction or sentence pending before a court has a reasonably arguable prospect of success: s 18(1)(j)
- any special vulnerability or needs the accused has including being an Aboriginal or Torres Strait Islander or because of youth or having a cognitive or mental health impairment: s 18(1)(k)
- the accused's need to be free to prepare for his or her appearance in court or to obtain legal advice: s 18(1)(l)
- the accused's need to be free for any other lawful reason: s 18(1)(m)
- the conduct of the accused towards any victim of the offence or any family member after the offence: s 18(1)(n)
- for a serious offence, the view of any victim or any family member of the victim (if available) in assessing if the accused could endanger the safety of victims, individuals or the community: s 18(1)(o)
- the bail conditions that could be reasonably imposed to address bail concerns: s 18(1)(p).
- whether the accused has any associations with a terrorist organisation (within the meaning of Div 102 Pt 5.3 of the Commonwealth Criminal Code): s 18(1)(q)
- whether the accused has made statements or carried out activities advocating support for terrorist acts or violent extremism: s 18(1)(r)
- whether the accused has any associations or affiliations with any persons or groups advocating support for terrorist acts or violent extremism: s 18(l)(s).

Section 18(2) provides a list of matters that are to be considered in deciding the seriousness of an offence but the matters that can be considered are not limited. The following are expressly listed in s 18(2):

- whether the offence is of a sexual or violent nature
- whether the offence involves the possession or use of an offensive weapon or instrument within the meaning of the *Crimes Act* 1900
- the likely effect of the offence on any victim and on the community generally
- the number of offences likely to be committed or for which the person has been granted bail or released on parole.

Section 19(1) provides that if, after making an assessment of any bail concerns, including what bail conditions may be imposed, the bail authority is satisfied that there is an unacceptable risk of all or any of the four criteria listed in s 19(2), bail must be refused.

That an accused has shown cause under s 16A that his or her detention is not justified is not relevant to a determination of whether there is an unacceptable risk: s 19(3).

Offences carrying a right to release – s 21

Under s 21(1), the court may make only the following bail decisions for offences with a right of release:

- to release the person without bail
- dispense with bail, or
- grant bail (with or without conditions).

Division 2 of the Act (Unacceptable risk test — all offences) applies to right to release offences subject to s 21(1): s 21(5). Section 19(4) provides that bail cannot be refused for an offence for which there is a right to release.

A right to release applies to (s 21(2)):

- fine-only offences
- offences under the *Summary Offences Act* 1988, other than the following "excluded offences" listed under s 21(3):
  - obscene exposure (s 5), if the person has previously been convicted of an offence under that section
  - violent disorder (s 11A), if the person has previously been convicted of an offence under that section or a "personal violence offence" as defined in s 4, *Crimes (Domestic and Personal Violence) Act* 2007
  - custody of an offensive implement (s 11B), if the person has previously been convicted of an offence under that section or a personal violence offence
  - custody or use of a laser pointer in a public place (s 11FA), and
  - loitering by a convicted sexual offender near premises frequented by children (s 11G):
- an offence that is being dealt with by way of a youth justice conference under Pt 5 *Young Offenders Act* 1997.

Note: A right to release no longer applies to an offence where an accused has previously failed to comply with a bail acknowledgment or a bail condition forming part of a bail decision for the

offence: s 21(4). A court before which a person appears, or is brought following non-compliance with a bail acknowledgment or bail condition, may refuse or revoke bail even where the offence is one for which there is a right of release, and there ceases to be a right of release if bail is revoked.

[20-320] Reasons to be recorded

Section 38 requires that the reasons for refusing bail or imposing bail conditions be recorded, as follows:

- if bail is refused, record the reasons for refusing bail, including (if bail was refused, because of an unacceptable risk) the unacceptable risk or risks identified: s 38(1). A person who is bail refused must, as soon as practicable, be given a written notice setting out the "terms of the decision" and information regarding the review or variation of the decision required by the regulations: s 34
- if imposing bail conditions, record why unconditional bail was not granted and the bail concern or concerns identified for imposing bail conditions: s 38(2)
- if a security or character condition is imposed, include the reasons for imposing any security requirement or requiring any character acknowledgments: s 38(3)
- if an accused has requested certain bail conditions and the court impose different conditions, record the reasons for doing so: s 38(4).

[20-340] Procedure for conditional release

Section 20 provides, subject to Pt 3 Div 1A and Div 2A, that if there are no unacceptable risks with respect to an accused, the bail authority must:

- grant bail (with or without conditions)
- release the person without bail, or
- dispense with bail.

[20-360] General rules for bail conditions — s 20A

Last reviewed: October 2023

Bail conditions can only be imposed if a bail authority is satisfied that there are identified bail concerns: s 20A(1).

Bail conditions may be imposed but only if the court is satisfied of the following under s 20A(2):

- The condition is reasonably necessary to address a bail concern (s 20A(2)(a)), and
- The condition is reasonable and proportionate of the offence (s 20A(2)(b)), and
- The condition is appropriate to the bail concern identified (s 20A(2)(c)), and
- The condition is no more onerous than necessary to address the bail concern identified (s 20A(2)(d)), and
- It is reasonably practicable for the accused to comply with the condition (s 20A(2)(e)), and
- There are reasonable grounds to believe that the condition is likely to be complied with by the accused (s 20A(2)(f)).

Note: A security requirement can only be imposed to address a bail concern of the person failing to appear. If that bail concern has not been identified, a security requirement cannot be imposed: s 26(5).

Table 1. Bail conditions that can be imposed

	Description	When available
Conduct requirement: s 25	A requirement that the accused do or refrain from doing anything (other than to provide security for compliance with a bail acknowledgment). For example, a place restriction, or not to contact or approach certain persons, or not to drink alcohol.	When necessary to address a bail concern.
Security requirement: s 26	A requirement that security be provided by the accused, or an acceptable person/s for compliance with a bail acknowledgment. This is a form of *pre-release* requirement: see **Pre-release requirement: s 29**. Such a condition may include: • an agreement to forfeit a specified amount of money if the accused fails to appear • the deposit of a specified sum of money or other acceptable security with the court with an agreement that it be forfeited if the accused fails to appear. The court is to determine what amounts to "acceptable security": s 26(4).	*Only* for the purpose of addressing a bail concern that the person will fail to appear, and only where that purpose is not likely to be achieved by one or more conduct requirements.
Character acknowledgment: s 27	An acknowledgment given by an acceptable person to the effect that they are acquainted with the accused and regard the accused as a responsible person who is likely to comply with their bail acknowledgment. The court is to determine what person/s or class/description of persons is an "acceptable person": (s 27(3)).	Only where the purpose for imposing is not likely to be achieved by one or more conduct requirements: (s 27(4)).
Accommodation requirement: s 28	A requirement that suitable accommodation arrangements be made for the accused before their release on bail. This is a form of pre-release requirement: see **Pre-release requirement: s 29**. An accommodation requirement is complied with when the court is informed by an appropriate government representative that suitable accommodation has been secured: s 29(4).	Only available where the person is a child or to enable the person to enter residential rehabilitation or where otherwise authorised by the regulations: s 28(3). **Note:** This condition cannot be imposed by a police officer. Once imposed, a court must re-list the matter every two days, until the condition is met: s 28(4).
Accompaniment requirement: s 28A	A requirement that the accused person be released into the care or company of another specified person or class of persons. This is a form of pre-release requirement: see **Pre-release requirement: s 29**. An accompaniment requirement is complied with when the specified person or class of persons is present at the place from which the accused person is to be released for the purpose of accompanying them: s 29(4A).	When necessary to address a bail concern.

	Description	When available
Pre-release requirement: s 29	A condition that must be complied with before the accused is released on bail. This may only be either: • a conduct requirement that the person surrender their passport • a security requirement • an accommodation requirement • a requirement that one or more character acknowledgments be provided, or • an accompaniment requirement. Upon compliance with a pre-release requirement (as set out in s 29 or the regulations), the accused is entitled to be released without any rehearing of the matter: s 29(5).	
Enforcement condition: s 30	A condition imposed for the purpose of monitoring or enforcing compliance with another bail condition (*the underlying bail condition*) that requires the person to comply while on bail with one or more specified police directions given for that purpose. This condition can only be imposed by a court and only following an application by the prosecutor. For example, where a person has a bail condition not to consume alcohol, an enforcement condition may be imposed that the person be breath tested by a police officer at certain times/places. An enforcement condition must specify (s 30(4)): • the kinds of directions that may be given to the person while at liberty on bail • the circumstances in which each kind of direction may be given (so as to ensure compliance with the condition is not unduly onerous) • the underlying bail condition/s for which each direction may be given.	Only where considered reasonable and necessary, having regard to: • the person's history (including their criminal history, particularly any serious offences or a large number of offences) • the likelihood/ risk of the person committing further offences while on bail • the extent to which compliance with any direction/s by the person may unreasonably affect another person. The general requirements of bail conditions set out in s 20A do not apply to enforcement conditions: s 20A(3).

[20-380] Procedure where bail is refused

Bail can only be refused where the court is:

- satisfied that cause has not been shown (s 16A(1) — where the relevant offence is a show cause offence), or
- not satisfied that exceptional circumstances exist (s 22A(1) — where the relevant offence is a terrorism-related offence), or
- following an assessment of bail concerns, that there is an unacceptable risk: s 19(1).

When bail is refused, the court must:

- immediately record the reasons for refusing bail, including (if bail was refused because of an unacceptable risk) the unacceptable risk or risks identified: s 38(1)
- give, as soon as practicable, a written notice setting out the "terms of the decision" to the person who is bail refused: s 34(1).

A court has a discretion to refuse bail when an accused is brought before the court on a first appearance and no bail decision has been made or bail refused and no bail application has been made: s 54.

[20-400] Limitations on the length of adjournment where bail is refused — s 41

Unless a person who is bail refused consents, a magistrate may only adjourn the matter for a period of not more than 8 clear days.

The following exceptions to this requirement are set out in s 41(2):

- the person is in custody for some other offence, and
- the court is satisfied there are reasonable grounds for a longer period of adjournment, and
- the person would be in custody for the other offence for the balance of the longer period.

In *Ahmad v DPP* [2017] NSWSC 90 at [27]–[29], Campbell J expressed doubt as to whether strict compliance with the 8 day adjournment period was essential.

[20-420] Multiple applications for release following a decision to refuse bail — s 74

A further release application is not permitted unless there are grounds to make another application. The following grounds are set out in s 74(3):

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

A further detention application is not permitted unless there is new material information to be presented to the court, or circumstances relevant to the grant of bail have changed: s 74(4).

Note: Changes to the *Bail Act* are not a change of circumstances pursuant to s 74(3)(c) or (4)(b). See Sch 3 cll 9(2) and 13.

What may amount to a change of circumstances in an individual case is likely to vary from case to case; it is a question of fact and degree: *R v BNS* [2016] NSWSC 350 at [45].

[20-440] Discretionary grounds to refuse to hear a bail application — s 73

The court may refuse to hear a bail application if satisfied:

- that it is frivolous or vexatious (s 73(1)(a)), or
- it is without substance or otherwise has no reasonable prospect of success: s 73(1)(b).

However, these discretionary grounds do not apply to a release or variation application made by an accused on a first appearance in proceedings for the offence: s 73(3).

[20-460] Procedure for fresh application — s 75

Any bail application heard by the court is to be dealt with as a new hearing. Evidence or information at the new hearing may be given in addition to, or in substitution for, that which was given in relation to an earlier bail decision: s 75.

[20-480] Procedures following a grant of bail

[20-500] Procedure if accused granted bail but remains in custody

If an accused who has been granted bail remains in custody because a bail condition(s) cannot be met, the manager of the correctional centre or officer in charge of the police station must notify the court in writing within 8 days of the person being received into custody: s 42.

On receipt of a notice, the magistrate will inform the registrar of the court of what action, if any, is to be taken. Ordinarily, the case should be relisted and the parties notified. Under s 55, the court has the power to conduct a hearing to vary bail conditions without an application, which may occur on the court's own motion (or at the request of the accused or a police officer). This is regarded as a form of variation application.

In any variation application under s 55, *the court may only review the existing bail, not the decision whether or not to grant bail*: s 55(2). It is a limited review. Accordingly, pursuant to s 55(6), the court may *only*:

- affirm the existing bail decision (as to the conditions of bail), or
- vary the bail decision, but not to revoke or refuse bail.

[20-520] Stay of magistrate's decision to grant bail for certain serious offences — s 40

Section 40 applies to "serious offences", defined in s 40(5) as:

- offences of murder, or
- any offence punishable by life imprisonment, or
- sexual offences involving intercourse, or an attempt to have sexual intercourse, with a person under the age of 16 yrs.

Where a decision is made to grant or dispense with bail for a serious offence, that decision is stayed if (s 40(1)):

- a bail decision for the offence (other than a bail decision under s 54) has not previously been made by a court or authorised justice, and
- a police officer or Australian legal practitioner appearing on behalf of the Crown immediately informs the court that a detention application is to be made to the Supreme Court, and
- the police officer or Crown provides a copy of the written approval of an authorised officer or the Director of Public Prosecutions to make a detention application in the Supreme Court.

  Note: The prosecution must immediately notify the court and provide a copy of the written approval: s 40(1)(b).

The stay has effect until the first occurring of any of the following (s 40(2)):

(a) the Supreme Court affirms or varies the decision, or substitutes another decision for the bail decision, or refuses to hear the detention application.

(b) the Crown files with the Supreme Court or the Local Court a notice that the Crown does not intend to proceed with the detention application.

(c) 4 pm on the day that is 3 business days after the day on which the decision was made.

While a stay operates, the accused is not entitled to be at liberty and remains in custody: s 40(3).

[20-540] Bail acknowledgments

The *Bail Act* 2013 introduces the concept of a *bail acknowledgment* in place of a bail undertaking.

Upon a grant of bail being made, the person is to be given a bail acknowledgment, which he or she is required to sign, a copy of which is to be given to the court before the person is entitled to release: ss 14(1), 33(1).

The bail acknowledgment is defined in s 33(2) as a written notice that contains requirements for the person to:

- appear before the court at a specified day, time and place, and
- notify the court of any change in the person's residential address. This is a new requirement that exists independently of any residence condition.

Note: A person who fails to reside at the address on the bail acknowledgment may be in breach of a bail acknowledgment, rather than failing to comply with a bail condition: **Enforcement of bail requirements and breaches of bail conditions** at **[20-580]**.

[20-560] Requirement to appear — s 13

A person granted bail, *or in respect of whom bail is dispensed with*, is required to appear before a court *and surrender to the custody of the court*, when required to do so: s 13(1). In effect, a person who appears before a court following a bail decision (to grant bail or dispense with bail) is in the custody of the court until the court makes further orders in the proceedings.

The time the person is required to appear is when the matter is called at the court premises: s 13(3). *Therefore, it is important to ensure prior to making any orders in a person's absence that the case is called at the courthouse*.

A court may excuse a failure to appear: s 13(4). A practical example is the receipt of a phone or written message and/or a medical certificate, which can be accepted by the court for non-attendance.

[20-580] Enforcement of bail requirements and breaches of bail conditions

[20-600] Failure to comply with bail conditions or bail acknowledgments — ss 77, 78

A police officer has a discretion under s 77(1) regarding what action may be taken where that police officer believes, on reasonable grounds, that the person has failed, or is about to fail, to comply with a bail condition or acknowledgment.

A police officer may take no action, warn the person, or take other action. If the police officer decides to arrest the person, or apply for a warrant for that person's arrest, the person is then

placed before the court. In those circumstances there has been no decision by a bail authority to refuse bail. It is for the prosecution to advise the court whether a detention application or a variation application is sought.

Persons arrested by police for failing to comply with bail conditions of the District or Supreme Courts regularly appear at Local and Children's Courts including courts in remote locations. The nearest District or Supreme Court may often be hundreds of kilometres away. In s 78(6), *relevant bail authority* is defined to include the Local Court, which has jurisdiction to determine bail under s 78 for persons on bail to appear before the District and Supreme Courts when the person had failed, or was about to fail, to comply with a bail acknowledgment or bail conditions; see also s 69(3). (See **Jurisdictional issues and restrictions on the Local Court**, above, at **[20-150]**.)

A failure to comply with a bail condition or bail acknowledgment is not an offence. It is a procedural mechanism for bail to be re-determined, if there has been a failure to comply with bail.

[20-620] Procedure for determination under s 78

1. Has the person failed, or is the person about to fail to comply with a bail condition or acknowledgment?

   In most circumstances, a failure to comply will be admitted, for example, failing to report to a police station. However, in circumstances where a failure to comply is not admitted, a short hearing may be required to determine this issue:

   - the court must be satisfied on the balance of probabilities: s 32
   - the party asserting a failure to comply has the onus of proof
   - the rules of evidence do not apply: s 31
   - the court may take into account "any evidence or information that the bail authority considers credible or trustworthy in the circumstance": s 31.

   Note 1 A practical example of a person *about to fail to comply* is where a person has a conduct requirement not to leave NSW. Police do not have to wait until the person has actually crossed the border. A person who has purchased a plane ticket to Melbourne and boards a fight to Melbourne with luggage would satisfy this requirement.

   Note 2 A detention application in relation to a person brought before the court cannot be adjourned without a bail decision being made. Such applications should be determined in accordance with the Act.

2. If satisfied a person has failed to comply with a bail undertaking, a court has the following options regarding what orders to make under s 78(1) or (2):

   - release the person on the original bail
   - vary the bail (which may include revoking bail).

   Note: A court may only revoke or refuse bail if satisfied a bail acknowledgment or condition has not been complied with and *having considered all the alternatives the decision to refuse bail is justified*: The unacceptable risk test still applies to proceedings under Pt 8 (Enforcement of bail requirements): s 78(3).

[20-640] Failing to appear — s 79

Failing to appear in accordance with a bail acknowledgment is a criminal offence: s 79(1). The penalty is either the maximum penalty for the substantive offence or 3 years imprisonment or a maximum $3,300 fine, whichever is the lesser: s 79(3), (4).

A statutory defence of "a reasonable excuse" applies. The onus is on the person to prove reasonable excuse: s 79(2).

Note: Section 80 deals with proceedings for the offence of failure to appear and s 94 contains facilitation of proof provisions for failing to appear proceedings.

[20-660] Variation of bail

[20-680] Bail variation on the court's own motion on first appearance — s 53

On a first appearance by an accused, a court may, of its own motion, grant bail or vary a previous bail (but not so as to refuse bail). However, the court cannot grant bail for a show cause offence without an application: s 53(4).

This power may only be exercised to benefit the accused: s 53(2).

[20-700] Interested persons who may make a variation application — s 51

A variation application may be made by an "interested person" defined under s 51(3) as:

- an accused to whom bail has been granted
- the prosecutor in proceedings for the offence
- the complainant, where the offence is a domestic violence offence
- the person for whose protection an order would be made, where the grant of bail relates to AVO proceedings
- the Attorney General.

Note: where a bail condition imposed by a higher court is the subject of a direction that it not be varied, the consent of both the accused and the prosecutor for the condition is required before any variation is made by the Local or Children's Courts: s 57; see also s 68(2A).

[20-720] Notice requirements for variation applications

No specific time frame is provided; however, reasonable notice of the application is required: s 51(5), (7).

Clause 20 *Bail Regulation* 2021 provides:

> **20 Making of variation application**
>
> (1) An interested person must make a variation application in writing and in the approved form.
>
> (2) An accused person may make a variation application orally if the person is before the court.
>
> (3) A court or authorised justice may make a decision on a variation application even if the application does not comply with subclause (1).
>
> (4) An interested person may, in one variation application, make a variation application in relation to more than one offence committed or alleged to have been committed by the same person.

(5) If an accused person who makes a variation application is in custody at a correctional centre, the general manager of the correctional centre must forward the variation application, without undue delay, to the registrar of the court to which the application is made.

(6) In this section—

interested person has the same meaning as in the Act, section 51.

Note: In determining a variation application, a court *must not* revoke bail unless this is requested by the prosecutor: s 51(9).

[20-740] Bail guarantors

[20-760] Variation applications affecting bail guarantors

The *Bail Act* itself does not require that a bail guarantor provide their consent to a variation of bail conditions. Section 36(3) provides that if a court varies a bail condition for entry into a bail security agreement, it must ensure that a person who has entered into an agreement is given a written notice setting out the terms of the condition as varied.

While there is no legislative requirement, it is recommended for procedural fairness that the views of a bail guarantor be considered in any variation application.

[20-780] Application by bail guarantor to be discharged from liability — s 83

Section 83(1) allows a bail guarantor to apply to a court to be discharged from liability under a bail security agreement at any time. An application may be made to "the court of appearance" (defined in s 83(6) as the court before which the person is required to appear) or the court that granted bail: s 83(2).

A bail guarantor cannot be discharged unless the accused is before the court: s 83(4).

Section 83(3) provides for the issue of a summons or warrant to bring the accused before the court for this purpose. The court must discharge the bail guarantor "unless satisfied that it would be unjust to do so": s 83(4). Once a bail guarantor is discharged the security requirement of the bail acknowledgment is no longer intact. Pursuant to s 83(5), a court may:

- vary the bail conditions, *and*
- have the person taken into custody until those new conditions are met.

[20-800] Bail on appeal

Section 62 empowers the court to hear bail applications pending an appeal:

62 Power to hear bail application if sentence or conviction appealed

A court may hear a bail application for an offence if:

(a) the court has convicted a person of the offence, and

(b) proceedings on an appeal against sentence or conviction are pending in another court, and

(c) the person has not yet made his or her first appearance before the court in the appeal proceedings.

Section 12(2) permits a fresh bail decision to be made:

> if, after the conclusion of substantive proceedings for an offence, further substantive proceedings for the offence are commenced.

An appeal against conviction or sentence falls within the meaning of *substantive proceedings*: see s 5(3). As the explanatory note to s 12(2) further states:

> **Note.** Proceedings for an offence generally conclude if a person is convicted of and sentenced for the offence. If an appeal against the conviction or sentence is lodged after that conclusion, bail is not revived, but a new bail decision can be made.

See also at [20-140] as to the additional power of the court to hear a bail application on appeal where the defendant is not present: s 64.

[20-820] Special bail provisions for Commonwealth child sex offences

Section 15AAA of the *Crimes Act* 1914 (Cth) creates a presumption against bail for certain Commonwealth child sex offences (defined in s 3). It applies to bail decisions made from 23 June 2020 regardless of when the offender was charged with the relevant offence: Sch 7, Pt 2 [5(1)], *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act* 2020. Conduct which constituted a Commonwealth child sex offence before 23 June 2020, but does not do so after that date, falls within the ambit of s 15AAA: Sch 7, Pt 2 [5(2)].

The Criminal Code offences to which s 15AAA relate include, but are not limited to:

- sexual intercourse, or sexual activity, with a child outside Australia, including the aggravated forms of these offences: ss 272.8(1), (2), 272.9(1), (2) and 272.10
- persistent sexual abuse of a child outside Australia: s 272.11
- benefitting or encouraging an offence against Div 272 Child sex offences outside Australia: ss 272.18 and 272.19
- aggravated offences of possession, control, distribution, or obtaining possession of child abuse material outside Australia: s 273.7
- aggravated offences of using or possessing child abuse material obtained through a postal, or similar, service: s 471.22
- use of an electronic service for child abuse material: s 474.23A
- aggravated offences of using, possessing, producing, controlling or supply child abuse material obtained through a carriage service: s 474.24A
- using a carriage service for sexual activity with a person under 16 yrs old including the aggravated form of that offence: ss 474.25A(1), (2) and 474.25B.

These offences are in the table which forms part of s 16AAA of the Act. Additional offences falling within s 15AAA are also listed in s 16AAB which concerns sentencing for specified Cth child abuse offences which are subsequent offences.

Note: in matters involving any Cth child sex offence it is good practice to ask the prosecutor whether s 15AAA applies to the particular offence.

Note: except as provided for by s 15AAA(1), (4), (5), (6) and (7) which relate to appeals related to bail decisions made under this section, s 15AAA does not affect the operation of a State or Territory law: s 15AAA(8).

[20-840] Onus on accused to satisfy court bail should be granted

Last reviewed: September 2023

Bail must not be granted for these offences unless the offender satisfies the court that "circumstances exist to grant bail": s 15AAA(1). There is no definition of what those circumstances might be. In determining whether such circumstances exist, the following matters in s 15AAA(2) must be taken into account, insofar as those matters are relevant and known to the court:

- the likelihood of the offender failing to appear
- the likelihood the offender would commit further offences
- whether there is a likely risk to the safety of the community or of causing harm to a person
- the likelihood the offender would conceal, fabricate or destroy evidence or intimidate a witness
- whether the offender was 18 years or older when the offence was committed
- if the offender has pleaded guilty or been conviction of the offence, whether the offender would not be likely to undertake a rehabilitation program, or not be likely to comply with bail conditions related to rehabilitation or treatment.

The right to liberty and presumption of innocence and the matters listed in s 18 of the *Bail Act* 2013 may inform this consideration: *R v Weatherall* [2023] NSWSC 710 at [10], [16]. It was also observed in *R v Weatherall* at [10] that the applicant must establish the s 15AAA circumstances on the balance of probabilities in accordance with s 32 *Bail Act*, and that to suggest there is a "heavy onus" upon the applicant puts an impermissible gloss on the provision.

If bail is granted, reasons must be given: s 15AAA(3).

The Cth Director of Public Prosecutions and the accused have a right of appeal: s 15AAA(5). A bail decision is stayed pending receipt of advice that the Cth DPP intends to appeal and takes effect upon notice being given: s 15AAA(6). Note the time limits as to the duration of the stay in s 15AAA(7).

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Apprehended violence orders

[22-000] Introduction

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Crimes (Domestic and Personal Violence) Act* 2007.

Abbreviations

ADVO — apprehended domestic violence order

APVO — apprehended personal violence order

PN 2/2012 — Local Court Practice Note 2 of 2012

PINOP — person in need of protection

CJC — Community Justice Centre

The Act envisages that apprehended violence orders (AVOs) can be made:

1. where a formal application is made in accordance with the relevant requirements of the Act, or
2. as a consequence of a person being charged with a particular offence.

The objects of the Act

In *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, Spigelman CJ stated at [20] (referring to repealed Pt 15A *Crimes Act* 1900):

> The legislative scheme for apprehended violence orders serves a range of purposes which are quite distinct from the traditional criminal or quasi-criminal jurisdiction of the Local Court. The legislative scheme is directed to the protection of the community in a direct and immediate sense, rather than through mechanisms such as deterrence. Individuals can obtain protection against actual or threatened acts of personal violence, stalking intimidation and harassment. Apprehended Violence Orders constitute the primary means in this State of asserting the fundamental right to freedom from fear. The objects served by such orders are quite distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law.

Sections 9 and 10 set out the objects of the Act. The court is to be guided by those objects when exercising jurisdiction.

Note: The court should ensure an understanding and familiarity with both sections.

In particular, s 9(2) states that, in relation to domestic violence:

> This Act aims to achieve those objects by:
>
> (a) empowering courts to make apprehended domestic violence orders to protect people from domestic violence, intimidation (including harassment) and stalking, and
>
> (b) ensuring that access to courts is as safe, speedy, inexpensive and simple as is consistent with justice.

The objects in s 10(2), which concerns personal violence, are in broadly similar terms but include, in s 10(2)(c), the additional object of ensuring dispute resolution options are encouraged where appropriate.

Local Court Practice Note 2 of 2012

Local Court Practice Note 2 of 2012 commenced on 1 May 2012. It mandates the procedure to be followed in the Local Court in ADVO and APVO applications and sets out case management and hearing procedures.

[22-020] Applications for orders

Persons who may seek orders

An application for an order can only be made by a person for whose protection an order is sought, the guardian of a person in need of protection (where a guardianship order is in force) or a police officer: s 48(2).

However, this is qualified by s 48(3), (4) and (4A).

Only a police officer may apply for an order where each person the subject of the order is a child at the time of the application: s 48(3).

Section 48(4) provides that an application may be made:

- by more than one person: s 48(4)(a), and
- if made by police, on behalf of more than one person: s 48(4)(b), and
- by a private applicant on behalf of a person with whom that applicant has a domestic relationship: s 48(4)(c).

Under s 48(4A) the court may refer an application for an order to police where the applicant is not a police officer, the orders sought extend to the protection of a child and the court considers the referral would be in the child's best interests.

Types of orders

Generally speaking, the Act provides for the making of two types of orders:

- Apprehended domestic violence orders: see Pt 4, and
- Apprehended personal violence orders: see Pt 5.

The Act draws distinctions between ADVOs and APVOs. For example, the test to be applied when making orders is set out separately for ADVOs (s 16) and APVOs (s 19), as are the matters to be considered when determining whether to make an order: s 17 for ADVOs and s 20 for APVOs. Applications are categorised ADVO or APVO upon issue by the registry.

If the court is unable to determine whether to make or treat an existing order as an ADVO or APVO, s 82(1) empowers the court to make whatever type of order it thinks fit. An order is not invalid if when it is made, it is incorrectly categorised as an ADVO or APVO: s 82(3).

The Act enables the making of such orders on an interim (see Pt 6) or provisional basis (see Pt 7): see **[22-060] Interim and provisional orders**.

Apprehended domestic violence orders

When seeking an ADVO, the PINOP must have, or have had, a domestic relationship with the defendant.

Definition — s 5(1) and (2), "domestic relationship". The definition is extremely broad and extends beyond persons in intimate relationships or who are related to one another.

Definition — s 6, "relative". This definition is equally broad.

Note: Section 5A extends the definition of a domestic relationship to include the relationship between a dependant and a paid carer.

Apprehended personal violence orders

APVOs relate to applications where the parties are not in a domestic relationship as defined under s 5.

[22-040] Service of applications

Section 55 requires that service of an application be in accordance with the Local Court Rules 2009.

Rule 5.6 requires personal service unless exceptions under the rules apply.

Definition — "personal service": see r 5.3 for the definition

The exceptions are:

- where violence or threats prevent personal service, by leaving the document as near as practicable to that other person: r 5.3(2)
- service on a legal practitioner: r 5.6A
- service on an inmate at a correctional centre: r 5.6B
- substituted service: r 5.11.

Rule 5.7(2A) provides that only a police officer or a person nominated by the court may serve an application for an AVO.

Rule 5.11 allows the court discretion to order service by other means that will ensure the application will be brought to the attention of the defendant. Orders of this kind are made where there is information that a person is avoiding service. Examples of substituted service are leaving the application at the front door and/or in the letter box of the stipulated premises.

A statement of service is required. A statement of service by a police officer no longer has to be signed. An electronic copy is sufficient: r 5.12(5).

It is important to ensure, when requested to make final orders ex parte, that service has taken place in accordance with the Act and the Rules.

[22-060] Interim and provisional orders

Last reviewed: March 2024

Interim orders — s 22

A court may make an interim ADVO or interim APVO if it appears it is "necessary or appropriate" to do so: s 22(1). Part 5, PN 2/2012 sets out the procedure to be adopted in determining an interim order application and the receiving of evidence when determining a contested application.

A court has a positive obligation to make an interim order when a person has been charged with a serious offence: s 40; see also **[22-140] Obligations to make interim orders when charges listed — s 40**.

If the parties do not consent to an interim order, before making the order the court must still be satisfied in applying the test under s 22 of the matters set out in s 17 (for interim ADVOs) or s 20 (for interim APVOs): Pt 5.3.

Section 22(3) enables the court to make an interim order whether or not the defendant is present or has been given notice of the proceedings.

Section 22(4) and r 5.5 of the Local Court Rules set out the circumstances where a court may make an interim order in the absence of the PINOP.

Application for orders where police are not involved may be short listed before the court where the applicant is seeking an urgent ex parte interim order. This occurs prior to any service of the application if the registrar is satisfied there are urgent circumstances.

Provisional orders — ss 25–32

A provisional order is generally made without the defendant having an opportunity to be heard. It remains in force at least until the matter is first listed before the court.

Only a police officer can apply for a provisional order. This may be done by telephone, facsimile or other communication device: s 25(1). A provisional order is taken to be an application for an order made under Pt 10 of the Act and, if the application is withdrawn or revoked, the provisional order is revoked: s 29(1)–(1A). Police must not make a provisional order that decreases the protection afforded to a person under an existing AVO: s 28B(2). Any such condition, if made, is of no effect: s 28B(3).

On the first return date, if a provisional order is in force, the court may dismiss the application under Pt 10 of the Act, revoke the provisional order, or make an interim or final AVO: s 32(1). If it does not, the provisional order becomes an interim AVO: s 32(2). A provisional order is revoked when the court makes an interim or final AVO and the defendant is present at court or, if the defendant is not at court, a copy of the interim or final AVO is served on them: s 32(3)–(4).

Provisional orders remain in force until either revoked, or an interim or final order is made, or the application is withdrawn and dismissed: s 32(1). However, if the defendant is not present in court, the provisional order ceases when the defendant is served with a copy of the interim or final order: s 32(2)(b).

A provisional order can only be revoked or varied by an authorised officer, which relevantly includes a magistrate, children's magistrate or a registrar of the Local Court: ss 3 and 33. Only a police officer may apply to vary or revoke a provisional order: s 33(3). Section 33A(1) permits a defendant to apply to vary a provisional order but only if the order was made by a senior police officer. If the protected person or one of the protected persons is a child only a police officer can make the application: s 33A(2).

A provisional order may not be renewed and a further provisional order may not be made in respect of the same incident: s 34(1).

Note: Personal service *by a police officer* is required for provisional orders: s 31. A breach of a provisional order carries the same penalty as a breach of an interim or final order.

[22-080] Procedure at first listing of the application

Practical issues

When both parties appear in an AVO application on the first occasion and there are no related charges the following approach is suggested.

Enquire of the applicant if the order is still sought (occasionally it is not).

Where the defendant is unrepresented, inform that person of the options available. These are:

- an adjournment for legal advice, if required
- consent to an order, without admitting any conduct in the application
- disputing the order.

If time is spent clearly explaining these choices to the first person in the list, the explanation may save time with other parties when their case is called. Where the application is for an APVO, s 21 (referral to mediation) should be considered before listing the matter for hearing.

In police applications, follow the same procedure with unrepresented persons.

Referral to mediation (APVOs only) — s 21

When considering whether to make an interim or final order, applications in apprehended personal violence proceedings are to be referred to a CJC unless the court is satisfied there is good reason not to do so: ss 21(1), 24A. A large number of disputes dealt with by the CJC are resolved by agreement between the parties. These include disputes between neighbours and some family members, workplace disputes as well as applications that are centred around what otherwise would be a civil claims dispute.

Referral to mediation "at any other time" is at the discretion of the court: s 21(1)(b).

If no interim orders are in force, the application is stayed until a written report is provided by the CJC on the outcome of the mediation or attempted mediation: s 21(4) and (6). The court in making interim orders should ensure provision for a contact during any CJC session.

The factors the court must consider in determining whether there is good reason not to refer a matter to mediation are set out in s 21(2), namely whether:

(a) there has been a history of physical violence to the protected person by the defendant, or

(b) the protected person has been subjected to conduct by the defendant amounting to a personal violence offence, or

(c) the protected person has been subjected to conduct by the defendant amounting to an offence under section 13, or

(d) the defendant has engaged in conduct amounting to harassment relating to the protected person's race, religion, homosexuality, transgender status, HIV/AIDS infection or disability, or

(e) there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful.

The existence of any one or more of those factors does not prevent a court from referring a matter to mediation: s 21(2A).

The CJC may still decline to accept the matter for mediation or terminate the mediation and refer the matter back to the court: s 21(3); see also s 24 *Community Justice Centres Act* 1983.

Practical issues

Upon a referral for mediation, ensure the following matters are attended to before the parties leave the courtroom:

- adjourn the matter for at least 6 weeks
- inform the parties to attend the registry and provide their contact details to the registry staff. The CJC will then contact them separately to arrange a mediation session at a suitable time and location
- if a written agreement is made at the CJC including the withdrawal of proceedings, inform the parties they need not attend on the next court date unless they wish to
- if the matter is not resolved at mediation, both parties must attend on the next court date.

Note: A person is not guilty of an offence against s 14(1) if the contravention was necessary to attend mediation under s 21: see s 14(3)(a).

Case management orders — PN2/2012

Where final orders are opposed, case management orders under Pt 6.3, PN 2/2012 apply. These include standard directions regarding the service of written statements of witnesses by both parties. Under Pt 6.4 there is no requirement for statements by police officers to be served at this stage. A hearing date should not be set until this direction has been complied with.

If considered necessary, have a copy of the statement template provided to the parties. These may be placed on the bar table.

Where parties are unrepresented ensure the court explains the consequences of non-compliance. This can be achieved by handing a copy of the Timetable for Statements provided for in PN 2/2012.

[22-100] Procedure to be adopted at a hearing

Practical issues

Be aware the legislative procedure to be adopted at hearings (with some exceptions) is set out in:

- the *Crimes (Domestic and Personal Violence) Act* 2007
- the Local Court Rules 2009
- PN 2/2012.

Sections 57–71 of the Act set out the provisions concerning the hearing of application proceedings and address various matters including:

- court to set time, date and place for hearing: s 57
- procedure if party not present on hearing date: s 57A
- whether proceedings to be in absence of the public: s 58 (also s 289U *Criminal Procedure Act* 1986 which requires the court to be closed if the complainant is giving evidence in domestic violence offence proceedings)

- change of venue: s 59
- right of representation and conduct of case: ss 60 and 61
- evidence to be on oath: s 63
- recording of evidence: s 64
- adjournments of the hearing: s 65
- power to dispense with rules: s 67
- power to stay proceedings (s 68 arrest of defendant): s 69
- witnesses and production of evidence: s 70
- warrants: s 71.

Note: Applications under the Act are not criminal proceedings. With some limited exceptions, the *Criminal Procedure Act* does not apply. The exceptions are:

- Section 70 — subpoenas and attendance of witness, refer to ss 220–232 (in Ch 4, Pt 3) *Criminal Procedure Act*
- Section 71 — warrants of arrest or commitment, refer to ss 233–244 (Ch 4, Pt 4) *Criminal Procedure Act*
- Section 41 — evidence of child witnesses is to be given in accordance with Ch 6, Pt 6, Divs 3 and 4.

While the onus of proof is a civil test, the application of the *Civil Procedure Act* 2005 is limited to some degree and dependent on the Local Court Rules and PN 2/2012.

Section 86(2) states:

> Without limiting subsection (1), the rules made for the purposes of this Act may adopt, with or without modification, the provisions of any rules made under the *Civil Procedure Act* 2005.

See Pt 3.2 PN 2/2012 and referral to s 56 *Civil Procedure Act* 2005.

Note: When an application is connected to a domestic violence offence, Ch 6, Pt 4B, Div 5 *Criminal Procedure Act* applies to the complainant's evidence in those proceedings: s 289T(1)(b). The complainant's evidence is to be heard in closed court unless the court directs otherwise: s 289U. They are also entitled to give evidence by AVL or two way communication technology, and have visual/other contact with an defendant restricted: s 289V. The prosecution must provide the court with a "Notice: Evidence of domestic violence complainant in criminal proceedings" at the first mention (Attachment E of PN 1/2012). The complainant cannot be examined by a self-represented defendant, but must be examined through a court appointed questioner: s 289VA. See further: **[8-000] Evidence by domestic violence complainants**.

Part 6 Local Court Practice Note 2 of 2012 — procedures at hearing

Evidence received at a contested hearing for a final order is by written statement. Unless the court grants leave, no further evidence in chief may be adduced: Pt 6.6. Inadmissible or privileged evidence is not made admissible by compliance with PN 2/2012: Pt 6.7.

The court retains a discretion if satisfied it is in the interests of justice, to dispense with compliance of all or part of Pt 6: Pt 6.8.

Part 7.2 sets out the evidence and other material on which a final order should be determined. The court has power to restrict time for the examination of witnesses by the parties: Pt 7.5.

Procedures for evidence from vulnerable persons

Division 4, Pt 6, Ch 6 *Criminal Procedure Act* 1986 applies to proceedings in relation to the making, variation or revocation of AVOs: s 306ZA. In particular, s 306ZB permits a vulnerable person to give evidence in apprehended violence proceedings by CCTV, unless he or she is the defendant. A "vulnerable person" is a child or cognitively impaired person: s 306M(1) *Criminal Procedure Act*.

See further **[24-040] Procedures at hearing**, for discussion of requirements in relation to the giving of evidence by, and questioning of, child witnesses under ss 41 and 41A.

Procedures for evidence in cases where sexual offences are involved

If the defendant is charged with a prescribed sexual offence under the *Criminal Procedure Act* and the PINOP is the complainant in relation to the offence, Pt 5 of that Act applies to the giving of evidence in the AVO proceedings: s 294B(1A), *Criminal Procedure Act* 1986.

The PINOP is entitled to choose to give evidence by CCTV or other alternative means that restrict contact with the defendant: s 294B(3). The proceedings may be adjourned to enable such means to be used: s 294B(3). However, the court may, of its own initiative or upon application, order that the PINOP's evidence not be given by those means if satisfied there are special reasons in the interests of justice for such an order: s 294B(5), (6).

Note: If the PINOP is a vulnerable person (that is, a child or cognitively impaired person), then Div 4, Pt 6, Ch 6 applies instead: s 294B(2).

Party's right to a support person when giving evidence — s 46

A party in AVO proceedings has the right to have a supportive person present when giving evidence.

That person may be a parent, guardian, relative, friend or other person chosen by the party as a supportive person. The supportive person may be with the party as an interpreter, or for the purpose of assisting the party with any difficulty or giving evidence associated with a disability, or for the purpose of providing the party with other support.

The court must make whatever direction is appropriate to give effect to a party's decision to have such a person present near the party and within the party's sight.

Procedure if party not present on hearing date — s 57A

Where service has taken place and there is no appearance of the defendant, a final order may be made in accordance with s 57A.

In such circumstances, the court may consider it appropriate to clarify with the applicant whether there are any family law proceedings, children or other factors relevant to making a final order. If there is no interim order in existence, the final order has no effect until it is served on the defendant.

If different orders are sought in more restrictive terms than the initial application, Pt 4.2, PN 2/2012 requires the filing and service of an amended application unless the court is satisfied it is not in the interests of justice to do so.

The court has a discretion to hear and determine the matter in the defendant's absence, if they are not present on the first or subsequent day on which the matter is listed for mention provided the court is satisfied the defendant had reasonable notice of the first return date or the date, time and place of the hearing: s 57(3), (4).

[22-120] Making orders

Last reviewed: March 2024

Statutory power to make orders — the test to be applied

The statutory power to make AVOs is contained in ss 16 (with respect to ADVOs) and 19 (with respect to APVOs).

16 Court may make apprehended domestic violence order

(1) A court may, on application, make an apprehended domestic violence order if it is satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears:

(a) the commission by the other person of a domestic violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person:

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

(2) Despite subsection (1), it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in, if:

(a) the person is a child, or

(b) the person is, in the opinion of the court, suffering from an appreciably below average general intelligence function, or

(c) in the opinion of the court:

(i) the person has been subjected on more than one occasion to conduct by the defendant amounting to a personal violence offence, and

(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and

(iii) the making of the order is necessary in the circumstances to protect the person from further violence or

(d) the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence against the person.

(2A) An apprehended domestic violence order that is made in reliance on subsection (2)(d) cannot impose prohibitions or restrictions on the behaviour of the defendant other than those prohibitions that are taken to be specified in the order by section 36.

(3) For the purposes of this section, conduct may amount to intimidation of a person even though:

(a) it does not involve actual or threatened violence to the person, or

(b) it consists only of actual or threatened damage to property belonging to, in the possession of or used by the person.

Note: Part 8 provides for the matters that may be included in orders. Section 35(1) provides that a court may impose such prohibitions or restrictions on the defendant's behaviour as appear necessary to ensure the safety and protection of the PINOP and any children from domestic or personal violence. Section 35(2) identifies various prohibitions or restrictions that may be imposed.

Definition — "domestic violence offence" is defined in s 11. See **Domestic violence offences** at **[5-500]**ff.

Section 36 sets out the prohibitions taken to be specified in every AVO. These include a prohibition on intentionally or recklessly harming an animal that belongs to, or is in the possession of, the protected person or a person with whom they have a domestic relationship: s 36(c).

Part 9 contains additional provisions relevant to the making of orders.

Note:

- The test does not require actual violence to have occurred, other conduct may be sufficient.
- Be aware of the statutory definition of intimidation: s 7. For applications for an AVO or to vary or revoke an AVO, the definition of intimidation includes conduct that causes a reasonable apprehension of harm to an animal that belongs or belonged to, or is or was in the possession of, the person or another with whom they have a domestic relationship: s 7(1)(c).
- The test may also involve considerations of conduct towards someone the PINOP has a domestic relationship with.
- Under s 16(2)(a) and (b), where the person is a child or vulnerable person there is no requirement that the person "in fact fears" an offence will occur or certain conduct will take place.
- Under s 16(2)(d) where the court is satisfied there are reasonable grounds to fear but no fears are in fact held, the court may nevertheless make an order, but only in the mandatory terms: s 16(2A).

For APVOs, the test is set out in s 19.

Sections 17 (regarding ADVOs) and 20 (regarding APVOs) set out the matters to be considered by a court when determining whether or not to make an order and the prohibitions and restrictions which should be included. In addition to considering the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application (ss 17(1) for ADVOs and 20(1) for APVOs), the court must also consider the various matters identified in ss 17(2) and 20(2).

Where an order would prohibit or restrict access to the defendant's residence, this includes the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made.

The court is to ensure an order imposes only those restrictions that, in its opinion, are necessary for the safety and protection of the protected person and any child directly or indirectly affected: ss 17(3) and 20(3).

If a condition is sought to exclude a defendant from any premises or place and the court does not make the condition sought, the court is required to give reasons for not making such a condition: ss 17(4) and 20(4).

If there is any inconsistency between AVOs made in relation to a defendant and more than one order applies to the same protected person, the most recent prohibition or restriction prevails (subject to s 28B which concerns provisional orders by police): s 81A.

Consent orders — s 78

Consent orders (interim and final orders) involve two considerations:

1. A court does not need to be satisfied as to the statutory prerequisites for the making of the order as would otherwise be the case, if the parties consent to the making of the order: s 78 (1).
2. An order can be made by the court with the consent of the parties whether or not the defendant admits to all or any of the particulars in the complaint: s 78(2).

Despite this, the court is still empowered to conduct a hearing if the order is a final order and the court is of the opinion it is in the interests of justice to do so: s 78(3).

Note
- Orders are made to prohibit or restrict a person from doing certain things.
- The only exceptions are where a person is ordered to undertake or perform a task. For example, orders for the recovery of property and orders requiring a defendant to surrender a firearm and related licence.
- Orders should be clear and unambiguous and contain no conflicts with other orders.
- Orders should only be as restrictive as the circumstances dictate.

Restrictions on the inclusion of residential addresses on orders — s 43

When making an order, a court must not state the PINOP's address unless satisfied:

- the defendant already knows the address, or
- it is necessary to achieve compliance and the personal safety or property of the PINOP would not be threatened, or
- where the PINOP is over 16 years of age, that person consents: s 43(2).

Similar requirements apply to a health service provider's residential address or intended residential address: s 44.

If the residential address must not be stated in an order because of s 44, then the address at which the health care provider ordinarily provides health care services is to be stated in the order instead: s 44(3).

Considerations in relation to children

See **[24-040] Making orders** in regard to specific issues that may arise in relation to children, including:

- The test to be applied
- Statutory obligations to extend orders to include children in certain circumstances
- Variation of family law orders (see also Family law orders and contact with children at **[24-040] Case management**).

Statutory requirements to explain orders — s 76

When making an order and when varying an existing order, the court is to explain to the defendant and/or protected person (if either is present), "in language that is likely to be readily understood", the following matters:

- the effect of the order

- the consequences that may follow a contravention of the order
- the rights of both the defendant and PINOP.

The court has an obligation to cause a "written explanation of the matters required to be explained under this section to be given to the defendant and protected person": s 76(3). The court's printout of the orders contains the information to comply with this requirement.

Suggested form of explanation/questions to unrepresented persons

The court should give, if it has not done so already, a clear explanation of the conditions contained in the order:

- "Do you understand a breach of the order is a criminal offence and that the penalties include a fine of up to $5500 and a gaol sentence of up to 2 years?"
- "Do you have questions about the order?" This last question often clarifies whether the defendant actually understands what has just happened or not.

To keep parties separated and avoid overcrowding, court registries generally request that persons not attend the counter to collect orders. If that is the case, state:

- "You may leave now. A copy of the order will be posted to you. The order takes effect immediately".

Modify this explanation when one or both parties are legally represented. Section 76(5) provides that a failure to comply with s 76 does not invalidate the order.

Property recovery orders — s 37

For the proper procedure in ancillary property recovery orders: see *Franks v Franks* [2012] NSWCA 209.

The court has power when making a final or interim order to make property recovery orders where the defendant or protected person has left property at the premises occupied by the other party.

A property recovery order may:

- direct access to particular premises to either party and/or a police officer or any person authorised by the court to remove property
- specify the nature of access, on what terms and specify particular property or "personal property".

Note:

- a property recovery order does not allow for entry by force: s 37(3)
- an order does not confer any right to take property to a person who does not have a legal right to possess it, even if specified in the order
- it is an offence for a person to contravene a property recovery order or obstruct a person who is attempting to comply with an order: s 37(6).

An application for a property recovery order must include details of any family law property orders of which the applicant is aware and of any pending family law property applications: s 37(IC). Further, the court must make its own enquiries in this regard: s 37(1D).

Practical issues

- Agreement for the return of property may be resolved by discussion with the parties and via third persons at court, negating the need for an order or the attendance of police.
- Unless the parties agree to specific property items, the order should only stipulate "personal property".
- Explain to the parties the order does not authorise removal of property if there is a dispute to ownership.
- In most circumstances, a property recovery order should allow for access only in company of a police officer to prevent a breach of the peace.
- A person cannot be convicted of a breach of an order if the contravention was done in compliance with a property recovery order: s 14(3)(b).

Particular caution should be exercised in deciding to make a property recovery order where ownership of particular property is disputed and it is unclear who is entitled to the property.

Duration of orders

Apprehended personal violence orders – s 79

The duration of an APVO is discretionary and "is to be as long as is necessary, in the opinion of the court, to ensure the safety and protection of the protected person": s 79(2).

If the court fails to stipulate a time, s 79(3) deems the order to be made for 12 months.

Apprehended domestic violence orders – s 79A

An ADVO remains in force for the period specified by the court: s 79A(1)(a). The period specified must be as long as is necessary to ensure the protected person's safety and protection: s 79A(2). When determining the duration of an ADVO, the court must consider:

(a) the protected person's circumstances and views

(b) the defendant's circumstances and, if they were under 18 when the application was first made, the impact if the order were to be more than the default period

(c) the material relied on to make the ADVO, and

(d) any other relevant matter: s 79A(3).

However, if the court does not specify the duration of the ADVO then the default period applies: s 79A(1)(b). This is 2 years for a defendant who is 18 years of age or older, and 1 year for a defendant under 18: s 79A(6).

Note: For an ADVO imposed on an adult who has been sentenced to full-time imprisonment for a relevant offence, the court must specify that the ADVO is for "the period of the term of imprisonment" and an additional two years, unless there is good reason to impose

a different period: s 39(2B), (2C). "Term of imprisonment" in this context refers to the full or total sentence imposed, including non-parole and parole periods: Second Reading Speech, Stronger Communities Legislation Amendment (Domestic Violence) Bill 2020, NSW, Legislative Council, *Debates*, 10 November 2020 amending s 39. Although the term is not defined in the Act, such a reading may generally be supported by the discussion in *Waterstone v R* [2020] NSWCCA 117 at [77], noting it deals with both Commonwealth and State offences.

Further, the date the ADVO commences may be a day before the day the person starts serving the term of imprisonment: s 39(2D); see also **[22-140] Court's obligations when other proceedings are pending**.

Indefinite orders – s 79B

A court may make an ADVO for an indefinite period, but only if satisfied the applicant has sought such an order, the defendant is 18 years or older and there are circumstances giving rise to a significant and ongoing risk of death or serious harm to the protected person or any dependants: s 79B(1).

In determining such a risk, the court must have regard to:

(a) the defendant's prior convictions for a domestic violence offence, including for a contravention of any other ADVO for the protected person or any other person protected under that order, and

(b) the defendant's conduct relevant to the risk of death or serious physical or psychological harm, such as assaults, stalking, threats to kill or use of weapons, relating to the protected person, and

(c) the nature, number and timing of the incidents involved in the conduct referred to above: s 79B(2).

A person against whom an indefinite order has been made may, but *only* with the court's leave, apply to vary or revoke the order: s 79B(4). Leave may only be granted if the court is satisfied there has been a significant change in circumstances since the order was made or last varied, or it is in the interests of justice: s 79B(5).

Interim orders — s 24

Interim orders remain in force until:

- the interim order is revoked, or
- a final order is made or served on the defendant, or
- the application is withdrawn or dismissed.

When orders take effect

Section 77 provides for the preparation and service of a final apprehended violence order or interim order on the defendant. Generally, the order can be served by the Registrar where the defendant is in court: s 77(3). If the defendant is not present, the order is to be served by a police officer: s 77(4).

A person cannot be convicted of a breach of an ADVO or APVO unless the person was present in court when the order was made or was served with a copy of the order in accordance with the requirements of the Act: s 14(2).

See also **Domestic violence offences** at **[5-500]**ff.

[22-140] Court's obligations when other proceedings are pending

Last reviewed: March 2024

Obligations to make interim orders when charges listed — s 40

If a person is charged with a serious offence, the court must make an interim order for the protection of the alleged victim of the offence unless the court is satisfied that the order is not required: for example, because an apprehended violence order has already been made against the person.

> **Definition** — "serious offence": see s 40(1), (5) for the definition. "Domestic violence offence" is defined in s 11. The definition of a "domestic violence offence" includes the offence of damaging property: see s 4. See also **Domestic violence offences** at **[5-500]**ff

On occasion, related charges and an AVO are listed on different court dates, or sometimes at different courts. Clarify with the prosecutor if it is unclear whether any charges have been or will be filed.

Obligations to make final orders upon finding of guilt — s 39

A court has an obligation to make a final order where a plea of guilty is entered or upon a finding of guilt for a serious offence, including in another court, regardless of whether an interim AVO or an application for an AVO has been made: s 39(1), (1A). "Serious offence" has the same meaning as in s 40.

A charge dealt with under s 10 *Crimes (Sentencing Procedure) Act* 1999 without conviction still provides an obligation to make an order: s 3(4).

A court need not make a final order if satisfied it is not required: s 39(2).

See also **Domestic violence offences** at **[5-500]**ff.

[22-160] Costs — ss 99 and 99A

These sections deal in totality with the question of costs in AVO proceedings. Section 99 contains a number of different considerations regarding applications for costs that are dependent on whether the application was for an AVO issued by a police officer, or by a private applicant. Section 99(3) provides power to award costs to either the applicant or the defendant.

Section 99A prohibits an award of costs against an applicant who is a protected person in AVO proceedings unless the court is satisfied that the application was "frivolous or vexatious". It further sets out the limits on the award of costs against a police officer applicant in ADVO proceedings.

[22-180] Warrants — s 88

Discretionary powers — s 88(1), (2)

Where an application for a final order is made and service cannot be effected, the court may issue a warrant to arrest the defendant and bring that person before the court for the purpose of having the application dealt with: s 88(1). A warrant under s 88 is a procedural warrant only and may be issued notwithstanding no offence is alleged to have been committed: s 88(2). Warrants should only be issued as an option of last resort.

Mandatory requirements — s 88(3)

(3) The authorised officer must issue a warrant for the arrest of the defendant if it appears to the authorised officer that the personal safety of the person for whose protection the order is sought will be put at risk unless the defendant is arrested for the purpose of being brought before the court.

Definition — the definition of "authorised officer" includes a court.

A warrant issued under s 88 cannot be executed after a 12 month period, unless the court orders an extension before the 12 month period expires: s 88(4).

[22-200] Non-publication prohibitions — s 45

Section 45(1) prohibits the publication or broadcast of the name of a child:

(a) for whose protection or against whom an AVO is sought in any AVO proceedings, or

(b) who is likely to be a witness in any AVO proceedings, or

(c) who is likely to be mentioned or otherwise involved in any AVO proceedings.

The court may direct that the name of any person who is a person for whose protection an order is sought, or who appears, or is likely to appear as a witness or be mentioned in the proceedings, not be published or broadcast. This power extends to the publication both before and after the proceedings are commenced and before they are disposed of: s 45(2).

A contravention of s 45(1) or a direction given under s 45(2) is an offence: s 45(3).

Note: these provisions are in addition to powers under the *Court Suppression and Non-Publication Orders Act* 2010.

[22-220] Variation or revocation of final or interim court orders

Sections 72–75

An interested party (defined in s 72) or a police officer may apply for a variation or revocation of an order: s 72A. This can include extending or reducing the order, amending or deleting any prohibitions, or adding additional prohibitions. The application must set out the grounds on which it is made: s 72A(3). An application to vary or revoke an order may only be made during the order's currency, and not after it has expired: *Wass v DPP (NSW)* [2023] NSWCA 71 at [59].

An application to vary or revoke a police initiated order where a protected person is a child requires leave of the court: s 72B. The court is not to grant leave if it is of the opinion the application would significantly increase the risk of harm to the child: s 72B(3). See also s 79B(6), which makes clear the power to revoke or vary an indefinite order in s 79B(4) does not apply to police-initiated orders where the protected person (or one of the protected persons) is a child.

An application to vary or revoke any police initiated order must be served on the Commissioner of Police: s 72C; see also s 72D which provides for notice in certain circumstances if the protected person is a child.

An order cannot be varied or revoked unless notice of the application is served personally or as the court otherwise directs on the other parties. In the case of an application made by a defendant, the application must be served on each protected person: s 73(4), (5).

If an application to extend an order is lodged with the court registry prior to the order expiring, the order may be extended without the defendant being served. The order may be extended for no more than 21 days (s 73(7), (9)), although further orders may be made under s 73(9) prior to the expiry of the extended order.

Otherwise, if an application for an extension of a final apprehended violence order or interim order is made before the order expires, the order is taken to continue in force until the application is dealt with by the court: s 73(8).

Practical issues

There are several circumstances where the court may refuse to hear a variation or revocation application, or may determine that it has no jurisdiction:

- If there has been no change in circumstances on which the order was based and the application is in the nature of an appeal of the order, the court may refuse to hear the application: s 73(3).
- Where the defendant consented to the order and now wishes to withdraw that consent and oppose the order, there is a right of appeal, with leave, only to the District Court: s 84(3)(b).

Part 9 PN 2/2012 directs the manner in which such applications are to be heard.

Discretion to vary existing order upon finding of guilt — s 75

If a person pleads guilty to or is found guilty of a "serious offence" a court may vary a final AVO or interim court order whether or not a variation application has been made: s 75(1).

Definition — "serious offence": see s 40(5). See also: definition of a "domestic violence offence" in s 11 and of a "personal violence offence" in s 4.

In exercising this discretion, the section requires the court to consider whether "greater protection for the person against whom the offence was committed" is required.

Registration and variation of interstate orders

Sections 96–98 provide a scheme for the registration of interstate and New Zealand orders and variation of registered orders. These orders are registered by the registrar of the court but prior to registration may be referred to a magistrate for modification and/or extension.

The magistrate can not only vary the period which the order has effect in New South Wales but can also make such other adaptations and modifications which the magistrate considers necessary for its effective operation in New South Wales.

After these extensions and modifications, the registrar of the Local Court is under an obligation to register the order.

Section 98 enables a prescribed person to apply for the variation, extension, reduction or revocation of a registered interstate restraint order. Such an order is not to be varied, etc on the application of the defendant unless notice of the application is served on the person in need of protection.

Note: Section 96(5) states that notice of the registration of an order (that has been varied or modified) is not to be served on the defendant unless the PINOP consents. The reasons behind s 96(5) are self-explanatory.

[22-240] Review and appeal provisions in relation to AVOs

Annulment of orders made or the dismissal of applications under s 84

Under s 84(1), a defendant may seek to annul an order made in his or her absence in the same manner as a s 4 application may be made against a conviction entered ex parte. The test under s 8(2) *Crimes (Appeal and Review) Act* 2001 is the same.

Under s 84(1A) an applicant who has had an application dismissed in his or her absence may seek an order to reinstate the proceedings. The court must be satisfied that, "having regard to the circumstances of the case, there is just cause for doing so": s 84(1B).

Note: Pt 11 PN 2/2012 sets out that other "interested parties" must be informed of such applications.

Appeals to the District Court, orders pending appeal — s 84(2)

Rights of appeal arise in the following circumstances:

- a defendant appealing against an order being made
- an applicant appealing against an application for an order being dismissed
- costs orders
- a party appealing against a variation or revocation of an order, or a refusal to vary or revoke an order
- a party to a non-local DVO appealing against a variation or revocation of an order, or a refusal to vary or revoke such an order.

Presumption against stay of orders

Lodging a notice of appeal under s 84 does not have the effect of staying the operation of the order concerned: s 85.

A defendant may apply to the Local Court to stay the order pending the appeal but the court may only stay the order, "if satisfied it is safe to do so, having regard to the need to ensure the safety and protection of the protected or any other person": s 85(2).

[22-260] National Domestic Violence Order recognition scheme

Part 13B of the Act, effective 25 November 2017, was inserted by the *Crimes (Domestic and Personal Violence) Amendment (National Domestic Violence Orders Recognition) Act* 2016. Part 13B provides for the NSW component of a national recognition scheme for domestic violence orders.

Note: See Pt 13 for registration of "external protection orders" made in New Zealand and personal violence orders made in another State or Territory.

Under s 98Y, each of the following is a recognised DVO in NSW:

- a local DVO (an ADVO or interim ADVO made under the Act: s 98T)
- an interstate DVO made in a participating jurisdiction (specified in s 98U)
- a foreign order that is a registered foreign order in any participating jurisdiction (specified in s 98V).

Any DVO made after 25 November 2017 becomes a recognised DVO when it is made: s 98Y(2). A DVO made in any jurisdiction can, upon application to the registrar, be declared to be a recognised DVO in NSW: ss 98ZZB, 98ZZC.

A recognised DVO (or recognised variation to a recognised DVO) is enforceable against the defendant in NSW (once the defendant has been properly notified of the making of the DVO under the law of the jurisdiction in which it was made): s 98ZD. Sections 98Z and 98ZA set out the circumstances in which a variation to, or revocation of, a recognised DVO is then recognised in NSW.

Recognised DVOs that are non-local DVOs can be varied or revoked as if they were local DVOs: ss 98ZL and 98ZM. See above **[22-220] Variation of final AVOs or interim court orders**. However, the court cannot vary or revoke a non-local DVO if it cannot be varied or revoked by a court in the jurisdiction in which the DVO was made: s 98ZM(2).

Applications to vary or revoke a non-local DVO are to be made, and may be dealt with, as if the DVO were a local DVO (subject to Div 3): s 98ZN(1)–(2). A court has a discretion to hear or decline to hear such an application: s 98ZO(1). The matters the court may consider in making such a decision are set out in s 98ZO(2) and include:

(a) the jurisdiction in which the defendant and protected person/s under the DVO generally reside or are employed

(b) any difficulty the respondent to the proceedings may have in attending the proceedings

(c) whether there is sufficient information available to the court in relation to the DVO and the basis on which it was made

(d) whether any proceedings are being taken in respect of an alleged contravention of the DVO and the jurisdiction in which those proceedings are being taken

(e) the practicality of the applicant (if not the defendant under the DVO) applying for, and obtaining, a local DVO against the defendant with similar prohibitions or restrictions

(f) the impact of the application on children who are protected persons under the DVO

(g) any other matters the court considers relevant.

The court may decline to hear an application if satisfied there has been no material change in the circumstances on which the making of the order was based and that the application is in the nature of an appeal against the order: s 98ZO(3).

The right of appeal to the District Court against a decision relating to variation or revocation extends to non-local DVOs: s 84(2)(e).

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AVO proceedings involving children

[24-000] Introduction

This chapter outlines:

- The jurisdiction of the Children's Court to make apprehended violence orders
- Considerations in relation to children that may arise in the course of AVO proceedings.

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Crimes (Domestic and Personal Violence) Act* 2007. References to PN 2/2012 are to Local Court Practice Note 2 of 2012, **Domestic and Personal Violence Proceedings**. See generally **[22-000] Apprehended Violence Orders**.

[24-020] Jurisdiction of the Children's Court

The Children's Court has jurisdiction to hear and determine an application for an apprehended violence order in the following circumstances:

Proceedings involving a child defendant

Where a child under the age of 18 years is the defendant, the matter must be dealt with in the Children's Court. There is no statutory provision to allow applications involving an adult and child defendant to be heard together, despite the same subject matter and common witnesses.

See **Children's Court Practice Note 8** regarding the procedure to be adopted in the Children's Court on the first listing of the matter. A court support officer and/or legal representative may be involved to consider if referral to mediation and/or counselling is more appropriate. In addition, there may be an adjournment of the proceedings by consent, between 3–5 months with interim orders to facilitate this process.

Power to make, vary or revoke AVO in care proceedings

The Children's Court may make an AVO in care proceedings under the *Children and Young Persons (Care and Protection) Act* 1998, for the protection of the child to whom the proceedings relate and any relative of the child residing at the same location. The order may be made either on application of a party to the proceedings or of the court's own motion: s 40A(2).

The court may also vary or revoke an order, but not if it is aware the defendant is subject to criminal proceedings relating to some or all of the circumstances giving rise to the order: s 40A(2), (3). Sections 48(3) and 72B (containing general restrictions on the making of variation and revocation applications) do not apply to orders under this section: s 40A(6).

The Commissioner of Police and the Secretary of the Department of Family and Community Services (FACS) must be notified before the court makes, varies or revokes an order under this section: s 40A(4), (5). Each of those parties has standing to appear in the proceedings: s 40A(4), (5).

Note: standing in proceedings under s 40A is delegated under instrument by the Commissioner of Police to all police prosecutors. As the Secretary, FACS is a party in care proceedings, the

legal representative employed or engaged by FACS in those proceedings will appear in any s 40A component of the proceedings.

The parties to the care proceedings and the defendant also have standing to appear in respect of the making of the AVO: s 40A(7).

[24-040] Considerations in proceedings involving children

Applications for orders

Where each person the subject of the order is a child at the time of the application, only a police officer may apply for an order: s 48(3).

A private applicant may seek orders that extend to the protection of a child. However, the court may refer such an application to the Commissioner of Police if it considers it would be in the best interests of the child for a police officer to appear in the application: s 48(4A).

Case management

Determination if child to give evidence

The Act presumes that children "should not be required to give evidence in any manner about a matter unless the court is of the opinion that it is in the interests of justice for the child to do so": s 41(4).

Definition — s 3, "child" means a person under the age of 16 years.

It will be apparent in many cases that a child may be called. In police applications, it should be ventilated at an early stage. However, in matters where parties are unrepresented it may not be immediately apparent and may be problematic.

A determination under s 41(4) should be made prior to allocating a hearing date. If CCTV facilities are required, that may affect the venue and date allocated in the court diary.

When making a determination under s 41(4), take into account the objects of the Act and s 41. This must be balanced against the nature of the order sought and the reasons why a party is requesting the court to allow a child to be called to give evidence.

Family law orders and contact with children

Where it is apparent that there are children of the relationship living in the household of the protected person and/or the defendant, the court should raise the matter with the parties (particularly unrepresented parties) prior to making any order.

When deciding whether or not to make or vary an AVO, the court is required to consider:

- the safety and protection of the protected person and any child directly or indirectly affected by domestic or personal violence (s 42(2)), and
- whether contact between the protected person or between the defendant and any child of either of those persons is relevant to the making or variation of the order, having regard to any relevant parenting order of which the court has been informed (s 42(3)).

An applicant has a positive duty to inform the court of any existing or pending parenting orders that may directly or indirectly affect a child, and the court is to inform the applicant of this obligation: s 42(1). Although a contravention of the section does not invalidate an order or variation (s 42(4)), Part 8.3 PN 2/2012 reinforces these requirements.

Procedures at hearing

Proceedings to be held in absence of public — ss 41, 41AA

Proceedings involving children/young persons, or where a child/young person is called as a witness, are to be heard in the absence of the public unless the court otherwise directs: ss 41(2), 41AA. "Young person" means a person over 16 years of age but under the age of 18 years: s 41AA(2).

Note: Section 41AA, which was inserted by the *Crimes Legislation Amendment (Victims) Act* 2018, commenced on 1 December 2018 and only applies to proceedings commenced from that date.

Even if the proceedings are open to the public, the court may direct any person, other than a person directly interested in the proceedings, to leave the court during the examination of any witness: s 41(3).

Evidence from children

If a child is required to give evidence in AVO proceedings, the evidence should be given in accordance with Div 3 and 4, Pt 6, Ch 6, *Criminal Procedure Act* 1986 (ss 306R–306ZI): ss 41(5) and (6). These provisions deal with the giving of evidence by vulnerable persons (including children). They enable evidence of the child's interview by police to be given by a recording, and the child to give evidence in the proceedings by CCTV.

See Pt 8 PN 2/2012 and **Evidence from vulnerable persons** at [10-000] for a full discussion of these statutory requirements; also **Procedures for evidence from vulnerable persons** at [22-100].

Note: s 294B(1A), *Criminal Procedure Act*, which extends special procedures for taking the evidence of the complainant in sexual offence proceedings to the complainant's evidence in AVO proceedings expressly does not apply in the case of a child who is covered by Div 4, Pt 6, Ch 6: s 294B(2).

Right to support person when giving evidence — s 46

A party to AVO proceedings (whether a PINOP or defendant), including a child, has the right to have a supportive person present when giving evidence in the proceedings: s 46(2). That person may be chosen by the party, and may include (without limitation) a parent, guardian, relative or friend: s 46(3)(a).

The court must make whatever direction is appropriate to give effect to a party's decision to have a supportive person present near the party, and within the party's sight, when the party is giving evidence: s 46(4).

Questioning of child witnesses — s 41A

A child giving evidence in ADVO proceedings is not to be cross-examined by an unrepresented defendant, but may be asked questions via a lawyer or other suitable person appointed by the court: s 41A(1).

Section 41A codifies the existing provision in PN 2/2012 at Pt 8.1, so far as ADVO proceedings are concerned. The practice note further applies in APVO proceedings.

Prohibition against publication of child's name and identifying information

Section 45 creates an offence for the publication of the name of, or any information, picture or material that identifies a child or is likely to lead to the identification of a child involved in

apprehended violence proceedings. The protection extends to a child for whose protection an order is sought who appears, or is likely to appear as a witness, or who is reasonably likely to be mentioned in proceedings: s 45(1).

See also *Civil Trials Bench Book*, "Closed court, suppression and non-publication orders" at [**1-0400**].

Making orders

Test to be applied

When making an ADVO, under s 16(2)(a) and (b), where the person is a child or vulnerable person there is no requirement that the person "in fact fears" that the defendant will commit a domestic violence offence or engage in stalking or intimidation.

When making an APVO, a substantially identical provision is found in s 19(2).

For considerations associated with setting the duration of an order, see s 79 (for APVOs) and s 79A (for ADVOs). The default period of an ADVO where the defendant is under 18 years old is 1 year: s 79A(1). However the court may specify a different period considering the factors outlined in s 79A(2). An indefinite order may not be made against a person who is under 18 when the application was made: s 79B(1)(b).

Under ss 17 and 20, certain considerations apply to the making of an AVO where a child is directly or indirectly affected by the defendant's alleged conduct. These include:

(a) where an order that would prohibit or restrict access to the defendant's residence — the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made

(b) any hardship to the protected person and any children that may be caused by making or not making the order

(c) the accommodation needs of all parties, particularly the protected person and any children.

Statutory obligations for children when making an order — s 38

Section 38(2) requires the court to extend the operation of any order made to include any children with whom the PINOP has a domestic relationship. If a court decides not to do this, it must give reasons for not doing so: s 38(3).

Variation of family law orders

In making an ADVO, defined as a family violence order in s 3 *Family Law Act* 1975 (Cth), the court may revive, vary, discharge or suspend any parenting order, recovery order or injunction made under s 68R *Family Law Act*. "Family violence" is defined in s 4AB *Family Law Act*. It provides that a child is "exposed to family violence" for the purposes of the Act if the child sees or hears family violence, or otherwise experiences the effects of family violence (s 4AB(2)), and sets out examples of situations that may constitute such exposure (s 4AB(3)).

Section 68R(3) sets out limits on the court's power. It may not alter an existing family law order unless also making or varying an interim or final family violence order, and must have material before it that was not before the court that made the family law order or injunction.

The court's jurisdiction derives from s 69J *Family Law Act*.

Practical considerations

Note the following:

- the statutory prohibitions under s 68R(3)
- the statutory prohibition against discharging a family law order or injunction that applies under s 68R(4) if the court is only making an interim order, and
- factors that must be considered under s 68R(5). The court must:
  - have regard to the purposes of this Division (as stated in s 68N, namely the resolution of inconsistencies between family law and family violence orders, ensuring family law orders do not expose people to family violence, and ensuring that the best interests of children are met), and
  - have regard to whether contact with both parents is in the best interests of the child concerned (see ss 60CB–60CG), and
  - be satisfied that it is appropriate to vary, discharge or suspend a family law order or injunction because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order or injunction, in circumstances where the order or injunction was inconsistent with an existing family violence order at the time it was made or granted.

The Family Court has similar powers in reverse situations under s 68Q *Family Law Act*.

The court should exercise caution when utilising powers under s 68R and be satisfied the application is not simply seeking to appeal or revisit existing family law orders.

Variation and revocation applications

Generally, an application to vary or revoke an AVO may be made only by a police officer or by an interested party (such as the defendant or a protected person, and in the case of a child who is a protected person, a parent or the Secretary, Department of FACS) in relation to the order: s 72A(2). However, limitations apply where a protected person under the order is a child.

Police-initiated orders where a protected person is a child

An application by an interested party to vary or revoke a police-initiated order where a protected person is a child requires leave of the court: s 72B. The court is not to:

- Hear the application, unless satisfied that notice has been served on the Commissioner of Police in accordance with the rules of court (see Pt 5, Local Court Rules 2009): s 72C(1)(b).
- Grant leave, if it is of the opinion the application would significantly increase the risk of harm to the child: s 72B(3).

The Commissioner of Police has standing to appear in proceedings for the variation or revocation of any police-initiated order: s 72C(2).

Other orders where a protected person is a child

Under s 72D, where an AVO was not police-initiated but a protected person under the order is a child, the court may, if considering it to be in the best interests of the child to do so:

- Notify the Commissioner of Police and any interested party of an application to vary or revoke the order, and
- Give the Commissioner and interested party standing to appear in the proceedings.

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Committal proceedings

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Criminal Procedure Act* 1986.

Local Court Practice Note Comm 3 (PN Comm 3) sets out the procedures to be followed by magistrates for committal proceedings for offences commenced on or after 9 January 2023. See, in particular, the flowchart at Appendix A which identifies the key steps in the proceedings. For Practice Notes applicable to earlier proceedings, see **[74-000]**.

[28-000] Introduction

Last reviewed: November 2023

Committal procedures were changed as a result of amendments to the *Criminal Procedure Act* 1986 by the *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 which commenced on 30 April 2018. A primary purpose of the reforms, as they relate to committals, is to reduce delays in indictable cases being finalised in the District Court. The Attorney General said, during the Second Reading Speech, that the reforms would do this "by improving productivity and ensuring that cases are effectively managed": NSW, Legislative Assembly, *Debates*, 11 October 2017, p 6.

It is the role and function of the Director of Public Prosecutions to determine whether a person should be tried upon indictment and the particular charge: s 7, *Director of Public Prosecutions Act* 1986. As a result of these amendments, the prosecutor must also certify the evidence available is capable of establishing the elements of each offence the subject of the proceedings: s 66(2).

Therefore, while a magistrate retains the power to manage committal proceedings from the time an accused is charged until they are committed for trial or sentence, the magistrate is no longer required to make a decision about the sufficiency of the evidence before committal.

[28-020] Indictable offences

Last reviewed: November 2023

An indictable offence may be a strictly indictable offence or an indictable offence as provided in the *Criminal Procedure Act*, s 260. The Act provides that an offence listed in Table 1 of Sch 1 of the Act is an indictable offence which is to be dealt with summarily unless the prosecuting authority or the person charged elects otherwise.

An offence listed in Table 2 of Sch 1 is an indictable offence which is to be dealt with summarily unless the prosecuting authority elects otherwise.

For Table 1 and Table 2 offences, s 263(1) provides an election must be made within the time fixed by the Local Court, unless special circumstances exist and leave is granted: s 263(2). However, an election may not be made, in the case of a not guilty plea, after the taking of prosecution evidence in the summary hearing or, in the case of a guilty plea, after the presentation of the facts by the prosecution: s 263(3). In relation to the summary disposal of indictable offences under Ch 5, an election is made either orally or in writing to the Local Court. If it is not made in this manner, an election has not been made: *Johnston v DPP* [2021] NSWSC 333 at [63]–[66]; *Criminal Procedure Regulation* 2017, cl 117(2).

[28-040] Nature of, and steps involved in, committal proceedings

Last reviewed: November 2023

Committal proceedings are defined in s 3(1) as:

> proceedings before a magistrate for the purpose of committing a person charged with an indictable offence for trial or sentence.

Committal proceedings are generally conducted by a magistrate in open court: ss 56(1), 57(1). The following steps during the committal proceedings are identified in s 55 (emphasis added):

(a) proceedings are commenced by the issuing and filing of a **court attendance notice**,

(b) a **brief of evidence** is served on the accused by the prosecutor,

(c) a **charge certificate** setting out the offences that are to proceed is filed with the Court and served by the prosecutor on the accused,

(d) if the accused is represented, one or more **case conferences** are held by the prosecutor and the legal representative for the accused,

(e) if the accused is represented, a **case conference certificate** is filed in the Court,

Note: An unrepresented accused is not required to participate in a case conference: s 69(a). In such cases, the matter should be adjourned so the accused can obtain legal advice and/or representation.

(f) the accused pleads guilty or not guilty to each offence which is proceeding and the magistrate **commits the accused for trial** (if the accused pleads not guilty) **or sentence** (if the accused pleads guilty).

The magistrate's role is limited to overseeing the various steps identified in s 55 and to ensuring the necessary procedural steps have been completed before committing the accused for trial or sentence: NSW, Legislative Assembly, *Debates*, 11 October 2017, p 6. That is, it is essentially a supervisory role, intended to ensure there has been compliance with the procedural regime: *Black v R* (2022) 107 NSWLR 225 at [7].

The magistrate may fix days for the purpose of taking steps or doing other things during the committal proceedings: s 56(2).

Subject to "any necessary modification" and any provision in Ch 3 Pt 2, the following provisions also apply to committal proceedings:

- sections 30 (change of venue), 36, 37–41 (representation, conduct of case, recording of evidence and adjournments), and 44 (case not to be proceeded with): s 58(a)
- Part 3 (attendance of witnesses and production of evidence in lower courts) and Pt 4 (warrants) of Ch 4: s 58(b) and (c).

Subject to one limitation addressed below, s 59(1) of the Act requires a magistrate to give the accused an oral and written explanation of the following:

(a) the process of charge certification, case conferences and committal for trial or sentence; and,

(b) the sentencing discount scheme under Pt 3 of the *Crimes (Sentencing Procedure) Act* 1999 that applies in the case of a guilty plea in relation to State offences.

An oral explanation of the committal process is not required if the accused is legally represented: s 59(1)(b).

The explanation must be given after a charge certificate is filed and before the first day on which a case conference is held. If a case conference is not required to be held (see further at **[28-120]**), then the explanation must be given before the accused is committed for trial or sentence: s 59(2).

Note: A magistrate is not required to explain the sentence discount scheme when the offences involved are Commonwealth offences: s 59(4).

Clause 9A of the *Criminal Procedure Regulation* 2017 sets out the suggested form for the oral explanation of the committal process. The written explanation is set out in cl 9B.

PN Comm 3 sets out in detail the procedures to be followed during committal proceedings. It provides timetables for the preparation and service of the brief of evidence, filing of charge certificates, case conferences and filing of case conference certificates.

Committal proceedings are to progress in accordance with the identified timetable unless the court is satisfied departure from the timetable is in the interests of justice: PN Comm 3, [5.1].

Information to be given to unrepresented accused — Table 1 offences

Section 265(1) *Criminal Procedure Act* provides as follows:

> When a person charged with an indictable offence listed in Table 1 to Schedule 1 first appears before the Local Court in respect of the offence, the Court:
>
> (a) is to address the person about the person's rights to make an election and the consequences of not making an election, and
>
> (b) is to give to the person a statement about the person's right to make an election and the consequences of not making an election that is in the form of words prescribed by the regulations.

The obligation does not arise if the defendant is represented by a lawyer: s 265(1A).

The statement referred to in s 265(1)(b) is set out in Sch 1, Form 5, *Criminal Procedure Regulation* 2017.

[28-060] Accused to appear by audio visual link (AVL)

Last reviewed: November 2023

The court must comply with the provisions of s 5BB(1) *Evidence (Audio and Audio Visual Links) Act* 1998. This section has the effect that upon the initial appearance of an accused person in custody, if bail is refused, the person must appear by AVL on the next occasion unless the court otherwise directs. There is no requirement for the accused person or the legal representative to consent to this course. (This provision does not apply to accused persons attending court cells in custody for the purposes of attending a conference).

Where facilities exist to enable the appearance of the accused persons in custody via AVL, the technology must be utilised. The court papers should be clearly marked AVL to ensure such accused persons appear via AVL.

[28-080] Serving the brief of evidence

Last reviewed: November 2023

A brief of evidence *must* be served for:

- strictly indictable matters,
- Table matters where an election has been made to proceed on indictment, and
- Commonwealth matters proceeding on indictment.

A brief of evidence will not be ordered in a Table matter unless the court is informed the accused has pleaded not guilty: PN Comm 3, [4.1].

Orders will be made for the service of the brief of evidence on the accused or their legal representative on the first return date in accordance with PN Comm 3, [7.1]. The brief must be served on or before the day specified by the magistrate (s 61(1)) together with copies of any proposed exhibits or, if it is not practicable to provide copies, a notice relating to the inspection of them (s 64).

The material in the brief may, but is not required to, be in admissible form: s 62(2). Removing the requirement that evidence be in admissible form is intended to facilitate early service of the brief: NSW, Legislative Assembly, *Debates*, 11 October 2017, p 7.

Relevant material obtained by the prosecutor after service of the brief must be served as soon as practicable: s 63(1)–(2). The prosecutor's disclosure obligations are unaffected: s 61.

The brief *must include* copies of the following:

- all material forming the basis of the prosecution case,
- any other material *reasonably capable* of being relevant to the accused's case, and
- any other material that *would* affect the strength of the prosecution case: s 62(1).

Note: The Office of the Director of Public Prosecutions (NSW) and the NSW Police Force have agreed to a Protocol for the contents of the brief of evidence which identifies when evidence should be provided in admissible form. The Commonwealth Director of Public Prosecutions has also published guidelines for its partner agencies concerning the types of evidence that should be obtained in admissible form.

A magistrate can only rely on the advice of the parties as to whether a brief of evidence is "complete" or "compliant" as it is not a function of the Local Court to investigate its contents: *Belkheir v DPP* [2023] NSWSC 1233 at [59]. If an accused takes issue with compliance with brief service orders and whether charge certification can proceed, the magistrate is to consider what action to take pursuant to s 68(2): *Belkheir v DPP* at [60]; see **[28-100] Charge certificates**, below.

A magistrate has an implied power to make a restricted retention order (RRO), if requested by the prosecution, which restrains the defendant from retaining copies of parts of the brief of evidence: *Commissioner of Police v Walker* [2023] NSWSC 539 at [61]–[62], [80], [82]; s 61(1), (2); *BUSB v R* (2011) 80 NSWLR 170 at [25]–[34]. A RRO may be necessary where a serious matter is not prosecuted or prosecution evidence is weakened as no other appropriate accommodation can be made for the safety of prospective witnesses: *Commissioner of Police v Walker* at [80]. Whether such an order is made and how it is framed are determined by balancing competing public policy considerations, including the accused's rights, and can be crafted to solve issues in a particular case: *Commissioner of Police v Walker* at [72], [80]; *HT v The Queen* (2019) 269 CLR 403.

[28-100] Charge certificates

Last reviewed: November 2023

The prosecutor must file and serve a charge certificate by the date set by the magistrate, which is after the service of the brief of evidence and "not later than 6 months after the first return

date for a court attendance notice in the committal proceedings": s 67(1), (2); see also *Belkheir v DPP* [2023] NSWSC 1233 at [58]. The matter will be adjourned to enable this to occur in accordance with PN Comm 3, [8.1].

A later day may be set if the accused consents or if the magistrate considers doing so is in the interests of justice: s 67(3). When determining whether or not it is in the interests of justice, the complexity of the proceedings is a relevant consideration: s 67(4).

The charge certificate must be set out in accordance with Form 1A of cl 9D *Criminal Procedure Regulation* 2017.

The charge certificate must relate to the offences set out in the CAN and must:

- specify the relevant offences and their details
- specify any back up or related offences
- if relevant, specify any offences that will not proceed, and
- contain any other matter prescribed by the regulations: s 66(1).

The prosecutor must certify the evidence is capable of establishing each element of the offences the subject of the proceedings: s 66(2). If the prosecutor determines that other offences are to be included in the proceedings an amended charge certificate must be served and filed before the accused is committed for trial or sentence: s 67(5).

Failure to file charge certificate

If the charge certificate is not filed in the specified time, the magistrate must discharge the accused or adjourn the proceedings: s 68(2). In determining the appropriate action the interests of justice must be considered: s 68(3). While the "interests of justice" encompass a wide variety of factors, a prosecutor should provide good and cogent reasons why charge certification cannot occur in the statutory time frame, particularly where an accused is in custody bail refused, or subject to stringent bail conditions: *Zahed v DPP* [2023] NSWSC 368 at [50]. By way of example, in *Zahed v DPP*, the nature of the charges (murder and aggravated kidnapping) and the size of the brief of evidence (17 lever-arch folders), taken together, justified a finding that it was in the interests of justice to extend the charge certification period beyond six months, although ordinarily, six months would be sufficient: at [53]–[57].

If a warrant has been issued because the accused failed to appear, the 6 month period for filing the charge certificate is extended by the number of days between the issue of the warrant and the accused being brought before the court: s 68(4).

[28-120] Case conferences

Last reviewed: November 2023

After a charge certificate has been filed and before a case conference is held a magistrate must provide the accused with an oral and written explanation of the committal process and the sentencing discount scheme in Pt 3 of the *Crimes (Sentencing Procedure) Act* 1999: see **[28-040]**, above.

Generally if an accused is represented the prosecutor and the accused's legal representative must hold a case conference after the charge certificate has been filed: ss 70(4), 71(1). The proceedings will be adjourned for eight weeks to enable a case conference to occur and for the case conference certificate to be filed: PN Comm 3, [9.2(a)].

There is no limit on the number of case conferences which may be held: s 70(5).

The initial case conference must be held in person or by audio visual link (AVL): s 71(2). However, an initial case conference may be held by telephone if the magistrate is satisfied there are exceptional circumstances which render it impracticable to hold the conference in person or by AVL: s 71(3). Subsequent case conferences may be held via telephone: s 71(2).

A further case conference may be held after an amended charge certificate is filed but is not required: s 70(6).

Separate case conferences must be held for jointly accused persons, unless the prosecutor and each accused consent to a joint conference and provided a charge certificate has been filed for each accused: s 73(1), 7(2).

When a case conference is NOT required

A case conference is not required if the accused:

- is unrepresented, or
- pleads guilty to the offences and the plea is accepted by the magistrate before the case conference is held, or
- is committed for trial under Div 7 (when unfitness to be tried is raised): s 69.

Obligations of accused's legal representative

The accused's lawyer is obliged to obtain instructions concerning the case conference and must explain to the accused the various matters identified in s 72(2) including the effect on the sentencing discount if the guilty plea is entered at different stages of the proceedings: s 72.

Completing and filing case conference certificates

After a case conference has been held, a case conference certificate must be completed and filed by the date ordered by the magistrate: s 74(1). The certificate must comply with Form 1B of the regulations: *Criminal Procedure Regulation* 2017, cl 9G.

The prosecutor and the accused's legal representative must ensure the case conference certificate complies with the requirements of the Act and is completed and signed before the date set: ss 74(3), (4).

Where more than one case conference is held, the certificate must be filed after all the case conferences are completed: s 74(2). Section 75 identifies the matters which need to be addressed by the parties in the certificate. Although magistrates do not see the certificate, where there have been lengthy plea negotiations, it may be prudent to enquire with the parties that all offers, including defence offers, have been recorded in the certificate. See *Ke v R* [2021] NSWCCA 177 where a 25% discount was allowed even though a rejected plea offer by the accused before committal was not recorded in the certificate.

When a case conference certificate is not required

A certificate is not required if all the offences to which the proceedings relate are to be dealt with summarily, or when the offences are not proceeding to committal: s 74(5).

Plea offer after certificate filed but before committal

A plea offer can be made after the case conference certificate has been filed but before committal. Such an offer is treated as if it formed part of the case conference material: s 77(1)–(2). Further plea offers must be made in writing, served on the other party and filed with the court: s 77(1). A plea offer made in these circumstances must be annexed to the case conference certificate: s 77(3).

Confidentiality of case conference material

Generally, case conference material is not admissible in any proceedings: s 78(1). Matters in case conference certificates are treated as confidential: s 79. The disclosure of any information during or in relation to the case conference is not a pre-trial disclosure for the purposes of the *Crimes (Sentencing Procedure) Act* 1999, s 22A: s 81.

Other than in the proceedings identified in s 78(2), a case conference certificate cannot be required to be produced in any proceedings: s 78(3).

Failing to fulfil case conference obligations

If the magistrate is satisfied that a case conference certificate has not been filed by the specified date due to an unreasonable failure by either party, the magistrate may make orders set out in s 76. Actions that may warrant a magistrate making such orders include unreasonable failures to:

- participate in a case conference, or
- complete or file the case conference certificate: s 76.

If a prosecutor has unreasonably failed to fulfil these obligations, the magistrate may discharge the accused or adjourn the committal proceedings: s 76(2).

If the accused's legal representative has unreasonably failed to fulfil their obligations, the magistrate may commit the accused for trial or sentence as if a case conference were not required, or adjourn the proceedings: s 76(3).

In determining whether to take such action, the magistrate must consider the interests of justice: s 76(4). This includes the availability of alternative s 76 pathways, the committal's impact on the defendant (the loss of a discount for an early plea of guilty in s 25D *Crimes (Sentencing Procedure) Act* 1999), and the broad purposes of committal proceedings (defined in *Landrey v DPP* (2022) 110 NSWLR 127 at [31] as "to ensure ... cases are not listed for trial until the possibilities of guilty pleas have been explored and, so far as possible, exhausted"): *Elwood v DPP* [2023] NSWSC 772 at [60]–[65]. In cases where delay, or long delay, is the cause of the failure to comply with case conferencing obligations, this may not demonstrate unreasonable failure to participate in a case conference or complete a case conference certificate: *Elwood v DPP* at [60].

[28-140] Examining prosecution witnesses during committal proceedings — ss 82–85

Last reviewed: November 2023

Section 82 provides:

- A magistrate may direct the attendance at the committal proceedings of a person whose evidence is referred to in the brief or who has been referred to in other material provided by the prosecution to the accused. The direction may be made following application by the accused or the prosecutor: s 82(1).
- The magistrate must give the direction if an application is made by the accused or the prosecutor and the other party consents to the direction being given: s 82(4).

An application can only be made after the charge certificate has been filed: s 82(3).

Test for direction under s 82

A direction may only be made if the magistrate is satisfied there are substantial reasons why, in the interests of justice, the witness should attend to give oral evidence: s 82(5). The principles

to be applied in deciding whether there are substantial reasons in the interest of justice were summarised in *Sim v Magistrate Corbett* [2006] NSWSC 665, per Whealy J, by reference to the test for the previous s 91, at [20] as follows:

1. The purpose of the legislation is to avoid delays in the criminal process by unnecessary or prolix cross-examination at committal.
2. The onus is on the defence to satisfy the Local Court that an order should be made directing the attendance of witnesses.
3. The process is an important part of the committal proceedings. The refusal of an application may have a significant impact upon the ability of the defendant to defend himself. As well, the prosecution has a real interest in ensuring only appropriate matters are sent for trial.
4. In relation to matters falling within s 91 *Criminal Procedure Act* 1986, the defendant must show that there are reasons of substance for the defendant to be allowed to cross-examine a witness or witnesses.
5. The obligation to point to substantial reasons is not as onerous as the reference to "special reasons" in s 93; nevertheless it raises a barrier, which must be surmounted before cross-examination will be permitted.
6. Each case will depend on its own facts and circumstances. It is not possible to define exhaustively or even at all what might, in a particular case, constitute substantial reasons. It may be a situation where cross-examination may result in the discharge of the defendant or lead to a successful no-bill application; it may be a situation where cross-examination is likely to undermine substantially the credit of a significant witness. It may simply be a situation where cross-examination is necessary to avoid the defendant being taken by surprise at trial. The categories are not closed and flexibility of approach is required in the light of the issues that may arise in a particular matter.
7. Substantial reasons might exist, for example, where the attendance of a witness is sought to enable cross-examination in respect of a matter which itself might give rise to a discretion or determination to reject evidence at trial.
8. The expression "substantial reasons" is not to be ascertained by reference to synonyms or abstract dictionary definitions. The reasons advanced must have substance in the context of the committal proceedings, having particular regard to the facts and circumstances of the particular matter and the issues, which critically arise or are likely to arise in the trial.

Note: For cases regarding substantial reasons, see *Murphy v DPP* [2006] NSWSC 965; *Sim v Magistrate Corbett* [2006] NSWSC 665; *McKirdy v McCosker* [2002] NSWSC 197; *Lawler v DPP* (2002) 56 NSWLR 1; *Losurdo v DPP* (unrep, 10/3/98, NSWSC) per Hidden J; *Hanna v Kearney* (unrep, 28/5/98, NSWSC) per Studdert J; *DPP v Losurdo* (1998) 44 NSWLR 618.

When a direction cannot be given

A direction may not be given requiring the attendance of the complainant in proceedings for a prescribed sexual offence if the complainant is a cognitively impaired person (within the meaning of Ch 6 Pt 6): s 83(1).

Nor may a direction be given to require the attendance of a complainant in proceedings for a child sexual assault offence if the complainant was under 16 years old when the alleged offences were committed and is under 18 years old at the time of making the application: s 83(2). The definition of a child sexual assault offence extends to Commonwealth offences

which correspond to the offences identified in s 83(3)(a)–(c) or an offence prescribed by the regulations: s 83(3)(d). Section 83(3)(d) only applies to proceedings which commenced after 1 December 2018.

Excluded witnesses under s 84

Section 84 provides that a direction may not be given in the following circumstances:

- to direct the attendance of an alleged victim of an offence involving violence the subject of the committal proceedings (even if the parties to the proceedings consent) unless the Magistrate is satisfied there are special reasons why the alleged victim should, in the interests of justice, attend to give oral evidence: s 84(1)
- to direct a vulnerable person whose evidence is referred to in the brief of evidence to give evidence orally unless:
  (a) the Magistrate is satisfied there are special reasons why the vulnerable person should, in the interests of justice, attend to give evidence, or
  (b) the prosecutor consents: s 84(1A)
- to direct the attendance of a sexual offence witness (even if the parties to the proceedings consent) unless the Magistrate is satisfied there are special reasons why the sexual offence witness should, in the interests of justice, attend to give evidence: s 84(1B).

Despite s 85(4) (see below), the Magistrate must not allow a person who is an alleged victim of an offence involving violence to be cross-examined in respect of matters that were not the basis of the reasons for giving the direction, unless satisfied there are special reasons why, in the interests of justice, the person should be cross-examined in respect of those matters: s 84(5).

The "offences involving violence" are set out in s 84(3). An indictable offence that may be dealt with summarily is not an "offence involving violence": s 84(4).

The requirement of "special reasons" in s 84(1) is a more stringent test than that of "substantial reasons": *Tez v Longley* [2004] NSWSC 74 (by reference to the predecessor provision in s 93(1)). See also *McNab v DPP (NSW)* (2021) 106 NSWLR 430 at [59], [97] (although the Court of Appeal in that case was considering those expressions in the context of s 19(1) *Crimes (Appeal and Review) Act* 2001). See further below.

The nature of "special reasons" in the interests of justice was considered in a number of decisions concerning the predecessor provision in s 93. Something more than a disadvantage to the accused from the loss of the opportunity to cross-examine the complainant at the committal must be shown. It would be necessary to show that there would be a real risk of an unfair trial should oral evidence not be permitted and that the prospect of prejudice or possible prejudice should be shown to be beyond the ordinary: *Murphy v DPP* [2006] NSWSC 965. In *Murphy*, Whealy J stated at [44]:

> Where, however, significant care must be taken is in the arena of allegedly inconsistent statements or versions from a complainant or a witness. I accept that where the victim has given more than one version of an alleged offence and those versions are materially inconsistent, this *may* warrant the alleged victim's attendance for cross-examination under the section. It will not follow automatically, however, that the section has been satisfied in such a circumstance … Where alleged inconsistencies result in a clear situation in which a defendant simply cannot know the case which he has to meet, the inconsistency may be elevated to a higher plane, such that the statutory hurdle may have been cleared.

In *McNab v DPP*, above, the court considered the distinction between using the phrase "special reasons", which applied when considering whether victims of offences of violence

should be called to give evidence on a conviction appeal, and "substantial reasons", for other witnesses (*Crimes (Appeal and Review) Act* 2001, s 19(1)). Basten and McCallum JJA (Bell P agreeing) concluded that the intention of using the expression "special reasons" was to provide additional protection to the relevant victim/s and that, for reasons to be "special", they should be exceptional and not apply generically to that category of witness and offence: at [59], [97].

Note: For other cases regarding "special reasons", see *Murphy v DPP* [2006] NSWSC 965; *DPP v O'Conner* [2006] NSWSC 458; *DPP v Rainibogi* [2003] NSWSC 274; *Lawler v DPP* (2002) 56 NSWLR 1; *O'Hare v DPP* [2000] NSWSC 430; *Faltas v McDermid* (unrep, 30/7/93, NSWSC) per Allen J; *Kennedy v DPP* (1997) 94 A Crim R 341; *B v Gould* (1993) 67 A Crim R 297; *Foley v Molan* (unrep, 20/8/93, NSWSC) per Levine J.

Vulnerable witnesses in Commonwealth committal proceedings

Section 15YHA of the *Crimes Act* 1914 (Cth) provides that "vulnerable witnesses" cannot be cross-examined at committal proceedings. This applies to a child witness in particular child proceedings (listed in s 15Y(1)), a vulnerable adult complainant in proceedings involving slavery or human trafficking offences (see s 15YAA and the offences listed in s 15Y(2)), or a special witness (see s 15YAB) for whom an order under s 15YAB(3) is currently in force: s 15YHA(2).

An adult is not a vulnerable adult complainant if they inform the court they do not wish to be treated as such: s 15YAA(2).

This provision applies to proceedings commenced on or after 20 July 2020.

Manner in which evidence to be given

Generally, the accused must be present when evidence is taken: s 87(1). However, a magistrate may excuse the accused from attending if they are legally represented: s 87(2).

Prosecution witnesses who are directed to attend must give evidence orally: s 85(1). However, s 86 permits evidence to be given by way of a written or recorded statement if:

(a) the accused and prosecutor consent, or

(b) the magistrate is satisfied there are substantial reasons why, in the interests of justice, the evidence should be given by a statement.

While witnesses may be examined and cross-examined, the magistrate must not allow a witness to be cross-examined about matters that were not the basis of the reasons for giving the direction unless satisfied there are substantial reasons why, in the interests of justice, the person should be examined about those matters: s 85(4).

[28-160] Committal for trial or sentence – Div 8, ss 95–98

Last reviewed: November 2023

The magistrate must commit the accused for trial or sentence after the case conference and charge certificates have been filed: ss 95(1), 97(3). However, a magistrate may commit an accused for sentence before a charge certificate is filed if the prosecutor consents, or if a charge certificate has been filed but no case conference has been held: s 95(2). Before committal, the magistrate must ascertain whether or not the accused pleads guilty to the offences being proceeded with: s 95(4). It is mandatory to make the inquiry: *Coles v DPP* [2022] NSWSC 960 at [26]; *Tuxford v DPP* [2023] NSWSC 1300 at [13]. A failure to do so has the potential to impact the sentencing discount subsequently available to an offender on sentence: *Coles v*

DPP, above, at [27]–[28]. Although the Local Court is a very busy forum, it is important a magistrate takes the time to know precisely what offences a defendant is pleading guilty and not guilty to: *Hijazi v DPP* [2022] NSWSC 1218 at [18].

A magistrate must commit an accused for trial unless they accept a guilty plea, in which case the accused must be committed for sentence to the District or Supreme Court: ss 96(1), 97(6). An accused can plead guilty at any time during the committal proceedings: s 97(1). A magistrate may accept or reject a guilty plea but if a guilty plea is rejected, the proceedings continue as if the accused had not pleaded guilty: s 97(2), (5).

Where there is a disagreement between the parties as to whether an accused should be committed for trial or sentence on the basis of a factual dispute, the court must determine whether the dispute relates to "essential facts" (the elements of an offence), which requires a trial, or "mere facts", where the dispute can be resolved on sentence: *Hamilton v DPP* [2020] NSWSC 1745. In *Hamilton v DPP*, the magistrate refused to commit the accused for sentence although he indicated an intention to plead guilty to a charge of detain for advantage contrary to s 86(1)(b) *Crimes Act* 1900 because there was a dispute as to the purpose of the detention. The magistrate accepted a prosecution submission that if the accused did not plead to the charge as certified then he had to be committed for trial. Justice Button held that in doing so the magistrate erred because, while obtaining an advantage was an element of the offence to be proved beyond reasonable doubt, the nature of the advantage was not an element or essential fact and therefore did not need to be proved: *Hamilton v DPP* at [65], [115]. The accused should have been committed for sentence.

In circumstances where an accused has been committed for sentence, a judge of the District or Supreme Court may order that the committal proceedings continue before a magistrate if it appears to the judge that the facts do not support the offence to which the accused pleaded guilty, the prosecution requests the order be made, or for any other reason the judge thinks fit to do so: s 101(1). The committal proceedings then continue as if the person had not pleaded guilty: s 101(2).

If the prosecution propose to proceed to trial on a principal count, a magistrate should not accept a guilty plea to any alternative count notwithstanding the implied discretion in s 97(2): *Black v R* (2022) 107 NSWLR 225 at [49]; see also Rothman J's observations in *Williams v R* [2022] NSWCCA 15 at [109]–[113] which are to similar effect.

Sample order — plea of guilty

I accept your plea and you are committed for sentence to the [*District/Supreme*] Court at [*Sydney/Sydney Western District etc*] on [*specify date*] or to a date to be fixed by the Criminal Listing Director or at such other court to be held at such other time and place as may be appointed.

Bail should be considered in the usual way.

The court should consider whether a pre-sentence report is required. Where this is indicated, the accused should be directed to report to the relevant Community Corrections Office within seven days and the necessary notations made on the court file.

An accused who is unrepresented must not be committed for trial or sentence unless the magistrate is satisfied the accused has had a reasonable opportunity to obtain legal representation for, or legal advice about, the committal proceedings: s 98.

Sample order — committal for trial — unrepresented accused

A brief of evidence has been served and a charge certificate has been filed. You are unrepresented. I confirm you have been given a reasonable opportunity to obtain legal advice but you remain unrepresented. [*use as appropriate either*: Witnesses have been called to give evidence. OR No witnesses have been called to give evidence.] I have already advised you that you are not required to participate in a case conference. Accordingly, the requirements of the Act having been met, I commit you for trial to the [*District/Supreme*] Court at [*Sydney/Sydney Western District etc*] on [*specify date*] or to a date to be fixed by the Criminal Listing Director or at such other court to be held at such other time and place as may be appointed.

My court officer will hand you a notice which provides information should you wish to make an application for Legal Aid. It also sets out the steps you need to take if you want to vary your bail conditions and sets out your obligations if you intend to rely on any alibi defence.

Sample order — committal for trial

A brief of evidence has been served and a charge certificate and a case conference certificate has been filed. [*use as appropriate either*: Witnesses have been called to give evidence. OR No witnesses have been called to give evidence.] Accordingly, the requirements of the Act having been met, I commit the accused for trial to the [*District/Supreme*] Court at [*Sydney/Sydney Western District etc*] on [*specify date*] or to a date to be fixed by the Criminal Listing Director or at such other court to be held at such other time and place as may be appointed.

My court officer will hand you a notice which provides information should you wish to make an application for Legal Aid. It also sets out the steps you need to take if you want to vary your bail conditions and sets out your obligations if you intend to rely on any alibi defence.

Sample order — committal for trial — when unfitness to be tried raised

The issue of fitness has been raised by [*nominate party who raised question of fitness*] and I am satisfied the issue has been raised in good faith. Accordingly, I commit the accused for trial to the [*District/Supreme*] Court at [*Sydney/Sydney Western District etc*] on [*specify date*] or to a date to be fixed by the Criminal Listing Director or at such other court to be held at such other time and place as may be appointed.

[28-180] Procedure when unfitness to be tried raised during committal proceedings — ss 93–94

Last reviewed: November 2023

Chapter 3, Pt 2, Div 7 deals with the procedures to be followed when an accused's fitness to be tried is raised.

The question of unfitness may be raised by either party, or by the magistrate, at any time during the committal proceedings. If satisfied the question has been raised in good faith, the magistrate may commit the accused for trial: s 93(1)–(2). Before doing so, the magistrate may require a psychiatric or other report be supplied by either party: s 93(3).

The accused can only be committed for trial under s 93 if the charge certificate has been filed: s 94.

If an accused is subsequently found to be fit to be tried, an order may be made, remitting the matter to a magistrate so a case conference can be held: s 52 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020.

The matter may also be remitted to a magistrate for the holding of a case conference if the court is satisfied that the question of the accused's unfitness is not going to be raised in the proceedings: s 52(4). Once the matter has been remitted, the proceedings are taken to be a continuation of the original committal proceedings: s 52(5).

[28-200] Costs — ss 116–120

Last reviewed: November 2023

If a an accused person is discharged, or the matter is withdrawn, or if committed for a different offence to that originally before the court, costs in favour of an accused person may be awarded: ss 116–117. See commentary *CPP* at [2-s 116] and following. Costs may also be awarded in favour of a defendant or the prosecutor on an adjournment if satisfied a party has incurred additional costs because of unreasonable conduct or delay by the other: s 118. See commentary *CPP* at [2-s 118.1] and following.

[28-220] Alibi defence

Last reviewed: November 2023

It is important for the magistrate to ensure that the appropriate form in relation to an alibi defence is served upon the accused person by the registrar of the court. Proof of such service may be important if the accused person seeks to raise an alibi defence at his or her trial, not having been given the necessary notice. If the conduct of the committal indicates that an alibi defence will be raised, it may be appropriate to give some further explanation as to the contents of the form and the obligations placed on the defendant.

If the defendant is committed for trial, the magistrate should consider the question of bail in the usual manner.

[28-240] District Court video link

Last reviewed: November 2023

The District Court has video conference facilities available to enable a video link between the court and various NSW correctional centres, including the Metropolitan Remand and Reception Centre at Silverwater. The links are designed to reduce unnecessary transportation of prisoners to and from court.

The Chief Judge requests that magistrates, upon a matter being committed for trial or sentence to the Sydney District Court, give represented accused persons in custody the option of appearing in person or by utilisation of the video link for the purpose of their first appearance in the District Court.

If an accused wishes to appear in person then the magistrate is to make normal orders for committal to the District Court with the result that they will be brought to the Downing Centre on the day of the first mention.

If the accused wishes to be heard by way of video link, then the magistrate is to make the normal orders for committal to the District Court, but is to note that the matter is to proceed by way of video link, further requesting that the person be in custody at Silverwater on the listed date.

Unrepresented prisoners are required to appear at the District Court on the first mention listing.

Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020

[30-000] Overview

The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020, which replaced the *Mental Health (Forensic Provisions) Act* 1990 (the 1990 Act), provides a mechanism for magistrates to deal with persons with mental health impairments or cognitive impairments otherwise than in accordance with law. All references to provisions in this chapter are to the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (the Act) unless otherwise stated.

Cases decided before the Act commenced, addressing those aspects of the 1990 Act which were unchanged, remain useful. The references in those cases to the old provisions have been updated to reflect the current legislation.

A table of the sections in the 1990 Act corresponding to those in the Act follows.

1990 Act	Corresponding provision/s in 2020 Act
s 31	s 8 Application of Part
s 32(1)	s 12 Defendants with mental health or cognitive impairments*, see also s 9 Order may be made at any time and s 15 Considerations*
s 32(2)	s 13 Adjournment of proceedings*, see also s 15 Considerations*
s 32(3)	s 14(1) Orders
s 32(3A), (3D)	s 16(1), (4) Non-compliance*
s 32(4)	s 14(2) Orders
s 32(4A), (4B)	s 11(1), (2) Reasons for decisions
s 32(6)	s 5 Cognitive impairment*
s 32A(1), (3)	s 17(1), (3) Reports from treatment providers*
s 33(1)	s 18(1), (2) Mentally ill or disordered persons* and s 19 Orders*, also see s 9 Order may be made at any time
s 33(1A), (1B)	s 20(1), (2) Community treatment orders
s 33(1D), (4B), (4C)	s 21(1), (3) Proceedings before authorised justice
s 33(2), (4)	s 23(1), (3) Dismissal of charges
s 33(4A)	s 11(1) Reasons for decisions
s 33(5)	s 26 Regulations*
s 33(5A), (5AB), (6)	s 22 Transfer of defendants by certain persons*
s 33(5B), (6)	s 24 Bail*
s 33(6)	s 7(1) Definitions*
s 35	s 25 Transfer from correctional/detention centre
s 36	s 10 Means by which magistrate informed

Note: Although many of the provisions in the 2020 Act are largely in the same terms, or to the same effect, as the corresponding provisions in the 1990 Act, those provisions marked with a * are either new or different in some material way.

Part 2 of the Act relating to summary proceedings applies to criminal proceedings commencing from 27 March 2021. Part 3 of the 1990 Act continues to apply to criminal proceedings which commenced before that date: s 8, Sch 2.

The provisions only apply to summary offences, or to indictable offences triable summarily: s 8(1). The provisions do not apply to committal proceedings: s 8(2).

Reasons must be given for any decision to make, or refuse to make, any order pursuant to Pt 2 of the Act: s 11. It is not mandatory to disqualify oneself from hearing a matter if a s 12 application is refused, but care must be exercised.

At those courts where the service is available, the clinical nurse consultant will provide a report to assist the court's determination of the matter. Frequently, if there is not a diagnosis of mental illness, the nurse may identify a cognitive impairment/intellectual disability.

Section 15 outlines the factors a magistrate may consider in determining a s 12 application (see below at **[30-060]**). The overview of the exercise of the court's discretion discussed in *DPP v El Mawas* (2006) 66 NSWLR 93, which concerned an application pursuant to s 32 of the 1990 Act, remains useful.

[30-020] To whom do the provisions relate?

Section 12 allows a magistrate to deal with a person under Div 2 if:

> [I]t appears to the magistrate that the defendant has (or had at the time of the alleged commission of the offence to which the proceedings relate) a mental health impairment or a cognitive impairment, or both.

However, s 12(3) provides that Div 2 does not apply if the defendant is a mentally ill person or a mentally disordered person. In such cases, s 18 (in Div 3) provides a mechanism for dealing with those defendants. A mentally ill person or a mentally disordered person is defined in the *Mental Health Act* 2007.

See also **Person suffering from a mental illness**, Commonwealth Offences chapter at **[18-140]**.

[30-040] Definitions — ss 4, 5 Mental Health and Cognitive Impairment Forensic Provisions Act 2020; ss 4(1), 14, 15 Mental Health Act 2007

Mental health impairment — defined in s 4 Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Under s 4(1), a person has a "mental health impairment" if:

(a) they have a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and

(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and

(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.

It may arise from an anxiety disorder, an affective disorder including clinical depression and bipolar disorder, a psychotic disorder, a substance-induced mental disorder that is not temporary, or other reasons: s 4(2). However, a person does not have a mental health impairment under the Act if it is caused solely by the temporary effect of ingesting a substance, or a substance-use disorder: s 4(3).

Cognitive impairment — defined in s 5 Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Under s 5(1), a person has a "cognitive impairment" if:

(a) they have an ongoing impairment in adaptive functioning, and

(b) they have an ongoing impairment in comprehension, reason, judgment, learning or memory, and

(c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from conditions identified in s 5(2).

Section 5(2) provides that a cognitive impairment may arise from any of the following conditions but may also arise for other reasons:

(a) intellectual disability

(b) borderline intellectual functioning

(c) dementia

(d) acquired brain injury

(e) drug or alcohol-related brain damage, including foetal alcohol spectrum disorder,

(f) autism spectrum disorder: s 5.

Mental illness — defined in s 4(1) Mental Health Act 2007

> A "mental illness" means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:
>
> (a) delusions,
>
> (b) hallucinations,
>
> (c) serious disorder of thought form,
>
> (d) a severe disturbance of mood,
>
> (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d).

Mentally ill persons — defined in s 14 Mental Health Act 2007

> (1) A person is a mentally ill person if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
>
> (a) for the person's own protection from serious harm, or
>
> (b) for the protection of others from serious harm.
>
> (2) In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration in the person's condition and the likely effects of any such deterioration, are to be taken into account.

When the definition of "mentally ill persons" was inserted in the *Mental Health Act* 1990 by the *Mental Health Legislation Amendment Act* 1997, the explanatory note for this section stated:

> A person may not be involuntarily detained under the Act unless the person is a mentally ill person or a mentally disordered person. The amendment inserts a new definition of *mentally ill person*

> that removes the existing requirement that a person suffering from a mental illness is such a person if the person requires care, treatment or control for the protection of the person or others from serious physical harm … The effect of this is to enable other kinds of harm, such as financial harm or harm to reputation, to be considered when determining whether a person can be detained as a mentally ill person. The new definition omits the existing provisions classifying persons suffering from certain mental illnesses characterised by severe disturbance of mood or sustained or repeated irrational behaviour as mentally ill if they require care, treatment or control for protection from serious financial harm or serious damage to reputation. The new definition also makes it clear that, in assessing whether a person is a mentally ill person, any likely deterioration in the person's condition and its effects is to be taken into account.

Mentally disordered persons — defined in s 15 Mental Health Act 2007

> A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary:
>
> (a) for the person's own protection from serious physical harm, or
>
> (b) for the protection of others from serious physical harm.

This category covers persons who are behaving irrationally and are a danger to themselves or to others.

[30-060] An inquiry under s 12

The question of the use of these provisions in dealing with a defendant is a discretionary one for the magistrate: see *Quinn v DPP* [2015] NSWCA 331 at [5]. In coming to a conclusion, the magistrate may inform themselves in any way they think fit, but a defendant is not required to incriminate themselves: s 10. The powers in s 10 must be exercised in accordance with the requirements of procedural fairness: *DPP v El Mawas* (2006) 66 NSWLR 93 at [74].

Section 15 lists the matters a magistrate may consider when deciding the appropriateness of dealing with a defendant in accordance with Div 2:

(a) the nature of the defendant's apparent mental health impairment or cognitive impairment;

(b) the nature, seriousness and circumstances of the alleged offence;

(c) the suitability of the sentencing options available if the defendant is found guilty of the offence;

(d) relevant changes in the circumstances of the defendant since the alleged commission of the offence;

(e) the defendant's criminal history;

(f) whether the defendant has previously been dealt with under the Act or s 32 of the 1990 Act;

(g) whether a treatment or support plan has been prepared, and the content of that plan;

(h) whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public;

(i) other relevant factors.

These factors, which inform the discretion of the magistrate, pull in different directions depending on the circumstances. The inclusion of "other relevant factors" in s 15(i) ensures a

broad discretion. Further, Spigelman CJ in *DPP v El Mawas* at [4] noted it "can be accurately described as conferring a 'very wide discretion'" (also see *Quinn v DPP* [2015] NSWCA 331 per Basten JA at [5]).

The rules of evidence do not apply: *Jones v Booth* [2019] NSWSC 1066 at [53].

A magistrate should have an outline of the facts, and to this end a copy of the alleged facts and record may be handed up.

If the application is made by the defendant they should be asked to tender the documents that they rely upon for the making of an application under the section. Usually these will be medical or psychiatric/psychological reports. It is, of course, open to the prosecution to seek to have the authors of such reports made available for cross-examination. Directions should be made requiring the service upon the prosecution of any medical evidence relied upon in the proceedings. It may be necessary to adjourn the proceedings to allow for this to happen: s 13.

The content of a psychologist's report may be considered when determining an application. It is wrong to proceed on the basis that only psychiatric reports may be received. The type of report which may be appropriate depends on the particular case: *Jones v Booth* at [57], [59].

Section 12(2) requires the magistrate to have regard to the matters placed before the court, and to consider if it would be more appropriate to deal with the defendant in accordance with the provisions of Div 2 than otherwise in accordance with law. *R v HW* [2017] NSWLC 25 at [69] states:

> It is recognised by appellate courts that the determination by a magistrate, whether to divert [a defendant] … requires a weighing of different interests, including the interest of an accused in receiving treatment and the public interest in those charged with criminal offences being dealt with according to law. Issues impacting on the magistrate's determination include the seriousness of the offence, issues of community safety, the limited duration of a section 32 order (6 months)*, the efficacy and specificity of a treatment plan, and issues of deterrence in sentencing (refer *DPP v El Mawas* (2006) 66 NSWLR 93; *Quinn v DPP* [2015] NSWCA 331; *DPP v Saunders* [2017] NSWSC 760).
>
> * An order under s 14 order may be made for up to 12 months: s 16(1).

The Act requires the inquiry to be a three-stage process:

- first, to decide whether, as a question of fact, the defendant comes within the definition pursuant to s 12
- second, to decide, as a matter of discretion whether to deal with the matter otherwise than according to law. In coming to a conclusion the magistrate will need to consider not only the material before the court, but must have regard to the public interest (see also s 15). Regard must be had to the public interest in the defendant having treatment mandated by the court, and the public interest in having the matter dealt with according to law
- third, once it has been determined that it is more appropriate to deal with the defendant in accordance with s 12, the magistrate must determine which of the actions set out in ss 13 and 14 should be taken.

Section 13(a) permits adjourning the proceedings to enable:

(i) an assessment/diagnosis of the defendant's apparent mental health or cognitive impairment,

(ii) development of a treatment/support plan,

(iii) a responsible person for an order to be identified, or

(iv) any other reason the magistrate considers appropriate.

Section 13(b) permits making other interim orders the magistrate considers appropriate.

Section 14(1) provides that the magistrate may dismiss the charge and discharge the defendant:

(a) into the care of a responsible person, unconditionally, or subject to conditions

(b) on the condition that the defendant attend on a person or at a specified place for assessment, treatment, or the provision of support for the defendant's mental health impairment or cognitive impairment [this will be generally to attend a community medical centre, or psychiatrist, or in the case of intellectual disability, a suitable support facility].

Note: Section 14(1)(b) requires the person or place nominated to be specified with some precision. Failing to name a particular person or particular place would render enforcement under s 16 virtually nugatory: *DPP v Saunders*, at [47], or

(c) unconditionally.

A magistrate must give reasons for making a decision: s 11; *Jones v Booth* at [56].

In many cases it will be appropriate for a magistrate to:

- express a brief finding as to whether the defendant falls within s 12(1), and if so, noting the nature of the impairment/s,
- indicate the balancing test in s 12(2) and the seriousness of the offence has been taken into account, and
- briefly discuss the proposed support/treatment and why it should be adopted or rejected.

Such findings can be expressed as sentences, rather than paragraphs or pages: *DPP v Soliman* [2013] NSWSC 346 at [61].

The magistrate would normally sign a formal order which might be in the following terms:

Order — s 14, persons suffering from mental health impairment or cognitive impairment

It appears to me:

(a) That the defendant has/had a mental health impairment or cognitive impairment.

(b) That, on an outline of the facts alleged in the proceedings or such other evidence as I consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of Pt 2 *Mental Health and Cognitive Impairment Forensic Provisions Act* than otherwise in accordance with law.

I make the following orders:

[*The orders should be set out fully and clearly.*]

[*These conditions should be contained clearly in a "treatment plan"/"support plan" which should form part of the psychiatrist's, psychologist's or support worker's report.*]

If the charge is dismissed, this does not constitute a finding that the charges are proven or otherwise: s 14(2). Where charges are dismissed subject to conditions, there is sanction if any of the conditions imposed are not complied with.

[30-080] Enforceability of s 14 conditional discharge orders

Section 16

If the court becomes aware that any conditions of a discharge are not being fulfilled, it may, within **12** months of the order being made, issue a call-up notice (or warrant if the defendant fails to appear or if their whereabouts are unknown) to bring the defendant back before it.

The following procedure is suggested when making a conditional discharge order to assist in enforcement procedure:

- ensure the service provider (community health centre, disability service or psychiatrist, etc) has provided a written report and is able to provide the service which will form the conditions of discharge
- any "responsible person" in whose care the defendant is placed is aware of the conditions and consents to the order
- the defendant has consented to the service provider notifying the court or Community Corrections in the event of a breach
- it is not appropriate to include a conditional discharge order that the defendant be of good behaviour or that he or she be supervised by Community Corrections. If any reference is to be made to Community Corrections the following wording is suggested:

Suggested order — s 14, conditional discharge orders

"Should the defendant fail to comply with any of the conditions of this order, he/she may be called to appear before the court, following notification by the treatment provider to the court or Community Corrections of non-compliance and the charge may be dealt with as if the defendant had not been discharged."

Breaches of s 14 conditional orders will be notified to the court by Community Corrections, which has negotiated a protocol with service providers, statewide. Notice of breach will be given to a magistrate who can then decide whether to action the matter pursuant to s 16(2) or (3).

[30-100] Breach proceedings

1. Breach proceedings can only be taken up to 12 months after a conditional discharge: s 16(1).
2. Committing further offences does not automatically result in a breach of a conditional discharge order. A breach must result from a failure of the defendant to comply with mental health or disability service support conditions.

[30-120] Orders under s 18 Mental Health and Cognitive Impairment Forensic Provisions Act 2020

Section 18 provides a mechanism for dealing with a defendant where "it appears to the Magistrate that the defendant is a mentally ill person or a mentally disordered person" within the meaning of the *Mental Health Act* 2007: see definitions of "mental illness" and "mentally disordered person" at **[30-040]**. Under the 1990 Act, the power did not extend to "mentally

disordered" persons. The word "appears" in s 18(1) is to be determined by the subjective state of mind of the magistrate: *State of NSW v Talovic* (2014) 87 NSWLR 512 at [133]–[135] — see interpretation of similar wording used in s 22 *Mental Health Act* 2007.

Section 19 provides that the magistrate may:

(a) order that the defendant be taken to, and detained in, a mental health facility for assessment, and/or

(b) order that the defendant be taken to, and detained in, a mental health facility for assessment and if the defendant is found on assessment not to be a mentally ill person or a mentally disordered person, the person be brought back before a magistrate or an authorised officer **as soon as practicable** unless granted bail by a police officer at that facility, and/or

(c) discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.

An order under s 19(c) could be made if the defendant is subject to a current community treatment order. Care should be taken when making an order under this provision: see further discussion at **[30-200]**.

The magistrate must state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under s 19: s 11.

Orders under s 19 must be made with the defendant present and not in chambers in the absence of the parties: *DPP v Wallman* at [30]–[31].

Section 21(1) provides an authorised justice (which has the same meaning as in the *Bail Act* 2013 and includes registrars) in the hearing of proceedings under the *Bail Act* may make orders in identical terms to those in (a) and (b), above, if it appears to the authorised justice that the defendant is a mentally ill person or a mentally disordered person. The authorised justice must state the reasons for making a decision as to whether or not a defendant should be dealt with under s 21(1): s 21(2). See further discussion concerning bail below at **[30-180]**.

If an order has already been made by an authorised officer under s 21(1) in bail proceedings, it is an error for a magistrate to make another order either under s 19(a) or (b): *DPP v Wallman* [2017] NSWSC 40 at [33].

"Mental health facility" in the Act (including in ss 19 and 21) has the same meaning as it has in s 4 of the *Mental Health Act*: s 3(2). The expression is defined as "a declared mental health facility or a private mental health facility".

An order by a magistrate or authorised justice may provide that a defendant be "taken to or from a place", in the case of a defendant under 18 years of age, by a juvenile justice officer, or in the case of any defendant, by a person of a kind prescribed by the regulations: s 22.

Clause 29 *Mental Health and Cognitive Impairment Forensic Provision Regulation* 2021 prescribes the persons who may "take a defendant to or from a place" for the purposes of s 22(1)(b). Specific people are prescribed where the defendant is on remand or serving a sentence of imprisonment. "Otherwise", a prescribed person includes a member of the NSW Health Service, a police officer, a correctional officer, a juvenile justice officer or a person who provides a transport service approved for that purpose by the Secretary.

It is essential that copies of the court attendance notices, police facts and any other material relied on in the proceedings such as medical reports that may assist the medical authorities at the mental health facility, accompany the defendant to the mental health facility.

It is usual for the magistrate to sign formal orders which might be in the following terms:

Order — s 19, mentally ill persons or mentally disordered persons

It appears to me that the defendant is a mentally ill person or mentally disordered person within the meaning of the *Mental Health Act* 2007.

I make the following order:

[*Here set out clearly and in detail the orders to be made under the section.*

Identify the specific sub-section in s 19 being utilised, the person (including any police officer) charged by the order with taking the person under cl 29 *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 and the mental health facility the person is to be taken to and from.]

Also see [*Psychiatric (Mental Health) Report Request Form*] issued by Justice Health and Forensic Mental Health Network.

Whether making an order under s 19(a) or (b), the person is to be taken to, and detained in a mental health facility for assessment. In either case, there is no certainty as to the outcome of the assessment: see *DPP v Wallman* at [37]–[39].

An order under s 19(a) or (b) (in appropriate cases) will effectively become a final diversionary order where the police indicate to the authorised medical officer under s 32(4) *Mental Health Act* that they will not apprehend the defendant: see discussion at [30-140]. In considering the 1990 Act, the NSWLRC report stated that the previous s 33(1)(a) could be used in this way for minor offences where the court takes the view that the best course is to have the defendant deal with their mental health issues: NSWLRC, *People with cognitive and mental health impairments in the criminal justice system – Diversion*, Report No 135, 2012 at [10.21]–[10.25] referred to in *State of NSW v Roberson* (2016) 338 ALR 166 at [45]. Section 23(1) provides that the charges are taken to be dismissed 6 months from the date of the s 19 order.

In other cases such as indictable offences dealt with summarily or repeat offenders, an order under s 19(a) or (b) (in appropriate cases) may not be a final order because the police choose to apprehend the detained person under s 32(4) *Mental Health Act* and take them to court and have the charges relisted: *DPP v Wallman* at [39]. See further explanation at **[30-140]**.

If an order is made under s 19(b), the outcome of the assessment will determine whether the proceedings continue at a later date. If, after an assessment, the defendant is found to be neither a mentally ill person nor a mentally disordered person, the police are required by the s 19(b) order to apprehend the defendant under s 32(5) *Mental Health Act* and to take the defendant back to court. Notwithstanding the terms of s 19(b), s 18(2) provides the selection of an order under s 19(a), (b) or (c), does not affect any other order the magistrate may make and the court may make any other order(s) as required by the case. The original court papers can be relisted for the defendant to be dealt with further.

[30-140] Detention and release following an order under s 19

Where a s 19 order has been made it is important to understand the interplay and direct connection between the *Mental Health Act* 2007 and the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (referred to in this section as the 2020 Act), including the critical role that the police play in determining the course of the proceedings.

Chapter 3 Pt 2 Div 2 *Mental Health Act* (ss 18–33) deals with the management of a defendant when they are detained in a mental health facility including orders made under Pt 2, Div 3 of the 2020 Act.

Sections 18(1)(e) and 24 *Mental Health Act* provide that a person may be "taken" to and "detained" in a declared mental health facility in accordance with an order made by a magistrate under Pt 2, Div 3 of the 2020 Act. Section 27(1)(a) *Mental Health Act* requires that the first assessment be conducted by an authorised medical officer as soon as practicable but within 12 hours and further assessments done thereafter under s 27(1)(b) and (c) if required. Reports are to be prepared in accordance with Form 1 Sch 1 *Mental Health Regulation* 2019.

From the time the s 19 order is made, until the conclusion of the assessment process, the person remains in continuous detention. Even after the assessment has concluded, if the person is admitted for treatment, their detention continues under the provisions of the *Mental Health Act*.

Where on the order of a magistrate under Pt 2, Div 3 of the 2020 Act a person has been detained in a mental health facility but following an assessment, is not required "to be detained or further detained", s 32 *Mental Health Act* takes effect: see s 32(1)(b). The circumstances or scenarios to which s 32 applies are as follows:

(i) The defendant has been taken to the mental health facility following an order under s 19(a) of the 2020 Act to be detained for an assessment. Following detention for assessment, it is decided the defendant is not a mentally ill person and does not require an admission for treatment.

(ii) The defendant has been taken to the mental health facility following an order under s 19(a) of the 2020 Act to be detained for the purpose of an assessment. Following detention for assessment, the defendant is then further detained as an involuntary patient for treatment and at the conclusion of that treatment is no longer required to be further detained.

(iii) The defendant has been taken to the mental health facility following an order under s 19(b) of the 2020 Act to be detained for the purpose of an assessment. Following the detention for assessment, the defendant is then found by the medical officer not to be a mentally ill or a mentally disordered person and, the defendant is to be brought back before a magistrate or authorised officer, unless the defendant is granted bail by a police officer at the facility.

(iv) The defendant has been taken to the mental health facility following an order under s 19(b) of the 2020 Act to be detained for the purpose of an assessment. Following the detention for assessment, the defendant is found to be a mentally ill or mentally disordered person, is further detained as an involuntary patient for treatment and at the conclusion of that treatment is no longer required to be further detained.

Scenarios (i) and (ii) both involve orders under s 19(a). An order under s 19(a) does not, of itself, terminate the Local Court's jurisdiction even if the defendant is dealt with further under the *Mental Health Act* — unless the detention continues for 6 months without the defendant being brought back to court: s 23(1) of the 2020 Act; *DPP v Wallman* [2017] NSWSC 40 at [39]–[41].

Under scenarios (i) and (ii) if a defendant the subject of an order under s 19(a) is found to be mentally disordered but is not, or ceases to be, mentally ill, they may not be held for more than 3 days: *DPP v Wallman* at [37] citing s 31 *Mental Health Act*. An authorised medical officer must examine a mentally disordered person detained in a mental health facility at least once

every 24 hours: s 31(3) *Mental Health Act*. If the person is found to be, or becomes, neither mentally disordered nor mentally ill, he or she must not be further detained: s 32(1)–(2) *Mental Health Act*; *DPP v Wallman* at [37].

Section 32(2) *Mental Health Act* mandates the release of the defendant by the authorised medical officer into the custody of the person who took the defendant — that is, police officer, juvenile justice officer, corrective services officer as the case may be (see definition in s 32(7) *Mental Health Act* of "relevant person") — who is present at the mental health facility in accordance with the order under Pt 2, Div 3 of the 2020 Act. This release into custody under s 32(2) is for the purpose of ascertaining "the results of any examination or examinations of the defendant". It appears to assume that the person who took the person to the mental health facility remains there during the assessment.

Section 32(3) *Mental Health Act* provides that if that person is not present when the authorised medical officer "becomes aware the defendant is no longer required to be detained, or further detained", the authorised medical officer must notify a police officer at the appropriate police station as soon as practicable that the defendant will not be further detained.

Section 32(4) *Mental Health Act* provides a framework of options or actions for the authorised medical officer (other than for scenario (iii) where s 32(5) applies) for orders made under Pt 2, Div 3 of the 2020 Act (in appropriate cases). Section 32(4) makes clear that the authorised medical officer is to consider any matter "communicated by a police officer as to the intended apprehension of the person by a police officer". It is at this point that the police may exercise a prosecutorial discretion not to apprehend the defendant and return the defendant to court. It is only "after" considering any matters communicated by police, may the authorised medical officer do any of the following under s 32(4):

- detain the person for a period not exceeding two hours pending apprehension by a police officer,
- admit the person as a voluntary patient,
- discharge the person into the care of the person's primary carer,
- discharge the person.

A police officer may apprehend a person under s 32 *Mental Health Act* without a warrant: s 32(6). If the police apprehend the defendant, cl 29 *Mental Health and Cognitive Impairment Forensic Provisions Regulation* 2021 empowers the police to take the defendant "from" the mental health facility back to court.

If after notification the police do not apprehend the person, the charge is deemed to be dismissed six months after the date of the s 19 order: s 23(1) of the 2020 Act.

In scenario (iii) where the order was made under s 19(b) of the 2020 Act, it is the duty of the police officer notified by the authorised medical officer to ensure that a police officer attends the mental health facility and apprehends the person as soon as practicable after the notification. In the meantime, s 32(5) *Mental Health Act* provides that the authorised medical officer must detain the person pending apprehension by the police.

If an order has been made under either s 19(a) or (b) of the 2020 Act, and the defendant is brought back before the court, s 23(2) provides that any period of time spent in the mental health facility as a consequence of the order must be taken into account when dealing with the charge.

As it is likely that any person returned to the court will be in custody, Pt 3 *Bail Act* 2013 relating to the making and variation of bail decisions applies.

[30-160] The prosecution and s 19 orders

The statutory scheme, as framed, envisages that the police will play an active role both in terms of taking the defendant "to and from" the court and in deciding *either* to apprehend the defendant and continue proceedings, or to utilise s 32(4) *Mental Health Act* as a diversionary option. It is well settled that the decision to prosecute or continue proceedings is not part of the Local Court's function: *Elias v The Queen* (2013) 248 CLR 483 at [34]. Unlike s 14 orders (see **[30-060]**), the decision to divert the defendant is made by the prosecution and not by the Local Court. The High Court has emphasised "the importance of maintaining the separation of the executive power in relation to prosecutorial decisions and the judicial power to hear and determine criminal proceedings": *Likiardopoulos v The Queen* (2012) 247 CLR 265, French CJ at [2].

It is self-evident that after a s 19(a) or (b) order has been made, it is incumbent on the police to liaise closely with the mental health facility. The practical and communication difficulties that sometimes occur between the mental health facility and the police are not an issue for the Local Court to resolve. The jurisdiction of the Local Court is only enlivened if the procedures and provisions, set out above, are followed and applied. It is important to also note that Parliament envisages that the police have a role to play during the detention period. Section 32(2) *Mental Health Act* provides that an authorised medical officer must release the person into the custody of any relevant person who is present at the mental health facility to ascertain the results of any examination or examinations of the person. The "relevant person" definition in s 32(7) *Mental Health Act* includes "any person (including a police officer) charged by the order with taking the person *from* the facility." [Emphasis added.]

[30-180] Section 19 and bail

Section 8 of the 2020 Act permits a magistrate to make an order under s 19 in proceedings under the *Bail Act* 2013.

Section 18(2) provides a magistrate may make an order under Pt 2, Div 3 of the Act without affecting any other order the magistrate may make, whether by way of adjournment or in relation to bail.

Section 12 *Bail Act* provides that bail remains until it is revoked or the substantive proceedings for the offence conclude and there are no further substantive proceedings for the offence pending before a court.

However, s 24(1) of the Act provides that an order made by either a magistrate or authorised justice under s 19(a) or (b) or s 21(1)(a) or (b) is, for the purposes of the *Bail Act*, taken to be a decision to dispense with bail for the offence.

When an order is made under s 19 of the Act, the charge which gave rise to the proceedings is "deemed" to be dismissed if the defendant is not returned to court within a period of six months from the making of the order: s 23. Therefore the orders under s 19 have the potential to be both interlocutory and final.

Once a defendant is found not to be mentally ill or mentally disordered, a police officer, of or above the rank of sergeant, has the power to grant the defendant bail at the particular facility: s 43(1B) *Bail Act*.

[30-200] Community treatment orders

A magistrate may under s 20(1) make a community treatment order (CTO) as an option when dealing with a matter under s 19(c).

A CTO must be in accordance with the *Mental Health Act* 2007 and all the necessary requirements under that Act must be met (save the holding of an inquiry) before such an order can be made: s 20(1) and (2). The *Mental Health Act* allows for the assessment to be delayed if the person is suffering from a condition or illness, other than a mental illness or condition, if the person is not fit to be the subject of the assessment. An example is where the defendant has occasioned significant injuries in the course of the commission of an offence or arrest that require immediate treatment (for instance, setting a broken limb under anaesthetic).

[30-220] Admission for purpose other than mental health assessment

There can be circumstances where a defendant is admitted to a mental health facility for treatment for a purpose other than following an assessment ordered by a magistrate.

Section 33 *Mental Health Act* 2007 allows for the assessment to be delayed if the person is suffering from a condition or illness, other than a mental illness or condition, if the person is not fit to be the subject of the assessment. An example is where the defendant has occasioned significant injuries in the course of the commission of an offence or arrest that require immediate treatment (for instance, setting a broken limb under anaesthetic).

In this circumstance, while the defendant may be admitted for treatment, it is not following an assessment as to his mental health. That assessment can be delayed. If the defendant is found not to be mentally ill or mentally disordered following the assessment as ordered by the magistrate, the defendant can be legitimately returned to court, notwithstanding the admission for treatment for the other illness or condition.

[30-240] Section 25 — orders for defendants who are in custody

Section 25 applies to defendants who are in custody pending a committal for trial or awaiting summary disposal of their case. Under s 25(2), if it appears to the magistrate that it may be appropriate to transfer the defendant to a mental health facility, an order may be made directing that the defendant be examined by two medical practitioners (including a psychiatrist) and, if appropriate, the relevant certificates be provided to the Secretary of the Ministry of Health under s 86 and that the magistrate be notified of the action, if any, taken under s 86.

In such circumstances, the reports prepared following any examination may form part of the material considered by the court when subsequently determining a treatment order.

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Civil Claims

see Judicial Commission of New South Wales, 2007
Civil Trials Bench Book

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Small Claims

[32-000] Introduction

The Small Claims Division in the Local Court is for civil matters up to $20,000: s 29(1)(b) *Local Court Act* 2007. The intent of the scheme is to provide for proceedings to be conducted with as little formality and technicality as the proper consideration of the matter permits: s 35(2) *Local Court Act*. The rules of evidence do not apply (s 35(3) and (5) *Local Court Act*), and there is a presumption against the cross-examination of witnesses: s 35(4) *Local Court Act*.

The overriding purpose of s 56 *Civil Procedure Act* 2005 applies and is to resolve the real issues in a just, quick and cheap manner.

[32-020] Pre-trial management

Once a defence is filed, the registrar lists the matter for pre-trial review (PTR): r 2.4 Local Court Rules 2009 and Local Court Practice Note Civ 1. Each party must be present or represented at the PTR by a person who has authority to negotiate a settlement of the proceedings. A matter can be registered for the Online Court, in which case the parties do not need to attend court in person. They must provide the PTR information through the Online Court.

At the PTR, the court (magistrate, assessor or registrar) must attempt to:

- identify the issues in dispute
- settle the matter
- propose the parties seek mediation at a community justice centre
- give directions in accordance with Local Court Practice Note Civ 1, including the production of witnesses statements
- give directions as to the cross-examination of witnesses only where there is a real issue as to credibility or a significant conflict in the evidence.

The court may refuse to list the matter for trial if it is satisfied that the parties have not made reasonable attempts to settle the matter.

Subpoenas may not be issued without leave of the court: r 7.3(3) Uniform Civil Procedure Rules 2005 (UCPR).

The standard case management order requires the parties to file and serve on the other parties statements and other written material intended to be relied upon at the hearing at least 14 days prior to the hearing.

A single expert direction is commonly made at the PTR where quantum is in issue in motor vehicle accident matters. There is a standard form "Single Expert Direction" as contained in Practice Note No SC Gen 10 of 17 August 2005.

There is a most helpful flow chart outlining the procedure in small claims in *Ritchie's Uniform Civil Procedure*, LexisNexis Butterworths, Australia, 2006 at [22,030.25].

[32-040] Motions

Unless the court orders otherwise, applications are to be made orally before the court, except for the following applications which are to be made by motion in accordance with Pt 18 UCPR (r 2.10 Local Court Rules 2009):

Motions to .

- transfer of proceedings to the General Division
- order for change of venue under Pt 8 UCPR
- order for the inspection of property: cf r 23.8 UCPR
- in relation to proceedings made after the court has given judgment in the proceedings (such as an application for a writ of execution), or
- set aside a judgment or order of the court: *Gorczynski v Holden* [2008] NSWSC 334.

Part 18 UCPR 2005 (Motions) is expressed not to apply in the Small Claims Division except in relation to the following applications (rr 1.5 and 1.6, and Sch 1, column 4, UCPR):

- inspection of property r 23.8
- general power to set aside judgment or order on sufficient cause if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith: r 36.15
- further power to set aside or vary judgment or order if notice of motion is filed before entry of the judgment or order, or after it has been entered in certain other circumstances: r 36.16, or
- dealing with interpleader motions: r 43.6

Unless the rules otherwise provide, or leave is granted by the court, interlocutory applications are to be made orally at the PTR: cl 21 PN Civ 1 of 2011.

[32-060] Compulsory settlement attempts

The court is not to give judgment or make a final order unless the magistrate or assessor has "used his or her best endeavours to bring, the parties to the proceedings to a settlement acceptable to the parties": s 36(1) *Local Court Act* 2007.

[32-080] Witnesses and hearings

Section 35(4) *Local Court Act* 2007 provides:

> Witnesses may not be cross-examined except in circumstances which, and to the extent to which, the cross-examination of witnesses is authorised by a practice note.

The magistrate or assessor would ordinarily read the statements, and hear submissions on that material from each party prior to making his or her judgment. In the absence of a direction at the PTR, cross-examination of witnesses would not take place.

In any proceedings, the magistrate or assessor may allow a person to appear or give evidence by telephone, audio-visual link or any other means of electronic communication if those facilities are available: r 2.8 Local Court Rules 2009.

The leading case on the principles to be applied in small claim's hearing matters is *Kojima Australia Pty Ltd v Australian Chinese Newspapers Pty Ltd* [2000] NSWSC 1153.

- The requirements of natural justice do not mandate an oral hearing in every case.
- Similarly, the requirements of natural justice may not confer on a party the right to cross-examine in a given case.
- "There may, however, be cases in which the denial of an oral hearing or of the right to cross-examine may constitute a denial of natural justice. In determining whether that is or is

not so in a given case, it is necessary to consider the whole of the circumstances including the legislation, the general practice as understood by the parties and any agreement as to the way in which the proceedings are to be conducted. It is for the relevant tribunal, in this case the Small Claims Division, to determine this in the light of its obligations to act fairly": *Kojima Australia Pty Ltd v Australian Chinese Newspapers Pty Ltd* at [32].

- It is a denial of natural justice to refuse a party the opportunity to address the court on the written material tendered: *Murray v Hay* [2000] NSWSC 190.
- There is no problem with the court reading the written material, hearing them speak to it, and then giving judgment later, if the parties agree to this course. In *Cohen v Blair* [2000] NSWSC 1076 Hidden J said at [6]:

> No doubt, it is a practical approach to cases of this kind and is consistent with the injunction in s 23B(1) of the *Local Courts (Civil Claims) Act* 1970 that proceedings in the Small Claims Division "be conducted with as little formality and technicality as the proper consideration of the matter permits".

[32-100] Transfer of proceedings

Proceedings may be transferred from the Small Claims to the General Division if:

- there is a cross-claim for greater than $20,000: r 2.2 Local Court Rules 2009
- the court is of the opinion, at any time before judgment, that the matters are so complex, difficult or of such importance that they ought to be transferred: r 2.3(1) Local Court Rules 2009.

Proceedings may be transferred from the General Division to the Small Claims Division, any time before judgment, if the court is of the opinion that:

- any complex, difficult or important issues have been resolved, in whole or in part, or
- it is appropriate to do so: r 2.3(1A) Local Court Rules 2009.

An application to transfer must be made by a party at least 28 days prior to the hearing date: r 2.3(3) Local Court Rules 2009.

The mere fact that there is an allegation of criminality in a case does not render it unsuitable for the Small Claims Division: *Wende v Finney t/as CBD Law* [2005] NSWSC 927.

A matter may also be transferred from the General Division back to the Small Claims Division at the discretion of the court: r 2.3(2) Local Court Rules 2009.

[32-120] Costs and expenses

Except as provided by the rules, the court sitting in its Small Claims Division has no power to award costs: s 37 *Local Court Act* 2007.

The court may only make orders for costs in the following circumstances [Local Court Rules 2009 r 2.9(2)]:

(a) if proceedings are discontinued or dismissed, or a defence is struck out, at a PTR or at a hearing,

(b) if proceedings are adjourned as a consequence of a party's default or neglect, including a party's failure to comply with a direction of the court,

(c) if proceedings on a motion are heard by the court,

(d) if judgment is given after a trial of proceedings.

Where circumstances fall within r 2.9(2)(a)–(c), costs are limited to the amount allowable (plus GST) on entry of default judgment for a liquidated claim: Local Court Rules, r 2.9(3)(a), *Legal Profession Uniform Law Application Regulation* 2015, Sch 1, Pt 3, Nos 2 and 4:

Amount at issue in the proceedings	Maximum costs (excl GST)
does not exceed $1,000	$364.80
$1000–$5000	$547.20
$5,000–$20,000	$729.60

If judgment is given after a trial of proceedings (r 2.9(2)(d)), costs are limited to the amount of costs that would be allowable (plus GST) on entry of default judgment for an unliquidated claim in the proceedings: Local Court Rules, r 2.9(3)(b), *Legal Profession Uniform Law Application Regulation* 2015, Sch 1, Pt 3, Nos 3 and 4:

Amount at issue in the proceedings	Maximum costs (excl GST)
does not exceed $1,000	$629.60
$1000–$5000	$944.40
$5,000–$20,000	$1,259.20

However, where judgment is given after a trial of proceedings (r 2.9(2)(d)), the maximum that may be awarded is increased by 25% if the court considers:

(a) the party made a genuine offer to compromise on the claim that was not accepted by the other party, and

(b) it was unreasonable for the other party not to have accepted the offer: r 2.9(3A).

Costs include fees, disbursements, expenses and remuneration: r 2.9(1). The court may also allow costs for the following under r 2.9(4):

(a) matters for which costs are fixed by a fixed costs legislative provision within the meaning of the *Legal Profession Uniform Law (NSW)*,

(b) court and service fees,

(c) fees for expert opinion reports (limited to a maximum of $350 for each report),

(d) search fees,

(e) costs in relation to, or arising out of, the issue of a subpoena.

For further information about scales of professional costs, see *Ritchie's Uniform Civil Procedure NSW*, LexisNexis at [29,010].

[32-140] Appeals

An appeal from a judgment or order in a small claims matter lies to the District Court, but only on the grounds of a lack of jurisdiction or denial of natural justice: s 39(2) *Local Court Act* 2007.

A denial of natural justice includes failure to give sufficient reasons for judgment, and also making a finding of fact where there is no evidence to support such a finding, but does not include an error of law: see *Stojanovski v Parevski* [2004] NSWSC 1144.

[32-160] Further references

See also S Olischlager, "Guide to managing small claims hearings", Local Court Webinar, 3 May 2023 on JIRS Program Materials.

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Proceedings under the National Consumer Credit Protection Act 2009

[34-000] Introduction

Commencing on 1 April 2010, the *National Consumer Credit Protection Act* 2009 (Cth) (the Act) introduced a National Credit Code (the Code) (contained in Sch 1 to the Act) that replaced the previous state-based Uniform Consumer Credit Code (the former Code).

Under the former Code, in New South Wales, the Consumer, Trader and Tenancy Tribunal (CTTT) had exclusive jurisdiction in respect of certain prescribed sections and shared jurisdiction with the courts in respect of all other parts.

Upon the referral of the area of consumer credit by the States and Territories to the Commonwealth and the introduction of the new Act and Code, some changes have occurred. Although the new Code largely replicates the former Code, consumer credit matters are now regulated solely by the Australian Securities and Investments Commission (ASIC) and matters previously determined by tribunals such as the CTTT must now be heard in court.

[34-020] Jurisdiction

Section 187 of the Act confers a civil jurisdiction on the Local Court in relation to matters arising under the Act, including the National Credit Code. In general terms, the Code applies to the provision of credit for a charge to a natural person or strata corporation, to be used wholly or predominantly for personal, domestic or household purposes or in relation to investment in residential property, by a credit provider carrying on business in Australia: see s 5 of the Code.

The conferral of jurisdiction in s 187 is subject to the court's "general jurisdictional limits, including limits as to locality and subject matter".

Section 199 sets out a range of proceedings that are to be dealt with as small claims proceedings if the plaintiff elects for the small claims procedure to apply. In view of the limitation in s 187, the Small Claims Division's jurisdictional limit of $20,000 applies to such proceedings (s 29 *Local Court Act* 2007), notwithstanding s 199 providing generally for the availability of small claims procedure in matters where the maximum monetary value of the credit contract (as opposed to the amount outstanding under the credit contract) is $40,000.

The apparent effect of s 199 is to entitle a plaintiff to elect for the small claims procedure set out in the Act to be applied, including General Division matters where the quantum is between $20,000 and $40,000. This includes provision that:

- the court is not bound by any rules of evidence and procedure: s 199(5)
- leave of the court is required for a party to be represented by a lawyer: s 199(7). In granting leave, the court may impose conditions designed to ensure that no other party is unfairly disadvantaged: s 199(8).
- costs may only be ordered against a party where the court is satisfied that the party brought the proceedings vexatiously or without reasonable cause, or that an unreasonable act or omission of the party caused the other party to incur the costs: s 200(2).

[34-040] Proceedings in relation to credit contracts under the former Code

Transitional provisions make arrangements for the Code to apply to certain contracts, made before 1 July 2010 to which the former Code applied. Section 3 Sch 1 *National Consumer Credit Protection (Transitional and Consequential Provisions) Act* 2009 provides that the Code applies if the contract is a "carried over instrument", that is, an instrument:

- that was made before 1 July 2010 and in force immediately before that date, and
- to which the former Code applied immediately before 1 July 2010. In general terms, the former Code applied in similar circumstances to the new Code, namely where:
  - the debtor is a natural person ordinarily resident or strata corporation formed in NSW
  - the credit is or is intended to be provided wholly or predominantly for personal, domestic or household purposes
  - a charge is or may be made for providing the credit, and
  - the credit provider provides the credit in the course of a business of providing credit, or as part of or incidentally to any other business of the credit provider.

[34-060] Proceedings in the Local Court

A wide range of matters arising under the Code can be dealt with in the Local Court.

The most frequently encountered matters are those in which a credit provider seeks an order to enter residential premises and repossess mortgaged goods (usually a motor vehicle) under s 100 of the Code. The section simply provides:

> The court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, authorise the credit provider to enter residential premises for the purpose of taking possession of mortgaged goods.

The proceedings are brought against the debtor under the credit contract and/or another person who has possession of the mortgaged goods.

Often, the credit provider will also seek an order for delivery up of the mortgaged goods under s 101(1) of the Code, which provides that:

> The court may, on the application of a credit provider that is entitled to take possession of mortgaged goods, order a person who has possession of the goods to deliver them to the credit provider at a specified time or place or within a specified period.

The following paragraphs focus on proceedings where an order under s 100 of the Code is sought.

A plaintiff cannot elect to have the small claims procedure apply to proceedings for an order under s 100 of the Code where the quantum is between $10,000 and $40,000: see s 199 of the Act for the proceedings to which the small claims procedure may apply.

[34-080] Identification of the defendant

In some instances the plaintiff may seek to subpoena the records of a third party such as the Roads and Maritime Services in an attempt to locate the debtor or person with possession of the mortgaged goods.

Subject to the requirements of the relevant rule being met, the appropriate procedure for ascertaining the whereabouts of a prospective defendant is preliminary discovery under r 5.2

Uniform Civil Procedure Rules 2005 (UCPR). An application for preliminary discovery is made by summons and must be supported by an affidavit that addresses the facts relied upon and specifies the kinds of information or documents sought.

An applicant may seek preliminary discovery in respect of the details of multiple prospective defendants in the one application and need not make separate applications for each: see, for example *RTA (NSW) v Care Park Pty Ltd* [2012] NSWCA 35 at [22].

[34-100] Commencement of proceedings

Proceedings should be commenced by summons in accordance with r 6.4(h) UCPR, which provides for this type of originating process where an application is made under any Act other than the *Civil Procedure Act* 2005.

The summons should be accompanied by a supporting affidavit, to which a copy of the contract is annexed, that addresses matters arising under the Code including the following:

- *Whether the contract is a "credit contract" to which the Code applies*: see ss 4 and 5(1) of the Code. If the contract was made prior to 1 July 2010, the affidavit should address whether it is a "carried over instrument": see **[34-040]**.
- *The goods to which the proceedings relate*.
- *The amount owing under the credit contract*. Section 91(1) of the Code provides that a credit provider is not, without the court's consent, able to repossess mortgaged goods where the amount owing is less than 25 per cent of the amount of credit provided under the contract or $10,000, whichever is less.

  The section also provides for certain exceptions. For example, s 91(1) of the Code does not apply where the credit provider believes on reasonable grounds that the debtor has removed or disposed of the mortgaged goods, or intends to do so, without the credit provider's permission. If an exception is relied upon, it should be addressed.
- *The address in respect of which the entry order is sought*. Section 100 of the Code specifies that the address is to be a "residential address".
- *Steps taken prior to the commencement of proceedings*. This may include a request to an occupier for entry to premises to take possession of mortgaged goods under s 99 of the Code. See cl 87 of the regulations as to the requirements for the proper making of a request.
- *A jurisdictional link that allows the proceedings to be brought in New South Wales*. Regulation 36(3) of the *National Consumer Credit Protection Regulations* 2010 provides generally that a court proceeding relating to a credit contract under the Code must be brought in a court of the State or Territory where the debtor ordinarily resides. Regulation 36(8) provides for an exception where the contract is not a standard form contract (within the meaning of s 12BK *Australian Securities and Investments Commission Act* 2001 (Cth)) and provides for a court proceeding in relation to the contract to be brought in a particular State or Territory.

It is not uncommon for proceedings to incorrectly be brought as application proceedings under s 45 *Local Court Act* 2007. There is no procedure for the transfer of application proceedings to the civil jurisdiction and in such instances the application proceedings should be dismissed for lack of jurisdiction.

Ascertain whether the person who commenced the proceedings is entitled to commence and carry on those proceedings on behalf of the credit provider. It may be necessary to make

orders as to the future conduct of the proceedings if the person is not so entitled. Commercial agents cannot commence and carry on proceedings on behalf of a credit provider for an order under s 100 of the Code. See *Civil Trials Bench Book*, **Local Court** at [**1-0890**] and **By whom proceedings may be commenced and carried on** at [**2-5410**].

[34-120] Service of summons

Before determining the proceedings, ascertain that the defendant has been served with the summons.

A credit provider may seek to argue that it is not required to serve the summons and supporting affidavit upon the defendant, with reliance placed on s 194 of the Code. As a matter of procedural fairness and having regard to the Code and the Act, as well as the UCPR, this argument should not be accepted.

Section 194(2) of the Code provides that a credit provider is relieved of an obligation to give a notice or other document to a person if a reasonable but unsuccessful attempt has previously been made. The provision is a general one that applies "to notices or other documents that are required to be given for the purposes of this Code" but makes no reference to court proceedings.

It is doubtful that the section is intended to extend to regulation of the service of originating process or other court documents at the expense of the local provisions applying in each court exercising jurisdiction under the Act, because the Code is silent on matters relating to court practice and procedure.

By contrast, the Act does expressly regulate court process in some areas, such as in the specification that certain matters can be dealt with as small claims proceedings in s 199.

In the absence of any specific instruction for other aspects of court practice and procedure such as service of originating process, it can be inferred that the local provisions apply.

Accordingly, service should be effected in accordance with r 10.20(2)(b) UCPR relating to service of originating process in the Local Court. The option of seeking an order for substituted service pursuant to r 10.14 is available to a credit provider in the event that it cannot practicably effect service on the defendant in the manner directed by r 10.20(2)(b) UCPR.

[34-140] Enforcement expenses and costs

A credit provider may seek to recover its reasonable enforcement expenses under s 107 of the Code. Enforcement expenses of a credit provider extend to those reasonably incurred by the use of the staff and facilities of the credit provider.

A credit provider may also seek an order for costs under s 98 *Civil Procedure Act*. Part F of the Local Court Practice Note Civ 1 applies to the awarding of costs in the General Division, and includes guideline amounts for various tasks or steps in the proceedings.

In matters where an election is made to have the small claims procedure under the Act apply, note the limitation on the circumstances in which the court may make a costs order against a party: see [34-020].

Proceedings under the Confiscation of Proceeds of Crime Act 1989

[36-000] Introduction

Last reviewed: May 2023

In broad terms, the *Confiscation of Proceeds of Crime Act* 1989 (the Act) empowers a court, upon the conviction of a defendant, to make orders for the confiscation of property derived from or used to commit a "serious offence" within the meaning of the Act: see [36-020]. It also includes interim mechanisms for the preservation of property to prevent it from being disposed of prior to the making of a confiscation order.

Thus, the principal objects of the Act set out in s 3 relevantly include:

- to deprive persons of the proceeds of, and benefits derived from, the commission of offences against certain laws of the State, and
- to provide for the forfeiture of property used in or in connection with the commission of such offences.

All proceeds confiscated under the Act are directed into the Victims Support Fund: s 15 *Victims Rights and Support Act* 2013.

For the purpose of this chapter, aspects of the legislation are described in general terms. For further detail, reference should be made to the Act.

[36-020] Definitions

Last reviewed: May 2023

The following definitions should be noted:

Appropriate officer

Section 4(1) defines the "appropriate officer" who is able to bring various applications under the Act, including:

- in all matters before the Local Court (other than a function under Pt 3, Div 2 concerning restraining orders) — the Director of Public Prosecutions, the Chief Commissioner of the Law Enforcement Conduct Commission or the Commissioner of Police.
- in relation to restraining orders or freezing notices — the Commissioner for the Independent Commission Against Corruption.

Rule 7.32(1) Uniform Civil Procedure Rules further provides that an appropriate officer may commence and carry on proceedings in the Local Court under the Act by a police prosecutor.

Conviction of a serious offence

Section 5 provides that a person is taken to have been convicted of a serious offence for the purposes of the Act if they have:

(a) been convicted, whether summarily or on indictment, by the court

(b) been dealt with by the court in relation to the offence under s 10 *Crimes (Sentencing Procedure) Act* 1999

(c) had the offence taken into account on a Form 1 under s 32 *Crimes (Sentencing Procedure) Act* 1999 when being sentenced for a principal offence

(d) been charged with the offence and has absconded before determination of the charge: see further, s 16 in relation to matters of which the court must be satisfied before making a confiscation order in these circumstances.

Serious offences

Section 7 provides that a "serious offence" is:

- any offence under NSW law that may be prosecuted on indictment. Accordingly, this includes Table offences prosecuted in the Local Court
- offences in relation to the supply of restricted substances under ss 16 and 18A *Poisons and Therapeutic Goods Act* 1966
- any other offence prescribed by the regulations. *Confiscation of Proceeds of Crime Regulation* 2021 cl 14 presently prescribes:
  - certain offences in relation to unclassified films or computer games under the *Classification (Publications, Films and Computer Games) Enforcement Act* 1995
  - publishing an indecent article under s 578C *Crimes Act* 1900.

Tainted property

There are several limbs to the definition of "tainted property" under s 4. The phrase includes property that was:

- used in or in connection with the commission of a serious offence. An example in relation to drug offences is a vehicle used to transport drugs to the point of sale
- substantially derived or realised, whether directly or indirectly, by any person:
  - from property used in or in connection with the commission of a serious offence. This may include the monetary proceeds from the sale of an item such as a vehicle used in the commission of an offence, and extends to another item purchased with that money
  - as a result of the commission of a serious offence. This may include property taken in the commission of an offence, the proceeds from the sale of such property, and other items purchased with the proceeds of sale
- substantially derived or realised, whether directly or indirectly, by any person for the depiction of a serious offence or the expression of the offender's thoughts, opinions or emotions regarding the offence in any public promotion. Examples include paid interviews that the offender gives to a news media organisation, or royalties from the sale of a book by the offender about the offence.

For examples from case law regarding "tainted property": see [36-100].

Property used in connection with the commission of an offence

The words "in connection with" have been described as being ordinary words of wide import in respect of which precise definition is undesirable. In a given case, the question of whether property is used in connection with the commission of an offence will be a matter of fact and degree: see *R v Sultana* (1994) 74 A Crim R 27; *Taylor v AG (SA)* (1991) 53 A Crim R 166.

As an overarching principle, the mere fact that the property in question is the location where the offence was committed will not ordinarily be sufficient to result in it being tainted property.

There must be some activity connected with the crime that has involved the utilisation of the property with the aim of committing or furthering the commission of the crime: *DPP (NSW) v King* (2000) 49 NSWLR 727 at 734 per O'Keefe J.

Thus, where the property is more than just the place where the offence is committed but is also an operating tool in the commission of the offence it will likely be tainted property: see for example, *R v Hadad* (1989) 16 NSWLR 476.

In *NSW Crime Commission v Pettit* [2021] NSWSC 980, Ierace J held at [86], in the context of "serious crime use property" in s 9B(2) of the *Criminal Assets Recovery Act* 1990, in the absence of a judicial discretion to avoid an assets forfeiture order that would be disproportionate to the offence, a narrow interpretation of the phrase "used … in connection with" is appropriate, and it obliges the court to be satisfied there is a substantial connection between the property the subject of the forfeiture order and the offence: at [86]. Justice Ierace also discussed previous judicial consideration of the meaning of the phrase at [38]–[63].

[36-040] An overview of applications under the Act

Last reviewed: May 2023

Subject to the limits on jurisdiction outlined below, the following applications under the Act may arise in the Local Court:

Freezing notices — Div 1A, Pt 3

A freezing notice may be sought as an interim measure prior to the making of a confiscation order where a defendant either has been or is to be charged with a serious offence, or upon the defendant's conviction. It has the effect of directing, that specified property must not be disposed of or dealt with pending determination of an application to the court for confirmation of the notice, and is to be held in the custody of a specified person such as the Commissioner of Police. Contravention of a freezing notice is an offence under s 42O.

Initially, upon application by an authorised officer (such as a police officer), an authorised justice may issue a freezing notice in the circumstances set out in s 42C. In making the application, the authorised officer must, in broad terms, have reasonable grounds for believing the defendant has committed a serious offence (if the defendant is yet to be convicted) and that the specified property is tainted property: s 42B. The application may be made in relation to property that is in the possession of the defendant, or within the effective control of the defendant despite being in the possession of another person: s 42B(1); also see s 10.

Upon application under ss 42I or 42K, the court is to review a freezing notice issued by an authorised justice, and may confirm or set aside the notice: s 42L(1). When confirming a freezing notice, the court must also make a property management order under s 42M that, in the usual course, directs the Commissioner of Police to take control of the property (if it is not already under the Commissioner's control), dispose of it, and retain any proceeds until they become payable to another person or the State under the Act.

Proceedings for the review of freezing notices are discussed at **[36-060]**.

Confiscation orders — Pt 2

The following types of confiscation order are available under the Act:

Forfeiture order An application for a forfeiture order can be made when the defendant is convicted of a serious offence: s 18. The order has the effect that specified property is forfeited

to and vests in the State (subject to any charge, encumbrance or registered interest to which the property was subject at the time): s 19. The State may take possession of the property if it has not already done so, and may dispose of or otherwise deal with it subject to certain limitations in s 19.

Pecuniary penalty order An application for a pecuniary penalty order can be made when the defendant is convicted of a serious offence other than a drug trafficking offence (see below). Such an order requires the defendant to pay a pecuniary penalty to the State in the amount assessed by the court as being the value of the benefits derived by the person from the commission of the offence: s 24.

Drug proceeds order An application for a drug proceeds order may be made when the defendant is convicted of a drug trafficking offence: s 29. The court is required to determine whether the defendant has derived a benefit in connection with drug trafficking, and if so assess the value of the benefit and order the defendant to pay the State a pecuniary penalty in that amount. Currently, the only offence within the definition of "drug trafficking offence" in s 4 that may be prosecuted in the Local Court is possession of precursors for the manufacture or production of prohibited drugs under s 24A *Drug Misuse and Trafficking Act* 1985.

Proceedings in relation to applications for confiscation orders are discussed at **[36-080]**.

Local Court jurisdiction

The Local Court has jurisdiction:

In respect of confiscation orders To determine applications for confiscation orders where it is the court before which the defendant was convicted. It follows that the court cannot make a confiscation order in instances where the offence to which the order relates is the subject of committal proceedings.

In respect of applications re freezing notices To determine applications in relation to freezing notices if proceedings, including committal proceedings, for the offence on which the notice is based are held before it.

See the definition of "appropriate court" in s 4.

Although the Act operates alongside criminal proceedings insofar as it is concerned with property that is the proceeds of, or used in the commission of, serious offences, proceedings under the Act are civil in nature.

Jurisdictional limits

Section 87 provides that applications to the Local Court are to be dealt with by the court sitting in its General Division (s 87(6)) as follows:

Confiscation orders When making a confiscation order following the conviction of a person, the court is not able to make an order unless satisfied that the value of property (as determined by the court) or amount payable under the order does not exceed its general civil jurisdictional limit (currently $100,000): s 87(2), (3), (3A). The court is not able to make a forfeiture order in relation to land: s 87(4).

Applications in relation to freezing notices The jurisdictional limitations in relation to the value and nature of property that may be dealt with when making a confiscation order do not apply to the confirmation of a freezing notice: see s 87(6).

Form of applications

Rule 7.32(2) Uniform Civil Procedure Rules provides for applications under the Act to be made:

By summons Where proceedings under the Act are first commenced, or

By notice of motion For subsequent applications where proceedings under the Act have previously been commenced; for instance, when seeking a confiscation order following the confirmation of a freezing notice.

[36-060] Freezing notices

Last reviewed: May 2023

Applications in relation to freezing notices

The court will be required to review a freezing notice issued by an authorised justice in the following circumstances:

Upon an application to confirm a freezing notice Such an application must be made to the court by an authorised officer within 14 days of the notice being issued by an authorised justice: s 42I(1). Notice of the application must be given to the defendant and any owner of the property or other person affected by the notice, and any person who is given notice is entitled to appear and adduce evidence at the hearing of the application:s 42I(3), (4).

The application will typically be listed with the proceedings for the serious offence to which the notice relates. Section 42I(2) requires the application to be set down for hearing on the first date for the proceedings for the offence that occurs after the application is made, or as soon as practicable after the application is made.

Accordingly, in matters where the application is listed prior to the disposition of the proceedings for the offence, the application need not be adjourned to await the outcome of those proceedings. If the freezing notice is confirmed but the court considers it is not appropriate to make an order for the disposal of the property at the time, a range of alternative orders for the management of the property concerned are available under s 42M: see **Property management orders,** below.

If the application is not opposed by the defendant (or where applicable another interested party) and subject to an affidavit of an authorised officer being available, the court may determine the application on the first listing date where it can be satisfied of the matters set out in s 42L: see **Determination of the application**, below.

Upon an application to set aside/vary freezing notice Such an application may be made by a defendant, authorised officer or other person claiming an interest in the property at any time before the confirmation of a freezing notice: s 42K(1).

This application may be heard before the day set down for hearing of any application to confirm the freezing notice, and must be dealt with by the court whether or not an application for confirmation is made within the 14-day period available under s 42I.

Determination of the application

Under s 42L(2) and (3), before confirming a freezing notice, the court must be satisfied that:

- The application is supported by an affidavit of an authorised officer that sets out the officer's reasonable belief, and grounds for believing:
  - that the defendant has committed the serious offence concerned (including where relevant details of any conviction)
  - in relation to the property concerned, that:
    - the property is tainted property in relation to the offence
    - the property is the defendant's proceeds of drug trafficking, or
    - the defendant has derived benefits (defined in s 4 to include services and advantages) from the commission of the offence. An example is where the commission of the

offence has resulted in the defendant's existing property increasing in value. If the property belongs to a person other than the defendant, it must be shown that the property is subject to the effective control of the defendant, within the meaning of s 10.

- There are reasonable grounds to believe the matters set out in the affidavit. This may be on the basis of the contents of the affidavit or other evidence given in the proceedings.
- Proceedings have been commenced against the defendant for, or the defendant has been convicted of, a serious offence. Although the initial freezing notice may be issued prior to the defendant being charged with a serious offence, upon the issue of the notice, a charge must be laid within 48 hours or the notice will cease to be in force: see ss 42C(1)(a), 42P(a).
- The property concerned is not affected by a restraining order or application for a restraining order under the Act or the *Criminal Assets Recovery Act* 1990. A restraining order under either piece of legislation has substantially the same effect as a freezing notice and may be obtained on application to the Supreme Court, ordinarily on an ex parte basis.
- It is appropriate in the circumstances to confirm the freezing notice.

Further issues that may be relevant to the determination of an application to confirm a freezing notice include:

Existence of a rebuttable presumption of tainted property in some instances Section 42L(6) provides for a presumption that property is tainted property in circumstances where evidence is given at the hearing that it was found in the possession of the defendant at or immediately after the commission of the offence.

If no evidence to the contrary is given, the subsection provides that the court must presume the property was used in, or in connection with, the commission of the offence.

If evidence to the contrary is given, the freezing notice must not be confirmed unless the court is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence.

Provision of undertakings as to costs or damages on behalf of the State The court may in its discretion refuse to confirm a freezing notice unless appropriate undertakings are provided on behalf of the State by an appropriate officer in relation to the payment of costs or damages that may arise from the making or operation of the notice. Ordinarily, a signed undertaking will be provided to the court at the hearing of the application. See s 42N.

Upon determination of the application:

If the freezing notice is confirmed The court must make a property management order in relation to the property concerned, which is taken to be part of the freezing notice: s 42L(5).

If the freezing notice is set aside The defendant or another person entitled to the property concerned may apply to the Attorney General for its return under s 42S.

Property management orders

A number of different orders are available to the court when making a property management order upon the confirmation of a freezing notice.

Section 42M(1) provides for the making of a standard property management order by which the Commissioner of Police is directed to:

- take control of the property concerned (if it is not already under the Commissioner's control) and dispose of it in the manner specified in the order, and
- retain any proceeds until they become payable to another person or the State under the Act.

There may be matters where an alternative arrangement is appropriate; for instance, that the property be taken and held by another person but not disposed of, or remain frozen but in the possession of the defendant or another person. Accordingly, s 42M(2) goes on to set out the following alternative orders that the court may make if appropriate to do so:

- that the defendant or another person not dispose of or otherwise deal with the property specified in the order, except to the extent and in the circumstances that may be set out in the order
- that the NSW Trustee and Guardian or Commissioner of Police retain or take control of the property. Section 42M(4)(b) provides for additional orders that may be made in this circumstance
- that the property be returned to the defendant or another person
- that the defendant or another person be allowed to access the property specified in the order.

Considerations when making a property management order

Section 42M(3) sets out the matters the court is to consider when determining what property management order should be made:

(a) if the defendant is in custody — whether they are likely to be granted bail

(b) any hardship reasonably likely to be caused to the defendant or a third party

(c) if the defendant is an Aboriginal person or a Torres Strait Islander, when considering hardship — the responsibilities arising from the defendant's ties to extended family and kinship

(d) the nature of the property and whether it is unique in nature

(e) the case against the defendant

(f) the expenses relating to storage and maintenance of the property

(g) the use that is ordinarily made or had been intended to be made of the property.

Content of a property management order

In making any of the above orders, the court:

- must, in the case of any order directing the sale of the property concerned, require it to be sold for not less than its value at the time of sale (s 42M(5))
- may include directions in relation to a particular part of the property concerned (s 42M(1), (2))
- may include provision for the defendant's reasonable living expenses, business expenses, or reasonable expenses in defending a criminal charge (s 42M(4)(a))

  There is no maximum limit set for the amount of legal expenses. The Act provides only that they must be reasonable, without further guidance or measure as to reasonableness. A defendant must establish on the balance of probabilities that they:

  (i) will incur legal expenses in connection with defending the criminal charge, and

  (ii) are not able to meet their reasonable expenses without resort to the tainted property. This will ordinarily require evidence of their other assets and whether legal aid is available. For consideration of "reasonable legal expenses" in case law: see [36-100].

- may make other ancillary or consequential orders it thinks appropriate in the circumstances (s 42M(4)(c)).

Power to make further orders

Under s 42V, a court that confirms a freezing notice or is dealing with proceedings for the serious offence to which the notice relates may, at any time, make any orders ancillary to the freezing notice that it considers appropriate. Without limitation, this includes an order:

- to set aside the freezing notice in respect of all or part of the property to which it relates (s 42V(2)(c))
- to vary the terms of the freezing notice such as the property to which it relates and any conditions of the notice (s 42V(2)(a))
- relating to the carrying out of an undertaking given by the State in connection with the confirmation of the freezing notice in regard to the payment of costs or damages (s 42V(2)(b)).

Pursuant to s 42V(3), such an order may be made upon application of an appropriate officer, the owner of the property, a person directed to take control of the property under the freezing notice, or any other person in respect of whom the court grants leave.

Duration of orders

If the court proceeds to make a confiscation order following the defendant's conviction of a serious offence in circumstances where a freezing notice is already in place, it may set aside or make any other order concerning the operation of the freezing notice that it considers appropriate: s 42Q(1).

A freezing notice otherwise remains in force until such time as it ceases upon one of the events listed in s 42P. In cases following the confirmation of the notice and making of a property management order by the court, this may be where:

- the charge for the serious offence is withdrawn, and the defendant is not charged with a related offence by the time of the withdrawal (s 42P(c))
- the defendant is acquitted of the charge or the charge is dismissed, and the defendant is not charged with a related offence by the time of the withdrawal (s 42P(d))
- upon the conviction of the defendant, the court refuses to make a forfeiture order in relation to the property the subject of the freezing notice, and any appeal against the refusal is finalised or the appeal period expires without an appeal being made (s 42P(e))
- at any time the court makes an order setting aside the freezing notice in relation to the whole of the property to which it relates (s 42P(f)).

Section 42S provides that when a freezing notice ceases to be in force, the defendant or other person lawfully entitled to the property may apply to the Attorney General for its return. If the property has already been sold pursuant to a property maintenance order, the defendant or other person is entitled to be paid an amount equal to the value of the property together with interest calculated from the date of disposal of the property.

Sample order

I confirm the freezing notice issued on [*date*] in respect of [*property*]. I make a property management order in the following terms [*select applicable*]:

- Standard order

  I direct the Commissioner of Police to [*select applicable*] take/retain control of the property and dispose of it by [*manner of disposal, eg, sale at public auction*] for no less than its value at the date of sale.

The Commissioner is to retain the proceeds of the sale of the property, together with any interest, until they become payable to a person or the State under the *Confiscation of Proceeds of Crime Act* 1989.

[*If applicable*] From the proceeds of sale of the property, the defendant is to be provided with the amount of [*specify*] for the purpose of his/her [*select applicable*] reasonable living expenses/reasonable business expenses/reasonable expenses in defending a criminal charge.

- Retention of property by third party

  I direct [*select applicable*] the NSW Trustee and Guardian/Commissioner of Police to [*select applicable*] take/retain control of the property but not dispose of or otherwise deal with the property until further order of the court authorising such disposal or dealing.

  [*If applicable, specify any further directions, eg*] The property is to be held in a secure garage/storage facility in such a manner that maintains it in its current condition.

- Return of property to defendant/other person

  I direct that the property be returned to [*specify*] the defendant/[*other person*].

  [*If applicable*] The property is not to be disposed of or dealt with by the defendant or any other person until further order of the court authorising such disposal or dealing, [*if applicable*] except in the following circumstances: [*specify*].

[36-080] Confiscation orders

Last reviewed: June 2023

Procedural aspects

When an application may be made

Under s 13, upon a person's conviction for a serious offence, an appropriate officer may apply to the court for:

- a forfeiture order, and/or
- a pecuniary penalty order, in the case of a serious offence other than a drug trafficking offence, or
- a drug proceeds order, in the case of a drug trafficking offence.

Section 13(3) provides that unless leave is obtained from the Supreme Court, an application for a confiscation order must be made within the "relevant period", defined in s 4 as 6 months after the day on which:

(a) the offender was sentenced for the serious offence, or

(b) an order was made in relation to the offence under s 10 of the *Crimes (Sentencing Procedure) Act* 1999, or

(c) the court took the offence into account under Pt 3, Div 3 of the *Crimes (Sentencing Procedure) Act* 1999, or

(d) the person is taken to have absconded under s 6.

Notice of application and standing

Notice of an application for a confiscation order against the property of a person convicted of a serious offence must be given by the appropriate officer to the person: s 14(1)(a).

Where a forfeiture order is sought, s 14(1)(a) also requires written notice to be given to any other person the appropriate officer has reason to believe may have an interest in the property.

A person to whom notice is given is entitled to appear and adduce evidence at the hearing of the application: s 14(1)(b).

Amendment of application

Section 15(1) empowers the court to amend an application for a confiscation order at any time prior to determining the application either upon the request or with the approval of the appropriate officer.

However, if the amendment would have the effect of including additional property or benefits, it must not be made unless the court is satisfied that:

- the property or benefit was not reasonably capable of identification at the time the original application was made, or
- necessary evidence became available only after the application was made: s 15(2).

Further notice requirements apply: see ss 15(3), (5). At a hearing to amend an application, a person who claims an interest in the relevant property may appear and adduce evidence: s 15(4).

Forfeiture order

Under s 18(1), upon application following the conviction of a person for a serious offence, the court may make an order that specified property is forfeited to the State if it:

- is satisfied the property is tainted property
- in the case of property that is the proceeds of the depiction of the offence in a public promotion (see (d) in the definition of tainted property in s 4(1)) — is satisfied it is appropriate to treat the property as being derived or realised by the defendant because of the commission of the offence

  Section 18(1A) provides that in considering this, the court may have regard to any matter it thinks fit, including:
  - whether or not such treatment of the property it is in the public interest
  - whether the depiction of the offence has any general social or educational value
  - the nature and purposes of the public promotion, including its use for research, educational or rehabilitative purposes.
- has taken into consideration, having regard to the material before the court:
  - the use ordinarily made or intended to have been made of the property
  - any hardship to the defendant or any other person that is reasonably likely to arise following the making of the order. In considering hardship, the court:
    - is not to take into account any hardship to the defendant arising from the sentence imposed in respect of the offence: s 18(2)
    - must take into account hardship reasonably likely to arise in the case of an Aboriginal or Torres Strait Islander defendant arising from their ties to extended family and kinship: s 18(2A).

Consideration of "hardship" in case law

Much of the case law on the issue of hardship has arisen in circumstances where consideration has been given to whether property that has been used in or in connection with the commission of the offence should be subject to forfeiture. It has been noted that:

- A purpose of the Act is to cause a measure of hardship in the deprivation of property; thus, consideration of hardship requires something more than "ordinary hardship in the operation of the Act": *R v Lake* (1989) 44 A Crim R 63.
- Hardship should be assessed in proportion to the offence in question: see *R v Bolger* (1989) 16 NSWLR 115 at 126–127. Ultimately, regard should be had to whether a forfeiture order would be severely disproportionate to the circumstances of the offence and the nature and degree of offending. If there is some disproportion, this of itself is not necessarily a reason to refuse an order in view of the intended deterrent purpose of the legislation: see *Taylor v AG (SA)* (1991) 53 A Crim R 166 at 179.
- There is an "infinite variety of circumstances" that may affect the exercise of the discretion whether or not to order forfeiture, but in broad terms relevant considerations may include:
  - the circumstances of the offence
  - the extent to which the property was connected with the commission of the offence
  - the seriousness of the offending
  - the value of the property in relation to the offence
  - the likely consequences of an order on the defendant and others who may be affected by it

    See *Taylor v AG (SA)* (1991) 53 A Crim R 166 at 178.

In *Zahrooni v R* [2010] NSWCCA 252, the NSW Court of Criminal Appeal at [60] stated:

- The primary purpose of the Act is to make crime unrewarding and unproductive.
- In accordance with the decisions in *Lake* and *Bolger*, this has the consequence that when considering the forfeiture of property that is used in or in connection with the commission of crime rather than being the proceeds of crime, a proper exercise of the discretion in s 18 of the Act requires consideration of the extent to which the property concerned was used in or in connection with the commission of the offence and the question of proportionality. Also see *NSW Crime Commission v Pettit* [2021] NSWSC 980 at [86] which considers the phrase "used… in connection with" in the context of "serious crime use property" in s 9B(2) of the *Criminal Assets Recovery Act* 1990.
- If the use of the property in connection with the commission of the offence is incidental, this will be a relevant consideration.

See further **[36-100]**.

Rebuttable presumption

A rebuttable presumption that property is tainted applies in instances where there is evidence before the court that the property was in the possession of the person at or immediately after the commission of the offence: s 18(4). If no evidence to the contrary is given, the court must presume the property was used in, or in connection with, the commission of the offence: s 18(4)(a). If evidence to the contrary is given, an order must not be made unless the court is satisfied, on the balance of probabilities, that the property was used in, or in connection with, the commission of the offence: s 18(4)(b).

Content of orders

Further matters to be addressed where relevant include:

Property other than money Where a forfeiture order is made in relation to property other than money, the court must specify an amount in the order that it considers to be the present value of the property: s 18(3).

Third party interests A forfeiture order may be made where a third party has an interest in the property. If making an order in such circumstances, the court should specify the extent of the estate, interest or rights in the property that are affected by the order as contemplated by s 18(5)

As the property only vests in the State to the extent specified in the order under s 19(1)(a), the third party may accordingly be compensated to the extent of their interest in the event the property is then sold or disposed of.

In some instances, including in the event a third party without notice of an application for a forfeiture order subsequently becomes aware of the order, the third party may apply to the court for a declaration as to the nature, extent and value of their interest in the property and an order for the transfer of the property to them or the payment of an amount equal to the value of their interest. See s 20 in relation to the circumstances in which an application may be made and the considerations of the court in determining whether to make such an order.

Leave to dispose of property early

When a forfeiture order is made, unless the court grants leave, the State is not permitted to dispose or otherwise deal with the property until such time as the period for appealing the order or conviction for the serious offence lapses, or any appeal is finally determined or lapses (whichever is later): s 19(3).

The prosecutor will ordinarily seek leave to dispose of the property before the expiration of this period, particularly in instances where it is argued that the value of property such as a vehicle is likely to depreciate.

Sample order

I order that property of the respondent, being [*specify*], is forfeited to the State [*if applicable*] to the extent of the respondent's estate/interest/rights in such property, namely [*specify nature and extent*].

[*For property other than money*] I consider the current value of the property to be [*specify amount*].

[*Select, if applicable*] I grant/refuse leave for the property to be disposed of or otherwise dealt with by or on behalf of the State before the "relevant time" within the meaning of s 19(4) *Confiscation of Proceeds of Crime Act* 1989.

Forfeiture of relevant property if person convicted of serious offence

Last reviewed: May 2023

Section 17B(1) provides a person's relevant property is forfeited to the Crown:

(a) at the end of the relevant period, or

(b) if an application for an exclusion order is made, on the day it is dismissed including any appeal, or

(c) if an application to vary or set aside a restraining order or confirmed freezing notice is made, on the day it is dismissed including any appeal.

"Relevant period" is defined in s 4 and is set out above. "Relevant property" is defined in s 17A.

Exclusion orders

A person may, during the relevant period, apply to the relevant court for an order excluding some or all of the relevant property from forfeiture under Pt 2, Div 1A in respect of forfeiture if convicted of a serious offence: s 17D(1). The person must give written notice to the relevant authority of the application and the grounds on which it is made, and the relevant authority may appear and adduce evidence at the hearing of the application: s 17D(2), (3).

On hearing the application, the court may direct the relevant property be returned to the applicant if satisfied, on the balance of probabilities, that the applicant's interest in the property is not tainted property or, if the relevant property relates to a restraining order under s 43A, not unlawfully acquired property: s 17D(4)(a). Otherwise, it may dismiss the application: s 17D(4)(b).

The court must not make an order under s 17D, if the property the subject of an application has been forfeited under Pt 2, Div 1A: s 17D(5). The court may declare relevant property has been so forfeited under s 17F.

Recovery of forfeited property

Section 17G provides a person may apply to the relevant court for an order to recover their interest in the relevant property within 6 months after it has been forfeited under Pt 2, Div 1A. The person must apply for leave if a forfeiture notice was given, or reasonable steps were taken do so: s 17G(3). The court may grant leave if satisfied:

(a) the person had a reasonable excuse for failing to make an exclusion order application during the relevant period, or

(b) if the person made an exclusion order application and appeared at the hearing of it, they have new evidence not available during the hearing, or

(c) there are special grounds for granting leave: s 17G(4).

The person must give written notice to the relevant authority of the application and the grounds on which it is made, and the relevant authority may appear and adduce evidence at the hearing of the application: s 17G(2), (5).

Under s 17G(6), on hearing the application, the court must:

(a) (i) if the interest has been sold or otherwise disposed of, order that the Crown pay the applicant the value of their former interest in the property as determined by the court on the day of the determination, or

(ii) otherwise — order that ownership of the property vests in the applicant and the interest in the property be returned to them, or

(b) otherwise — dismiss the application.

The court must not make an order under s 17G(6)(a) unless satisfied, on the balance of probabilities:

(a) the applicant was not involved in the commission of the serious offence in relation to which the relevant property was forfeited,

(b) if the applicant acquired the interest at the time of or after the commission of the offence, they acquired it:

  (i) for sufficient consideration, and

  (ii) without knowing, and in circumstances that would not arouse a reasonable suspicion that, at the time of acquisition, the property was unlawfully acquired (for property that relates to a restraining order made under s 43A), or otherwise, tainted: s 17G(7).

Pecuniary penalty order

Under s 24(1), upon application following the conviction of a person for a serious offence other than a drug trafficking offence, the court may assess the value of benefits derived by the person from the commission of the offence and order the person to pay an equivalent pecuniary penalty to the State. The order may apply to property in the possession or control of the person, as well as benefits provided for a person, either within or outside New South Wales: s 25(6).

Assessing the value of benefits

When assessing the value of the benefits, s 25(2) provides for the court to have regard to the information before it concerning:

- The money or value of other property or other benefit that came into the possession or control of the defendant or another person at the defendant's request or direction due to the commission of the offence: s 25(2)(a), (a1), (b)
- In relation to drug offences, the market value of similar substances at the time of the offence and the amount or range of amounts ordinarily paid for the doing of an act (such as supplying): s 25(2)(c)
- The value of the defendant's property before and after the commission of the offence, or where the defendant has been convicted of more than one offence, at the time before, during and after the period of the offences: s 25(2)(d)
- The defendant's income and expenditure before and after the commission of the offence, or where the defendant has been convicted of more than one offence, at the time before, during and after the period of the offences: s 25(2)(e)

In arriving at a valuation of the benefits, the court:

- is not to deduct any expenses or outgoings incurred by the defendant in the commission of the offence(s) when calculating the value of the benefits derived by the defendant: s 25(5)
- is to reduce, where applicable, the pecuniary penalty to be paid by an amount equivalent to the value of any property in respect of which a forfeiture order is to be made: s 24(2)
- may treat any property that is subject to the effective control of the defendant (within the meaning of s 10) as property of the defendant for the purpose of assessing the value of benefits derived by the defendant from the commission of the offence: see further, s 27.

Benefits from the depiction of the offence in a public promotion

When considering whether to treat a benefit provided for the depiction of an offence in a public promotion as a benefit derived by the defendant due to the commission of the offence, the court:

- may have regard to any matter it thinks fit, including:
  - whether or not such treatment of the property it is in the public interest
  - whether the depiction of the offence has any general social or educational value
  - the nature and purposes of the public promotion, including its use for research, educational or rehabilitative purposes: s 25(2A)
- may treat the value of the benefit derived by the defendant due to the commission of the offence as being a proportion of the total value of the benefit derived from the promotion as seems just and equitable in the circumstances, where satisfied that part but not all of the public promotion relates to the depiction of the offence: s 25(2B).

Rebuttable presumption

A rebuttable presumption applies where evidence is given that the value of the defendant's property after the commission of the offence or at the end of the period of offences exceeds the value of the property beforehand. The court is to treat the value of benefits derived by the defendant due to the commission of the offence as being not less than the excess, unless the defendant satisfies the court that all or part of the excess was due to causes unrelated to the commission of the offence(s): see s 25(3), (4).

Drug offences

Section 25(7) provides for a member of the Police Force or Australian Federal Police or a Customs officer who is experienced in the investigation of indictable offences to give evidence of the market value of a prohibited drug or plant, or the range of amounts payable for a performing an act in relation to a prohibited drug or plant, at a particular time or period. The subsection is expressed as applying despite any rules of law or practice in relation to hearsay evidence.

Sample order

I assess the value of the benefits derived by the respondent due to his/her commission of a serious offence to be [*specify amount*].

I order the respondent to pay a pecuniary penalty of an equal amount to the State, [*if applicable*] reduced by the amount of [*specify amount*] to take account of the value of property that is the proceeds of the offence and [*select applicable*]:

- has been forfeited to the State under this Act, or
- has been forfeited to another State or Territory under a law of the Commonwealth, or
- in respect of which a forfeiture order is proposed to be made.

Drug proceeds order

Under s 29(1), upon application following the conviction of a person for a drug trafficking offence, the court is to determine whether a defendant has derived benefits at any time in connection with drug trafficking (within the meaning of s 4), and if so, assess the value of those benefits and order the person to pay an equivalent pecuniary penalty to the State.

The process for making a drug proceeds order and the matters for consideration in assessing the value of any benefits are substantially similar to those that apply in relation to pecuniary penalty orders: see further, ss 29, 30. Differences include:

When assessing the value of benefits derived by the defendant The court may consider the value of the defendant's property, income and expenditure that appears to have been held since the defendant's conviction, or to have been transferred to the defendant at any time within a period of 6 years prior to the date when proceedings against the defendant were commenced: s 30(1)(f), (g).

Provision for statements relating to drug trafficking Section 31 provides for the prosecution to tender a statement to the court that sets out any matters relevant to determining whether the defendant has derived benefits from drug trafficking or the assessment of the amount of those benefits.

Where the statement has been served on the defendant, the court can require the defendant to indicate the extent to which he or she accepts each allegation contained in the statement: s 31(2).

If the defendant accepts an allegation to any extent, it is to be treated as conclusive of the matter to which it relates: s 31(1)(b).

If the defendant does not indicate the extent to which he or she accepts an allegation, it may be treated as an acceptance of the allegation (except where the allegation in question is that the defendant has benefited or has derived a benefit from drug trafficking carried on by the defendant or another person): s 31(3).

Sample order

I assess the value of the benefits derived by the respondent in connection with drug trafficking to be [*specify amount*].

I order the respondent to pay a pecuniary penalty to the State of [*specify*], being an amount equal to the value of the benefits derived by the respondent in connection with drug trafficking, [*if applicable*] reduced by the amount of [*set out amount*] to take account of the value of property that is the proceeds of drug trafficking and [*select applicable*]:

- has been forfeited to the State under this Act, or
- has been forfeited to another State or Territory under a law of the Commonwealth, or
- in respect of which a forfeiture order is proposed to be made.

Drug trafficker declarations

The DPP or a police prosecutor may apply to an appropriate court for a drug trafficker declaration against a person convicted of a serious drug offence (as defined in s 5(2) of the *Drug Supply Prohibition Order Pilot Scheme Act* 2020: s 34(6)) during the sentencing proceedings for the serious drug offence or at another time: s 34(1), (2). The court must make a drug trafficker declaration if the person has been convicted of:

- at least 3 serious drug offences in the previous 10 years, or
- a serious drug offence involving a commercial quantity of a prohibited drug or plant (as defined in the *Drug Misuse and Trafficking Act* 1985: s 34(6)), or
- a serious drug offence and the court is satisfied the person is or was a member of a criminal group (as defined in Pt 3A, Div 5 *Crimes Act* 1900: s 34(6)): s 34(3).

A drug trafficker declaration expires after five years: s 34(5).

Forfeiture orders

An appropriate officer may apply for a forfeiture order in relation to property belonging to, or in the effective control of, a person against whom a drug trafficker declaration is made: s 34A(1). Such an application must be made within 12 months of the making of the declaration: s 34A(2).

The court must make the forfeiture order unless satisfied the person's property was lawfully acquired, the onus of which is on them: s 34A(3), (4), (7), (8).

Once an application has been determined, no further application may be made in respect of the same drug trafficker declaration, except with the leave of the Supreme Court: s 34A(5).

Sections 14–17 and 19–22 apply to a s 34A forfeiture order in the same way they apply to a s 18 forfeiture order.

[36-100] Relevant case law

Last reviewed: May 2023

Tainted property

See table of relevant case law on tainted property at www.judcom.nsw.gov.au/publications/benchbks/local/confiscation_proceeds_crimes_act.html#p36-100.

Reasonable legal expenses

Relevant considerations

In *NSW Crime Commission v Younan* (1993) 31 NSWLR 44, in considering the discretion to provide for reasonable legal expenses when making of a restraining order under what is now the *Criminal Assets Recovery Act* 1990, the court set out four factors that need to be considered:

1. the strength of the prosecution case
2. the size of the fund of the property involved
3. the probable amount of the legal expense, and
4. the effect of any exemption upon the achievement of the purposes of the Act.

In *R v Weightman* (unrep, 23/06/04, NSWSC), Studdert J added a fifth factor:

5. the source of the funds.

The defendant in *Weightman* was charged with murder of his parents. The property he inherited under their will was the subject of a restraining order, from which the defendant sought provision for his reasonable legal expenses in defending the murder charges. In refusing the defendant's application, Studdert J noted comments in Younan that:

> the notion that a thief … might use the actual funds taken from another for the payment of the lawyers of either of both of them so that, at the end of the proceedings there would be no real prospect of recovery by the owner is self evidently objectionable. It would have the effect of defeating the purpose of legislation such as the Act.

The outcome in *Weightman* can be contrasted with *DPP v Brown* [2005] NSWSC 870, where the funds the subject of a freezing notice were profits from a media interview rather than being the alleged proceeds of crime. The defendant, a security officer, was charged with murder after shooting a man who had attempted to rob her. Prior to being interviewed and charged by the police, a news and current affairs program paid the defendant for an interview in which she gave her version of events.

Evidence was given that the defendant would not likely be entitled to legal aid and would therefore need to fund her defence. As the application for access to the funds was made prior to the committal hearing, it was difficult to assess the strength of the case. In apparently reluctantly allowing the defendant access to the funds for the purpose of her defence, Howie J stated at [20], [25], [28]:

> The general policy behind the Act is that persons should not be able to profit from their criminal behaviour either directly or indirectly. That policy applies with considerable force to the money obtained by, or promised to, the applicant by selling her story to the media. To engage in that activity while at the same time avoiding assisting the police with their investigations was morally reprehensible.
>
> …
>
> The difficulty in the present application is that, had the restrained funds not been available, the applicant would be in the position faced by most person who find themselves in the predicament of defending a prosecution for a serious criminal offence without funds to engage counsel let alone experienced senior and junior counsel. She may not have been entitled to legal aid because of the constraints imposed in relation to committal proceedings. Yet … having regard to the seriousness of the allegation, the state of the evidence and the need to cross-examine two vitally important witnesses, it would not be inappropriate for the applicant to be represented by those who seek to act for her.
>
> …
>
> I was initially of a mind to refuse the application so strong is the policy inherent in the legislation against persons, such as the appellant, selling their version of events to the media and the deterrence aspect of depriving such persons of the benefit obtained from allegedly criminal activity … Had the charge been less serious, had the committal proceedings not involved the cross-examination of witnesses, and had I been in a better position to assess the strength of the prosecution case, I would have found … the balance to be in favour of refusing the application notwithstanding that it might have had the effect of depriving the applicant of legal representation, or at least her preferred legal representation. However, for the reasons above, I ultimately formed the view that the public interest was that some of the funds be released to the applicant for her defence of the charge of murder at committal proceedings.

Tension between objects of the Act and right to legal representation

It is evident from the case law that there is a conflict between the objects of legislation that has the effect of preventing a person from dealing with an asset, and a person's right to legal representation, particularly the best legal representation they can afford.

In *NSW Crime Commission v Fleming* (1991) 24 NSWLR 116, Kirby P observed in relation to restraining orders at 136 [References omitted]:

> 3. Given the objects of the Act… it is scarcely likely that Parliament would have intended that a person, securing provision for "reasonable legal expenses", should have a complete free hand in that regard to the extent that the person expends funds upon legal expenses, the property of that person is diminished … It would be especially surprising, given the objects of the Act, to adopt a construction of its provision which would permit an accused person unrestricted use of property which is clearly the proceeds of drug-related activity to engage a team of expensive private lawyers paid at the full market rates of the private Bar …
>
> 4. On the other hand, the Act is not written on a blank page. It was enacted against a background of settled civil rights. These include the presumption of innocence in criminal proceedings; the presumption that a person may use his or her property as that person decides, and specifically may use that property to defend serious legal proceedings. It is not only in the interests of the individual that such property should be used for the last-mentioned purpose. It

is also in the interests of society in at least three respects. It helps to ensure both the reality and appearance of a fair trial of issues seriously in contest (as cases involving drugs often are). It may assist in the provision of considered legal advice which may result, in proper cases, in a plea of guilty to serious criminal charges which may save significant court time and public cost. And it may ensure that a person is not thrown upon public legal assistance in resisting serious actions of the State which threaten that person's property, livelihood, reputation and even liberty. It is clearly undesirable, in at least most cases, that people without knowledge of legal procedure should be forced to defend their interests without legal assistance. This is why it is repeatedly stressed that there is a public as well as an individual interest in the competent legal representation of persons before the courts.

Hardship

See table of relevant case law on hardship at www.judcom.nsw.gov.au/publications/benchbks/local/confiscation_proceeds_crimes_act.html#p36-100.

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Children's Court

Criminal jurisdiction

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Children (Criminal Proceedings) Act* 1987 (CCPA).

[38-000] Guiding principles

The following principles bind the court: s 6 CCPA:

- Children have rights and freedoms before the law equal to those enjoyed by adults, and in particular a right to be heard and a right to participate in the processes that lead to decisions that affect them.
- Children who commit offences bear responsibility for their actions but because of their state of dependency and immaturity, require guidance and assistance.
- It is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.
- It is desirable, wherever possible, to allow a child to reside in his or her own home.
- The penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.
- It is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties.
- It is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions.
- Subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

See also s 7 *Young Offenders Act* 1997 which states further principles regarding young people facing criminal proceedings intended to guide persons exercising functions under the Act.

The rationale behind s 6, and leading cases on the relevance of youth in sentencing, were summarised by McClellan CJ at CL in *KT v R* [2008] NSWCCA 51 at [22]ff. More recently in *Paul Campbell v R* [2018] NSWCCA 87 at [20]–[32], the CCA provided a restatement of issues concerning the criminal liability and punishment of children and outlined the relevant principles.

Reference should also be had to:

- *Children's Court Act* 1987 (CCA)
- Children's Court Rule 2000 (CCRule)
- *Children (Community Service Orders) Act* 1987 (CCSOA)
- *Children (Detention Centres) Act* 1987 (CDCA)
- *Children (Protection and Parental Responsibility) Act* 1997 (CPPRA)
- *Young Offenders Act* 1997 (YOA)
- *Crimes (Sentencing Procedure) Act* 1999 (CSPA)

- any relevant regulations.

[38-020] Criminal procedure generally

Jurisdiction and criminal responsibility

Section 28 states that the Children's Court has jurisdiction to hear and determine proceedings if the offence is alleged to have been committed by a person:

- who was a child when the offence was committed, and
- who was under the age of 21 years when charged before the Children's Court with the offence.

A "child" is defined in s 3(1) as a person who is under the age of 18 years.

Generally, the Local Court and the Drug Court may not hear and determine criminal proceedings over which the Children's Court has jurisdiction: ss 7(1), 7(2).

Doli incapax

Children under 10 years are conclusively presumed to be incapable of committing a criminal offence: s 5.

Where a child is over 10 years old but under 14, there is a common law presumption of doli incapax. In such cases, the prosecution must prove beyond reasonable doubt that the child did the act charged and, when doing the act, knew it was wrong, as distinct from merely naughty or mischievous: *RP v The Queen* (2016) 259 CLR 641 at [9]. The child must know the act is seriously wrong as a matter of morality, or according to the ordinary principles of reasonable persons, not that it is a crime or contrary to law: *Stapleton v The Queen* (1952) 86 CLR 358; *M v The Queen* (1994) 181 CLR 487. Evidence to prove the child's guilty knowledge must not be the mere proof of doing the act charged, however horrifying or obviously wrong the act may be: *C v DPP* [1996] AC 1 at 38.

Doli incapax is an element of the prosecution case that must be rebutted beyond reasonable doubt: *RP v Ellis* [2011] NSWSC 442.

What suffices to rebut the presumption will vary according to the nature of the allegation and the child. The prosecution must point to evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew it was morally wrong to engage in the conduct. Attention should be directed to the particular child's intellectual and moral development. The strength of evidence required is not necessarily correlated to the child's age. Children do not mature at a uniform rate. Some 10-year-old children will possess the capacity to understand the serious wrongness of their acts while other children aged very nearly 14 years old will not: *RP v The Queen*, above, at [8], [12].

Jurisdiction — driving matters

The Children's Court has jurisdiction for driving matters where:

- the young person is under licensable age (*Road Transport (Driver Licensing) Regulation* 2017 cl 12(2), (3)) — 16 yrs for cars; 16 yrs, 9 mths for motorbikes: s 28(2)(b), or
- the young person is of licensable age, and at least one other charge for an offence committed at the same time comes within the Children's Court criminal jurisdiction (for example, stealing a motor vehicle): s 28(2)(a).

Even though a person under 16 years cannot be convicted, a court may disqualify them from holding a licence for a specified period. Any finding of guilt in the Children's Court for a traffic matter, even where a conviction is not recorded, is taken to be a conviction under the road transport legislation, except where the court makes an order under s 33(1)(a): s 33(6).

Criminal Procedure Act 1986 (CPA) s 210 enables a Local Court to impose penalties provided for by the CCPA when dealing with a child found guilty of a traffic offence. For example, imposing a s 33(1)(b) good behaviour bond pursuant to the CCPA would allow Youth Justice supervision, which cannot be achieved by a CRO or CCO.

A Local Court cannot impose a sentence of imprisonment on a child found guilty of a traffic offence: s 210(3) CPA.

Jurisdiction — Commonwealth offences

A child or young person charged with or convicted of a Commonwealth offence may be tried, punished or otherwise dealt with as if the offence were against a law of the State or Territory: *Crimes Act* 1914 (Cth) s 20C.

Explaining the proceedings

The court must ensure it takes such measures as are reasonably practicable to ensure the young person understands the proceedings: s 12(1). If requested by the child or a person on their behalf, the court must explain any aspect of the procedure, or any decision or ruling made: s 12(3). See further the *Equality before the Law Bench Book* 2006 "Explain court proceedings and processes adequately" at [6.3.4.1].

The court must also ensure the young person is given the fullest opportunity practicable to be heard, and to participate, in proceedings: s 12(4).

Closed court — s 10

Section 10 provides that the court is closed and that persons other than the following should be excluded:

- a person directly interested in the proceedings (unless the court otherwise directs)
- a person preparing a report for the media (unless the court otherwise directs), or
- a family member of a deceased victim of the offence.

The court may also direct that any person (other than the child, any other person directly interested in the proceedings or a family victim) be excluded from the proceedings during the examination of any witness if of the opinion such a direction is in the interests of the child: s 10(2).

A Local Court hearing a traffic offence committed by a child defendant is not a closed court: see s 10(3). As to the publication or broadcasting of names: see Div 3A, ss 15A–15G. In particular, s 15A prohibits the publication or broadcasting of the names of children involved as offenders, witnesses, or brothers and sisters of victims in criminal proceedings, subject to exceptions set out in ss 15B–15F. See also *Criminal Trial Courts Bench Book* at [1-358].

Admissions

Special provisions apply restricting the admissibility of statements and admissions to a police officer by a child to a police officer: s 13. The provision applies to admissions or statement

which pre-date the enactment of s 13, or any legislative equivalent: *R v Mercury* [2019] NSWSC 81 at [70]. Admissions are not to be admitted unless a parent, chosen support person or lawyer was present, unless the court is satisfied there was a proper and sufficient reason for the absence of such an adult, and considers that, in the particular circumstances of the case, the statement or admissions should be admitted: s 13(1)(b).

See *R v Phung and Huynh* [2001] NSWSC 115; *R v T* (2001) 122 A Crim R 206; *R v G* [2005] NSWCCA 291 (regarding photographs); *R v Mercury*, above.

Detention for questioning

The detention for questioning provisions of Pt 9 *Law Enforcement (Powers and Responsibilities) Act* 2002 (LEPRA) apply to persons under the age of 18 years but have been modified by the *Law Enforcement (Powers and Responsibilities) Regulation* 2016, in particular Pt 3 Div 3 which contains provisions concerning the rights of children to support persons and access to legal advice. Police have a responsibility to assist a child to contact the Legal Aid Youth Hotline or the Aboriginal Legal Service Custody Notification Line: *R v Cortez* (unrep, 3/10/02, NSWSC) per Dowd J.

In *R v FE* [2013] NSWSC 1692, evidence of police interviews was excluded because the custody manager failed to comply with their obligation to assist the juvenile in exercising their rights under Pt 9 of LEPRA, by disregarding clearly communicated advice, from the Legal Aid Youth Hotline solicitor on behalf of the child, that the child wished to exercise her right to silence.

Regarding access to a lawyer: see *R v Cortez*, above.

Forensic procedures and identification particulars

The law permitting orders to be made to undertake forensic procedures on suspects applies to a child (defined as a person at least 10 years old but under 18 years): *Crimes (Forensic Procedures) Act* 2000 (CFPA) s 3(1). A child cannot consent to a procedure and a court order must be obtained: ss 7, 23 CFPA. A child may have representation at a hearing and an independent person must be present before a *final* forensic procedure order can be made: s 30 CFPA. However, a hearing or representation is not required for an *interim* order: s 33 CFPA; *Kindermann v JQ* [2020] NSWSC 1268 at [37]–[40].

Where a child over 14 years old is in lawful custody for any offence, a police officer may take or cause identity particulars to be taken, including the child's photograph, fingerprints or palmprints: ss 133(1)–(2) LEPRA.

However, where the child in lawful custody is under 14 years, a police officer must apply to the Children's Court for an order authorising the taking of a photograph, fingerprints or palmprints: s 136 LEPRA.

The power under s 63 of the CFPA for police officers, correctional officers or any other person specified by court order to take identifying particulars as soon as practicable after an offender is sentenced to imprisonment, applies equally when a juvenile is sentenced to a control order: s 33C(1)(a).

Further, the court may order a juvenile offender to present himself or herself for the taking of identification particulars upon finding certain offences proven: s 134 LEPRA. See also "Court orders for identification" at [16-440].

If the Children's Court finds a child not guilty, or finds the offence proven but dismisses the charge under s 33(1)(a)(i), it must make an order requiring destruction of any photographs,

finger-prints and palmprints relating to the offence: s 38(1). Where a child is dealt with by any other order under s 33, the court may order destruction if of the opinion that the circumstances of the case justify doing so: s 38(2).

See also s 137 LEPRA, which deals with circumstances in which another court finds an offence alleged against a child not proved.

Taking other offences into account

As in the case of adult offenders other offences may be taken into account: ss 31–35A CSPA.

Offences committed whilst on parole

Where a magistrate finds a young person has committed an offence whilst on parole, the parole clerk at Parramatta Children's Court should be notified by the Registrar so that action can be taken to revoke that parole.

Special defences and exceptions for children charged with certain offences

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* 2018 introduced defences and exceptions to certain *Crimes Act* offences for persons under 18 years of age.

It is a defence to prosecutions for offences against ss 66C(3), 66DB, 66DD, 73 or 73A *Crimes Act* 1900 if the alleged victim is of or above 14 years old and the age difference between the alleged victim and accused is no more than two years: s 80AG(1) *Crimes Act*. Where raised, the prosecution bears the onus of disproving the defence beyond reasonable doubt: s 80AG(2) *Crimes Act*.

An exception to the offence of possessing child abuse material under s 91H *Crimes Act* applies where the accused possessed the material when they were under 18 years and a reasonable person would consider the possession acceptable having regard to certain matters: s 91HB *Crimes Act*.

Further, it is a defence to a possession charge under s 91H *Crimes Act* if the person depicted in the material is the accused: s 91HA(9) *Crimes Act*. In offences of production or dissemination of child abuse material under s 91H *Crimes Act*, it is a defence if the only person depicted in the material is the accused and the production or dissemination occurred when they were under 18: s 91HA(10) *Crimes Act*.

[38-040] Bail

Note: References in this section are, unless otherwise stated, references to the *Bail Act* 2013.

The *Bail Act* 2013 applies to any person accused of an offence (s 7(2)), including children. However, the show cause requirement does not apply if the accused was under 18 years old at the time of the offence: s 16A(3).

As with bail decisions concerning adults, the court must consider whether any of the unacceptable risks listed in s 19(2) are present before making a bail decision. If satisfied there are no unacceptable risks, bail is to be granted unconditionally: s 20. If satisfied one or more unacceptable risks exist, bail may nonetheless be granted if conditions can be imposed that sufficiently mitigate that risk.

When determining bail for a child, one of the factors to be considered in deciding whether there is an unacceptable risk is "any special vulnerability or needs the accused person has including because of youth": s 18(1)(k).

See further at **[20-360]** for conditions that may be imposed for the purpose of mitigating an unacceptable risk.

Bail conditions for children, as with adults, should be determined according to the legislative provisions in the *Bail Act* 2013 and not influenced by considerations associated with the welfare of the child (unless provided for in the *Bail Act*). For example, the imposition of a curfew on a child for an offence which occurred during the day may not be reasonable and proportionate to the offence for which bail is granted (see *Bail Act* s 20A(2)(b)).

Section 28 permits a grant of bail to a child, with a requirement that suitable accommodation arrangements are made before the bail can be entered: ss 28(1), 28(3). If an accommodation requirement is imposed in respect of a child, the court must ensure the matter is re-listed for further hearing at least every 2 days until that requirement is complied with: s 28(4). This is for the purpose of monitoring and ensuring the child's release, and is not a review of bail as bail has already been granted. A court may require a report from an officer of a government agency about efforts to obtain accommodation, but does not permit a direction that the agency secures accommodation: s 28(5). A conduct requirement that the child reside at the relevant accommodation while on bail may also be imposed as a condition of bail.

Order

You will not be released until ..... has made arrangements about where you will live while on bail. That agency is to advise the registrar of the court where you will be living while you are on bail.

While at liberty on bail you are to live at the address arranged by the agency and notified to the registrar.

The matter will be relisted on [*date ..... 2 days hence*] to monitor whether suitable arrangements for accommodation have been made.

A court that has refused, or affirmed a decision to refuse bail for an offence after hearing a detention application may hear a further release application by a child accused where the previous application was made on a first appearance for the offence: s 74(3).

For further information on bail generally, see **Bail** at **[20-000]**ff.

[38-060] Committals

Committal for trial/sentence

The court has no jurisdiction to deal with a "serious children's indictable offence" to finality: ss 3, 17, 28(1) CCPA. Other indictable offences may be dealt with according to law or under the CCPA: s 18.

Part 3, Div 3A to the CCPA creates separate committal procedures for children charged with certain indictable offences.

This process closely mirrors the process in the adult jurisdiction, except for the mandatory discount scheme for sentencing which does not apply to a person who is both under 18 at the time of the offence and under 21 at the time of charge: s 25A(1)(b) CSPA. Refer to Children's Court Practice Note 12 for the procedures to be followed.

For "serious children's indictable offences" (defined in s 3), Ch 3, Pt 2 of the *Criminal Procedure Act* 1986 applies: s 27(2B) CCPA.

See also, **Committal proceedings** at **[28-000]**ff.

Committal for trial or sentence for other than a "serious children's indictable offence"

Generally, if a child is charged with an offence (other than a serious children's indictable offence) the proceedings are dealt with summarily: s 31(1).

Committal for trial at the election of the child — s 31(2)

A child charged with an indictable offence (other than one punishable summarily without the accused's consent) may inform the court at any time during, or at the close of, the prosecution case, that they wish to take their matter to trial trial: s 31(2).

- If the child makes a request under s 31(2) before the prosecution closes its case, the proceedings continue as summary proceedings until the prosecution evidence is complete: s 31(2A).
- If the child makes a request under s 31(2) in relation to an offence and the court is of the opinion, after all the prosecution evidence has been taken, and having regard to all the evidence before the court, that the evidence is not capable of satisfying a reasonable jury beyond reasonable doubt that the child has committed an indictable offence, the child must be discharged: s 31(2B).

Once such a request has been made, Pt 3, Div 3A (Committal proceedings) of the CCPA applies.

Committal for trial at court's determination — s 31(3)

Where a child is charged with an indictable offence and the court, after hearing all the prosecution evidence, is of the opinion that having regard to all the evidence before the court, the evidence is capable of satisfying a jury beyond reasonable doubt that the child has committed an indictable offence, and that it would not be proper for the matter to be dealt with summarily, the proceedings are to be dealt with as committal proceedings in accordance with Pt 3, Div 3A: s 31(3).

If a decision is made under s 31(3) to commit the child for trial, the court must provide a statement of reasons for its decision forthwith: s 31(4).

Committal for sentence

Where a child is charged with an indictable offence and pleads guilty, and the court is of the opinion that, having regard to all the evidence before it (including any background report of a kind referred to in s 25), it would not be proper for the matter to be dealt with summarily, the proceedings must be dealt with as committal proceedings in accordance with s 31H: s 31(5). The court must commit the child to the District or Supreme Court for sentence: s 31H(2).

For a sentence matter, the facts, criminal record and a background report may all be considered in determining whether or not to commit a child for sentence.

Circumstances where it may be considered that a case may not properly be disposed of summarily include:

- where it may be more appropriate for a child to be dealt with according to law (including the matters listed in s 18(1A))
- the seriousness of the offence and where a sentence is likely to exceed the maximum available to the Children's Court

- an offence where the child is already the subject of a cumulative sentence such that no further effective sentence can be imposed
- a case involving an issue of mental illness or fitness to plead, or
- the seriousness and nature of the offence rendering a joint trial of a number of co-accused (being both juvenile and adults) desirable in the interests of justice.

See also the *Sentencing Bench Book* at **[15-100] "Pt 3 — Criminal proceedings in the Children's Court"**.

Committal procedures — Pt 3, Div 3A

Pursuant to s 31A, the procedures for committal proceedings under Div 3A apply where:

- a child made a request under s 31(2) and the court did not discharge the child under s 31(2B), or
- the court forms the opinion required by s 31(3)(b) that the evidence is capable of satisfying a jury beyond reasonable doubt that the child committed an indictable offence and it is not appropriate that the matter be disposed of summarily.

Note: where the child is charged before the Children's Court with a child sexual assault offence, Div 3AA applies. Section 31AA(3) defines a "child sexual assault offence".

In conducting the committal proceeding, the court:

- must give the child an opportunity to give evidence or call any witness on their behalf: s 31B(1)
- must give the child a warning before giving them an opportunity to answer the charge: s 31B(2)
- may end further examination or cross-examination of a witness if satisfied further examination or cross-examination will not help the court make a determination under s 31B(6): s 31B(4)
- must consider all the prosecution evidence given under s 31, Div 3AA or s 31C and any defence evidence and determine whether or not there is a reasonable prospect a reasonable jury, properly instructed, would convict the child of an indictable offence: s 31B(6).

Before giving the accused an opportunity to answer the charge, a warning must be given both orally and in writing: s 31B(2), cl 7 *Children (Criminal Proceedings) Regulation* 2021. The form of the oral and written explanations are set out in Sch 1, cll 1 and 2 respectively.

If of the opinion:

- that there is a reasonable prospect a reasonable jury, properly instructed, would convict the child of an indictable offence — the court must commit the child for trial: s 31F(1)
- that there is not a reasonable prospect a reasonable jury, properly instructed, would convict the child — the court must immediately discharge the child in relation to the offence: s 31F(2).

Sections 31C–31E deal with the admissibility of statements in Div 3A proceedings. The provisions under Ch 6 Pt 3A CPA apply: s 31D(2).

Committal for sentence

At any time during committal proceedings under Div 3A, the child may plead guilty to the offence and the court may accept or reject the plea: s 31G(1)–(2). Committal proceedings continue if the plea is rejected: s 31G(4).

If the plea is accepted, or if the child pleaded guilty at an earlier stage and the court has made a determination under s 31(5), the court must commit the child to the District or Supreme Court for sentence: s 31H.

Transfer of back up and related offences — applies irrespective of when proceedings commenced

Under s 31(6), when a child charged with an indictable offence or a serious children's indictable offence (the "principal indictable offence") is committed to another court for trial or sentence:

- the prosecutor must, if the child has been charged with back up or related offences to the principal indictable offence, produce a certificate to the court specifying the back up or related offence/s, and
- the court may transfer the back up or related offence/s to the other court.

Where a back up or related offence is transferred under s 31(6), those proceedings must be dealt with in accordance with ss 167–169 of the CPA: s 31(7).

Hearing juvenile and adult cases together

The Children's Court may hear and determine committal proceedings relating to an indictable offence made jointly against an adult and juvenile together if:

- the indictable offence is one which cannot be dealt with summarily with the consent of the child, and
- the court is of the opinion it is in the interests of justice to do so: s 29(2).

Note: There is no provision which otherwise enables adult and juvenile offences or offenders to be dealt with together either as a committal or a summary hearing.

[38-080] Sentencing orders and principles

Sentencing principles

The relevant principles regarding the sentencing of children are outlined in detail in *Campbell v R* [2018] NSWCCA 87 at [20]–[32].

Conviction

A conviction cannot be recorded if the young person is under 16 years at the time of the offence: s 14(1). A court can choose not to record a conviction for young people above 16 years. Whether or not a conviction is recorded, all sentencing options under s 33 apply.

Youth Koori Court

The Youth Koori Court operates at Parramatta and Surry Hills Children's Courts. Referral to the court can only occur for matters where there is an indication of a guilty plea, or a finding of guilt. There is a geographic restriction in that only matters within the catchment area of Parramatta and Surry Hills Children's Courts are eligible. There is, however, the capacity to refer matters to the Koori Court for sentence for a child who has been accepted into the program by virtue of other eligibility, and where the child requests to do so. Refer to Children's Court Practice Note 11 for further information regarding the Youth Koori Court.

Criminal records of children

See **Subjective matters at common law [10-405]** "Prior record" and **Children (Criminal Proceedings) Act 1987 [15-020**] "Hearings" in the *Sentencing Bench Book* where the way in which a child's prior record may be taken into account. Some criminal records of conviction and sentence of young people are "expunged" after prescribed periods (subject to certain employment exceptions): ss 8 and 12 *Criminal Records Act* 1991.

Victim impact statements

Part 3, Div 2 of the *Crimes (Sentencing Procedure) Act* 1999 provides for the statutory scheme regulating the preparation and receipt of victim impact statements on sentence proceedings. The scheme applies to the Children's Court, under s 27(4A) of that Act, to the following offences:

(a) offences against ss 91H, 91J, 91K, 91L, 91P, 91Q or 91R *Crimes Act* 1900, or

(b) an offence that is not one referred to in Table 2 of Sch 1, *Criminal Procedure Act* 1986 and the offence:

  (i) results in the death of, or actual physical bodily harm to, any person, or

  (ii) involves an act of actual or threatened violence, or

  (iii) is one for which a higher maximum penalty may be imposed if the offence results in the death of, or actual physical harm to, any person than may be imposed if the offence does not have that result, or

  (iv) is a prescribed sexual offence.

See *Sentencing Bench Book*, **The statutory scheme for victim impact statements** at **[12-820]** for further information.

Hierarchy of penalties

The following table sets out a practical hierarchy of court-ordered penalties available in the Children's Court. The table does not include the separate powers of police or investigating officers to give a caution for certain offences. [See after this table for further discussion on individual penalty options.]

Sentencing alternatives in the Children's Court jurisdiction			
Requirements for particular order	**Legislation**	**Maximum penalty**	**Breach proceedings**
Young Offenders Act 1997			
Only summary or Table 1 or 2 offences can be dealt with under this Act: s 8(1). Some offences in this category are excluded: s 8(2). See also [38-320].			
Caution without charge			
Available for particular offences in Pt 4, Div 1 or graffiti offence. Child must admit the offence. Charges dismissed, however court must record caution. Note: court power to give caution under s 33 CCPA unaffected.	s 31(1)(a) YOA s 31(1)(b) YOA ss 31(1A), 31(4), 33(1) YOA; cl 15(3) *Young Offenders Regulation* 2016 s 31(3) YOA	May not be given on more than 3 "occasions": s 31(5) YOA	Nil Charges cannot be laid again in relation to the same offence: s 32 YOA

Sentencing alternatives in the Children's Court jurisdiction			
Requirements for particular order	**Legislation**	**Maximum penalty**	**Breach proceedings**
Youth justice conference			
Court may refer at any stage in proceedings including after finding of guilt. Child must: • admit offence • consent to conference. Conference outcome plan must be referred to court for approval. On being informed of successful completion of outcome plan, court must dismiss the charge if matter was referred without a finding of guilt. Completion is equivalent to autrefois convict. See also [38-320].	ss 40(1A), 40(3) YOA s 33(1)(c1) CCPA ss 36(b), 40(1A)(b) s 36(c) YOA s 54(2) YOA s 57(2) YOA s 58	Maximum time to implement outcome plan is 6 mths: cl 6 *Young Offenders Regulation* 2016	Brought back to court for sentence on notification by conference organisers or on court's own motion, if: • conference not attended: see ss 51, 54 YOA • outcome plan not approved by court, or • outcome plan not completed by young person.
Children (Protection and Parental Responsibility) Act 1997 (CPPRA)			
Instead of proceeding to sentence, child and/or a parent may be required to undertake to be of good behaviour or undertake counselling and other programs. **Note:** This is rarely used.	ss 8, 9 CPPRA	Not specified	Child may be sentenced: s 8(4) CPPRA. Parent may forfeit monetary security: s 9(4) CPPRA
Children (Criminal Proceedings) Act 1987			
Proven but dismissed without conviction and with or without caution			
Offence proven but court does not proceed to convict, and directs that the charge be dismissed (and may issue a caution).	s 33(1)(a)(i)	Not applicable	Not applicable.
Good behaviour bond			
On finding the child guilty, the court may: • discharge the person on condition they enter a good behaviour bond: s 33(1)(a)(ii), or • make an order directing the person to enter into a good behaviour bond: s 33(1)(b). Must contain conditions that person will: • appear before the court when called on to do so, and • be of good behaviour. May contain other conditions as specified. A fine may be imposed in addition to s 33(1)(b) bond (but not as a condition of bond).	s 33(1)(a)(ii) s 33(1)(b) s 33(1A), cl 8 *Children (Criminal Proceedings) Regulation* 2021 ss 33(1)(d), 33(1A)(c)	2 yrs	On breach, may be called up for re-sentence: s 41 CCPA.

Sentencing alternatives in the Children's Court jurisdiction			
Requirements for particular order	**Legislation**	**Maximum penalty**	**Breach proceedings**
Fine			
In fixing a fine, the child's age, their ability to pay and the potential impact of a fine on their rehabilitation must be considered. A s 33(1)(b) bond may be imposed in addition to fine.	ss 33(1)(c); 33(1AA) s 33(1)(d)	Whichever is the lesser: • 10 pu, or • the max fine at law	Fine default procedures under s 58 *Fines Act* 1996
Adjournment for rehabilitation or other purposes			
Adjournment for any of the following purposes (if bail for the offence is/has been granted or dispensed with under the *Bail Act* 2013): • assessing the child's capacity and prospects for rehabilitation, • allowing the child to demonstrate that rehabilitation has taken place, • any other purpose the court considers appropriate in the circumstances.	s 33(1)(c2)	Proceedings may be adjourned for no more than 12 mths.	
Probation			
For conditions see: cl 8 *Children (Criminal Proceedings) Regulation* 2021. A fine may also be imposed. **Note:** A more serious penalty than a bond.	s 33(1)(e) s 33(1)(e1)	2 yrs	On breach, may be called up for re-sentence: s 41 CCPA.
Community service order — see Children (Community Service Orders) Act 1987 (CCSOA)			
May be imposed where: • custodial sentence applies to offence, and • a custodial sentence would otherwise be applied. For children, a CSO is a direct alternative to a control order. Must have juvenile justice report stating young person is suitable and that work is available. Probation order may be imposed in addition to CSO. May run concurrently with another CSO order. Caps apply to total number of hours.	s 33(1)(f) CCPA s 5 CCSOA s 5(1)(a) CCSOA, s 34(1) CCPA s 5(1)(b) CCSOA s 9(b) CCSOA s 33(1)(f1) CCPA s 10 CCSOA ss 13(3)–13(3A) CCSOA	(a) aged 10–15 yrs: 100 hrs for all offences (b) aged 16–17 yrs, if max penalty: • does not exceed 6 mths: 100 hrs • is over 6 mths but less than 12 mths: 200 hrs • is more than 12 mths: 250 hrs See s 13(1) CCSOA.	Administrative increase by up to 10 hrs, where failure to comply is trivial, or there are good reasons for dealing with failure by increasing hours s 20(1) CCSOA. Court revocation and re-sentence: ss 21, 21A CCSOA.

Sentencing alternatives in the Children's Court jurisdiction			
Requirements for particular order	**Legislation**	**Maximum penalty**	**Breach proceedings**
Suspended control order sentence			
Custodial sentence under s 33(1)(g), but suspended subject to young person entering bond to be of good behaviour. Must not be serving a sentence of imprisonment or parole period.	s 33(1B) CCPA	2 yrs	ss 41, 41A CCPA Sentence following breach may be made concurrent with fresh sentences.
Control order			
Full-time custody in a detention centre. Can only be imposed where no other order is appropriate. Only available for offences that provide for sentence of imprisonment. Background report must be tendered and considered before order can be imposed. Reasons must be given why no alternative sentence under s 33(1)–(f1) is appropriate. A control order takes effect when made unless otherwise ordered.	s 33(1)(g) CCPA General principles of sentencing: s 33C provides that Pts 3 and 4 CSPA apply s 33(2) CCPA s 34 CCPA s 25(2) CCPA s 35 CCPA s 37 CCPA	2 yrs max (3 yrs if cumulating): s 33A(5); s 33AA(5) CCPA 5 yrs cumulation does not apply in Children's Court: s 58 CSPA Cumulative sentences must be imposed, subject to s 58 CSPA, for the following offences: • escape: s 33C CCPA; • assault detention officer: s 33AA CCPA; • assault generally/assault by convicted inmate: ss 55(5)(a1), 56(1)(b), (3A) CSPA	Children's Court acts as Parole Authority for Children's Court sentences: Pt 4C CDCA. See ss 65, 66 CDCA. See also cll 90–107C, Sch 2 Forms, *Children (Detention Centres) Regulation* 2015

[38-100] Background reports

A background report must be prepared, tendered in evidence, and considered by the court before a control order or a term of imprisonment can be imposed on a person who was a child when the offence was committed and under the age of 21 years when charged before the court with the offence: s 25(1)–(2). A failure to obtain a report is an error of law: *CO v DPP* [2020] NSWSC 1123 at [25]–[28]. A report is also required to be prepared and considered by the court before a community service order can be imposed: s 9(b) CCSOA.

Clause 6 *Children (Criminal Proceedings) Regulation* 2021 requires a background report under s 25 to be in the approved form and to deal with matters relevant to the circumstances surrounding the commission of the offence concerned including:

- the child's family background, employment, education, friends and associates,
- the nature and extent of their participation in the life of the community,
- disabilities (if any),
- antecedents, and
- any other matters that the Children's Court may require, or that the prosecutor considers appropriate.

Background reports are provided to the court subject to the consideration of any objections by the parties based on, for example, irrelevant or improper content such as information regarding uncharged acts. See also the *Sentencing Bench Book* "Background reports" at [15-080].

Offenders under 17 years and 6 months of age (and for community service of any age) are assessed and supervised by officers of the Department of Juvenile Justice and, if relevant, the Department of Family and Community Services. In some instances the Department of Juvenile Justice may advise that it is more appropriate for older offenders (at least older than 17 years and 6 months of age) be assessed and/or supervised by Community Corrections.

[38-120] Sentence — further details and draft orders

Dismissal (with or without caution) — s 33(1)(a)(i)

This is the equivalent of a s 10(1)(a) dismissal under the CSPA.

> **Order**
>
> The offence is proved. Without conviction, the charge is dismissed.
>
> *or*
>
> The charge is dismissed with a caution.

Release on good behaviour bond — ss 33(1)(a)(ii), 33(1)(b)

The court may dismiss a charge but place an offender on a good behaviour bond under s 33(1)(a)(ii). Alternatively, s 33(1)(b) allows the court to make an order directing the person to enter into a bond.

In either case, the period of the good behaviour bond must not exceed 2 years.

Bonds imposed under s 33 must contain the following two conditions, namely that the person will:

- appear before the court if called to do so at any time, and
- be of good behaviour.

A bond may also contain other conditions, except for those requiring the person to perform community service work, or make any payment (whether in the nature of a fine, compensation or otherwise). The kinds of conditions that may be imposed are listed in cl 8 *Children (Criminal Proceedings) Regulation* 2021.

> **Order**
>
> **s 33(1)(a)(ii)**
>
> The offence is proved. Without conviction, the charge is dismissed on condition that you enter into a bond to be of good behaviour for a period of [*specify period*]. The conditions are that you will be of good behaviour, appear before the court if called upon to do so, and inform the Children's Court of any change to your residential address [*and any further conditions*].
>
> **s 33(1)(b)**
>
> The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted.

You will be released on entering a good behaviour bond to be of good behaviour for [*specify period*]. The conditions are that you will be of good behaviour for the period of the bond, appear before the court if called upon to do so, and will inform the Children's Court of any change to your residential address [*and any further conditions*].

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Impose a fine — s 33(1)(c)

The fine imposed must not exceed whichever is the lesser of either 10 penalty units or the maximum fine provided for the offence: s 33(1)(c). A fine may be imposed even though the offence does not provide a maximum fine.

Before making an order imposing a fine on a child, the court must consider the child's age and, where information is available, their ability to pay the fine and the potential impact of the fine on the rehabilitation of the child: s 33(1AA).

Order

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted and fined $ [*specify sum*].

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Release on condition to comply with an outcome plan — s 33(1)(c1)

The court may make an order releasing the person on condition that the person complies with an outcome plan determined at a youth justice conference. See further **Young Offenders Act 1997** at **[38-320]**. Referral to a youth justice conference is an order that would normally be made under the *Young Offenders Act*.

Note: Bail is usually dispensed with if the young person is directed to attend a youth justice conference.

Order

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted but released on condition that you comply with an outcome plan determined at a conference.

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Release on bail to demonstrate rehabilitation — s 33(1)(c2)

The court may make an order adjourning proceedings against the person to a specified date (being an adjournment for a maximum period of 12 months from the date of the finding of guilt), and granting bail to the person in accordance with the *Bail Act* 2013:

- for the purpose of assessing the person's capacity and prospects for rehabilitation, or
- for the purpose of allowing the person to demonstrate that rehabilitation has taken place, or
- for any other purpose the Children's Court considers appropriate in the circumstances: s 33(1)(c2).

Release on good behaviour bond and fine — s 33(1)(d) (see (b) and (c) above)

[38-140] Release the offender on probation — s 33(1)(e)

The court may make an order releasing the offender on probation. The period of probation must not exceed two years. Clause 8 *Children (Criminal Proceedings) Regulation* 2021 lists conditions that can be included in a probation order:

(a) conditions requiring the child to attend school regularly,

(b) conditions relating to the child's employment,

(c) conditions aimed at preventing the child from committing further offences,

(d) conditions relating to the child's place of residence,

(e) conditions requiring the child to undergo counselling or medical treatment,

(f) conditions limiting or prohibiting the child from associating with specified persons,

(g) conditions limiting or prohibiting the child from frequenting specified premises,

(h) conditions requiring the child to comply with directions of a specified person in [relation to any matters referred to in (a)–(g) above],

(i) conditions relating to such other matters as the court considers appropriate in relation to the child.

Order

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted and released on probation for [*specify period*] on the condition that you be of good behaviour and not commit any offence and comply with the following conditions [*specify*].

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Release on probation and fine — s 33(1)(e1) (see (e) and (c) above)

Where the court orders probation under s 33(1)(e) and community service work under s 33(1)(f), the order may include a condition requiring the child to comply with the community service work order: cl 8(2) *Children (Criminal Proceedings) Regulation* 2021.

Supervision

Supervision by Youth Justice can be imposed with a good behaviour bond or a probation order: cll 8(1)(h) and (i) *Children (Criminal Proceedings) Regulation* 2021. If the length of an order surpasses the child turning 18, then supervision is normally passed on to Community Corrections, although in some circumstances, where the order continues for less than 6 months after the child turns 18, Youth Justice may retain supervision.

Order the child to perform community service — s 33(1)(f)

Jurisdiction

A community service order may only be imposed where:

- the court would otherwise impose a custodial order, that is, as a direct alternative to a custodial order: s 5 CCSOA
- the court has been notified by an officer that arrangements are available in the child's residential area: s 9(a) CCSOA,
- the court is satisfied, after considering a report, that the young person is suitable and sufficiently mature: s 9(b) CCSOA.

Conditions

The court may also impose conditions "not inconsistent with the Act or regulations": s 11 CCSOA.

An order may recommend that the community service work to be performed by the person should include participation in a personal development, educational or other program: s 5(1B) CCSOA.

The court may recommend, in relation to an order for offence other than a graffiti offence, that the community service work include the removal of graffiti and consequential restoration of the building, vessel, etc: s 5(1A) CCSOA.

In relation to an order for a graffiti offence, the court must impose a graffiti clean up condition, unless it considers that it would not be reasonably practicable in the circumstances, in which case it must make a record of its reasons: ss 11(3)–(5).

Cumulation

Community service orders may be concurrent (s 10 CCSOA) or the court may make an order that they be cumulative: s 13(3) CCSOA subject to keeping within the maximum hours permitted to be imposed.

Maximum hours for children's community service order — CCSOA

Age of young offender at time of offence	Maximum penalty for the offence (full time custody)	Maximum CSO hours: s 13
Under 16 yrs	Any offence, and cumulative sentences	100 hrs
16 or 17 yrs	6 mths or less	100 hrs
16 or 17 yrs	More than 6 mths and not more than 12 mths	200 hrs
16 or 17 yrs	More than 12 mths	250 hrs
16 or 17 yrs	Cumulative sentences	250 hrs (s 13(3A))

The maximum duration for a community service order is 12 months: s 3(1) CCSOA. Applications may be made to the Secretary to extend the relevant maximum period by either

the person in respect of whom the order was made or the assigned officer, on the grounds that an extension would (having regard to circumstances that have arisen since the order was made) be in the interests of justice: s 20A CCSOA.

Explanations required

When making an order the court must:

- explain to the child the purpose and effect of the order; that the order may be amended or varied; and the consequences that may follow if the order is not complied with: s 6 CCSOA, and
- specify a place at which, or a person to whom, the child shall present himself or herself and the period within which he or she shall so present himself or herself: s 14 CCSOA.

Order

(after giving the explanations required by s 6 CCSOA)

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted and ordered to perform [*specify*] hours of community service work. You must present yourself to [*specify person*] at [*specify place*] within [*specify period*] to make arrangements to start the order. It is a further condition of the order that you [*specify eg good behaviour and supervision by the Department of Juvenile Justice or the Department of Community Services*].

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Release the offender on probation and order community service – s 33(1)(f1) (see (e) and (f) above)

[38-160] Suspended sentence — s 33(1B)

Suspended sentences are no longer a sentencing option for adult offenders, but remain a sentencing option for children under the CCPA. A court dealing with a person under s 33(1)(g) may make an order suspending the execution of its order a specified period (not exceeding the term of that order), and releasing the person on condition that the person enters into a good behaviour bond under s 33(1)(b) for such a specified period: s 33(1B).

Eligibility

The court may not impose the initial custodial sentence unless no other sentence is appropriate. A sentence cannot be suspended when the child is serving another sentence by way of full-time custody or serving the balance of a sentence on parole: s 33(1B); *R v Edigarov* (2001) 125 A Crim R 551.

Length of suspension

The suspension may not be longer than the sentence: s 33(1B)(a). It is usually the same length as the sentence.

Order

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted and committed to the control of the Minister administering the *Children (Detention Centres) Act* 1987 for a term of [*specify period*] commencing [*specify date*] and expiring [*specify date*].

The execution of the committal is suspended for the period [*specify period*], and you are released on the condition that you enter into a good behaviour bond for the specified period.

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

[38-180] Make a control order — s 33(1)(g)

A control order may be made only for an offence that provides for a sentence of imprisonment: s 34(1).

A control order should not be made unless the court is satisfied it would be wholly inappropriate to deal with the child under any other type of sentence: s 33(2). Reasons must be recorded why it would have been wholly inappropriate to so deal with the matter and the reasons why the child has been so dealt with: s 35.

A control order is a sentence subject to the provisions of Pts 3 and 4 *Crimes (Sentencing Procedure) Act* 1999. A control order must not exceed the maximum period of imprisonment provided for the offence, or 2 years, whichever is the shorter.

The court has power to make a control order cumulative to a maximum of 3 years provided such order would not have the effect of the detainee being detained for more than two periods specified in different control orders, being periods that are not to any extent concurrent: s 33A.

A court, when imposing a control order that exceeds six months in duration, may set a non-parole period. The court may decline to set a non-parole period s 45(1) CSPA and state reasons for so doing: s 45(2) CSPA. Where a non-parole period has been set for a detention order for a period of 3 years or less, being an order for which a non-parole period has been set, is taken to be subject to a parole order (a "statutory parole order") directing the release of the offender on parole at the end of the non-parole period. See further "Juvenile offender parole legislative framework" at **[42-000]**ff.

Order

The offence is proved. A conviction will not be recorded.

or

The offence is proved and you are convicted.

[Note: a conviction cannot be recorded if the young person was under 16 years at the time of the offence].

Term without non-parole period (sentence of less than six months)

You are committed to the control of the Minister administering the *Children (Detention Centres) Act* 1987 for a term of [*specify period*] commencing [*specify date*]. You will be released on [*specify date*].

Term with non-parole period

You are committed to the control of the Minister administering the *Children (Detention Centres) Act* 1987 for a non-parole period of [*specify period*] commencing [*specify date*]. The total sentence imposed is [*specify period — usually non-parole period plus a further one-third of the non-parole period*]. As a result of these orders you will be released on parole on [*specify date*] and the child is eligible for parole on that date. The parole is subject to the following conditions [*specify conditions*].

Cumulative sentence

This order is cumulative on the order of (term) imposed on [*specify date*] (which expires/the non-parole period of which expires) on [*specify date*] and is to commence on that date and you are directed to be released on [*specify date*].

[38-200] Orders of licence disqualification, forfeiture

Pursuant to s 33(5), nothing in s 33 limits or affects any powers that the Children's Court may have apart from this section to:

- impose any disqualification under the road transport legislation within the meaning of s 6 *Road Transport Act* 2013 on a person whom it has found guilty of an offence,
- to order the forfeiture of any property that relates to the commission of an offence of which it has found a person guilty, or
- to make an order for restitution under s 43 CPA, or
- to make a community clean up order in respect of a fine imposed for an offence under the *Graffiti Control Act* 2008.

Section 33(6) provides that for the purposes of any provision of the road transport legislation that confers power on a court with respect to a person who has been convicted of an offence, a finding of guilt by the Children's Court for an offence is taken to be a conviction for the offence, unless the court makes an order under s 33(1)(a).

[38-220] Non-association or place restriction order

Pursuant to s 33D, the court may make a non-association or place restriction order if the court has sentenced the offender under s 33 (except s 33(1)(a)(i), (c1) and (c2)) in relation to an offence that attracts a penalty of 6 months imprisonment or more.

The duration of the non-association or place restriction order must not exceed 12 months: s 33D(4).

Section 33D does not limit the kinds of prohibition or restriction that may be imposed on a person such as conditions of a good behaviour bond or probation order under s 33 (as provided in cl 8(1)(f)–(g) *Children (Criminal Proceedings) Regulation* 2021).

Part 8A CSPA applies equally to and in respect of a non-association or place restriction order made by the Children's Court: s 33D(6).

[38-240] Placement on child protection register

Section 3A *Child Protection (Offenders Registration) Act* 2000 requires that a child's name be placed on the child protection register upon a finding that a registrable offence is proven, unless the offence is for a Class 1 or Class 2 offence (defined in s 3(1)) and the court deals with the child under s 33(1)(a) or for a single offence of the kind listed in s 3A(1)(c).

However, s 3C provides that a court sentencing a person for a sexual offence committed when that person was a child has a discretion to declare that person not be treated as a registrable person in respect of that offence. The discretion applies only in certain circumstances listed in s 3C(3):

- the victim of the offence was under 18 years of age at the time of the offence, and
- the person has no prior convictions for any Class 1 or Class 2 offence, and
- the court does not impose full-time detention or a control order (unless suspended) in respect of the offence, and
- the court is satisfied that the person does not pose a risk to the lives or sexual safety of one or more children, or of children generally (see s 3AA for the matters to be taken into account in such an assessment).

"Sexual offence" for the purposes of s 3C is defined in s 3C(6).

Section 3C applies to any sentence imposed on or after 1 December 2018, regardless of when the offence was committed.

Failure to comply with reporting conditions constitutes an offence carrying 5 years imprisonment and/or 500 pu: ss 17 and 18 *Child Protection (Offenders Registration) Act* 2000.

[38-260] Mental health — Forensic provisions

Part 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 applies to children in the Children's Court. See **Inquiries under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020** at **[30-000]**.

[38-280] Costs and compensation

Compensation

The court may order compensation for loss against a child under ss 94 or 97 *Victims Rights and Support Act* 2013, but the maximum amount that may be ordered is 10 penalty units if under 16 years or 20 penalty units if older: s 36(3) CCPA.

The court must have regard to the child's means and income, if any, in deciding whether or not to make such an order: s 36(2). Compensation may not be ordered as a condition of a bond: see s 33(1A)(c)(ii) CCPA.

Victims support levy

Where an offender is 18 years or older when sentenced, a victims support levy (currently $86 for financial year 2021/22 cf cl 2 *Victims Rights and Support (Victims Support Levy) Notice* 2020) is payable, as is the case for an offender dealt with in a Local Court.

Where a child is so dealt with, such levy is not payable if the court directs at the time or later that the child is exempt from such payment: s 106(3) *Victims Rights and Support Act* 2013.

Costs

The court costs levy under s 211A of the CPA does not apply to Children's Court proceedings or to proceedings in which a person who was under 18 years at the time an offence is dealt with under Pt 3 Div 4 CCPA: s 211A(3), (7)(b).

However, the Children's Court may, at the end of summary proceedings in which a person is found guilty of an offence, order that the person pay court costs: s 42A(1) CCPA. Court costs ordered to be paid under s 42A are in addition to, and do not form part of, any pecuniary penalty imposed in respect of the offence: s 42A(2).

The amount of court costs ordered to be paid under s 42A cannot exceed the amount that would be payable under s 211A CPA if that section applied to the offence: s 42A(4) (for the 2018/19 financial year, $85).

[38-300] Breaches of orders

Breach of good behaviour bond, probation and release for compliance with outcome plan

Section 41 CCPA deals with breaches of good behaviour bonds, probation, and release on condition of compliance with a youth justice conference outcome plan.

An offender may be issued with a court attendance notice by an authorised officer or member of the police force who believes with reasonable cause that the offender has failed to comply: s 41(1).

Alternatively, a court may call on a person to appear before it if it suspects that the child has failed to comply: s 41(1A).

Offenders under the age of 21 years will be brought before the Children's Court and, if it is proved that they have failed to comply, they may be dealt with in any manner in which they could have been dealt with by the Children's Court in relation to the offence: ss 41(3)(a), 41(4).

Offenders of or above the age of 21 years will be brought before the Local Court and, if it is proved that they have failed to comply, they may be dealt with in any manner in which they could have been dealt with by the Local Court, had the person been of or above the age of 21 years when the person was originally dealt with in relation to that offence: ss 41(3)(b), 41(5).

Breach of suspended sentence

Where the Children's Court has, under s 33(1B), suspended the execution of an order under s 33(1)(g) and the person concerned has entered into a good behaviour bond, action with respect to a failure to comply with any such bond may be taken under s 41.

The bond is to be terminated unless the court is satisfied that:

- the person's failure to comply with the conditions of the bond was trivial in nature, or
- there are good reasons for excusing the person's failure to comply with the conditions of the bond: s 41A(2).

Once the bond is terminated, suspension of the execution of the order under s 33(1)(g) ceases to have effect, and Pt 4 CSPA applies as if the order were a sentence of imprisonment: s 41A(3).

[38-320] Young Offenders Act 1997

The Act establishes a scheme to enable juvenile offenders (ie under 18 years of age) to be dealt with as an alternative to the CCPA.

Note: References in this paragraph are, unless otherwise stated, references to the YOA.

The Act applies to summary offences or offences that may be dealt with summarily under Ch 5 CPA, that is Table 1 and Table 2 offences: s 8(1). Certain exceptions are listed in ss 8(2), (2A) and (3) including, but not limited to:

- traffic offences where the child is old enough to hold a licence
- certain sexual offences
- drug offences involving more than a small quantity of a prohibited drug,
- an offence under the *Crimes (Domestic and Personal Violence) Act* 2007, eg stalking and intimidation, contravening an AVO.

The Children's Court may utilise the Act in three ways:

- by giving of a caution (s 31(1)),
- by referral to a conference and:
  - (i) if the matter (though admitted) was referred without the making of a finding of guilt, upon receiving notice that an outcome plan has been satisfactorily completed, dismiss the charge, or
  - (ii) otherwise make an order releasing the child on condition that the child complies with an outcome plan: s 33(1)(c1) CCPA.

Each of the above requires that the child admits to the offence: ss 31(1)(b), 36(b), 40(1A)(b). See s 10 as to what constitutes an "admission".

Caution

Where a court chooses to caution an offender under s 31 in relation to an offence, an order must be made dismissing the proceedings: s 31(1A).

The court may allow any victim of the offence to prepare a written statement describing the harm occasioned to them by the offence and, if it considers it appropriate, may permit all or part of the statement to be read to the child when giving the caution: s 31(1B).

A court that gives a caution must notify in writing the Area Commander of the local police area in which the offence occurred of the decision and reasons (s 31(4)) and must make a record of any caution in accordance with cl 15 *Young Offenders Regulation* 2016: s 33.

A child may not be cautioned if they have been dealt with by caution on 3 or more occasions (regardless of whether the caution was a police caution or a court caution): s 31(5).

Where the child is cautioned, no further proceedings may be taken for the offence in respect of which the caution is given or for any other offence in respect of which proceedings could not be commenced if the child had been convicted of the offence for which the caution was given: s 32.

Referral for youth justice conference

Section 40(1A) deals with referrals for conferences by courts. A matter may be referred at any stage in proceedings, including after a finding that a child is guilty of an offence: s 40(3). In determining whether or not to refer a matter for conferencing the court must take into account the following (s 40(5)):

- the seriousness of the offence

- the degree of violence involved in the offence
- the harm caused to the victim
- the number and nature of any offences and times the child has been dealt with under the Act, and
- any other matters the court thinks appropriate.

The child must consent to the holding of the conference: s 36(c). After a referral is made, the Commissioner of Police must be notified in writing of any particulars of the referral: s 40(4).

A court may, at any time after referral and before a conference is held, determine that the matter should not be dealt with by way of a conference: s 44(3).

A child may also decide not to proceed with a conference before it is held: s 44(1).

The aim of the conference is to reach agreement on an outcome plan that the young person can complete, which may include an apology and/or reparation to the victim(s), participation in a counselling, alcohol/drug or educational program, or actions which are directed towards the child's reintegration into the community: s 52(5)–(5A).

An outcome plan must be referred to the court for approval: s 54(1).

Note: The court can only approve or not approve the plan, it cannot alter the plan.

If an outcome plan is not approved by the court or if the child fails to satisfactorily complete an outcome plan the proceedings may be continued.

If a court is notified that the child satisfactorily completed the outcome plan, no further criminal proceedings may be taken: s 58. If the matter was referred for a conference before a finding of guilt was made, the offence must be dismissed: s 57(2).

A criminal history referring to warnings, cautions and conferencing is admissible in proceedings before a Children's Court (s 68(2)) but will only be located on the Computerised Operational Policing (COPS) computer system.

Non-compliance

If a child doesn't proceed with a caution or conference, fails to attend a conference, fails to reach an agreement at conference to an outcome plan, or fails to satisfactorily complete an outcome plan, the proceedings may be continued or re-commenced against the child (even if an applicable limitation period has expired): s 64(1).

The proceedings must be commenced not later than the expiry date of the applicable limitation period, or 3 months after the matter is referred back to the person or body under s 64, whichever is the later: s 64(2).

If the Children's Court has released a child on condition of compliance with an outcome plan under s 33(1)(c1) CCPA, and the child fails to comply with the outcome plan, an authorised justice may issue a summons or warrant for the arrest of the child, and proceedings may be continued or commenced under s 64: s 57.

[38-340] Apprehended violence orders

Applications commenced against a young person

The Children's Court is authorised to deal with such cases where the defendant is less than 18 years of age at the time the complaint is made: s 91(1) *Crimes (Domestic and Personal Violence) Act* 2007.

Application proceedings involving defendants under the age of 18 are to be heard in closed court, although the court may permit the presence of some persons if it is considered appropriate: s 86(1)–(2) *Crimes (Domestic and Personal Violence) Act*.

Children's Court Practice Note 8 sets out Children's Court procedures in cases where apprehended domestic or personal violence order proceedings have been commenced against a young person.

The Practice Note requires consideration to be given to the availability of suitable counselling or other intervention services for the young person, and where appropriate, the young person's family. In matters involving the police, if the police prosecutor and young person consent, the court may make an interim domestic or personal violence order and adjourn the proceedings:

- for 3 months, to allow the young person to engage with the relevant counselling or intervention service, or
- for 5 months, if no suitable counselling is available, or the young person does not wish to participate in counselling.

The Practice Note does not apply to applications against a young person involving allegations of sexual assault or indecent assault, applications which are related to criminal charges of a serious nature and cases where such applications have been repeatedly sought in the past. However, in such a case the procedures set out in the Practice Note may be applied with the consent of the prosecutor and the young person.

The Children's Court may vary or revoke an order made by the Children's Court irrespective of the age of the defendant at the time the application for variation or revocation is made: s 91(3) *Crimes (Domestic and Personal Violence) Act*.

Children in out-of-home care are not considered to be in a domestic relationship with their carers. The "Joint Protocol to reduce the contact of young people in residential out-of-home care (OOHC) with the criminal justice system" (the Protocol) applies to any child under the age of 18 and living in residential OOHC.

Police and DCJ are signatories to the Protocol and guiding principles are outlined in the Protocol (at 1.1). They include that young people living in OOHC may have a range of complex needs arising from experiences of trauma, abuse and neglect; that police should only be called as a last resort in response to incidents arising from challenging behaviours, and this action should reflect and be similar to a response in a family situation where a young person is living at home with their birth parents; and that the practice of being culturally responsive and facilitating connection to family, community and culture improves the child's wellbeing. The parties to the Protocol are to be consciously focused on the rights and interests of young people from Aboriginal backgrounds and to be culturally sensitive and relevant in their responses in providing care.

The protocol aims to promote the principle that criminal charges will not be pursued against a young person if there is an alternative and appropriate means of dealing with the matter, and to enhance police efforts to divert young people from the criminal justice system.

See also **AVO proceedings involving children** at **[24-000]**ff.

Applications made for protection of a young person

An application made by or on behalf of a child against an adult is heard in the Local Court.

Note: ss 41(2)–(5) and 41AA *Crimes (Domestic and Personal Violence) Act* respectively deal with the exclusion of the public in cases where an order (or variation or revocation of the order) is sought for the protection of a child under the age of 16 years, or between the ages of 16 and 18 years.

Any final order made for the protection of a child results in that order being notified to the Office of the Children's Guardian. If the person against whom the order is made at any subsequent time seeks to work in child-related employment, the fact that an order has been made must be taken into account as part of a Working with Children check.

Care and protection jurisdiction

Note: All references to sections in this chapter are, unless otherwise stated, references to sections in the *Children and Young Persons (Care and Protection) Act* 1998. Where "child" is referred to herein, the reference also includes a "young person".

[40-000] Objects and principles of the Act

Last reviewed: November 2023

Objects

Section 8 sets out the objects of the Act:

(a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and

(a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and

(b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

(c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The "paramountcy principle"

The paramount principle under which the Act is to be administered is that in any action or decision concerning a particular child, their safety, welfare and well-being is paramount: s 9(1).

This principle prevails over all other considerations, even where it conflicts with the rights or interests of the parents: *Re Tanya* [2016] NSWSC 794 at [69].

The unacceptable risk of harm test

In cases where issues such as removal, restoration, custody, placement and contact are to be determined, the proper test to be applied is that of "unacceptable risk" of harm to the child(ren) concerned: *M v M* (1988) 166 CLR 69 at [25]; *Re Tanya*, above, at [69].

The application of that test requires a determination, firstly, whether a risk of harm exists, and secondly, the magnitude of that risk: *M v M*, above, at [24]. Once a risk is found to exist and its magnitude is assessed, the court must balance that risk against the risk that the child may be harmed by lack of contact with the parent when determining whether the risk of harm is unacceptable: *Re Hamilton* [2010] CLN 2 at [45]; *Re Tanya* at [69].

The assessment does not require a finding, on the balance of probabilities, of facts from which an inference of unacceptable risk may be drawn. There may be several possible sources of risk, none of which is proved on the balance of probabilities, but nonetheless the accumulation

of those possible risks could justify an overall finding of unacceptable risk. However, caution should be exercised before making a finding on that basis: *Re Benji and Perry* [2018] NSWSC 1750 at [51]–[52].

Although the High Court in *M v M* was concerned with the risk of harm by sexual abuse, it is well established that the "unacceptable risk" test does not arise solely in respect of allegations of physical or sexual abuse; it can include any or all matters that compromise the safety, welfare and well-being of a child, and is examined in light of an accumulation of factors proved: *DFaCS (NSW) and the Colt Children* [2013] NSWChC 5 at [146]–[149]; *Secretary, DFaCS and the Harper Children* [2016] NSWChC 3 at [32]–[33].

Additional principles to be applied

Subject to the paramount principle, other principles to be applied in the administration of the Act are (s 9(2)):

(a) the child's views must be given due weight

(b) account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child

(c) the least intrusive intervention in the life of the child and his/her family must be taken, consistent with the paramount concern of protecting the child from harm and promoting their development

(d) children temporarily or permanently deprived of their family environment are entitled to special protection and assistance from the State, and his/her name, identity, language, cultural and religious ties should, as far as possible, be preserved

(e) arrangements for out-of-home care should be made in a timely manner; the younger the child, the greater the need for early decisions regarding permanent placement

(f) a child in out-of-home care is entitled to a safe, nurturing, stable and secure environment. Unless contrary to his/her best interests, and taking into account their wishes, this includes retention of relationships with people significant to the child (birth or adoptive parents, siblings, extended family, peers, family friends and community)

(g) if a child is placed in out-of-home care, the permanent placement principles (see below) are to guide all actions and decisions regarding permanent placement.

The principle of least intrusive intervention in s 9(2)(c) is confined to when it is necessary to take action in order to protect a child from harm. There must be a prospect of harm if action is not taken, and the question is then the nature of the action. Where the court is considering whether or not to displace existing care arrangements and return a child to the child's family, the principle has limited application, although the preference for existing care arrangements to continue may still be a material matter: *Re Tracey* (2011) 80 NSWLR 261 at [79].

Australia's treaty obligations under the United Nations Convention on the Rights of the Child are also relevant to determinations under the Act: *Re Tracey*, above, at [43]–[49]. Although the paramountcy principle is reflected in Art 3.1 of the Convention, other Articles may be relevant in determining the best interests of the child, particularly Arts 3.2, 5, 8.1, 9.1, 12.1, 29 and 30.

Principle of making "active efforts"

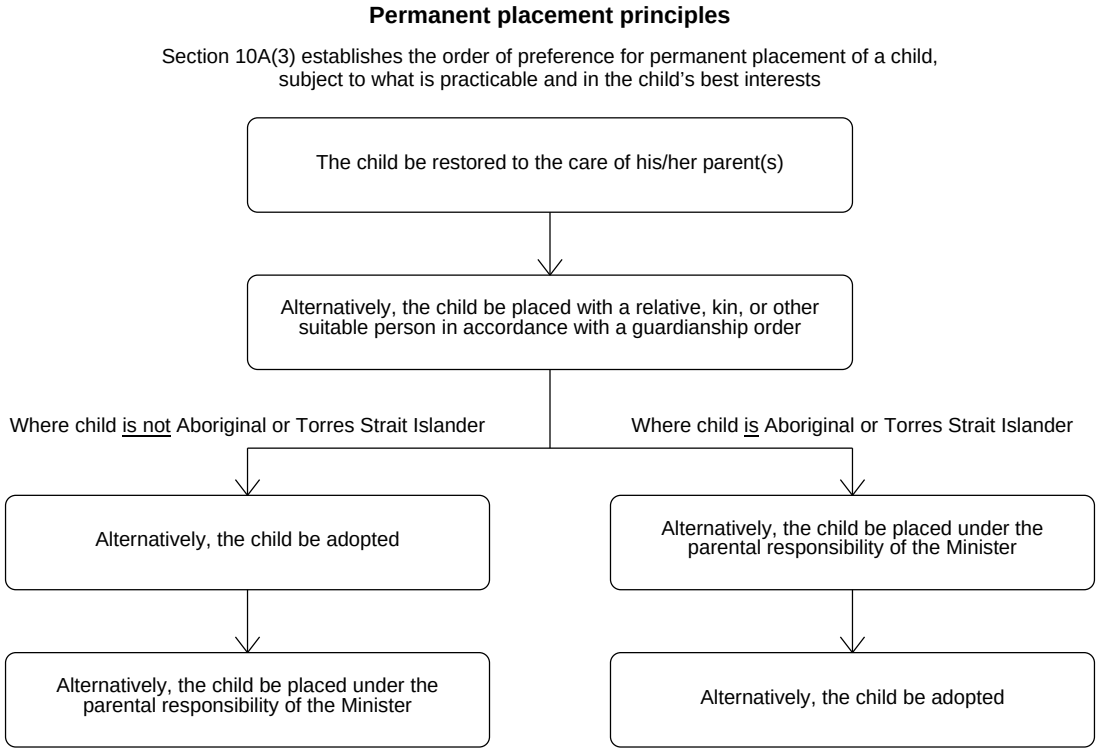
For applications made on or from 15 November 2023, subject to the "paramountcy principle", functions under the Act must be in accordance with the principle of active efforts: s 9A(1), (5); Sch 3 Pt 14 cl 2(a). The "principle of active efforts" means making active efforts to prevent

the child from entering out-of-home care, and in the case of removal, restoring the child to the parents, or if not practicable or in the child's best interests, with family, kin or community: s 9A(2). Active efforts are to be timely, practicable, thorough and culturally appropriate, amongst other things, and can include providing, facilitating or assisting with access to support services and other resources — considering alternative ways of addressing the needs of the child, family, kin or community: s 9A(3), (4).

Permanent placement principles

Section 10A(1) defines "permanent placement" as "a long-term placement following the removal of a child or young person from the care of a parent or parents pursuant to this Act that provides a safe, nurturing, stable and secure environment for the child or young person".

Subject to ss 8 and 9, a child in need of permanent placement is to be placed in accordance with the permanent placement principles: s 10A(2). Section 10A sets out a hierarchy to prioritise the placement of children with family: *A v Secretary, Family and Community Services* [2015] NSWDC 307 at [473]–[476].



Aboriginal and Torres Strait Islander principles

The Aboriginal and Torres Strait Islander Principles are enshrined in Ch 2, Pt 2 of the *Children and Young Persons (Care and Protection) Act*.

Section 11(1) provides that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children with as much self-determination as is possible.

Section 12A(2) sets out the five elements which make up the Aboriginal and Torres Strait Islander Children and Young Persons Principle: (a) prevention; (b) partnership; (c) placement; (d) participation, and (e) connection, which apply to the administration of the Act, as relevant to the decision being made, in relation to Aboriginal and Torres Strait Islander children and young persons: s 12A(1), (3).

These are aimed at enhancing and preserving Aboriginal children's sense of identity, as well as their connection to their culture, heritage, family and community: Second Reading Speech, Legislative Council, *Family is Culture Review Report 2019*, p 250.

Proper implementation of the Aboriginal and Torres Strait Islander Principles requires an acknowledgement that the cultural identity of an Aboriginal child is "intrinsic" to any assessment of what is in the child's best interests: *The Secretary of the Department of Communities and Justice and Fiona Farmer* [2019] NSWChC 5 at [116]–[117].

Particular principles regarding Aboriginal and Torres Strait Islander children and their special heritage are enunciated by s 13 and are reflected particularly in ss 78(2A), 78A(4), 83(3A), 83A. Broadly speaking, these principles provide that if Aboriginal and Torres Strait Islander children are to be removed from their parents, they should be placed with (s 13(1)):

- extended family members or, at least
- members of their community or, if that is not practical
- other Aboriginal and Torres Strait Islander persons residing nearby or, as a last resort
- a suitable person(s) approved by DCJ after consultation with members of the extended family and appropriate Aboriginal and Torres Strait Islander organisations.

Section 5 provides the relevant definitions in relation to the identification of Aboriginal and Torres Strait Islander children. The decision of *Hackett (a pseudonym) v Secretary, DCJ* [2020] NSWCA 83, although relating to the *Adoption Act* 2000, provides guidance in respect of the application of s 5. "There is no requirement in order … to be an Aboriginal child for the child to have a specified proportion of genetic inheritance" and "descent is different from race": *Hackett* per Leeming JA at [53]; [86]; *Adoption Act*, s 4(1), (2).

The late identification, or the de-identification, of children by DCJ can have consequences for planning and placement so, in cases where identification is an issue, the court will be assisted by timely evidence from the parties.

If a child has one Aboriginal and Torres Strait Islander parent and one non-Aboriginal and Torres Strait Islander parent, the child may be placed with the person with whom the best interests of the child will be served having regard to the principles of the Act: s 13(4). Arrangements must be made to ensure the child has the opportunity for continuing contact with the other parents' family, community and culture: s 13(5).

In determining placement, account is to be taken of the child's expressed wishes and whether they identify as an Aboriginal and Torres Strait Islander person: s 13(2).

In relation to placement with non-Aboriginal and Torres Strait Islander persons, no final order allocating sole parental responsibility for an Aboriginal and Torres Strait Islander child to a non-Aboriginal and Torres Strait Islander person may be made except after extensive consultation and with the express approval of the Minister for Aboriginal Affairs and the Minister for Community Services: s 78A(4).

Section 83A(3) provides, for care applications made on or after 15 November 2023, that a permanency plan for an Aboriginal and Torres Strait Islander child must comply with permanent placement principles, the Aboriginal and Torres Strait Islander Child and Young Persons Principle and the placement principles under s 13. The plan must also include a cultural plan that sets out how the child will maintain and develop connection with family, community and identity: s 83A(3)(b). For earlier applications, see former s 78A(3). For further information, see **[40-080] Court's consideration of care and permanency plans**.

Further, if an Aboriginal and Torres Strait Islander child is placed with a non-Aboriginal and Torres Strait Islander carer, the following principles are to determine the choice of a carer (s 13(6)):

(a) subject to the child's best interests, a fundamental objective is to be the reunion of the child with his/her family or Aboriginal and Torres Strait Islander community

(b) continuing contact must be ensured between the child and his/her Aboriginal and Torres Strait Islander family, community and culture.

The Aboriginal and Torres Strait Islander placement principles under s 13 are an aspect of the important principle in s 9(2)(d) that a child's cultural ties should be preserved when they are removed from their family. However, s 13(1) must not be blindly implemented without regard to the principle of paramountcy and the other objects and principles set out in ss 8 and 9: *Re Victoria and Marcus* [2010] CLN 2. In the exceptional case of *Re Victoria and Marcus*, the children were placed with carers who were not Aboriginal rather than their Aboriginal grandparents as the court found there was a real risk the grandparents would actively discourage the children from identifying with their Aboriginal cultural links, "contrary to the whole purpose and spirit of the Aboriginal Placement Principles set out in s 13(1)": at [52].

The principles in s 13(1) do not apply to emergency placements to protect a child from serious risk of immediate harm, or to a placement of less than two weeks duration: s 13(7).

[40-020] Applications

Emergency care and protection order (s 46)

In situations where there is an urgent need to protect a child, FACS can apply to the court for an emergency care and protection order (ECPO). If satisfied that a child is at risk of serious harm, the court may make an ECPO: s 46(1). The order, while in force, places the child in the care of the Secretary or person specified in the order: s 46(2).

If the child has been removed without warrant, or care is assumed by an order under s 44, the application must be made within three working days after the day on which removal or assumption of care: s 45(1A).

An ECPO has effect for a maximum of 14 days: s 46(3). However, it may be extended once only for a further maximum period of 14 days: s 46(4).

Care order (s 61)

An application for a care order must be commenced by the Secretary: s 61(1). It must specify the particular care order sought and the ground(s) under s 71(1) on which it is sought: s 61(1A); see below at **[40-060] Grounds — s 71(1)**.

When making a care application the Secretary must:

- provide a written report which summarises the facts, matters and circumstances on which the application relies and states whether or not the child is currently the subject of an order made by the court in the exercise of its jurisdiction under the Act (or by any other court exercising jurisdiction with respect to the custody or guardianship of children or parental responsibility for children): s 61(2); Children's Court Rule 2000, r 21. See also Children's Court Practice Note 2 "Initiating Reports and Service of the relevant portion of the Community Services file in Care Proceedings"
- for care applications made on or after 15 November 2023, provide evidence of active efforts made to take alternative action in accordance with s 9A and the reasons why active efforts

were unsuccessful; and provide evidence that alternatives to a care order were considered by the Secretary and the reasons why the alternatives were not considered appropriate: s 63(1); Sch 3 Pt 14 cl 2(b). This includes evidence that, before making the care application, active efforts were made to provide, facilitate or assist with support for the child and their parents' safety, welfare and well-being, and that a parent responsibility contract, a parent capacity order, a temporary care arrangement and alternative dispute resolution were considered: s 63(2). Active efforts are not applicable when seeking an emergency care and protection order: s 63(3). If the court is not satisfied with the evidence, then neither the dismissal of the care application nor the discharge of the child to the care responsibility of the Secretary should be taken, unless in the best interests of the child's safety, welfare and well-being: s 63(5),

- for care applications made before 15 November 2023, see former s 63(1).

Applications for guardianship order (s 79B)

Despite the restriction under s 61(1) that a care application only be made by the Secretary, an application for a guardianship order may be made by the Secretary, or (with the Secretary's written consent) either the agency responsible for supervising the placement of the child, or a person who is seeking to be allocated all aspects of parental responsibility for the child (including an authorised carer): s 79B(1).

The Secretary must not make, or consent to, an application unless satisfied that the person to whom parental responsibility is to be allocated has agreed to undergo, and has satisfied, the suitability assessments prescribed by cl 3 and Sch 2 *Children and Young Persons (Care and Protection) Regulation* 2022: s 79B(1A).

Interim orders

Interim care orders may be made after a care application is made and before the application is finally determined (s 69), and prior to the determination of whether a child is in need of care and protection, where the court is satisfied it is appropriate to do so: s 69(1A). An interim order is of a temporary or provisional nature pending final resolution of the proceedings, and an applicant generally speaking does not have to satisfy the court of the merits of its claim: *Re Jayden* [2007] NSWCA 35 at [74]–[75].

When seeking an interim care order, the Secretary has the onus of satisfying the court that it is not in the best interests of the child's safety, welfare and well-being that he or she should remain with his or her parents or other persons having parental responsibility: s 69(2).

Other forms of interim orders may be made if the court considers them appropriate for the safety, welfare and well-being of a child, pending the conclusion of the proceedings: s 70.

An interim care order should not be made unless the court is satisfied that making the order is necessary in the interests of the child, and is preferable to making a final order or dismissing the proceedings: s 70A.

When applying the relevant tests under ss 69, 70 and 70A, the court may be satisfied simply by weighing the risks involved on the evidence available to it at the time (cf *M v M* (1988) 166 CLR 59): *Re Jayden*, above, at [79].

The usual interim order is for the allocation of parental responsibility to the Minister until further order: *Re Mary* [2014] NSWChC 7 at [27]. See **Orders allocating parental responsibility (s 79)** at **[40-100]**.

[40-040] Hearings — practice and procedure

General nature of proceedings

Expeditious and non-adversarial

Children's Court proceedings are not be conducted in an adversarial manner: s 93(1). They are to be conducted with as little formality and legal technicality and form as circumstances permit: s 93(2).

The intended purpose of not conducting the proceedings in an adversarial manner is to give effect to the paramountcy principle. Adversarial proceedings, pitting parents against each other or against another carer, would not promote the paramount interests of the child and may actually harm the child by poisoning future relationships between parties who will continue to maintain contact with the child. The risks to ongoing relationships if proceedings are conducted in an adversarial manner are self-evident and well understood: *D v C (No 2)* [2018] NSWCA 310 at [41].

All matters are to proceed as expeditiously as possible: s 94(1). For that purpose, the court is to set a timetable for each matter taking into account the child's age and developmental needs, and may give such directions as it considers appropriate to ensure the timetable is kept: s 94(2)–(3).

See Children's Court Practice Note 5 "Case management in care proceedings", 16.6 for Standard directions.

The granting of adjournments should be avoided to the maximum extent possible. Adjournments must only be granted if the court is of the opinion that it is either in the best interests of the child, or there is some other cogent or substantial reason to do so: s 94(4).

Rules of evidence not applicable

The court is not bound by the rules of evidence unless it determines that the rules should apply in relation to particular proceedings, or particular parts of proceedings: s 93(3). The court may, upon application by a party to the proceedings, determine that rules of evidence are to apply in relation to the proof of a fact if, in the court's opinion, proof of that fact is or will be significant to the determination of part/all of the proceedings: s 93(3A).

However, the court must be careful and examine the sources of evidence, particularly quasi-opinion and secondary evidence, to determine its strength and the weight to be given to it: *LZ v FACS* [2017] NSWDC 414 at [150].

Standard of proof

The standard of proof is proof on the balance of probabilities: s 93(4). The *Briginshaw v Briginshaw* (1938) 60 CLR 336 principle is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Re Sophie* [2008] NSWCA 250 at [48], [50].

Appearance and legal representation

Persons with the opportunity to be heard

The court must not make an order that has a significant impact on a person who is not a party to proceedings unless the person has been given an opportunity to be heard on the matter of significant impact: s 87(1).

If the impact of the order is on a group of persons, s 87(2) provides that only one representative of the group, approved by the Children's Court, is to be given the opportunity to be heard. If the group affected is an Aboriginal or Torres Strait Islander family or community, the representative may be a member of a relevant Aboriginal or Torres Strait Islander organisation or entity: s 87(2A).

However, the opportunity to be heard afforded by s 87 does not give the person who is heard the status or rights of a party to the proceedings: s 87(3).

Persons with the right to appear

Pursuant to s 98(1), in any proceedings with respect to a child, the following persons may appear in person or be legally represented or, by leave of the court, be represented by an agent, and may examine and cross-examine witnesses on matters relevant to the proceedings:

- the child and each person with parental responsibility for the child
- the Secretary,
- the Minister.

Further, any other person who, in the court's opinion, has a genuine concern for the safety, welfare and well-being of the child may, by leave, appear in the proceedings, or be legally represented, or be represented by an agent, and may examine and cross-examine witnesses on matters relevant to the proceedings: s 98(3).

Justice Slattery, considering the distinction between the rights afforded by ss 87 and 98 in *Bell-Collins Children v Secretary, DFaCS* [2015] NSWSC 701, noted that one of the differences in focus between s 87(1) and s 98(3) is marked out by the differing thresholds that must be passed in order to enliven each section. While s 87(1) focuses on the "impact on a person", s 98(3) is more child-centred. Persons meriting leave under s 98(3) will sometimes be people who, by their participation, can fill an evidentiary gap in the proceedings that it may be in the best interests of the child to see filled: at [33]–[34].

Representation of the child

The court may appoint a legal representative for the child: s 99(1). Such an appointment is deemed to have been made to a Legal Aid solicitor or barrister on the filing of a care application: Children's Court Practice Note 5 "Case management in care proceedings", 10.1.

Section 99A provides that a legal representative for a child is to act as a:

- **direct legal representative** if the child is capable of giving proper instructions and a guardian ad litem has not been appointed, or
- **independent legal representative** if the child is not capable of giving proper instructions, or a guardian ad litem has been appointed.

The following rebuttable presumptions apply:

- a child less than 12 years is not capable of giving proper instructions: s 99B(1)
- a child not less than 12 years is capable of giving proper instructions [this presumption is not rebutted merely because the child has a disability]: s 99C(1).

The following table compares the role of direct and independent legal representatives as provided, without limitation, by s 99D.

Role of direct legal representative (DLR): s 99D(a)	Role of independent legal representative (ILR): s 99D(b)
Ensuring the child's views are placed before the court	Acting on the instructions of the guardian ad litem [where appointed]
Ensuring all relevant evidence is adduced and, where necessary, tested	Interviewing the child
Acting on the instructions of the child	Explaining the role of an ILR to the child
	Presenting direct evidence to the court about the child and matters relevant to their safety, welfare and well-being
	Presenting evidence of the child's wishes (although not bound by the child's instructions in this regard)
	Ensuring all relevant evidence is adduced and, where necessary, tested
	Cross-examining parties and their witnesses
	Making applications and submissions to the court for orders considered appropriate in the child's interests
	Lodging an appeal if considered appropriate

In considering the distinction between the two forms of representation, the court in *Re Sally* [2011] NSWSC 1696 noted that "the critical difference … is that the Direct Legal Representative acts on instructions of the child but the Independent Legal Representative exercises a degree of independent judgment about what is in the child's … best interests in setting the course on behalf of the child before the Court": at [12].

Guardians ad litem

The court may appoint a guardian ad litem for a child if it is of the opinion that there are special circumstances warranting, and the child will benefit from, the appointment: s 100(1).

Special circumstances may include that the child has special needs because of age, disability or illness, or that the child is, for any reason, not capable of giving proper instructions to a legal representative: s 100(2).

The functions of a guardian ad litem are to safeguard and represent the child's interests, and to instruct the child's legal representative: s 100(3). Where a guardian ad litem has been appointed, the child's legal representative is to act on their instructions: s 100(4).

In addition, if the court is of the opinion that the parent(s) of a child is incapable of giving proper instructions to their representative, they may appoint a guardian ad litem for either or both parents, or request the parent's legal representative act as amicus curiae: s 101(1).

See *Department of Human Services v Kieran; Siobhan; Robert Isaac* [2010] CLN 1, in which Marien DCJ held that for children of tender years, it is unlikely that special circumstances under s 100(1) would exist, but most importantly, it is highly unlikely that the appointment of a guardian ad litem (and in the context of that case, an Aboriginal guardian ad litem), would benefit the child over and above the benefits derived from the appointment of an independent legal representative: at [30].

Explanation of proceedings

The court must take such measures as are reasonably practicable, taking into account the child's age and developmental capacity, to ensure the child understands the proceedings, in particular the nature of any assertions made in the proceedings and the legal implications of any such assertion: s 95(1).

For the purpose of enabling the court to perform its duties under s 95(1), the court may request the child's legal representative advise it of the steps taken to ensure the child understands the necessary aspects of the proceedings: Children's Court Practice Note 5 "Case management in care proceedings", 21.1.

Support persons

Any participant in proceedings before the court may, with leave, be accompanied by a support person: s 102(1). Leave must be granted unless:

- the support person is a witness
- the court is of the opinion, having regard to the child's wishes, leave should not be granted, or
- there is some other substantial reason not to grant leave: s 102(2).

Persons excluded from proceedings

Sections 104–104C deal with exclusions of certain persons from the proceedings, as set out in the table below:

Provision	Relevant person	Court's power
s 104	The child the subject of the proceedings	May be directed by court: • to leave at any time,* • not to be present at non-court proceedings. Only if, in the court's opinion, the prejudicial effect of excluding the child is outweighed by the psychological harm likely to be caused if the child remained present.
s 104A	Any person (other than the child) [even if directly interested in the proceedings]	May be directed by court: • to leave at any time • not to be present at non-court proceedings. Only if, in the court's opinion, such a direction is in the interests of the child
s 104B	Any person not directly interested in the proceedings	Must be excluded unless the court otherwise directs
s 104C	News media	Entitled to enter and remain unless court otherwise directs

Publication of names and identifying information

Section 105 prohibits publication or broadcast of certain information in any form that may be accessible by a person in NSW (whether before, during or after proceedings). This includes the name of a child who is the subject of the proceedings, is or is likely to be a witness, mentioned or otherwise involved in any capacity in the proceedings, or who is the subject of a report under the Act: s 105(1).

It is also prohibited to express the name of any child in a way that identifies them as being or having been under the parental responsibility of the Minister or in out-of-home care, for example by identifying them as a foster child or as a ward of the State: s 105(1AA).

* If child directed to leave proceedings, the court must also order that media be excluded: s 104(4)

The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

Exceptions apply, such as where a young person consents, where the court consents, or where the Minister with parental responsibility consents: s 105(3).

Examination and cross-examination of witnesses

A Children's Magistrate is entitled to examine and cross-examine a witness to any proceedings to the extent deemed proper for the purpose of eliciting the information relevant to the exercise of the court's powers: s 107(1).

The court must forbid offensive, scandalous, insulting etc questions, and oppressive or repetitive examination, unless satisfied it is essential in the interests of justice for the examination to continue or for the question to be answered: s 107(2)–(3). Questions to a witness, who is a parent or primary care-giver of a child, the subject of a care application, concerning the witness's previous history of dealings with any child, are taken not to be intrinsically offensive, scandalous or oppressive: s 107(3A).

Views of siblings

The court has a discretion to obtain and consider the views of any siblings of a child with respect to whom proceedings are brought and must take account of the interests of any siblings in determining what orders (if any) to make in the proceedings: s 103.

[40-060] The "establishment" phase

Determination — "child in need of care and protection"

A final care order may only be made if the court is satisfied that the child is in need of care and protection, pursuant to either ss 71 or 72. Satisfaction of one of these two bases for making a care order is commonly described as the "establishment issue" or "establishment phase" of proceedings: *Re Alistair* [2006] NSWSC 411 at [65]; *SB v Parramatta Children's Court* [2007] NSWSC 1297 at [44].

Section 71 provides a number of grounds on which the court can find that the child is in need of care and protection (see **Grounds — s 71(1)** below). The reasons identified in s 71(1) are not merely facts or particulars but are grounds, at least one of which the court must be satisfied before a care order is made: *SB v Parramatta Children's Court*, above, at [51].

By contrast, s 72(1) provides that a care order may only be made if the court is satisfied either that the child "is in need of care and protection" (the s 71 criterion) or, in the alternative, that the child is "not then in need of care and protection", but:

> (a) was in need of care and protection when the circumstances that gave rise to the care application occurred or existed, and
>
> (b) would be in need of care and protection but for the existence of arrangements for the care and protection of the child made under ss 39A, 49, 69 or 70.

Read together, ss 71 and 72 provide alternative bases for making a care order. The alternative created by s 72(1) is relevant and applicable only when the court is not satisfied there is an existing need for care and protection. The court must be satisfied that, despite the absence of existing need, both the circumstances identified in paragraphs (a) and (b) of s 72(1) exist: *VV v District Court of NSW* [2013] NSWCA 469 at [19]–[20].

If the court is not satisfied of either basis for a need for care and protection, it may dismiss the application: s 72(2).

Presumption — previous removal of another child

Section 106A(1) obliges the court to admit any evidence adduced that a parent or care-giver of a child, the subject of a care application, (a) has previously had a child removed from, and not restored to, their care and protection, or (b) is a person named or otherwise identified by the coroner or police as having been involved in causing a reviewable death of a child or young person. Evidence under s 106A(1)(b) is prima facie evidence that the child, the subject of the application, is in need of care and protection: s 106A(2).

The presumption in s 106A(2) may be rebutted if the court is satisfied, on the balance of probabilities, that the parent or primary care-giver was not involved in causing the relevant reviewable death of the child or young person: s 106A(3).

The presumption under s 106A is not itself a ground for making a care order: *SB v Parramatta Children's Court* at [49]–[51]; *RC v Director-General, DFaCS* [2014] NSWCA 38 at [43].

Grounds — s 71(1)

Section 71(1) sets out the grounds on which a care order may be made:

(a) there is no parent available to care for the child as a result of death or incapacity or for any other reason,

(b) the parents acknowledge that they have serious difficulties in caring for the child and, as a consequence, the child is in need of care and protection,

(c) the child has been, or is likely to be, physically or sexually abused or ill-treated,

(d) the child's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers,

Note: the court cannot conclude the child's basic needs will likely not be met only because of a parent or primary care-giver's disability or poverty: s 71(2)

(e) the child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living,

(f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service,

(g) the child is subject to a care and protection order of another State or Territory that is not being complied with,

(h) s 171(1) applies in respect of the child [the Secretary has requested that the child be removed from statutory or supported out-of-home care].

The court may make a care order for a reason not listed under s 71(1), but only if it was pleaded by the Secretary in the care application: s 71(1A).

[40-080] The "placement" or "welfare" phase

Last reviewed: November 2023

Assessment orders — referral to Children's Court Clinic

Section 53(1) permits the court to order the physical, psychological, psychiatric or other medical examination and/or assessment of a child. If they have sufficient understanding to make an informed decision, the child may refuse to submit to an examination or assessment: s 53(4).

The court may also appoint a person to assess the capacity of a person who has, or is seeking, parental responsibility for the child: s 54(1). An assessment may only be carried out with the person's consent: s 54(2).

Assessment orders may be made on the application of the Secretary (at any time), or by a party to a care application: s 55(1). The Act does not provide for the court to make an assessment order on its own initiative: *Re M (No 5) — BM v Director-General, DFaCS* [2013] NSWCA 253 at [128].

Applications for assessment orders under s 53 or s 54 should be filed as soon as possible after establishment: Children's Court Practice Note 5 "Case management in care proceedings", 16.6.2(a). See also Children's Court Practice Note 6 "Children's Court Clinic assessment applications and attendance of Authorised Clinicians at hearings, dispute resolution conferences and external mediation conferences" which contains procedures for the making of assessment applications.

In determining whether to make an assessment order, the court must have regard to (s 56(1)):

(a) whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere,

(b) whether any distress the assessment is likely to cause the child or young person will be outweighed by the value of the information that might be obtained,

(c) any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose,

(d) any other matter the Children's Court considers relevant.

The court must also ensure a child is not subjected to unnecessary assessment: s 56(2).

If the court makes an assessment order it is to appoint the Children's Court Clinic to prepare and submit the report, unless the Clinic informs the court that it is unable to do so or considers it is more appropriate for another person to do so: s 58(1). If the Clinic so informs the court, the court is to appoint another person whose appointment, so far as possible, is agreed to by the child, the parents and the Secretary: s 58(2).

Section 58 is absolute in its terms. The discretion as to whether it is appropriate that the Children's Court Clinic, or some independent person, make the assessment is vested in the Clinic rather than in the court. Therefore, an order for an assessment report which does not appoint the Clinic in compliance with s 58(1) will be invalid: *Re Oscar* [2002] NSWSC 453 at [13]–[14].

An assessment report submitted to the court is taken to be a report to the court, rather than evidence tendered by a party: s 59.

Dispute resolution

Before or at any stage during a hearing, the court may refer a care application to a Children's Registrar for the Registrar to arrange and conduct a dispute resolution conference (DRC): s 65. The purpose of a DRC is to give parties an opportunity to agree on action that should be taken in the best interests of the child: s 65(2). As far as practicable, a DRC should be held as early as possible in the proceedings: Children's Court Practice Note No 3, "Alternative dispute resolution procedures in the Children's Court", 11.1.

DRC's are conducted using a conciliation model, with the Registrar acting as conciliator: s 65(2A).

The court may also make an order under s 65A(1) that the parties to a care application participate in an alternative dispute resolution process (external ADR). It may do so on its own initiative or on the application of a party: s 65A(2).

Section 244B provides that the following, where made during the course of, or prepared for the purposes of, a DRC or external ADR, are not admissible in any proceedings unless the persons participating, or identified, consent to admission:

- evidence of anything said or any admission
- the conduct of any party
- any document.

Further, a person who conducts or participates in a DRC or external ADR must not disclose anything said or done or any admission made during the process to any other person (s 244C), except in certain circumstances permitted by s 244C(2)–(4).

Care plans and permanency planning

Care plans

Once a child is found to be in need of care and protection, and an order is sought for removal of the child from the care of his or her parents, it becomes the responsibility of the Secretary to prepare a care plan: s 78(1). A care plan must also be prepared by an applicant for a guardianship order: s 79B(8).

A court must not make a final order for removal of a child or for the allocation of parental responsibility for the child unless a care plan has been considered: s 80.

Section 78(2) provides that the care plan must make provision for the following:

(a) allocation of parental responsibility between the Minister and the parents for the duration of any period for which the child is removed from the care of the parents,

(b) the kind of placement proposed, including:

  (i) how it relates in general terms to permanency planning for the child, and

  (ii) any interim arrangements proposed for the child pending permanent placement and the timetable proposed for achieving a permanent placement,

(c) arrangements for contact between the child and parents, relatives, friends and other persons with whom they are connected,

(d) the agency designated to supervise the placement in out-of-home care,

(e) the services that need to be provided to the child.

It must also contain information about the child's circumstances such as their family structure, history, development and experience, relationship with their parents, cultural background, etc. See further *Children and Young Person (Care and Protection) Regulation* 2022, cl 10 and Sch 3.

Further matters are also required to be set out pursuant to Sch 3 of the Regulation, including resources required, roles and responsibilities of each person, agency or body participating, and the frequency and means by which the progress of the plan will be assessed.

Section 78(3) provides that the care plan "is to be made as far as possible with the agreement of the parents of the child". In context, the expression "as far as possible" requires the Secretary

to assess what is possible by reference not merely to the wishes of the parents, but to the objects of the Act and the circumstances which have generated the application for removal of the child from the parents' care: *Re M (No 5) — BM v Director-General, DFaCS*, above, at [133].

If a care plan made on or after 15 November 2023 is for an Aboriginal or Torres Strait Islander child, it must include a cultural plan to show how the connection with First Nation's family, community and identity will be maintained and developed: s 78(2A)(a), Sch 3, Pt 14 cl 2(c). The plan must be developed in consultation with the child, their parents, family and kin, and relevant First Nation's organisations and entities: s 78(2A)(b). The plan must comply with permanent placement principles, the Aboriginal and Torres Strait Islander Children and Young Persons Principles and the placement principles for Aboriginal and Torres Strait Islander children under s 13: s 78(2A)(c). For earlier applications, see former s 78A(3).

The care plan is to be in the form approved by the Secretary in consultation with the Children's Court Advisory Committee and regulations: s 78(5) and (6).

See further **Court's consideration of care and permanency plans**, below, at **[40-080]**.

Permanency planning

"Permanency planning" refers to the making of a plan that aims to provide a child with a stable placement that offers long-term security and:

- has regard, in particular, to the principles set out in s 9(2)(e) and (g)
- meets the child's needs
- avoids the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1).

Where the Secretary makes a care application seeking removal of the child, it must prepare a permanency plan and submit it to the court for consideration: s 83.

A care plan is required to provide how the placement sought relates to the permanency planning of the child: s 78(2)(b)(i). Therefore, in practice, the care plan incorporates the permanency plan required by s 83: *Re M (No 5) — BM v Director-General, DFaCS* at [107].

Realistic possibility of restoration?

The Secretary is required to assess whether there is a realistic possibility of the child being restored to his or her parents within a reasonable period: s 83(1). A "reasonable period" is no more than 24 months: s 83(8A).

There are two limbs involved in the assessment of whether there is a realistic possibility of restoration, as prescribed by s 83(1). This requires regard to be given to:

(1) the child's circumstances, and

(2) evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that led to the removal of the child from their care.

The requirement that the possibility of restoration be "realistic" was clearly inserted to require that the possibility of restoration be real or practical and not fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future": *Re Saunders and Morgan v Department of Community Services* [2008] CLN 10 at [13]–[14]; endorsed in *In the matter of Campbell*, above, at [56]. The concept is not to be confused with the mere hope that a parent's situation might improve: *Re Tanya* [2016] NSWSC 794 at [69].

The words "within a reasonable period" in s 83 enable the court to take into account future likely events which might occur within a reasonable period. The court may consider whether a parent has already commenced a process of improving his or her parenting, and whether there has already been some significant success which enables a confident assessment that continuing success might be predicted: *DFaCS v The Steward Children* [2019] NSWChC 1 at [33].

Depending on the Secretary's assessment, the permanency plan must provide for either restoration or another suitable long-term placement: s 83(2)–(3). A plan prepared under s 83(3), for a care application made on or after 15 November 2023, must include the reasons why there is no realistic possibility of restoration within a reasonable period, and details of active efforts made to restore the child to their parents or, if not practicable or in the child's best interests, to their family, kin or community: s 83(3A); Sch 3, Pt 14 cl 2(f). For earlier applications, see former s 78A(3).

Where the permanency plan provides for restoration, it must include (s 84(1)):

(a) a description of the minimum outcomes the Secretary believes must be achieved before it would be safe for the child or young person to return to his or her parents,

(b) details of the services the Department is able to provide, or arrange the provision of, to the child or young person or his or her family in order to facilitate restoration,

(c) details of other services that the Children's Court could request other government departments or funded non-government agencies to provide to the child or young person or his or her family in order to facilitate restoration,

(d) a statement of the length of time during which restoration should be actively pursued.

A permanency plan need not provide details as to the exact placement of the child in the long-term but must be sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future: s 78A(2A).

Permanency planning and Aboriginal and Torres Strait Islander considerations

For care applications made on or after 15 November 2023, s 83A sets out the requirements for the preparation of a permanency plan for an Aboriginal or Torres Strait Islander child: Sch 3 Pt 14 cl 2(g). For earlier applications, see former s 78A(3).

Further, if a plan indicates an intention to provide permanent placement of an Aboriginal and Torres Strait Islander child through adoption by a non-Aboriginal and Torres Strait Islander person, certain requirements under s 78A(4) must be met.

See further, above, at **[40-000] Aboriginal and Torres Strait Islander principles**.

Court's consideration of care and permanency plans

The court's obligations to consider care and permanency plans may be summarised as follows:

- the court cannot make a final order for removal of a child or allocating parental responsibility unless it has first considered a care plan presented by the Secretary: s 80
- the court must decide whether to accept the Secretary's assessment of whether or not there is a realistic possibility of restoration within a reasonable period: s 83(5A). Before making this determination, for care applications made on or after 15 November 2023, the court may direct the Secretary to provide the reasons why restoration within a reasonable period is not possible, and evidence of the active efforts made to restore the child to the parents, or, if not

practicable or in the best interests of the child, to family, kin or community: s 83(5B); Sch 3 Pt 14 cl 2(f). For earlier applications, see former s 83. (Further, if the Secretary's assessment is not accepted, the court may direct the Secretary to prepare a different permanency plan: s 83(6))

- the court must not make a final order unless it expressly finds (s 83(7)):
  - (i) permanency planning for the child has been appropriately and adequately addressed, and
  - (ii) if the permanency plan involves restoration, that there is a realistic possibility of restoration within a reasonable period,
- for care applications made on or after 15 November 2023, s 83A sets out the requirements for the preparation of a permanency plan for an Aboriginal or Torres Strait Islander child: Sch 3 Pt 14 cl 2(g). For earlier applications, see former s 83.

Permanency planning was found not to have been appropriately and adequately addressed as required by ss 78A(2A) and 83(7A) in *Re Hamilton* [2010] CLN 2. In that case, the three children each had special needs. At the time the care plan was presented, two of the children had not undergone a full psychological assessment and no suitable placements had been found. The care plan did not provide a reasonably clear picture as to the way in which the child's needs, welfare and well-being would be met: at [66].

See also *DFaCS and Boyd* [2013] NSWChC 9; *Re Tracey* (2011) 80 NSWLR 261; *Re Rhett* [2008] CLN 1.

[40-100] Final care orders

Last reviewed: November 2023

Care orders generally

The orders available to the court in care proceedings, and discussed in further detail below, are the following:

- orders accepting undertakings (s 73)
- supervision orders (s 76)
- orders allocating parental responsibility (s 79)
- guardianship orders (s 79A)
- contact orders (s 86)
- prohibition orders (s 90A)
- orders for provision of support services (s 74)
- orders to attend therapeutic treatment (s 75).

It is possible to make consecutive care orders: s 67A.

The fact a particular care order is sought in the care application before the court does not preclude a different or additional order being made, provided all pre-requisites to the making of that order are satisfied: s 67.

Orders accepting undertakings (s 73)

If the court is satisfied a child is in need of care and protection, it may make an order accepting undertakings given by (s 73(1)):

(a) a responsible person, with respect to the care and protection of the child, or

(b) the child, with respect to their own conduct, or

(c) both of the above.

A "responsible person" may be a person with parental responsibility for the child, birth or adoptive parents or primary care-givers (whether or not they have parental or care responsibility): s 73(7).

The undertaking must be signed by the person giving it: s 73(2)(a). The order remains in force for its duration or until the child attains 18 years (whichever is sooner): s 73(2)(b).

Order

Pursuant to s 73(1) and for a period of [*specify period*] from the date of these orders the court accepts undertakings from [*specify party*] as follows:

[*list undertakings*]

The following are examples of undertakings under s 73:

- the parent is to accept the advice, guidance and support of DCJ officers
- the parents keep DCJ officers informed of their place of residence and that of the child, and not change such address without first notifying such officers
- the child be presented by the parents for all medical appointments
- to comply with the terms of any contact order made by the court with respect to the child,
- not to consume alcohol 24 hours before contact with the child, and/or not to be under the influence of alcohol or any other substance during contact.

As to breaches of undertakings, see **[40-200] Breach of care orders**.

Supervision orders (s 76)

If the court is satisfied a child is in need of care and protection, it may make an order placing the child under the supervision of the Secretary: s 76(1).

A supervision order must specify the reason for the order, the purpose of the order and the length of the order: s 76(2).

The maximum period of supervision is 12 months (s 76(3)), however the court may specify a maximum period longer than 12 months, but less than 24 months, if satisfied there are special circumstances warranting an order of that length: s 76(3A). Where a longer period is ordered, the order may be revoked (on the court's own motion or on the Secretary's application) after expiration of the first 12 months if the court considers there is no longer a need for supervision in order to protect the child: s 76(7).

The court may also extend, on its own motion or on application by the Secretary, the period of supervision as it considers appropriate, provided the total period does not exceed 24 months: s 76(6).

The court may require a report to be presented before the end of the period of supervision that discusses the outcomes of the supervision, whether the purposes of supervision have been achieved, and whether there is a need for further supervision and/or other orders in order to protect the child: s 76(4)(a). The court can also order one or more progress reports during the supervision period: s 76(4)(b). The court may consider a report after the period of supervision ends, provided it is both reasonable in the circumstances and in the best interests of the child and, after considering such a report, may make a new supervision order for a duration of no more than 24 months from the start of the original supervision order: s 76(4A), (4B).

Orders allocating parental responsibility (s 79)

Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children: s 3.

Where the court finds a child is in need of care and protection, it may make an order allocating all, or one or more specific aspects of, parental responsibility for a specified period: s 79(1).

The court cannot make an order unless particular consideration has been given to the permanent placement principles and the court is satisfied the order is in the child's best interests: s 79(3). The permanent placement principles are to be read subject to the objects of the Act in s 8 and the principles in s 9: *LZ v FACS* [2017] NSWDC 414 at [236].

Who may be allocated parental responsibility?

Parental responsibility may be allocated to the following person(s) (s 79(1)):

(a) to one parent to the exclusion of the other, or to both parents jointly, or

(b) solely to the Minister, or

(c) to one or both parents and to the Minister jointly, or

(d) to one or both parents and to another person or persons jointly, or

(e) to the Minister and another suitable person or persons jointly, or

(f) to a suitable person or persons jointly.

The court must not allocate parental responsibility jointly between two or more persons unless satisfied they can work together co-operatively in the child's best interests: s 79(8).

If aspects of parental responsibility are allocated jointly between the Minister and another person(s), either the Minister or the other person may exercise those aspects but if they disagree the disagreement is to be resolved by order of the court: s 79(7).

Aspects of parental responsibility

Section 79(2) sets out, without limitation, specific aspects of parental responsibility which may be allocated:

(a) the child's residence

(b) contact

(c) education and training

(d) religious and cultural upbringing

(e) medical and dental treatment.

Special requirements where all aspects are allocated to the Minister

If all aspects of parental responsibility are allocated to the Minister, the maximum period for the order is 24 months, if the permanency plan approved by the court involves restoration,

guardianship or adoption (unless the court finds there are special circumstances warranting a longer period): s 79(9)–(10). For care applications made on or after 15 November 2023, in determining whether there are special circumstances warranting the allocation of parental responsibility for more than 24 months, the court is to have regard to the matters set out in s 79AA; Sch 3 Pt 14 cl 2(e).

The Minister must, so far as is reasonably practicable, have regard to the views of the persons who had parental responsibility for the child before the order was made while still recognising that the child's safety, welfare and well-being remains the paramount consideration: s 79(6).

Restrictions on s 79 orders

Parental responsibility cannot be allocated to an organisation or principal officer of a designated agency (other than the Secretary): s 79(4A).

The court must not make an order under s 79:

- if, taking into account the permanent placement principles, it would be more appropriate to make a guardianship order under s 79A: s 79(4)
- if the order would be inconsistent with:
  (a) any Supreme Court order exercising jurisdiction with respect to the custody and guardianship of the child, or
  (b) a guardianship order made by the Guardianship Tribunal: s 79(5).

Suitability reports and progress review

When making an order under s 79 allocating parental responsibility to any person other than a parent, the court may order a party to prepare a written report concerning the suitability of the arrangements for the care and protection of the child: s 82(1).

The report must:

- be provided to the court within 24 months (or an earlier period if the court specifies), or after that time if it is reasonable in the circumstances and in the best interests of the child, and
- include an assessment of progress in implementing the care plan, including progress towards the achievement of a permanent placement, and
- be given to each other party to the proceedings (unless the court orders otherwise): s 82(2).

If the court considers the report and is not satisfied that proper arrangements have been made for care and protection of the child it can, on its own motion, re-list the matter for the purpose of conducting a review of progress in implementing the care plan (a "progress review"): s 82(3).

If the court intends to conduct a progress review, it must give notice of its intention within 30 days of receiving the report: s 82(3A)(a). It may also invite the party to give evidence and make submissions at the progress review, regarding progress in implementing the care plan, including progress towards achieving a permanent placement: s 82(3A)(b).

Allocation of parental responsibility by guardianship order (s 79A)

Guardianship orders are governed by s 79A of the Act. The court may make an order allocating to a suitable person all aspects of parental responsibility for a child who is in statutory or supported out-of-home care, or who it finds is in need of care and protection until the child reaches 18 years of age: s 79A(2).

The court must be satisfied of each of the following (s 79A(3)):

- there is no realistic possibility of restoration of the child to the parents, and
- that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
- if the child or young person is an Aboriginal or Torres Strait Islander child or young person — permanent placement of the child or young person under the guardianship order is in accordance with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under s 13, and
- if the child or young person is 12 or more years of age and capable of giving consent — the consent of the child or young person is given in the form and manner prescribed by the regulations: cl 12.

Parental responsibility may be allocated jointly to more than one person under a guardianship order: s 79A(4).

A guardianship order cannot be made if it would be inconsistent with any Supreme Court order with respect to the child made under its custody and guardianship of children jurisdiction, or a guardianship order made by the Guardianship Tribunal: s 79A(5).

Unless varied or revoked under s 90, a guardianship order remains in force until the child reaches age 18: s 79A(6).

The court's power to order suitability reports or to undertake a progress review applies only to orders allocating parental responsibility under s 79, and not to orders allocating parental responsibility by guardianship order under s 79A: s 82(1).

Contact orders (s 86)

Section 86(1) provides that the court may make an order doing any one or more of the following:

(a) stipulating minimum requirements concerning the frequency and duration of contact between a child or young person and his or her parents, relatives or other persons of significance to the child or young person,

(b) requiring contact with a specified person to be supervised,

(c) denying contact with a specified person if contact with that person is not in the best interests of the child or young person.

Contact orders may be made (s 86(1A)):

- on application by a party to proceedings before the court with respect to a child, or
- on application, with leave, by any person who:
  - (i) was a party to care proceedings with respect to the child,
  - (ii) considers himself or herself to have a sufficient interest in the child's welfare.

The court may grant leave if it appears there has been a significant change in any relevant circumstances since a final order was made: s 86(1B). Before granting leave, the court must consider whether there has been an attempt to reach an agreement about contact arrangements by participation in alternative dispute resolution, and may order participation in dispute resolution under s 65 or s 65A: s 86(1D).

For assistance in determining the matters to be considered in making a decision regarding contact, regard should be had to the Children's Court Contact Guidelines.

In identifying the contact arrangements which will properly answer the needs of the individual child, the court is required to consider a number of factors depending on the circumstances of the particular case, and to balance the benefits and risks of contact with the primary focus on the child's best interests: *Re Helen* [2004] NSWLC 7.

Section 86 requires the court not only to consider whether any contact, and if so of what nature, should be ordered, but also whether any such contact should be supervised: *Re Liam* [2005] NSWSC 75 at [42]. The court must obtain the consent of the proposed supervisor before making an order for supervised contact. If the supervisor does not accept the requirement then contact should not be given: s 86(2), (4); *Re Liam*, above, at [48]; *SM v Director-General, Department of Human Services and SG* [2010] NSWDC 250 at [11].

Note: Contact orders do *not* prevent a person having parental responsibility consenting to contact. In order to prevent a person having parental responsibility giving such consent it is necessary to make an order under s 90A (see, below, **Prohibition orders** at **[40-100]**).

As there is no provision in the Act for the enforcement of contact orders, it may be advisable to make an order accepting undertakings to comply with the contact order (see above, **Orders accepting undertakings** at **[40-100]**).

Duration of contact orders

A contact order has effect for the period specified in the order, unless varied or rescinded under s 86A or s 90: s 86(5). However, if the court finds there is no realistic possibility of restoration of a child to his or her parent, the maximum period for the order is 12 months: s 86(6).

Contact orders and children the subject of guardianship orders

Supervision must not be ordered in relation to contact with a child who is the subject of a guardianship order: s 86(2).

The 12-month limitation under s 86(6) does not apply to a contact order concerning a child the subject of a guardianship order if the court is satisfied a contact order longer than 12 months (for example, for the duration of the guardianship order) is in the child's best interests: s 86(8).

Variation of contact orders by agreement

The terms of a contact order may be varied by agreement between the parties. A contact variation agreement must be in writing, signed and dated by the affected parties (and the child's legal representative, if the variation agreement is made within 12 months of the order), and registered with the court: s 86A(2).

Order

Pursuant to s 86 it is ordered that [*specify name*] is to have contact with the child [*if necessary, name child*] for a period of [*specify period, or until further order*] as follows:

[*describe contact arrangements*]

[*if applicable*] The above contact is to be supervised by [*specify name or agency*]

Note: if the order is an interim order, it should be preceded by the words "until further order".

Prohibition orders (s 90A)

At any stage in care proceedings, the court can make an order prohibiting a person (including a parent or any person who is not a party to the care proceedings), in accordance with the terms of the order, from doing anything that could be done by the parent in carrying out his or her parental responsibility: s 90A(1).

The terms of s 90A are wide and permit the court to make a variety of orders. Examples include:

- an order prohibiting the father from allowing the mother to have unsupervised contact with the child: *Re M (No 5) — BM v Director-General, DFaCS* [2013] NSWCA 253
- an order prohibiting the parents from removing the children from the Commonwealth of Australia without the prior written consent of the Secretary: *LZ v FACS* [2017] NSWDC 414
- an order prohibiting the mother from having any contact with the children until the children attain the age of 18: *FACS v Dimitri* [2012] NSWChC 12
- an order prohibiting the mother from living alone with the child: *Secretary, DFaCS and M* [2015] NSWChC 1.

As to breaches of undertakings, see below, **[40-200] Breach of care orders**.

Order

Pursuant to s 90A, [*name party*] is prohibited from [*describe prohibited action*].

Note: if the order is an interim order, it should be preceded by the words "until further order".

Order for provision of support services (s 74)

Under s 74(1), the court may make an order directing a person or organisation to provide support for a child (other than a child the subject of an application for a guardianship order) for a specified period (not exceeding 12 months).

The preconditions for such an order are set out in s 74(2):

- the person or organisation who would be required to provide the support has been notified, given an opportunity to appear and be heard by the court, and consents to the making of the order, and
- the child's views in relation to the proposed order have been taken into account.

The parents of a child cannot be compelled to accept the provision of support services, particularly if the services relate to the parents rather than to the child, although acceptance can be the subject of an undertaking under s 73.

Order

[*Specify person/organisation*] is ordered to provide, for a period of [*specify period*], support services for the child or young person, namely [*specify the type of support services*].

Order to attend therapeutic treatment (s 75)

The court may require a child (aged less than 14 years) to attend a therapeutic program relating to sexually abusive behaviours, and require the child's parents to take whatever steps are necessary to enable the child to participate in the program: s 75(1). The order is only available in relation to a child who has exhibited sexually abusive behaviour: s 75(1A).

The court may also order a parent to attend either:

- a therapeutic program relating to sexually abusive behaviours, or
- any other kind of therapeutic or treatment program: s 75(1B).

The court must be presented with, and consider, a treatment plan outlining the proposed treatment before an order can be made: s 75(3).

Orders are not available under this provision if the child (or parent) has been convicted in criminal proceedings arising from the same sexually abusive behaviours: s 75(2).

Orders under this provision are not available in relation to applications for a guardianship orders: s 75(4).

Order

The child [*specify name*] is by order required to attend a therapeutic program relating to sexually abusive behaviours, namely [*name program*] for a period of [*specify period*]. [*Specify names of parents*] are required to take whatever steps are necessary to enable the child to participate in the program.

OR

[*Name parent*] is ordered to attend a therapeutic program, namely [*name program*] for a period of [*specify period*].

[40-120] Costs in care proceedings

The court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so: s 88.

Examples of cases in which exceptional circumstances have been found to justify an order for costs include:

- *Re: A foster carer v DFaCS (No 2)* [2018] NSWDC 71 (FACS knowingly relied on inadequate investigations)
- *Secretary, DFaCS v Tanner* [2017] NSWChC 1 (Secretary's Care Plan was "deliberately misleading" and "baseless")
- *Secretary, DFaCS and the Knoll Children* [2015] NSWChC 2 (Department's handling of matter required carers to obtain separate legal representation)
- *Director General, DFaCS v Robinson-Peters* [2012] NSWChC 3 (Mother ordered to pay father's costs due to gross incompetence of legal representation)
- *Department of Community Services v SM* (2008) 6 DCLR (NSW) 384 (Department's appeal without grounds or merit)

The situations in which exceptional circumstances may be found are not exhaustively defined or limited by prior cases; the court may have regard to the particular circumstances of the case, including evidence adduced, conduct of the parties and the ultimate results: *Secretary, DFaCS and the Knoll Children*, above, at [26].

Section 88 does not provide the court with power to award costs against a non-party such as a legal representative: *Director General, DFaCS v Robinson-Peters*, above, at [54].

[40-140] Alternatives to care applications — registration/approval of a care plan (s 38)

Last reviewed: November 2023

A care plan developed by agreement during alternative dispute resolution may be registered with the court: s 38(1). A care plan is taken to be registered with the court when it is filed with the registry, without any order or other action by the court: s 38F.

A registered care plan allocating parental responsibility, or aspects of parental responsibility, to any person other than the child's parents only takes effect if the court makes an order by consent to give effect to the proposed changes: s 38(2). No care application needs to be made, and the court does not need to be satisfied of any ground under s 71 that the child is in need of care and protection: s 38(2A).

However, the court is required to be satisfied that:

- the proposed order will not contravene the principles of the Act, and
- the parties to the care plan understand its provisions and have freely entered into it, and
- any party other than the Secretary has received independent legal advice concerning the provisions to which the proposed order will give effect, and of the nature and effect of the proposed order: s 38(2B).

The court may also make such other care orders as it could make under Ch 5, Pt 2 of the Act to give effect to the care plan (for example, an order accepting undertakings), if satisfied of the same matters as required by s 38(2B): s 38(3).

Section 79B(1A), (8)(b)–(c) applies to the Secretary in seeking a guardianship order by consent to give effect to a care plan under s 38 in the same way as they apply to an application for a guardianship order: s 38(4). Further, the information required under s 79B(9)–(10) must also be included in a care plan developed by agreement which seeks guardianship orders: s 38(5). See above, **Allocation of parental responsibility by guardianship order s 79A** at **[40-100]**.

[40-160] Applications for rescission or variations of care orders

Last reviewed: November 2023

Application to rescind or vary final orders — leave of the court required

Applications for rescission or variation of final care orders may be made with the leave of the court: s 90(1). Applications for leave may be made by the following (s 90(1AA)):

- the Secretary
- the child
- a person with parental responsibility for the child
- a person from whom parental responsibility for the child was removed
- any person who considers him or herself to have a sufficient interest in the child's welfare.

The court may only grant leave if it "appears that there has been a significant change in any relevant circumstances since the care order was made or last varied": s 90(2).

The range of "relevant circumstances" will depend upon the issues presented, but may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard: *In the matter of Campbell* [2011] NSWSC 761 at [42].

The issue of "significant change" requires that the change appear to be of sufficient significance to justify the court's consideration of a rescission or variation application: *S v Department of Community Services* [2002] NSWCA 151 at [23]. A comparison is required between the situation at the time the application is heard and the facts underlying the decision when the order was made or last varied: *S v Department of Community Services* at [27]. A non-exhaustive list of factors which indicate a significant change are listed in cl 4 *Children and Young Persons (Care and Protection) Regulation* 2022.

The discretion available to the court in determining whether to grant leave under s 90(1) is very wide; even if a parent has established a significant change in a relevant circumstance since the care order was made or last varied, the court is not compelled to grant leave. Further, even if the parent has addressed all the issues of concern which led to removal of the child, the length of time the child has been in a stable placement, the age of the child and the expressed wishes of the child that their placement not be disturbed may together strongly support a finding that it is not in the best interests of the child to disturb their current placement: *Kestle v Director, DFaCS* [2012] NSWChC 2 at [51].

Section 90 prescribes mandatory matters for the court's consideration when determining whether to grant leave: s 90(2A).

The list of considerations to be considered by the court is split into two categories as follows:

Primary considerations — s 90(2B)	**Additional considerations — s 90(2C)**
(a) the views of the child and the weight to be given to those views, having regard to the child's maturity and capacity to express his or her views	(a) the child's age
(b) the length of time the child has been in the care of the present carer and the stability of those arrangements	(b) the nature of the application
(c) if the court considers the present care arrangements are stable and secure, the course that would result in the least intrusive intervention into the life of the child and whether that course would be in the child's best interests.	(c) the plans for the child
	(d) whether the applicant has an arguable case
	(e) matters concerning care and protection of the child identified in: (i) a report under s 82, or (ii) a report prepared in relation to a review under s 85A or in accordance with s 150.

The court may dismiss applications if satisfied they are frivolous, vexatious or an abuse of process, or if satisfied the application has no reasonable prospect of success and the applicant has previously made a series of unsuccessful applications for leave: s 90(2D), (2E).

The court may restrict the grant of leave to a particular issue or issues: *Kestle v Director, DFaCS*, above, at [53]; *Re M (No 6)* [2016] NSWSC 170 at [66]. An example of when a

restricted grant of leave may be appropriate is where the court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact: *Kestle* at [53].

Refusal of leave under s 90(1) is an order of the court: *S v Department of Community Services* at [48].

Variation of interim orders

The law in relation to variation of interim orders was previously unclear: see *Re Mary* [2014] NSWChC 7 at [23]–[33]; *Re Timothy* [2010] NSWSC 524 at [59]–[60].

The *Children and Young Persons (Care and Protection) Amendment Act* 2018 (commenced 4 February 2019) inserted s 90AA to provide that a party to care proceedings may apply to the court to vary an interim care order. The court may vary an interim care order if satisfied that it is appropriate to do so: s 90AA(2).

Section 90(9) now expressly provides that s 90 does not apply to an application to vary an interim care order.

Section 90AA extends to proceedings before the court that were pending (but not finally determined) immediately before 4 February 2019.

[40-180] Parent capacity orders

Part 3 of Ch 5 of the Act deals with parent capacity orders (PCOs). Such an order can require a parent or primary care-giver to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills: s 91A.

PCOs may be made on the application of the Secretary, or on the court's own initiative if it determines under s 90A that a prohibition order has been breached by the parent or primary care-giver: s 91B.

If it considers it appropriate, the court may refer the application to a Registrar to be dealt with by way of a dispute resolution conference (DRC): s 91D(1)–(2). PCOs may be made by consent: s 91F(2). Unless the parties are seeking consent orders on the first return date the application is to be referred for a DRC: Children's Court Practice Note 10 "Parent capacity orders", 5.1.

In order to make a PCO there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child at risk of significant harm. The court must also be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course without the order: s 91E.

A PCO has effect for the period specified in the order unless varied or revoked: s 91G.

A PCO may be varied or revoked at any time on application of the Secretary or the parent the subject of the order: s 91H(1). The court must be satisfied there has been a significant change in any relevant circumstances: s 91H(2).

[40-200] Breach of care orders

On being notified of an alleged breach of undertaking (s 73(5)) or supervision order (s 77(3)), the court must:

- give the parties an opportunity to be heard concerning the allegation,
- determine whether the undertaking has been breached, and
- if so, make such orders as it considers appropriate in all the circumstances.

A very similar procedure applies in relation to an alleged breach of a prohibition order: s 90A. The court must (s 90A(3)):

- give notice of its intention to consider the alleged breach to the person alleged to have breached the prohibition order,
- give that person an opportunity to be heard concerning the allegation,
- determine whether or not the order has been breached, and
- if the order has been breached — make such orders (including a parent capacity order) as it considers appropriate in all the circumstances.

The person alleged to have breached a prohibition order is entitled to be heard, and may be legally represented, at the hearing of the matter: s 90A(4).

[40-220] Alternative parenting plan where serious or persistent conflict

In addition to the court's care powers, Pt 1, Ch 7 of the Act applies if there is a serious or persistent conflict between the parents and the child of such a nature that the child's safety, welfare or well-being is in jeopardy; or if the parents are unable to provide adequate supervision for the child to such an extent that the child's safety, welfare or well-being is in jeopardy: s 111(1).

A parent, child, or any other person may ask the Secretary for assistance in the above circumstances: s 113(1). If the differences between the child and their parents is so serious it is no longer possible for the child to continue living with the parents, the Secretary may seek to resolve the differences by alternative dispute resolution before making an application for appropriate orders: s 114(2). Further, in the case of serious differences, the child, parent or Secretary may apply for an order approving an alternative parenting plan (defined in s 115): s 116.

The court may make such orders as it considers appropriate to give effect to a proposed alternative parenting plan or specified parts of the plan: s 118(1). In considering whether to make such orders, it must consider the matters in s 118(2).

The court must not make an order unless satisfied that the parents and the child have been advised of the desirability of seeking legal advice, and

(a) that all appropriate steps that could be taken to resolve the matter have been taken and all other appropriate forms of dispute resolution have been exhausted, or

(b) that no useful purpose would be served in taking those steps or other forms of dispute resolution: s 116(3).

Children's Court

Parole

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Children (Criminal Proceedings) Act* 1987 (CCPA) and the *Children (Detention Centres) Act* 1987 (CDCA).

[42-000] Juvenile offender parole legislative framework

[42-020] Introduction

Part 4C was added to the *Children (Detention Centres) Act* 1987 (CDCA) as a result of amendments effected by the *Parole Legislation Amendment Act* 2017 which commenced on 26 February 2018. Part 4C contains a "separate legislative framework for juvenile parole" and was introduced to improve transparency and enable the system to be more appropriate for juveniles: Second Reading Speech, Parole Legislation Amendment Bill 2017, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 14.

Previously, the Children's Court exercised its powers with respect to parole by reference to the parole provisions in the *Crimes (Administration of Sentences) Act* 1999.

[42-040] Jurisdiction

Part 4C of the CDCA confers jurisdiction on the Children's Court to determine parole for juvenile offenders: s 41(1). Parole determinations can be made by the President of the Children's Court or a Children's Magistrate (s 7, *Children's Court Act* 1987): s 41(2).

In exercising its functions under Pt 4C, the court must have regard to:

- the principles set out in s 6 CCPA (see **[38-000] Guiding principles**)
- the purpose of parole for children, being to promote community safety while recognising that children's rehabilitation and re-integration into the community may be highly relevant to that purpose: s 38.

[42-060] Application of Pt 4C

Part 4C applies to juvenile offenders who are under 18 years old when they first become eligible for parole or at any later time when they are considered for parole: s 40(1). A juvenile offender ("juvenile") is defined as a person:

- subject to a control order, or
- serving a sentence of imprisonment and under 18 years old when they committed the offence: s 39.

This scheme does not apply to juveniles in custody for a Commonwealth offence: s 42(3). Part IB, Div 5 *Crimes Act* 1914 (Cth) applies to federal offenders.

Generally, the court cannot consider parole for a juvenile once they turn 18. However, Pt 4C continues to apply if:

- the juvenile's 18th birthday occurs while they are on parole and is during the last 12 weeks of the parole period: s 40(3)(a); or
- the Secretary considers it is appropriate that the offender, or a class of offenders of which the offender is a member, continue to be dealt with under Pt 4C: s 40(3)(b). This is intended to be directed towards particularly vulnerable offenders: Second Reading Speech, Parole Legislation Amendment Bill 2017, NSW, Legislative Assembly, *Debates*, 11 October 2017, p 18.

A juvenile is only eligible for parole if s/he:

- is subject to at least one detention order with a non-parole period, and
- has served the non-parole period and is not subject to any other detention order: s 42(2).

[42-080] Parole orders

The court considers parole in those cases where the detention order is greater than 3 years: s 45. If the detention order is 3 years or less the juvenile is taken to be subject to a statutory parole order unless they are also subject to a detention order of more than 3 years: s 44.

Note: special provision is made for terrorism related offenders: see [**[42-160]**] below.

Clause 91 of the *Children (Detention Centres) Regulation* 2015 identifies the material that must be contained in a parole report prepared by a juvenile justice officer.

The court must consider whether the juvenile should be released on parole at least 60 days before the parole eligibility date: s 45(1). Consideration of a case can be deferred until not less than 21 days before that date if the court thinks it cannot complete its consideration because a required report has not been provided or because other relevant matters require further consideration: s 45(2).

A parole order must not be made unless the court is satisfied it is in the interests of community safety: s 46(1). In considering that issue, the rehabilitation and re-integration of the juvenile may be relevant: s 46(2). Other matters the court must consider are listed in s 46(3) and include:

- the nature and circumstances of the offence
- any relevant comments by the sentencing court
- the juvenile's criminal history
- the likely effect of release on the juvenile's victim or the victim's family
- whether, where relevant, the juvenile has failed to disclose the location of the victim's remains
- any Departmental report concerning the grant of parole; and
- any other report prepared on behalf of any State authority concerning the grant of parole.

If the juvenile has provided post-sentence assistance (defined in s 46(7)), the court may consider the nature and extent of the assistance and the degree to which the juvenile's willingness to provide such assistance demonstrates their progress to rehabilitation: s 46(4).

If the State (in relation to a serious juvenile offender) or the Secretary (in relation to any juvenile) makes submissions concerning parole, the court must not make a decision without taking those submissions into account: ss 86, 87.

Release on parole

A juvenile can only be released on parole in accordance with a parole order directing their release and must be released on the date specified: ss 43, 50. The sentence continues to run while the juvenile is on parole: s 51.

If the release date falls on the anniversary of the commission of an offence involving violence, the court must consider the potential trauma to a victim and their family if the juvenile is released on that date: s 49(1). Offences involving violence are identified in s 49(2).

The court may make a parole order for an otherwise ineligible juvenile if the juvenile is dying or there are exceptional extenuating circumstances: s 47.

[42-100] Parole conditions

Parole orders are subject to standard conditions which the court cannot revoke or vary: s 53(1), (5). The court also has power to impose, vary or revoke additional conditions: s 53(2).

In determining whether to impose, vary or revoke a condition, the court must have regard to the criteria in s 53(4) to assess whether the new condition, variation or revocation:

- assists in managing a risk to community safety
- has a likely effect on any victim/s and their family
- assists in managing the risk of parole breaches by the juvenile
- assists in supporting the juvenile's participation in rehabilitation programs and managing the juvenile's re-integration into the community.

Standard conditions are in either Pt 4C or the *Children (Detention Centres) Regulation* 2015. The standard conditions in cl 94 of the Regulation require the juvenile to:

- be of good behaviour,
- not commit any offence, and
- adapt to live a normal lawful community life.

A parole order must also include:

- a supervision condition: s 55(1). The period of supervision and the juvenile's obligations while under supervision are in cl 95 of the Regulation.
- where the juvenile is subject to more than 3 years detention, conditions giving effect to a post-release report prepared by the Department, and adopted by the court (with or without changes), may also be included: s 53(3).

Note: The period of supervision for a juvenile released to parole under s 47 is the whole period for which the order is in force: s 55(3).

An exemption from supervision can only be made in exceptional circumstances: s 56(1). The exemption may be unconditional, or subject to conditions, but the exemption order must specify why it was granted: s 56(2), (3).

Conditions that may be imposed in addition to the standard conditions include:

- non-association: s 54(1)(a)
- place prohibition or restriction: s 54(1)(b).

[42-120] Revocation, non-compliance and reconsideration

Under Pt 4C, Div 6, the court has the power to revoke a statutory parole order and any parole order made by the court on its own initiative or upon the making of a recommendation by a juvenile justice officer or, in particular situations, the Secretary.

Parole orders can be revoked by the court:

- before a juvenile's release: s 63
- because of non-compliance with the order: s 65; or
- after the juvenile's release but for reasons not related to non-compliance: s 66.

If the court is satisfied a juvenile has failed to comply with their parole obligations, it may:

- record the non-compliance and take no further action
- formally warn the juvenile
- impose additional conditions on the order
- vary or revoke conditions of the order (other than those imposed by the Act or regulations); or
- revoke the parole order: s 65(2).

The Secretary also has certain powers and may take certain action with respect to non-compliance of parole orders: s 64. However, the Secretary can refer serious instances of non-compliance to the court and, in such cases, may also make a recommendation about the action the court may take: s 64(3).

The Attorney General, Minister or Director of Public Prosecutions may request the revocation of a parole order of a juvenile sentenced for a "serious children's indictable offence" (defined in s 3(1) *Children (Criminal Proceedings) Act* 1987) if the order was made on the basis of false, misleading or irrelevant information: s 69.

Revocation orders

Before release: s 63

An order revoking parole can be made at any time before the juvenile's release if the court is satisfied that upon release the juvenile poses:

- a serious identifiable risk to community safety (including any additional terrorism concerns), or
- a serious and immediate risk to his/her own safety

which cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the parole conditions: s 63(1)(a) and (b).

The order can also be revoked on the juvenile's request or, in the case of an order made by the court, if there has been a substantial change to a matter considered by the court since making the order: s 63(1)(c) and (d).

After release: s 66

An order revoking parole can be made any time after the juvenile's release if the court is satisfied:

- the juvenile poses a serious and immediate risk to community safety (including consideration of any additional circumstances relating to terrorism), or
- there is a serious and immediate risk the juvenile will leave NSW

and, in either case, the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the parole conditions: s 66(1)(a) and (b).

Parole orders under s 47 can be revoked if the basis on which the order was made no longer exists, that is the juvenile is no longer dying or the exceptional extenuating circumstances no longer exist: s 66(1)(c). More generally, orders can also be revoked if the juvenile fails to appear when required (s 66(1)(d)) or if the juvenile applies for revocation of the order (s 66(1)(e)).

Hearings for non-compliance and revocation — s 67

While the court is not required to hold a hearing before revoking a parole order or taking action in relation to non-compliance, it is required to hold a hearing within 28 days of giving the juvenile notice of the revocation: s 67. The procedure for hearings is set out in Pt 4C, Div 8 (see **[42-140]**).

A juvenile may apply to the Supreme Court for a direction to the Children's Court if alleging the order was revoked because of false, misleading or irrelevant information: s 70(1). The Supreme Court does not have power to consider the merits of the court's decision except on the basis identified in s 70(4).

Reconsideration options after refusing or revoking parole — ss 72, 73, 74

If the court refuses to make a parole order or revokes a parole order, a juvenile may apply for reconsideration (under s 72 or s 73 respectively) and in either case the court must specify:

- a new date when the juvenile will be eligible for parole: ss 72(a), 73(1)(a)
- a hearing date to reconsider the question of the juvenile's release: ss 72(b), 73(1)(b)
- a date on or after which the juvenile can apply to the court for release on parole: ss 72(c), 73(1)(c).

In addition, if the court has revoked a parole order, it may defer determining any of the matters in s 73(1)(a)–(c) for a period of not more than 3 months, and may defer determining any of those matters on one or more occasions: s 73(1)(d), (2).

A juvenile can apply for parole after it has been refused or revoked, or if a decision has been deferred: s 74(1). Such an application should usually only be made on or after the date specified by the court: s 74(1)(a).

However, applications may be made at any time after the decision if:

- new information becomes available that is relevant to either the grant of parole or a condition of parole: s 74(1)(b)(i), or
- there has been a material change in the juvenile's situation since the decision: s 74(1)(b)(ii).

An application can be supported by written submissions: s 74(3).

The court must set a hearing date (as soon as practicable) and give the juvenile notice of the date, time and place for the hearing (s 74(4)) but may refuse to consider applications it considers frivolous, vexatious or without prospect of success (s 74(5)). Section 76 deals with setting the date of parole after reconsideration. Where a parole order is refused, certain dates need to be specified: s 73.

[42-140] Procedure at hearings

The court may conduct hearings in accordance with Pt 4C, Div 8 and, unless otherwise ordered, s 10 of the *Children (Criminal Proceedings) Act* 1987: s 77. Section 10 concerns excluding the general public from criminal proceedings.

Upon giving written notice, a magistrate may require juvenile offenders or other persons to appear for the purpose of proceedings under Pt 4C and may also require the production of documents: s 78.

Sections 79, 80 and 81 concern the entitlement to representation, making submissions about the grant of parole and the court's power to adjourn the proceedings. The State has power, at any time, to make submissions to the court concerning a serious offender: s 86. A serious offender is one serving a sentence of imprisonment or subject to a detention order after being convicted of a violence offence (defined in s 49): cl 107A *Children (Detention Centres) Regulation* 2015.

If the State, Minister, Attorney General or Secretary informs the court that they intend to make submissions with respect to parole, the court must provide them with a copy of the documents the court will use to make the decision: cl 107B.

Warrants may be issued if the juvenile fails to appear or if the court is of the view the juvenile will not appear if given notice: s 82.

A parole order is not invalidated by the court's failure to comply with procedural requirements imposed by the Act: s 90.

Notice of a decision concerning the grant or revocation of parole must be given to the juvenile: s 89.

Requirement for reasons and finality

The court must keep a record of the proceedings: cl 107C.

The court must record its reasons for making a decision concerning parole: s 95(1). The reasons must address those matters that must be taken into account under Pt 4C: s 95(2).

Decisions by the court under Pt 4C are final: s 96. Notices must be served personally or by post: s 94.

[42-160] Terrorism related offenders

Special provisions concerning terrorism related juvenile offenders are in Div 5. Those provisions extend to juveniles engaging in, or inciting or assisting others to engage in, terrorist acts or violent extremism in NSW, any other part of Australia or in any other country: s 58(2). Division 5 applies to pending parole orders and to parole orders made before 26 February 2018: Pt 6, Sch 1 CDCA.

Division 5 applies to a juvenile who:

- is subject to a detention order for, has previously been convicted of, or has been charged with, a terrorism offence (defined in s 58(1)),
- is subject to a control order under Pt 5.3 Criminal Code (Cth),

- has any associations with a terrorist organisation within the meaning of Pt 5.3, Div 102 Criminal Code (Cth),
- has made statements, carried out activities, or has any associations or affiliation with persons or groups advocating support for terrorist acts or violent extremism: s 59.

Note: Div 5 applies in addition to, and despite anything to the contrary in, any other provision of or made under this Part: s 61(3).

The court must not make a parole order for a juvenile known to the court to be a terrorism related offender (defined in s 58(1)) unless satisfied the juvenile will not engage in, or incite or assist others to engage in, terrorist acts or violent extremism: s 60(1).

When deciding whether or not to release a terrorism related juvenile offender on parole the court must have regard to any credible information it has concerning the risk of the juvenile engaging in, or inciting or assisting others to engage in, terrorist acts or violent extremism: s 61(1). In making such a decision, it is appropriate for the court to have regard to advice from the NSW Police Force or any other public authority, Australia-wide, established for law enforcement, security or anti-terrorist purposes: s 61(2).

Parole orders under s 47 may be made if the juvenile is dying or there are other exceptional, extenuating circumstances: s 61(4).

Revoking or suspending terrorism related orders

A parole order directing the release of a juvenile offender known to the court to be a terrorism related offender must not be revoked or suspended unless the court is satisfied the juvenile will not engage in, or incite or assist others to engage in terrorist acts or violent extremism: s 60(2), (3).

A statutory parole order (s 44) may be revoked any time before or after the juvenile's release on parole: s 60(4).

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Coronial matters

Note: All references to sections in this chapter are, unless otherwise stated, references to sections of the *Coroners Act* 2009. Although reference is made to legislation and case law where appropriate, some of the information contained in this chapter is in accordance with practices of the Coroner's Court as at March 2023.

[44-000] The role of the coroner

The role of a coroner is both judicial and investigative. It is to investigate and make findings about unnatural, sudden, or suspicious deaths: ss 3 and 17. In addition, a coroner's role is to conduct mandatory inquests into certain kinds of deaths. These include deaths of persons in custody or as a result of police operations. In NSW, coroners also have jurisdiction to investigate fires and explosions.

A key function of the coroner is also to make recommendations with the goal of preventing future deaths: ss 3(e) and 82.

"Coronial proceedings" are defined in s 46 to include inquests into deaths, fire inquiries and interlocutory proceedings relating to those types of proceedings: see s 46(1) and (2).

All NSW magistrates are coroners by virtue of their status: s 16. Coronial matters which arise in the Sydney metropolitan area are handled by the State Coroner and Deputy State Coroners (senior coroners) situated at the Lidcombe Coroners Court.

For all NSW reportable deaths, the coronial directions for post mortem investigations are made by the State Coroner and the Deputy State Coroners at Lidcombe: see **Post mortem investigative procedures: coronial directions** at **[44-040]**.

In regional areas, coronial jurisdiction is ordinarily exercised locally by the magistrate, with the exception regarding NSW reportable deaths, above, and the matters in *State Coroner's Bulletin No 23* of December 2022. See **When do the State Coroner and Deputy State Coroners have exclusive jurisdiction?** at **[44-020]**.

See also *Coronial Practice Note 1 of 2018* for further information.

Resources available at Lidcombe Coroners Court:

- Duty Coroner — advice
- Coronial Case Management Unit (CCMU)
- Coronial Information and Support Program (CISP) and Aboriginal Coronial Information and Support Program (ACISP) — information and support for families: see https://coroners.nsw.gov.au/documents/guides/CISP%20brochure.pdf.

Deaths of First Nations people

In 2022, the State Coroner issued the Protocol in relation to deaths in custody of First Nations people. Its purpose is to implement the recommendations relating to coronial processes arising from the Royal Commission into Aboriginal Deaths in Custody. In particular, it aims to ensure that, for First Nations families, coronial processes do not perpetuate cycles of grief and loss.

The Protocol requires investigations and inquests involving First Nations deaths in custody to be carried out in a timely manner. Importantly, there is to be early engagement with First Nations families to explain coronial procedures, keep them updated on an investigation/inquest's progress, and ensure their concerns are understood and examined. Importantly, the Protocol also aims to ensure that inquests are conducted in a culturally appropriate manner, in consultation with the family.

Although the Protocol is directed mainly to deaths of First Nations people in custody, its content is designed to guide coroners' response in relation to *all* reportable First Nations deaths.

For all reportable deaths of First Nations people, coroners are strongly encouraged to make early contact with a member of ACISP based in Lidcombe. ACISP officers will generally make immediate contact with First Nations family members, and are skilled in providing ongoing support to these families. ACISP officers are also an invaluable support to coroners in providing advice regarding family concerns and how the inquest (if there is to be one) can be conducted in a manner that is culturally appropriate to the deceased person's family and community.

[44-020] Reportable deaths

Last reviewed: November 2023

What deaths are reportable to coroners?

Section 6 defines a "reportable death" as:

- violent or unnatural deaths: s 6(1)(a)
- sudden deaths the cause of which is unknown: s 6(1)(b)
- deaths in unusual or suspicious circumstances: s 6(1)(c)
- deaths which are not the "reasonably expected outcome of a health-related procedure": s 6(1)(e), or
- deaths of patients resident in psychiatric hospitals, including patients temporarily absent: s 6(1)(f).

Section 35 requires that a person who has reasonable grounds to believe that a reportable death has taken place must make a report to a police officer, a coroner or assistant coroner as soon as possible.

There is no longer a requirement that a deceased person must have seen a medical practitioner within six months of their death, to allow for a doctor to issue a death certificate. For deaths occurring on or after 20 January 2020, a doctor may issue a death certificate without having seen the deceased within a prescribed timeframe.

However a doctor is prohibited from issuing a death certificate in respect of a reportable death: s 38. Any death certificate issued in respect of a reportable death is invalid.

What health-related procedure deaths are reportable?

The definition of "health-related procedure" is broad. Section 6(3) states that it may be a medical, surgical, dental or other health-related procedure. It includes the administration of anaesthetic, sedatives and other drugs.

Whether a death is reportable following a health-related procedure involves considering the following:

- was the decision to undertake the procedure a reasonable one, having regard to the patient's condition/any underlying disease or injury, and their quality of life if the procedure was not carried out?
- did the procedure cause or contribute to the death, or would it have occurred in any event as a result of the patient's condition/any underlying disease or injury?
- was the procedure carried out with reasonable care and skill?

What do reports to the coroner contain?

Ordinarily, reports of deaths are prepared by police officers in a Form P79A "Report of death to the coroner" (Form P79A). This report summarises the known details of the deceased person, identifies the next of kin, and sets out the circumstances of the death or the discovery of the body. It should advise whether or not the deceased person is of Aboriginal and/or Torres Strait Islander descent. It will also provide preliminary advice that the matter is, or is not, one which falls within s 24 concerning children and persons with a disability.

Usually the Form P79A also informs the coroner whether a medical practitioner has been treating the deceased person in recent times, and the deceased person's known medications. It will also usually outline the preliminary views of the police as to whether the circumstances of the death are suspicious.

As the Form P79A is prepared at a very early stage, subsequent investigations may provide additional information contrary to information contained in it.

If a person dies in hospital, in addition to the Form P79A, the coroner will be provided with a NSW Department of Health — Form A "Report of death of a patient to the coroner". It provides an opinion as to the cause of death.

The suspected death of a missing person is reported in a Form P79B "Report of suspected death to the coroner" which is prepared by police. This form sets out the missing person's particulars and the relevant information concerning their disappearance, the attempts made to locate them, and the basis on which death is suspected by police.

When does a coroner have jurisdiction?

A coroner has jurisdiction when:

- a reportable death is reported: s 21(1)(a)
- a coroner has reasonable cause to suspect that a death is a reportable death, whether or not a report has been made: ss 20 and 21(1)(a)
- it appears to a coroner, or there is reasonable cause to suspect, that a medical practitioner has not issued a death certificate in respect of a death or suspected death: s 21(1)(b).

The death in question must have occurred within the last 100 years: s 19. The deceased must have a sufficient connection with NSW: s 18. A coroner's jurisdiction is not dependent on a report being made under s 35: see s 20.

When do the State Coroner and Deputy State Coroners have exclusive jurisdiction?

The State Coroner and Deputy State Coroners, called "senior coroners" in s 22, have exclusive jurisdiction in respect of deaths:

- in custody or in other lawful detention: s 23(1)(a), (b), (d) and (e)
- as a result of police operations: s 23(1)(c)
- of children in care: s 24(1)(a)
- of children who have been the subject of reports made to the Department of Communities and Justice (DCJ) within 3 years of the death: s 24(1)(b)
- of siblings of children reported to DCJ within 3 years of the death: s 24(1)(c)
- of children which might be due to abuse, neglect or which are otherwise suspicious: s 24(1)(d)
- of persons living in or temporarily absent from specialist disability accommodation or assisted boarding houses: s 24(1)(e)
- of disabled persons receiving care in the community: s 24(1)(f).

Deaths of persons in aged care homes are not of themselves included in s 24.

Whether a facility is "specialist disability accommodation " within the meaning of s 24(3), is usually disclosed in the Form P79A.

The reporting requirements in relation to deaths in custody are contained in s 37.

The State Coroner has also directed that the following matters be transferred to the State Coroner at Lidcombe (see *State Coroner's Bulletin No 23* of December 2022):

- the sudden and unexpected death of an infant aged under 12 months old where the cause of death is not immediately apparent at the time of death
- the death of a person as a result of murder or suicide
- the death of persons as a result of a disaster (where there are 5 deaths or more), not including a motor vehicle collision
- the death of a person as a result of a VH registered aircraft crash, not including gliders or non-VH registered aircraft
- where an inquest is likely to take 5 days or more to complete, and
- a high profile or significant public interest matters at the direction of the State Coroner.

Before a regional coroner makes a decision to set a matter down for inquest or inquiry, they must consult with the Duty Coroner: see *State Coroner's Bulletin No 24* of February 2023. The Duty Coroner can be contacted by phone, or via email.

What are the key questions for a coroner?

From the time a coroner assumes jurisdiction in a case, which is usually when a death is reported, their investigation is focused on answering the following primary questions:

- has a person died?
- if so, can that person be identified?

- when did they die?
- where did the death take place?
- what was the direct cause of death?
- what was the manner of death?

These questions may lead to other questions relating to health or safety issues, but they are the starting points for all coronial proceedings relating to deaths.

The difference between cause and manner of death

"Cause of death" refers to the "real cause of death … not the mode of dying", and not the terminal cause — in the end we all die because our hearts and brains stop functioning: *Ex p Minister of Justice; Re Malcolm* [1965] NSWR 1598.

"Manner of death" refers to the circumstances of the death, that is, the way in which it came about. In seeking to answer this however, coroners are cautioned against undertaking an overly broad inquiry. *R v Doogan; Ex p Lucas-Smith* (2005) 158 ACTR 1 at [28] states that an inquest is not a:

> wide-ranging inquiry akin to a Royal Commission, with a view to exploring any suggestion of a causal link, however, tenuous, between some act, omission or circumstance and the cause or non-mitigation of the [death].

See also *Harmsworth v State Coroner* [1989] VR 989.

The primary distinction to be made between the two concepts is that cause of death is a physiological concept, whereas manner of death relates to the circumstances in which a death took place. J Abernethy et al, *Waller's Coronial Law and Practice in NSW*, 4th edn, LexisNexis, Sydney, 2010 (Waller) at [81.16] provides the following illustration of the distinction:

> For example, if one is inquiring into a death following a fall from a height, the cause of death would be the injuries sustained in the fall. The manner of death would be how that fall came about — Did the deceased jump, was he pushed or did he or she fall accidentally?

[44-040] Post mortem investigative procedures: coronial directions

Note: For all NSW reportable deaths, it is a practice of the Coroner's Court for the State Coroner and Deputy State Coroners at Lidcombe to provide the directions for the initial medical investigative procedures. Ordinarily a regional magistrate will not be required to make any such directions.

A coroner may, by written order, direct a qualified medical practitioner to conduct a post mortem investigative procedure, including a post mortem examination, if it is necessary or desirable to do so to assist in the investigation of a death where the coroner has jurisdiction: s 89.

Post mortem examinations are not necessary in every case: see **Coronial certificates**. Their purpose is to assist coroners to determine the matters about which they are required to make findings — namely the identity of the deceased person, and the date, place, cause and manner of death: see s 81(1).

Importantly, a coroner's directions concerning post mortem investigative procedures must reflect the principles in s 88(1) that the dignity of the deceased person is respected, and s 88(2)

that the least invasive procedure that is appropriate be used to determine cause and manner of death: see J Hatzistergos, second reading speech, Coroner's Bill 2009, NSW Legislative Council, 16 June 2009.

Although a coroner is guided by the medical investigator's advice and recommendations, consistent with the principle in s 88(2), the coroner is not bound to accept them if satisfied that a less intrusive procedure will establish the cause or manner of death on the balance of probabilities: see second reading speech, above, at [25].

A coroner should also consider the relatives of the deceased person, and ensure that their distress is not unnecessarily exacerbated by the coronial process, including by the making of post mortem investigation directions. Most families expect that the body of their loved one will be released to them as soon as possible. They also expect that their cultural or religious values will be respected. It is not uncommon for families to object on cultural grounds to a direction for an autopsy, or to procedures which will delay burial or cremation: see **Objections to post mortem directions**.

The range of post mortem directions

Section 89(1) sets out the post mortem investigation directions that a coroner may make. Examples of the directions that may be made include:

- a coronial autopsy, understood as the opening and examination of the deceased's person's three cavities, namely, the head, thorax and abdomen

  Note: Consistent with the "least invasive procedure" principle in s 88(2), the opening and examination of one or two of the cavities may be sufficient for the pathologist to identify the medical cause of death, in which case the pathologist will not proceed further.

- an external examination of the body
- the taking and testing of blood or tissue samples for toxicological analysis
- the taking and testing of tissue samples for microscopic examination, and
- a review of the medical records of the deceased person.

Although s 90(3) authorises the retention of small samples of certain bodily tissue, the directions which s 89 authorises do not include the power to direct that a whole organ be retained and examined. There will be cases where, for example, the medical investigator (usually a forensic pathologist) wishes to retain and examine a deceased person's brain. Section 90(5) empowers the coroner to direct this, provided they are satisfied this is desirable or necessary to assist the investigation into the manner or cause of death. A coroner needs to consider this step carefully, given its very invasive nature. Further, senior next of kin must be notified of such an order as soon as reasonably practicable: s 90(6).

Note: Section 88A(1) empowers a pathologist to undertake the following non-invasive preliminary examinations without a coronial direction, set out in s 88A(2):

- visual examination (including a dental examination)
- reviewing personal and health information
- taking and testing samples of bodily fluid, including blood, urine, saliva, vitreous humour and mucus (which may require an incision be made)

- imaging of the remains, including by way of computed tomography (CT scan), magnetic resonance imaging (MRI scan), x-rays, ultrasound and photography
- taking and testing samples from the surface of the remains, including swabs from wounds and inner cheek, and samples of hair, from under fingernails and from skin
- fingerprinting, and
- any other procedure that is not a dissection, the removal of tissue or invasive in any other way.

Matters to take into account

Coroners must consider whether it is necessary or desirable to make post mortem investigative directions. Factors to consider include:

- whether cause of death can be established without a post mortem examination
- whether cause of death can be established with a less invasive procedure than the one recommended
- whether a family objects to, or desires, a post mortem examination: see **Objections to post mortem directions**
- whether there are medical treatment concerns which may have contributed to the death, and which a post mortem examination may elucidate,
- whether the circumstances of the death are suspicious.

Objections to post mortem directions

A senior next of kin or relative may object in writing under ss 96 and 99 to a post mortem investigation direction or the authorisation to retain a whole organ. Objections are made for a variety of reasons, which may include religious, cultural and social reasons, and a coroner needs to take these into account when determining whether the direction is necessary or desirable to assist in the investigation of the death.

If a senior next of kin or relative objects to a post mortem direction, the coroner must consider whether a less invasive procedure will be sufficient to establish the person's cause and manner of death: see s 89. The coroner should consult with the pathologist, and work closely with the CISP officer who has been assigned the case. The CISP officer will engage in discussions with the relative/s, explaining the reasons for the proposed direction, and conveying to the coroner the family's feelings and wishes. In this manner, the great majority of objections to post mortem directions are able to be resolved. However, if they are not able to be resolved, s 97 provides a mechanism for appeal to the Supreme Court.

If a coroner determines, after considering an objection, that the post mortem examination or organ retention is necessary or desirable, senior next of kin are to immediately be notified of the decision, the right to apply to the Supreme Court for an order that it not be conducted, and that a post mortem examination may be conducted after 48 hours from the time they are given the notice: s 96(3), (4).

The post mortem report

In most cases, the cause of death is revealed in the post mortem report. Pathological practice in post mortem reports is to list the cause(s) of death in descending order.

In Section 1, the post mortem report lists the direct cause of death followed by antecedent causes, that is, morbid conditions giving rise to the direct cause, with any underlying condition stated last.

Section 2 will list other underlying conditions possibly contributing to the death, but not relating to the disease or condition which caused it.

The post mortem report annexes ancillary reports, which can include a radiology report, analytical toxicology report and neuropathology report.

Coronial certificates

Many reportable "natural causes" deaths only require a non-invasive preliminary examination to establish cause and manner of death. The pathologist is often able to identify a cause of death based on visual examination, CT imaging and, in some cases, the deceased person's health care records. In these circumstances the pathologist will usually recommend an inquest be dispensed with and that a coronial certificate be issued.

It is a practice of the Coroner's Court, if it is appropriate in the circumstances, to issue a coronial certificate: see s 89(6) and the discussion below. Assistant coroners may also do so: s 15(1)(b)(iii).

The coronial certificate records the cause of death, together with the date and place of death. A high proportion of matters are finalised by this means.

It is important for families to be aware that the issuing of a coronial certificate means there will be no further medical investigation into the cause of death.

Note: If the death falls within one of the categories within s 24, a coronial certificate can only be issued by the State Coroner or a Deputy State Coroner: s 22.

The Act does not expressly provide for the issue of coronial certificates, however, s 89(6) provides a coroner has the power to dispense with a post mortem examination if, after obtaining advice from police officers and medical practitioners, they are satisfied that the death was the result of natural causes, and a senior next of kin has advised that the family do not want any form of autopsy to be conducted.

Section 89(6) can also be utilised in cases where the pathologist is of the view that the person died of natural causes, but they are unable to ascertain the exact cause of death. This may be the case where the person's body is significantly decomposed, or where more than one medical condition appears to have caused the death and the pathologist cannot ascertain which was predominant. If a coroner is satisfied that:

- there are no suspicious circumstances
- the death is one of natural causes, and
- the family are content with this course of action,

a coronial certificate may issue giving the cause of death as "Unascertained natural causes".

The issuing of a coronial certificate does not preclude a coroner from investigating other issues, including the care and treatment provided to the deceased person and whether it contributed to their death.

[44-060] The coroner's other investigative powers

The Act provides extensive powers for the coroner to investigate deaths prior to inquest. In cases where an inquest is not mandatory, these powers will most often be exercised with a view to determining whether an inquest is required.

The police investigation

A coroner has power under s 51(2) to order a police investigation of a death.

In some cases, where the circumstances of the death are clear and are not suspicious, and it appears that the death is natural, a coroner may decide not to order a brief of evidence.

Where the death appears to be from unnatural causes (for example, suicide or accident) but there appear to be no suspicious circumstances, an "officer in charge (OIC) only" brief may be ordered, which consists of an investigating police officer's statement. This statement will assist the coroner determine such matters as:

- whether the deceased person acted with the intention of bringing about their own death
- where and when the deceased person was last seen or heard so as to establish the date or date range of death, and
- whether the family asks the coroner to consider an inquest, and the reasons why.

In other cases, a full brief should be ordered. Examples of such cases include suspicious deaths, deaths in police operations, deaths in custody, correctional centres or mental health facilities (unless due to natural causes), deaths in which significant medical issues arise, and deaths of children.

Coronial investigation scene orders

Coroners do not issue search warrants. They have power to issue coronial investigation scene orders: ss 39–45.

Police investigators may, however, apply for search warrants in appropriate cases in the ordinary way under the *Law Enforcement (Powers and Responsibilities) Act* 2002.

The threshold for a coronial investigation scene order is low. A coroner may issue an order if they consider that a coronial investigation should be conducted in a certain place. By implication, however, a rational basis for that view is required.

Coronial scene orders are usually sought by police officers where they have been unable to secure consent to enter a property in which a person has died, or which is related in some other way with the death. Notwithstanding the low threshold for such an order, as these are coercive orders, it is important to establish that the investigating police officer has made reasonable attempts to obtain consent to investigate the circumstances of a person's death.

An order may be made by phone (s 40(1)), which is later confirmed in writing to police: s 40(6).

Section 43(1)(a)–(r) and (2) outline the powers a police investigator may exercise at the coronial investigation scene. They are similar to crime scene powers under the *Law Enforcement (Powers and Responsibilities) Act*. In summary, they enable the investigators to close off and control the scene, to remove persons from the scene, to perform any necessary investigations on the scene, to conduct tests, to dig, to remove parts of structures and to seize and remove body parts and other evidence.

Records and policy documents

A coroner does not have power to issue a subpoena before an inquest is ordered. The coroner does have the power under s 53 to give notice in writing to a person to produce documents or things which may assist the coroner's investigation.

This power is regularly exercised to obtain medical records. It can also be used to obtain policy and procedure documents which govern relevant procedures within prisons, hospitals, and the NSW Police Force. The power is subject to claims of privilege including the privilege against self-incrimination: s 53(3), (4). However, this privilege cannot be claimed in respect of medical records: s 53(4); see **The privilege against self-incrimination**.

[44-080] The decision whether to hold or dispense with an inquest

Assessing the coronial brief

In the case of deaths of First Nations persons, it is recommended that from first receipt of the matter the coroner make contact with an ACISP officer at the Lidcombe Coroner's Court. Often the ACISP officer will have already made contact with the deceased person's family. The ACISP officer will be an important point of contact with the family, keeping them advised of progress and updates, and ensuring that their concerns about the person's death are made known to the coroner at an early stage.

The police investigation brief and the medical evidence, including a post mortem report, may not be available to the coroner for a period of months after a death.

Once these are available, the coroner will assess the material to determine if it adequately deals with the principal questions a coroner must seek to answer. That is, is the evidence sufficient to establish the identity of the person who has died, and the date, place, cause and manner of their death: see s 81(1).

Note: Unless there is a forensic reason to do so, a coroner need not view photos of the deceased person and the death scene.

Other questions a coroner should consider when analysing the brief are:

- whether the police investigator regards the circumstances of the death as suspicious
- whether other lines of inquiry should be followed
- whether concerns raised by the family about the circumstances of death have been addressed (see **Family concerns**)
- whether the investigator has made recommendations for remedial action, and
- whether the case raises issues of general public interest, particularly in relation to health or safety.

In many cases the basic material on the file (autopsy report, OIC statement, and advice whether family seeks an inquest) will be sufficient to form the view that an inquest is not warranted, and to dispense with one (unless an inquest is mandatory). In over 97% of NSW cases, inquests are dispensed with because the answers to the above questions are relatively clear, or they become clear with further investigation.

In other cases, the appropriate decision will be to direct that further investigations take place, and with the benefit of further information, a coroner may be satisfied that an inquest is not required, and can be dispensed with.

Note: Examples of situations where further investigation may be required are set out below at **Family concerns**, **Concerns about medical treatment** and **Concerns about mental health care**.

When is an inquest required?

In the following circumstances an inquest is mandatory pursuant to s 27(1):

- suspected homicides, not including suicides: s 27(1)(a)
- cases in which a person dies in custody or as a result of a police operation: ss 23 and 27(1)(b)
- when the evidence does not sufficiently disclose whether a person has died: s 27(1)(c)(i)
- when the evidence does not sufficiently disclose the identity of the person who has died, or the date, place, cause or manner of their death: s 27(1)(c)(ii) and (d)
- when the Minister or State Coroner directs that an inquest be conducted: ss 28 and 29.

In the first two categories above, the inquest must be conducted by the State Coroner or a Deputy State Coroner: s 22.

Cases where it is not clear that a person has died

This is usually the case with missing persons, as the person's body has not been found, and a coroner will need to determine whether the missing person is alive or dead. If the evidence in the police brief does not enable the coroner to come to a conclusion about this on the balance of probabilities, an inquest must be conducted: s 27(1)(c)(i).

Cases where cause and manner are not sufficiently disclosed

It is not uncommon for an autopsy report to provide no clear cause of death. This may be because the degree of decomposition of a body does not enable proper examination of the body's organs and tissue. In other cases, the pathologist may not be able to ascertain a cause of death because certain fatal events such as epilepsy and cardiac arrhythmia leave no pathological signs.

However, it will not be necessary in all such cases to proceed to an inquest. A coroner may consider:

- seeking a specialist medical opinion as to the cause of death. This course can be discussed with the forensic pathologist, who will advise whether it is likely to yield results and, if so, the appropriate medical discipline. See **Concerns about medical treatment**.
- whether the medical evidence is sufficient to establish cause of death on the balance of probabilities
- seeking the family's advice as to whether they would be satisfied with a finding of "unascertained natural causes". This of course will only be an option where the coroner is satisfied that the death is one of natural causes. If the post mortem examination finds no evidence of fractures, toxicological irregularity, or other signs of trauma, this may point to the likelihood of a natural causes death.

If the cause and/or manner of death remain undetermined, an inquest is required to be held: s 27(1)(d). In these circumstances, it may only be necessary to call evidence from the officer in charge and the pathologist and, if the cause and/or manner of death are unable to be determined, such a finding may be made. See **Open findings**.

When may a coroner dispense with an inquest?

Except where an inquest is mandatory, a coroner has a wide discretion to dispense with an inquest: s 25.

Senior next of kin should always be asked whether they wish an inquest to be conducted and, if so, the reasons why. This advice should be sought by the officer in charge when compiling the coronial brief. See **Family concerns**.

A coroner will ordinarily dispense with an inquest where the identity of the person and the date, place, cause and manner of death are sufficiently disclosed on the evidence, there is no particular issue of public health or safety to address, there are no suspicious circumstances, and no compelling request for an inquest has been made.

See **The "Reasons for dispensing with an inquest" form**.

Family concerns

When determining whether an inquest should be dispensed with, a coroner should take into account any concerns raised by the family regarding the circumstances of the death. Relatives rightly expect that their concerns about the death will be carefully considered.

A coroner should always respond to family communications with respect and courtesy, and should direct further investigations if these are warranted. A coroner also needs to consider whether to respond to the family in writing, or whether it is more appropriate to involve a CISP officer in the communications with the family.

If a coroner decides that a family concern warrants further investigation, the family should be informed of this, and that the purpose of the investigation is to determine if an inquest is warranted.

In deciding whether a family concern requires further investigation, coroners need to consider the following matters.

The nature of the concern

Is the concern sufficiently or at all related to the cause and manner of death? If it is, further evidence may be needed, such as witness statements, an expert review of the medical care given, or a response from a hospital or health service as to the specific matter which appears to have contributed to the death. See **Concerns about medical treatment**.

In cases where family members are unhappy with their interactions with hospital staff, or are concerned with medical procedures and/or conditions that are not connected to their relative's death, the coroner should acknowledge those concerns, and explain they are outside the scope of the coroner's role. In such cases, if appropriate, the family can be provided with information regarding the Health Care Complaints Commission or the Aged Care Quality and Safety Commission for example.

In other cases, a family may request an inquest because they would like to know more about how their relative died. It may be helpful to provide them with the autopsy report (with a caution that it may be distressing to read) and/or a copy of the OIC's statement, together with a letter explaining that these documents provide the answers to the questions that a coroner is required to answer.

If family concerns are expressed in very vague terms or with insufficient clarity, they may be asked to clarify their concerns and outline how their concerns relate to the known cause of death.

Will an inquest provide answers to the family's questions?

It is not always the case that additional investigations or an inquest will shed further light on what is distressing the family. For example, it may not be possible to be more precise about when

a death occurred, or why a person took the heartbreaking decision to end their life. Similarly, the coroner may assess that further enquiries will not be able to fill gaps in the evidence as to a deceased person's last known movements.

Having carried out further investigation in response to family concerns, a coroner may be of the view that outstanding issues are resolved, or that further enquiries will not resolve them. In this case, the coroner should prepare a letter to the family, for signature by the Registrar, explaining what the investigations have revealed and why there is no basis for further investigation or an inquest. It may be helpful to attach a copy of further evidence obtained, for example, an expert medical report.

In addition, it may be appropriate to engage a CISP or ACISP member to help explain these decisions to the family.

Concerns about medical treatment

Family members sometimes seek an inquest because they believe their relative's clinical care was deficient, or they are of the view that hospital staff or their GP ought to have detected the medical condition which was the cause of death.

The coroner needs to determine whether there was any deficiency in the person's medical care, and if so whether it caused or contributed to their death. This might not be evident from the coronial brief and autopsy report.

In such cases, coroners might commence with a discussion with the pathologist who conducted the post mortem examination. If the pathologist believes it is within their expertise, they will usually assist with advice as to:

- whether anything appeared to have gone wrong with the medical procedure and the post-procedure care
- whether there are known risks for the procedure which would have been difficult to avoid
- whether, prior to the procedure, there were appropriate assessments of the person's fitness for the surgery, and
- whether in the case of GPs, the medical condition ought reasonably to have been detected earlier.

If a pathologist considers an area to be outside their area of expertise, they will usually advise what specific further medical investigation might assist, and identify the appropriate medical specialty.

Coroners can also obtain the person's hospital notes and review them, in particular the deceased person's discharge summary. This may be appropriate where the hospital admission was brief, or the medical condition was not complex. In these circumstances the coroner may be able to form their own view as to whether there is any basis for the family's concern.

Serious adverse event reviews

If further medical investigation appears necessary, a useful first step is to obtain a copy of any serious adverse event review (SAER) (formerly a root cause analysis report) into the circumstances of a hospital death: see *Health Administration Act* 1982, s 21A. This is an investigation and analysis procedure used within the NSW public health system, and many private health facilities. It aims to identify if a death was caused or contributed to by a serious systemic problem, and if so, to make recommendations to reduce the risk of future such incidents. Coroners can obtain a copy of the SAER by means of a s 53 order to the relevant hospital or NSW Local Health District.

Importantly, pursuant to s 21P of the *Health Administration Act* the contents of a SAER are not admissible in legal proceedings, including coronial inquests. However, family members will ordinarily have received a copy of it. For coroners they are a useful way to find out if systemic problems have been identified as relevant to the death, and if they have been rectified. If the hospital or health care facility has implemented the recommendations, there may be nothing to be gained from further investigation or an inquest.

Another step is to engage an independent medical expert to review those aspects of the hospital treatment that are of concern. See **Obtaining expert reports**.

If as a result of these steps the coroner forms the view that there were no deficiencies in clinical care, or that contributory systemic deficiencies have been addressed, the coroner should prepare a letter for the family explaining the investigations that have been undertaken, and how they establish that there is no basis for an inquest.

However, if there is to be an inquest, the coroner needs to ensure that the medical issues are confined to those which are necessary for coronial findings. Although there is likely to be some degree of overlap, the inquest is not an opportunity to test the waters for a civil action in medical negligence.

Obtaining expert reports

In some cases, it may assist to obtain an independent expert's report to provide an opinion as to the cause of death or the adequacy of clinical care given: see *State Coroner's Bulletin No 20* of 2022. The coroner should first consult with the Duty Coroner as to why an independent expert's report is required, and what the proposed questions to the expert would be. It is recommended that the coroner also obtain assistance from the Duty Coroner to identify suitable experts. If an expert's report is to be obtained, the approval of the Registrar is required if the proposed cost exceeds $6,000: *State Coroner's Bulletin No 20* of 2022.

The expert's review can usually be conducted on the basis of the hospital records. While the expert would probably find it useful to also have statements from the treating clinicians, gathering medical statements is a lengthy and expensive process, and may turn out to have been unnecessary if the expert review does not identify significant deficiencies.

If the coroner decides to engage a medical expert, the SAER should not be among the materials provided to the expert as this may influence their opinion. Further, as the SAER's contents are inadmissible in an inquest, this could create problems if the expert witness's report and/or oral evidence is relied upon in the inquest.

Concerns about mental health care

Many reportable deaths occur against a background of chronic or acute mental illness.

Suicides are deeply distressing for families. Many families have been supporting their relative or partner for years and have done their best to keep them safe. Suicide deaths can be distressing for coroners as well.

Sadly, it is not uncommon for suicide deaths to occur within hours or days of a person's discharge from a mental health unit. When this happens, the family is often bewildered and frustrated by the decision to discharge their relative.

Whether the decision to discharge the deceased person requires further investigation must be decided on a case-by-case basis. A decision to involuntarily detain a person is governed by the provisions of the *Mental Health Act* 2007. A treating psychiatrist may have little difficulty establishing that a person suffers a mental illness and requires care and treatment. However,

when considering involuntary detention, a psychiatrist must be satisfied that no other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available. After a person has had a period of admission and has achieved a degree of stability, the psychiatrist may form the view that the test for maintaining them in involuntary detention can no longer be met.

It may be appropriate for the coroner to focus instead upon the adequacy of the discharge plan that has been prepared for the person. This sets out the plans that have been made for their mental health care and support, once discharged into the community. The discharge plan (and clinical notes for the admission) can be obtained with a s 53 order.

If appropriate, the coroner can also consider seeking a review by an expert psychiatrist of the mental health care provided; see **Obtaining expert reports**. The Duty Coroner can assist with this decision and the choice of expert. If an expert's report is critical of aspects of the person's care, enquire with the hospital or mental health service if they have taken steps to address these issues.

Certain mental health-related deaths require a higher level of scrutiny. These include:

- suicides occurring within the mental health facility itself. A SAER report is likely to be available to assist the coroner.
- suicides of adolescents. If a young person has taken their life shortly after discharge, consider investigating the sufficiency of the discharge plan, and whether the young person's parents or carers were advised of strategies to keep the young person safe in the hours and days post-discharge.

Where the death occurs while the person was an involuntary patient, the matter is to be transferred to Lidcombe Coroner's Court.

Concerns about socio-medical issues

Sometimes families raise concerns about wider socio-medical issues such as the practice of doctor-shopping for medications, the inadequacy of mental health services, and the effects of cyber-bullying. These are often recurring issues and may have broad relevance to the manner of the person's death. In such cases, the coroner should contact the Duty Coroner to discuss whether relevant recommendations have previously been made in respect of the issue to inform the decision of whether an inquest should be held.

The "Reasons for dispensing with an inquest" form

The great majority of cases will not proceed to inquest and will be dispensed. The State Coroner has directed that in all cases in which inquests are dispensed with, a coroner must provide written reasons which are placed on the coronial file: see *State Coroner's Bulletin No 3* of May 2018.

Ordinarily the "Reasons for dispensing with an inquest" form (the Dispense form) need not exceed 3–4 paragraphs. It should evidence that the coroner:

- has fulfilled their statutory duty of determining the identity of the deceased person and the time, place, cause and manner of their death
- is satisfied there are no suspicious circumstances which warrant further investigation
- is satisfied there is no scope for making recommendations in the interests of public health and safety, and
- in cases where the family has sought an inquest, in brief, why there is no basis for one.

It is preferable to refer to the deceased person by their name, rather than use the term "the deceased".

If the person was already deceased when found, include when they were last seen or heard from. This is usually the best evidence of when the person died, or the range of dates within which they died.

Briefly summarise the conclusions within the post mortem report. This is the best and often only evidence as to cause of death.

In cases of suicide, the Dispense form should briefly set out the coroner's reasons for finding that the manner of death was self-inflicted and intentional.

If the coroner has concluded that a cause of death can be established on the balance of probabilities, notwithstanding that the post mortem report finds the cause to be "Unascertained", the Dispense form should briefly set out the coroner's reasons for reaching this conclusion.

Once the coroner has prepared and signed the Dispense form, it is a practice of the Coroner's Court to print it on yellow paper and place it on the coronial file. It is an essential record in circumstances where a person requests, pursuant to s 29(2), that the State Coroner review the coroner's decision not to conduct an inquest.

Release of the Dispense form

The coroner must, on the request of a person who, in the coroner's opinion, has a sufficient interest in the circumstances of the death, provide their written reasons for dispensing with an inquest to that person: s 26(1)(c). If the coroner refuses the request to provide the reasons to a person, they are required to give written reasons for the refusal: s 26(2).

The Act does not define what a sufficient interest is, but s 57(3) deems a relative to be a person with a sufficient interest to appear in an inquest. It would be consistent to conclude that a relative has a sufficient interest to request the coroner's written reasons for dispensing with an inquest.

"Relative" is defined in s 5 to include spouses, parents, guardians, children and persons standing in loco parentis of the deceased. If none of those people exists, a sibling of the deceased person is deemed to be a relative for the purposes of the *Coroners Act*.

Persons other than relatives may also have a sufficient interest, but this will depend on the individual circumstances of the case: see **Access to coronial material**.

Is a coroner functus officio after dispensing with an inquest?

If fresh evidence or facts are produced to a coroner who has previously dispensed with an inquest, a coroner may commence an inquest if of the opinion that it is necessary or desirable in the interests of justice to do so: s 25(3).

However, even if no fresh evidence or facts are produced, a coroner may commence an inquest having previously dispensed with one. As no coronial proceedings have taken place, and no determinations have been made following an inquest, a coroner who dispenses with an inquest would not appear to be functus officio: *Terry v East Sussex Coroner* [2002] QB 312.

Senior next of kin disputes

Section 6A(1) defines the deceased person's "senior next of kin" by way of a list of categories of person (if available) in cascading order of eligibility from (a) their spouse, to (b) their adult children, to (c) their parents, to (d) their adult siblings, to (e) their executor or legal personal representative. Some of these categories potentially identify more than one person as senior next

of kin and, as the Act does not give priority to any one person within a particular category, more than one person may meet the definition of senior next of kin. The Act also does not provide a coroner with the power to determine who, within a particular category, will be recognised as senior next of kin. Following are some common disputes and ways of potentially resolving them.

Where multiple persons within a category satisfy the definition of next of kin and there is a dispute between them as to who should be recognised, the coroner may first seek assistance from a CISP officer who can encourage those persons in dispute to cooperate with each other in selecting a senior next of kin. These disputes are often resolved in this way. However, if they are not, the coroner does not have the power or duty to determine that only one senior next of kin will be recognised, and those in dispute may be able to seek declaratory relief in the Supreme Court.

Where a person in one category (for example, a parent or adult child) disputes the legitimacy of the relationship between the deceased and a person in another category higher in the order of eligibility within s 6A(1) (for example, a de facto partner), it is a practice of the Coroner's Court for the coroner to make a determination as to whether the person was in a de facto relationship at the time of death. In such cases, the coroner may ask the Registrar to invite the person questioning the relationship to submit their reasons for doing so in writing, and for the de facto partner to respond in writing.

The definition of "spouse" in s 4 includes a de facto partner as defined in s 21C *Interpretation Act* 1987. The meaning of "de facto partner" includes a person in a de facto relationship with another person, and a person is in a de facto relationship with another person if they have a relationship as a couple living together, and they are not married to one another or related by family: s 21C(1)–(4) *Interpretation Act*. In determining whether two persons have a relationship as a couple, s 21C(3) *Interpretation Act* provides that all of the circumstances of the relationship are to be taken into account, including the matters listed in that provision. It may be helpful to advise persons involved in such a dispute that the role of senior next of kin for coronial purposes has no bearing on matters of inheritance.

Once the coroner has determined senior next of kin, if appropriate, it is recommended they ask a CISP officer to contact the senior next of kin to encourage them to cooperate with the other person in relation to funeral arrangements and to keep the other person informed of developments relating to the deceased person. Further, once the coroner determines the matter, the other person may be able to seek declaratory relief in the Supreme Court.

Access to coronial material

"Coronial material" covers a broad range of material. It includes post mortem reports, witness statements, medical records, hospital records, photographs, videos, evidence transcripts, exhibits, and suicide notes.

If a coronial matter proceeds to inquest, the principles of natural justice require that adequate reasons be given by a coroner if they refuse to provide evidence to a party of sufficient interest: *Musumeci v Attorney General of NSW* (2003) 57 NSWLR 193. This may be the case where there is a genuine risk that releasing the material will prejudice an ongoing police investigation, a future trial, or the integrity of a person's evidence.

Although s 65 generally governs the provision of the coroner's file (or part thereof) to other persons, the discussion below regarding the provision of material to family members is in accordance with the procedures of the Coroner's Court.

Coroners frequently receive requests for release of coronial material during the investigative phase of a matter, or in cases where it has been decided not to conduct an inquest. The following are common examples.

Family requests for coronial material

The post mortem report and OIC statement

In the investigative phase, it is usual to provide senior next of kin with a copy of the post mortem report and/or OIC statement, if requested. As families often seek an inquest because they want to know more about how their relative died, providing these core documents can help resolve these issues.

If senior next of kin makes such a request, a copy of the post mortem report and OIC statement should ordinarily be provided once they are available. The post mortem report should be accompanied by a letter cautioning that the contents may be distressing to read, and suggesting that it be read in the company of a GP or counsellor.

Post mortem reports and statements should generally not be provided to senior next of kin if the death is suspicious and the requestor, or a close relative, is a person of interest in the police investigation.

Other coronial material

In the ordinary course, a coroner will, after reviewing the contents of the coronial brief, provide a copy of it to senior next of kin upon their request. The copy of the coronial brief provided should not contain death scene photographs or videos which depict the deceased person and they should be advised that these have been excluded from the material provided.

Occasionally senior next of kin asks to view such material. For some families, viewing it is an important part of their grieving process. If the coroner decides to grant access, CISP officers can provide advice about facilitating this. It is highly advisable that the family view the material in the presence of a CISP officer, or a local counsellor.

Suicide notes

Other than exceptional cases, family members and friends should be permitted to have copies of letters or notes that the deceased person has left for them. In addition, these documents sometimes include the wishes of the deceased person as to funeral and testamentary arrangements, in which case a decision about their release needs to be made quickly.

If a note or letter is addressed to a specific person, a copy should be released to that person only, unless they agree to it being released to others. If there is no specific addressee, coroners should use their discretion as to who can have access.

Sometimes the letters or notes contain comments that may be hurtful to the addressee. This of itself is not a reason to refuse access. However, in such circumstances, it is appropriate to ask a CISP officer to prepare the addressee for this, or to forward the document with a warning that its contents may be distressing.

The original letter or note can be provided to the addressee once the matter is finalised.

Requests from other family members

Often family members other than senior next of kin, such as parents, siblings, former partners, and adult children, ask for access to coronial material. This is usually on the basis that the senior next of kin is not willing to share information with them.

Coroners need to keep in mind that pursuant to s 57, a relative is considered to be a person with sufficient interest in the proceedings. If a coroner receives such a request, it is appropriate to contact senior next of kin to ask if they are opposed to such access and if so, their reasons. However, it is a matter for the coroner whether those reasons justify denial of access to the family member.

Requests from other individuals and groups

An applicant for coronial material who is not a family member must request access pursuant to s 65. Coroners are exempt from the provisions of the *Privacy and Personal Information Protection Act* 1998 while carrying out coronial functions: s 6 *Privacy and Personal Information Protection Act* 1998.

Requests for coronial material are often made by media organisations, researchers, insurance companies, and law firms interested in actions arising out of the death. These requests require careful consideration. Coronial files include very personal information about the deceased person and others, as well as material that is very likely to distress grieving family members. Therefore, coroners need to be sensitive both to the feelings of relatives, and to the potential for gross breaches of privacy.

The request for access is to be granted if the coroner thinks it is "appropriate" under s 65(2) having regard to the non-exhaustive factors in s 65(3). These are:

- the principle of open justice
- the effect on a deceased person's relatives of disclosure
- the connection the person requesting access has with the proceedings
- the reason why access is sought, and
- any other relevant matter.

During and after an inquest, media organisations may want access to the coronial file in the interests of fair and accurate reporting of the proceedings. Access should ordinarily be restricted to tendered material and caution should be exercised in relation to the release of visual and audio material. Copies of photographs, videos or recordings of the death scene which depict the deceased person should **not** be released.

Ensure that the media organisation is aware of any orders for non-publication: see **Non-publication orders**.

When an inquest is not held, law firms and/or insurance companies may want access to coronial material. Usually this is for the purpose of advancing civil proceedings, or assessing whether such an action might be commenced, or responding to such actions. It is debatable whether such a purpose is related to advancing a legitimate interest in the coronial proceedings.

Research bodies may seek access to coronial material for the purpose of advancing medical knowledge, or enhancing systems of clinical governance. It would be appropriate to advise senior next of kin of the request, and canvass their views upon it.

There is a fee payable for provision of documents: s 65(2)(b).

Note: Generally, the fee is not required of family members who request information.

[44-100] Conducting an inquest

How does it differ from other court cases?

Inquests are inquisitorial in nature, resembling commissions of inquiry rather than criminal or civil litigation. Inquest findings do not bind participants, allocate criminal or civil liability, or declare rights as between parties. They are fact-finding proceedings.

Coroners may be likened to investigating magistrates. They determine the issues to be examined at the inquest, and give directions for investigation to police and other investigators. They are assisted by, and work with, a police advocate or counsel assisting.

There are no parties to the inquest as the term is usually understood. Rather, there are persons who have a sufficient interest in the circumstances of the death in question. Apart from relatives who have a statutory right of appearance pursuant to s 57(3), all other persons appear by leave only: s 57(1). A coroner must be satisfied that a person seeking leave to appear has a sufficient interest: see **Who may appear at an inquest?**.

The coroner is not bound by rules of evidence or procedure other than the requirements of procedural fairness: s 58(1). The *Evidence Act* 1995 does not apply in coronial proceedings: *Decker v State Coroner of NSW* (1999) 46 NSWLR 415.

Note: for matters falling within s 23, that is deaths of persons in police or correctional custody, and deaths as a result of police operations, Practice Notes 2 and 3 have set case management directions which are aimed at their timely setting for inquest.

Who may appear at an inquest?

Persons with sufficient interest may be granted leave to appear in inquests and inquiries: s 57.

Unless exceptional circumstances dictate otherwise, relatives of the person who is the subject of the inquest are presumed to have standing: s 57(3); see also *Annetts v McCann* (1990) 170 CLR 596. One of the interests families represent is the reputation of their deceased relative: *Annetts v McCann* at 599.

A person with a sufficient interest will generally be a person, natural or corporate, whose reputation may be scrutinised or subject to adverse comment in a coroner's findings, or to whom recommendations may be made. Persons with sufficient interest are often police officers, treating doctors and nurses, and persons of interest in suspicious deaths.

Insurers would not ordinarily be regarded as having a sufficient interest, if the only question for them is whether ultimately they may be liable to pay compensation to an insured person. On the other hand, by virtue of their subrogated rights, they may have a direct interest in examining a person in relation to a suspicious fire.

Parties must seek leave to appear and demonstrate that they have an interest to protect by appearing. If they cannot do so, they may be allowed to attend the inquest or inquiry with a watching brief.

Persons granted leave to appear are entitled to be legally represented.

The date and place of the inquest

When fixing a date for the inquest, it is important to consult with the deceased person's family. Aside from the question of convenience, inquests can be very painful experiences for the family, and they may have good reason for wishing to avoid certain dates — for example, the deceased person's birthday or the anniversary of their death.

Generally, the matter will be listed in the courthouse within the area where the death occurred.

Only the State Coroner can order that a jury be called, and then only in an inquest or inquiry over which they preside and consider that there are sufficient reasons to justify a jury: s 48.

Preparing for the inquest

The basic tasks for preparing an inquest are as follows:

- analysis of the brief and identification of the issues and witnesses to be called
- engagement with CISP or ACISP where appropriate, for liaison with, and support for, the family: see **The family at the inquest**
- consultation with counsel assisting or the police advocate to ensure that all relevant issues have been identified
- identification of the need for further evidence, including expert evidence
- identification of persons who may have a sufficient interest in the proceedings. They must be notified in writing that their interests may be adversely affected by the anticipated evidence with a suggestion they seek legal advice and representation
- providing a copy of the brief to persons with sufficient interest, unless there is a compelling reason not to do so: see **Access to coronial material**. They should be invited to identify any issues and evidence they wish the coroner to consider, and to nominate any witnesses they request the coroner to call for examination, providing their reasons. This may include evidence from expert witnesses in reply to evidence within the coronial brief
- send draft issues list and draft witnesses list to the persons with sufficient interest
- in complex matters, setting a directions hearing to resolve interlocutory issues or controversies, and timetables for obtaining and serving further evidence. Section 49 provides that a coroner may issue case management directions. See also Practice Notes 1, 2 and 3
- in matters where police officers may be subject to adverse comment, to prevent a perception of conflict of interest between police advocates and the officers under examination, coroners should consult the State Coroner to request that the Crown Solicitor's Office provide counsel assisting
- in complex matters, consider requesting the assistance of the Crown Solicitor's Office
- consider conducting an informal view as it may enable a better understanding of the evidence. This is distinct from a formal view during the inquest which then becomes part of the evidence. The intention to conduct an informal view should be notified to the persons of sufficient interest, consistent with the principles of procedural fairness
- if the case involves questions of public health or safety, the coroner and counsel assisting should turn their minds to potential policy issues and recommendations
- if recommendations are contemplated, a check should be made with the State Coroner's Office and the National Coronial Information System for recommendations made in similar matters. This can be done through the State Coroner's Office: see **Making recommendations** at **[44-140]**
- subpoenas should be issued for witnesses required and for any further documents not already obtained under a s 53 notice to produce

- interpreters should be ordered if required
- any necessary or appropriate technology, AVL links, and video equipment should be organised
- any applications for non-publication orders should be heard and determined: see **Non-publication orders**.

Working with counsel assisting

The coroner works closely with counsel assisting prior to, and during, the inquest.

No mention is made within the *Coroners Act* of the right of counsel assisting to appear, or the role and responsibility of counsel assisting. They are, nevertheless, an institution well-established in Australian coronial jurisdictions.

In NSW, the role of counsel assisting may be performed by a police prosecutor or a coronial advocate in more straightforward cases. In more complex inquests, the coroner may be assisted by a lawyer within the Crown Solicitor's Office, who may consider engaging counsel.

The relationship between coroner and counsel assisting is unique. There is no bar to discussions with counsel assisting before, during or after the evidence. Similarly, the officer in charge of the case can be consulted by the coroner as to the issues of the case. On behalf of the coroner, counsel assisting and the instructing solicitor liaise with the police investigator with carriage of the matter, the persons of sufficient interest or their legal representatives, and the witnesses.

Unlike other judicial officers, a coroner is not a passive recipient of a case brought before the court. Coroners provide guidance to counsel assisting as to how they wish to conduct the inquest, and will ensure that counsel assisting keeps the inquest focused on the issues. Counsel assisting is the coroner's adviser but, ultimately, the coroner must decide the issues to be examined, the witnesses to be called, the conclusions that will be drawn and any recommendations that will be made. Confidence, trust and mutual recognition of their respective roles is imperative for both coroner and counsel assisting.

Regional magistrates may feel uncomfortable working in this manner with a police advocate whom they ordinarily keep at arm's length. If so, they may seek a police prosecutor from another circuit or district to assist them. Alternatively, they may apply to the State Coroner for the assistance of one of the coronial advocates based at Lidcombe Coroners Court.

Ordinarily, coroners should not have discussions with expert witnesses to be called on contentious issues, as this may lead to the perception that the coroner has prejudged the issue or has not afforded procedural fairness: *Re Doogan; Ex p Lucas-Smith* (2005) 158 ACTR 1 at [98] and [99]. This task should be left to counsel assisting.

The procedure at inquest

First Nations deaths: cultural considerations at the inquest

Where the death is of a First Nations person, there are cultural aspects to consider. At the beginning of the inquest or at the close of the evidence, the family may wish to incorporate ceremonies which are specific to the deceased person's family or tribal community. These are encouraged, as consistent with the spirit of recommendations made within the Royal Commission into Aboriginal Deaths in Custody, and with the State Coroner's Protocol regarding First Nations deaths.

It is also important to:

- consult the family on how they wish the deceased person to be named throughout the proceedings
- include in the opening address of counsel assisting, details of the tribal community which the deceased person identified with, and their community and kin connections
- pre-warn the family if the inquest will involve visual or audio material of the deceased person.

ACISP officers at Lidcombe are available to provide advice to coroners on these issues, and to liaise with, and give support to, the family.

Inquests and the model litigant policy

Government agencies such as the NSW Police Force, NSW Department of Health and Corrective Services NSW frequently appear in inquests.

They are bound by the DCJ, Model Litigant Policy, June 2016, a statement of principles reflecting the existing law. The policy, while referring to civil litigation, applies generally to litigation conducted by NSW government agencies. It states:

> **3.1** The obligation to act as a model litigant requires more than merely acting honestly and in accordance with the law and court rules. It also goes beyond the requirement for lawyers to act in accordance with their ethical obligations. Essentially it requires that the State and its agencies act with complete propriety, fairly and in accordance with the highest professional standards.

Coroners are entitled to expect that those acting for the Crown or government agencies will cooperate with and provide as much reasonable assistance to them as is consistent with their duty to represent their clients' interests.

General inquest procedure

After appearances are taken at the beginning of the inquest, it is courteous for the coroner to welcome family members who are present and to express sympathy to them for the loss of their relative. See **The family at the inquest**.

Counsel assisting will make an opening address. This will outline the purpose of the inquest, provide background to the case, outline the issues to be investigated and the statutory questions to be answered, and highlight the key features of the anticipated evidence.

The officer in charge is usually called first. The brief of evidence is normally tendered through that officer. Sometimes they may be asked to provide an overview of the investigation, or to provide evidence on specific issues identified by the family or by parties of sufficient interest.

If a view is to be conducted, it is often useful for it to be conducted immediately after counsel assisting has opened or after the officer in charge has summarised the evidence gathered during the investigation.

Witnesses are then called and examined by counsel assisting. Note that the coroner determines the witnesses called to give evidence. Persons with sufficient interest may apply to the coroner to have a particular person examined (s 60(1)), but it is ultimately the coroner who determines which witnesses are called and the order in which they are called. Ordinarily, most of the evidence will be adduced by counsel assisting.

While counsel representing persons of sufficient interest have rights of cross-examination, these are limited to protecting the interests of their clients. They do not have unfettered rights

to cross-examine at large or to address the coroner. Any documents sought to be relied on by persons with sufficient interest should be shown first to counsel assisting and, if appropriate, tendered through them.

Although the rules of evidence and procedure do not apply, procedural fairness is critical. Persons of sufficient interest are entitled to appear, to be legally represented, to be provided with the evidence and to seek to provide evidence in response, to examine witnesses in relation to their own interests, and to make submissions regarding any finding or comment which is adverse to their interests: *Annetts v McCann* (1990) 170 CLR 596; *Musumeci v Attorney General of NSW* (2003) 57 NSWLR 193.

Coroners may, if they consider it to be in the interests of justice, order witnesses to leave the courtroom until called: see s 74(1)(b).

At the conclusion of the evidence, it is common for a member or members of the deceased person's family to address the court about their loved one: see **The family at the inquest**.

For other issues that can arise at the inquest, see:

- **Non-publication orders**
- **The privilege against self-incrimination**
- **Suspending an inquest or inquiry** at **[44-120]**.

Submissions

Following the family statement, the advocate or counsel assisting will address the court, suggesting findings that are available on the evidence and proposing recommendations if appropriate.

Persons of sufficient interest do not have a general right to address on the whole of the evidence but are entitled to put submissions relevant to the protection of their own interests: *Annetts v McCann* at 601. In practice, however, interested persons are usually given wider latitude.

Legal representatives or counsel assisting sometimes request that their submissions be provided in writing, rather than orally at the close of the evidence. This request should be considered on a case-by-case basis. Agreeing to written submissions will prolong the period before findings can be given, and is not usually appropriate where the evidence and issues are not complex. However, where they are, it may be appropriate to set a timetable for the filing of written submissions. In addition, where recommendations are proposed, persons of sufficient interest who will be impacted by the recommendation will often require a short adjournment to consider their position and provide written submissions as to the need or practical feasibility of the proposal: see **Making recommendations** at **[44-140]**.

Findings

Section 81 requires that a coroner who holds an inquest or fire inquiry must record their findings in writing. For assistance with the format of findings, coroners may access findings in relation to previous inquests on the NSW Coroner's Court website.

Depending on the complexity and quantity of the evidence, it may be possible for the coroner to deliver findings, noting they must be recorded in writing.

However, due to the length or complexity of the evidence in some cases, the coroner will need to reserve findings and prepare a written document containing these together with detailed reasons. In addition, if recommendations are being considered, they need to be drafted with care.

As is the case when a magistrate reserves judgment following a criminal and civil hearing, the date for findings should ordinarily be fixed within days and not months of the inquest or inquiry.

What standard of proof applies?

The standard of proof for findings is the civil standard. In relation to suicide, the *Briginshaw* civil standard applies: *Briginshaw v Briginshaw* (1938) 60 CLR 336.

Findings in respect of missing persons

It is not always clear that a missing person is dead, even if they have been missing for a lengthy period. An inquest will almost always be required, due to the absence of clarity that the person has died, and as to the cause and manner of their death. An inquest is also likely to be important for the missing person's family and friends, who have been left without answers as to what happened to their loved one.

There is a presumption of law that a person is dead if, at the time of the inquest:

> at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living: *Axon v Axon* (1937) 59 CLR 395 at 405 Dixon J.

Typically, police investigations concerning a missing person will include investigations concerning the deceased's bank accounts, social security records, police records, passport checks (including immigration records), records of the NSW Roads and Maritime Services and the like. Evidence will also be taken from close friends and relatives of the missing person as to when they were last seen or heard from, and whether it would be out of character for them not to have made contact.

A finding that a person is dead is a serious matter warranting the application of the *Briginshaw* standard of proof: *Briginshaw v Briginshaw*, above; also see Waller at [81.29].

Having heard the evidence the coroner may be satisfied that a missing person has died. However it is unlikely there will be sufficient evidence to establish cause and manner of death: see **Open findings**.

Open findings

An "open finding" refers to the situation where a coroner is unable to make a finding due to insufficiency of evidence. Open findings will often be made where a person's remains are decomposed. In such cases, the coroner will make findings on each of the statutory criteria for which they can be made, while those remaining are left open.

Open findings, in particular as to cause and manner of death, are also common in inquests in relation to missing persons.

Was the manner of death suicide?

Before a finding of suicide can be made, a coroner should be "comfortably satisfied" on the balance of probabilities to the *Briginshaw* standard that this is the appropriate finding: see Waller at [81.29].

In cases where a person has died as a result of drug toxicity, it may not be clear that the person ingested the drugs with the intention of taking their own life. This may also be the case where the death is the result of a fall from a height, particularly if the person was affected by drugs or alcohol.

When making a finding as to the manner of death in such matters, a coroner should state whether the evidence is sufficient to find that a person intended to end their life, or did not intend to end their life, or the coroner is unable to determine this issue.

Section 75(1) and (4) enable a coroner to make a non-publication order before, during or after findings, in respect of information concerning a death that appears to have been self-inflicted.

Once a finding has been made that the death was self-inflicted, s 75(5) prohibits the publication of a report of the proceedings (or any part of them) unless the coroner specifically permits the publication by order. The coroner may only make such an order if it is desirable in the public interest to do so: s 75(6); also see **Non-publication orders**.

The family at the inquest

Inquests are usually painful experiences for family members. Few would choose to relive the distressing experience of their relative's death, were it not for the sake of finding answers to their questions and seeking changes which might prevent future such deaths.

Coroners need to be sensitive to the feelings of the family, and to do what is possible to reduce the distressing impacts of the inquest.

In appropriate cases, CISP or ACISP members should be contacted to request support for family members during the inquest.

Coroners should take care to know the names of family members who are attending the inquest, and their relationship to the deceased person. They should ask the family by what name they would prefer their relative to be called throughout the inquest. They should also pre-warn the family of forthcoming evidence which describes the immediate events of the person's death, or will include medical evidence which may be confronting to hear.

When the family is not represented at the inquest, counsel assisting should consult with family members, and examine issues raised by them which are materially relevant to the inquest.

Family statements

Prior to the inquest, the family should be made aware that they will have the opportunity to honour the memory of their loved one by telling the court about them. This address will usually occur at the close of the evidence, but before closing submissions are commenced.

Although they do not have the status of evidence, "family statements", as these addresses are known, are a very valuable part of the inquest. For the coroner they are an insight into the life of the deceased person, and what they meant to those who loved them. For the family this is an opportunity to honour their relative as the human being they were, rather than just being the subject of evidence about clinical procedures or police attention.

Although it is right to allow latitude to the content of the family statement, it should not be the occasion for the family to make critical or insulting comments about medical staff, police or other family members. For this reason, in advance of the statement being given counsel assisting will generally request from the family a written draft of what they intend to say, to ensure that these boundaries are respected.

It is also appropriate to be very flexible about the manner in which the family statement is given. Usually it is spoken by a family member or members, but sometimes the family prefers that their words are read to the court by their legal representative, or by counsel assisting. The family statement is sometimes accompanied by music, or with a video which the family has specially prepared. Items that were special to the deceased person are sometimes placed in the court or shown to the coroner, such as poems, photographs or artworks.

In the case of First Nations people, there may be an accompanying ritual or ceremony.

The family statement is an emotional experience for all, and particularly for the family. Once it has been given, it is usual for the coroner to take a short adjournment before returning to hear closing submissions.

Legal aid may be available for unrepresented persons for a coronial inquest. The letter notifying the family about the forthcoming inquest should advise them to make this enquiry with Legal Aid NSW.

Non-publication orders

Coroners have a power to prohibit publication of evidence received in inquests and inquiries, where it is in the public interest to do so: s 74(1)(b).

In addition to the coroner's express powers to make non-publication orders, Hamill J in *Commissioner of Police v Deputy State Coroner* [2021] NSWSC 398 at [78] accepted that a coroner has an implied or incidental power to make non-publication, non-disclosure or suppression orders over material adduced in evidence, evidence gathered in the course of a coronial investigation and material held on the court file.

The Act's definition of "published" in s 73 is wide enough to include internet publications, as well as publication in blogs and other websites where content is made available to the general public.

Although the term "public interest" is not defined in the Act, the coroner may have regard to the factors listed in s 74(2) which include the principle that coronial proceedings should generally be open to the public.

It is well established that although the principle of open justice is of great importance, it is not absolute: *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *R v Kwok* (2005) 64 NSWLR 335. Nevertheless, orders for non-publication should only be made where publication would frustrate the administration of justice: *Mirror Newspapers Ltd v Waller* (1985) 1 NSWLR 1.

Prior to the service of the coronial brief, parties with sufficient interest such as the Commissioner of NSW Police and the Commissioner of Corrective Services NSW might seek orders for non-publication of specific material, pursuant to s 74(1)(b). These applications often relate to specified content of policies and procedures. The application is usually brought on the grounds that publication would not be in the public interest because it would jeopardise police methodology, or compromise security and good order within prisons.

Evidence brought in support of such applications should be specific as to the material which is said to require non-publication, and addresses the specific harm purported to flow to the public interest if the order is not made. A non-publication order can be restricted to parts and not necessarily the whole of a document.

The terms of a non-publication order must be clear and recorded on the court file.

In NSW, non-publication orders must also be considered by coroners in cases of suicide: s 75. Reporters present in court should be warned that it is an offence to publish a report of the proceedings without an order from the coroner permitting them to do so: s 75(5) and (7).

Disclosure and admission of confidential material

This issue may arise when a party with sufficient interest makes a claim for public interest immunity, or when considering whether to disclose all of the evidence in a coronial brief to a person of interest. In such cases, it is recommended the Duty Coroner be consulted.

Also see *HT v The Queen* (2019) 269 CLR 403 and *Commissioner of Police v Attorney General (NSW* [2022] NSWSC 595.

The privilege against self-incrimination

A witness is not permitted, without lawful excuse, to refuse to be examined in an inquest, if required by the coroner to give evidence: s 62. A "lawful excuse" is a valid excuse supported by law: *Signorotto v Nicolson* [1982] VR 413; or a reason or excuse recognised by law as a sufficient justification: *McGuiness v Attorney-General (Vic)* (1940) 63 CLR 73 per Dixon J at 105. However, witnesses are entitled to object to answering questions if a truthful answer may tend to incriminate them or make them liable to a civil penalty: s 58(2).

Dicta in *Maksimovich v Walsh* (1985) 4 NSWLR 318 at 328 indicates that it would be proper for a judicial officer to advise a witness of this privilege if the witness is unrepresented. This may also be the case where a witness's representative has overlooked the privilege.

If a witness objects to answering a question, the coroner must determine if there are reasonable grounds for the objection: s 61(2). That is, is there is a "real and appreciable risk" of criminal proceedings being taken against the witness: *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 422. Whether the risk is real or appreciable will usually be apparent to coroners from the coronial brief.

If the coroner decides that there are reasonable grounds for the objection, they must inform the witness in accordance with s 61(3), which includes in s 61(3)(b) that the coroner will give a certificate to the witness if they give evidence willingly or if required to do so under s 61(4).

The effect of a s 61 certificate

If a certificate is given, the effect is that the evidence given by the witness cannot be used against the person in any proceedings in NSW except for criminal proceedings in respect of perjury. The protection extends to derivative use, that is, to any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence at the inquest: s 61(7). The protection does not however extend to Australian jurisdictions other than NSW, or to prosecutions in a foreign country.

The derivative use immunity provided by a certificate means that the coroner needs to consider carefully whether to grant one. If given, the effect is likely to significantly compromise any future criminal investigation and prosecution of that witness. This problem is most acute where the witness is suspected of committing a criminal offence which may have caused the death. For this reason, in such cases it is usual for the coroner not to require such a witness to give evidence at the inquest.

In many cases however there may be minimal or no prospect of later criminal proceedings, and significant value to the inquest and to the family in hearing the witness's evidence. These features would operate strongly in favour of granting a certificate.

Compelling the witness's evidence

If a witness declines to give their evidence with the benefit of a certificate, a coroner is empowered to compel the witness to do so, if satisfied that the interests of justice require this course: s 61(4)(b).

"The interests of justice" is not defined in the *Coroners Act*. The criteria proposed within Odgers's *Uniform Evidence Law* in relation to certificates under s 128 of the *Evidence Act* 1995 may be adapted and used as a guide in coronial proceedings.

Global objections

A global objection is an objection to giving any evidence, on the grounds that any answer the witness might give may be a link in the chain which would ultimately lead to self-incrimination.

In *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at 423, Kirby P commented:

> The proper procedure in a claim for privilege is to object to each question as it is asked …

However, to adopt this course will often result in an inefficient and unwieldly process. A better approach may be to consider whether particular lines of questioning will have the tendency to incriminate the witness. If so, objection may be taken on an identified "topic by topic" basis, rather than on an individual or a global basis.

[44-120] Suspending an inquest or inquiry

When must a coroner suspend a coronial investigation?

If, before or during an inquest or inquiry, a person is charged with an indictable offence which raises the issue of whether they caused the death or fire in question, the coroner must suspend the coronial investigation or inquiry, pending the completion of the criminal proceedings: s 78(1)(b), (2)(b).

When must a coroner suspend an inquest or inquiry after it has commenced?

While coroners must inquire into suspicious deaths, they are not permitted to make any finding, comment or recommendation suggesting a person has committed any offence: ss 81(3) and 82(3). It is not a coroner's function to determine questions of criminal or civil liability. The coroner's task is to find the facts surrounding the cause and manner of a person's death, not to draw legal conclusions from those facts.

Furthermore, coroners are not bound by rules of evidence or procedure and their findings, if expressed in condemnatory terms, may cause harm to a person's reputation, or prejudice a future trial.

For these reasons, and pursuant to s 78(1)(b), if a coroner finds that the evidence given up to a certain point in an inquest or inquiry:

- is capable of satisfying a jury beyond reasonable doubt that a known person has committed an indictable offence, and
- there is a reasonable prospect that a jury would convict the known person of the indictable offence, and
- the indictable offence would raise the issue of whether the known person caused the death or fire which is the subject of the inquest,

the coroner is required to suspend the inquest or inquiry: s 78(3)(b).

In assessing the prospects of conviction, the coroner must only take into account evidence that would be admissible in criminal proceedings. In addition, the "known person" must be a living individual.

In practice it is suggested that counsel assisting, without urging that s 78 be applied, proceed to outline the evidence that may support that conclusion.

Before suspending an inquest under s 78, a coroner must give the person of interest an opportunity to make submissions against this course of action: *Maksimovich v Walsh* at 328 per Kirby P. President Kirby suggested that it would be appropriate for the coroner to be open with the person of interest so that they have a chance to address the issue properly.

To protect the person of interest from prejudicial publicity, s 76 prohibits the publication of certain matters, including s 78 submissions, without the coroner's express permission.

It is suggested that, having given a person of interest an opportunity to be heard on the question of s 78, a coroner should not give reasons for rejecting them: to do so would go against the policy underpinning s 78. Rather, if that is their intention, the coroner should simply state that they have heard the submissions but intends to suspend the inquest or inquiry.

Before suspending the inquest, the coroner may make findings that a person died on a certain date, in a certain place but must not name any person who may have been responsible for the death or make any statement about the circumstances or cause of death. This is also the case with fire inquiries: s 78(2).

After the matter is suspended

Pursuant to s 79, after the criminal proceedings are complete a coroner may:

- resume an inquest or inquiry which has already begun
- commence an inquest or inquiry, or
- dispense with the resumption or holding of an inquest or inquiry.

It may be appropriate to commence an inquest following criminal proceedings, where there are wider aspects of the manner of death to be considered, for example, the role of agencies in failing to prevent the death.

It has been held that the double jeopardy rule is not breached if a coroner holds an inquest after a person has been acquitted of an alleged homicide: *Domaszewicz v The State Coroner* (2004) 11 VR 237.

The referral to the Office of the Director of Public Prosecutions

After suspending an inquest or inquiry, the coroner is to refer the matter to the Office of the Director of Public Prosecutions (ODPP) in accordance with the protocol between the Coroner's Court and the ODPP dated 16 February 2023. In accordance with the protocol, within two months of suspending the inquest or inquiry, the coroner is to make their best efforts to ensure the ODPP is provided with the relevant material, including:

- the depositions taken at the inquest or inquiry (s 78(4)(a))
- in an inquest or inquiry referred to in s 78(1)(b), a written statement signed by the coroner, specifying the name of the known person and particulars of the indictable offence/s concerned (s 78(4)(b)), and
- a copy of the brief of evidence.

It is a practice of the Coroner's Court to also include an analysis of the legally admissible evidence in short form, and a list of any obvious requisitions for further evidence.

The protocol provides that the ODPP will make a determination within six months following receipt of the referral from the Coroner's Court, subject to any requisitions for further material raised by the ODPP.

[44-140] Making recommendations

One of the objects of the *Coroners Act* is to enable coroners to make recommendations that will improve public health or safety and help prevent future deaths of a similar kind: s 3(e). Section 82(1) provides a coroner with power to make recommendations considered necessary or desirable in relation to any matter connected with the death or fire. Recommendations can be, without limitation, directed to public health and safety matters, or that a matter be investigated or reviewed by a specific person or body: s 82(2).

During the inquest a coroner may foreshadow to persons with sufficient interest that recommendations are under consideration. In doing so, the coroner is not to pre-judge what their factual findings will be. This may enable additional relevant evidence to be adduced at the inquest in respect of whether it is necessary or feasible to make those recommendations.

At the close of evidence, submissions regarding the proposed recommendations should be invited from any persons with sufficient interest, particularly those who will be affected by them. This is required in the interests of procedural fairness. Such submissions should assist the coroner with information including as to whether the proposed recommendations are useful, practical, and can feasibly be implemented. The affected parties may also be able to suggest a more effective way of achieving a proposed recommendation's purpose.

A pragmatic and informed approach to the making of recommendations is important. If recommendations are impracticable or vague they are not likely to be implemented, and unlikely to be effective if they are. Further, a coroner's credibility is likely to be diminished by extravagant, vague or impractical recommendations.

Accordingly, the most effective recommendations are specific, concrete and supported by the evidence.

An exception to this general rule is where the inquest exposes a systemic problem, and the coroner is not in possession of sufficient information to frame specific recommendations. In these cases it may be appropriate to recommend that the specific issue be reviewed by the appropriate body with a view to finding ways to address it.

If recommendations concerning government agencies are made, the coroner should make these to the responsible Minister. Other recommendations should be made to the person or body in question directly.

Recommendations are recorded on the National Coroners Information System (NCIS): see www.ncis.org.au.

Recommendations must be made at the time that findings are made. Once a coroner is functus, they cannot reopen the case to make further recommendations: *X v Deputy State Coroner for NSW* (2001) 51 NSWLR 312.

When similar recommendations have previously been made

Many of the problems coroners confront have previously been the subject of inquests in NSW and other States. Inconsistency between recommendations, especially recommendations that contradict one another, reduces the credibility of coroners and frustrates agencies who are asked to implement them.

Before recommendations are made final, a check should be made with the State Coroner's Office and the NCIS to ascertain if the proposed recommendations have previously been made, and to ensure that potential inconsistency between recommendations is avoided.

If similar recommendations have previously been made, this of itself does not mean they ought not to be repeated in a subsequent inquest. This is particularly the case with enduring and significant issues of public health and safety, where the case for change is strong and little or no progress has been made with implementing the previous recommendations.

The National Coronial Information System (NCIS)

NCIS is intended to work as a national database, systematically collecting coronial data to enable the wide dissemination of coronial experience and information. Coroners may apply to NCIS for access to its databases through the State Coroner's Office or request aggregate data reports to assist with coronial investigations. Reports can include data from open and closed cases, identifying information, summaries and recommendations: see www.ncis.org.au.

Information on the database includes:

- particulars of deceased persons: name, date of birth, occupation, age, gender, place of residence, etc
- if a work-related incident
  - (i) occupation at the time of incident
  - (ii) industry at the time of incident
- indigenous identification
- time/location of incident
- activity at time of incident
- intent, both suspected at time death reported and final
- mechanism of injury: primary, secondary and tertiary
- object or substance involved: primary, secondary and tertiary
- medical cause of death
- where the death is related to a motor vehicle accident
  - (i) vehicle type
  - (ii) driver/passenger
  - (iii) context
  - (iv) user.

Full text reports include:

- police narrative of circumstances
- autopsy report
- toxicology report
- findings.

NCIS does *not* contain:

- transcripts of inquests
- photographic evidence
- witness statements.

What happens after recommendations are made?

Coroners have no statutory power to demand a response to recommendations. They are entitled to request one: *State Coroner's Circular* No 72. If a recommendation is made to a non-government organisation or a private individual, coroners should specify a reasonable time by which a response is requested.

The Premier's Memorandum 2009-12 sets out the process for Ministers and NSW public officials to respond to coronial recommendations.

It requires that, on receipt of a recommendation, the Minister or official acknowledge it within 21 days.

If the Minister or official considers that the recommendation falls within the responsibility of another Minister or agency, they are required to forward the recommendation to that Minister or agency and to notify the State Coroner and Attorney General of the referral. The recipient is then required to acknowledge receipt of the recommendation.

Within six months of receiving a coronial recommendation, a Minister or NSW government agency should write to the Attorney General outlining any action being taken to implement the recommendation. Reasons should be given if a recommendation is not to be implemented and may include that the recommendation will not achieve the intended outcome; the outcome can be achieved in another way; or the recommendation is impractical having regard to the cost and potential benefits.

Ministers and agencies are encouraged to provide updates to the Attorney General on any further action taken to implement recommendations following their initial advice.

Incomplete inquests

If due to illness, retirement or other reason, a coroner is unavailable to conduct or complete an inquest, the State Coroner may direct another coroner to hold the inquest: s 33(2). Before doing so, the State Coroner must consult the Chief Magistrate: s 33(3).

If an inquest has already been commenced, the depositions taken may be admitted in evidence in the fresh inquest: s 64.

[44-160] Supreme Court applications

Apart from rare applications to the Supreme Court from next of kin objecting to autopsies, applications are sometimes made by persons involved in inquests and enquiries on points of law.

The Supreme Court may, on the application of the Minister or any other person, make an order that an inquest or inquiry that has been (or that has purportedly been) held be quashed and that a new inquest or inquiry be held if the court is satisfied that it is necessary or desirable to do so in the interests of justice because of fraud, the rejection of evidence, an irregularity of proceedings, an insufficiency of inquiry, the discovery of new evidence or facts, or any other reason: s 85.

In Supreme Court applications, the coroner is usually represented by the Crown Solicitor. The DCJ generally liaises with the Crown Solicitor's Office regarding representation of magistrates. Magistrates should direct enquiries to the DCJ.

Upon receiving a Supreme Court summons or other originating process, a coroner should also immediately get in touch with the State Coroner's Office to notify of the action and the nature of the issue being litigated.

[44-180] Fire inquiries

One of the objects of the Coroners Act is to enable coroners to investigate fires and explosions that destroy or damage property within NSW, in order to determine the causes and origins of (and in some cases, the general circumstances concerning) such fires and explosions: s 3(d).

Section 30 provides for two types of inquiry in relation to a fire or explosion that has destroyed or damaged property within NSW:

- an inquiry to investigate the cause and origin of a fire or explosion, and
- in limited circumstances, a general inquiry, which extends to an examination of all of the circumstances surrounding a fire or explosion, including but not limited to its cause and origin: ss 30–32.

The State Coroner has directed that a fire or explosion need only be reported to the coroner when:

- a person dies or is seriously injured as a result of the fire or explosion
- the fire or explosion has a significant impact on the local community, or relates to a systemic health or safety issue of public interest, or
- the Attorney General, NSW Police Commissioner or delegate, Commissioner of Fire and Rescue NSW, Commissioner of NSW Rural Fire Service, or the NSW State Coroner requests the report of the fire or explosion: see *State Coroner's Bulletin No 22* of October 2022.

What is meant by "cause and origin" of a fire?

In *R v Doogan; Ex p Lucas-Smith* (2005) 158 ACTR 1, it was held that the phrase "cause and origin" are separate concepts. The Supreme Court of the Australian Capital Territory (Full Court) said at [23]:

> The word "origin" means, of course, the source or beginning, and in the context of a fire it clearly refers to the starting point.

In relation to causation, the "commonsense" test in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 was adopted by *R v Doogan*; *Ex p Lucas-Smith* at [29]:

> The application of that test will obviously depend on the circumstances of the case and, in the context of a coronial inquiry, it may be influenced by the limited scope of the inquiry which … does not extend to the resolution of collateral issues relating to compensation or the attribution of blame.

Mandatory inquiries

An inquiry is required to be held in the following circumstances:

- if directed by the State Coroner, or
- if requested by an "authorised public official" (namely, the Commissioner of the NSW Fire Brigades, the Commissioner NSW Rural Fire Service, or the Minister): s 32(1), (2).

A general inquiry may only be held following a direction by the State Coroner: ss 30(2), 32(3). Such a direction must be made if an authorised public official so requests, or otherwise if the State Coroner is of the opinion a general inquiry should be held: s 32(4).

The decision whether to dispense with a fire inquiry

Coroners may dispense with the holding of an inquiry, where the circumstances are other than those set out in s 32. The coroner must be satisfied either that the cause and origin of the fire are sufficiently disclosed or that an inquiry is unnecessary: s 31(1).

In many cases reported to the coroner, an inquiry is dispensed with on the basis that there is no public interest in conducting one. This is usually because the fire is minor, the coroner is satisfied on the basis of the police investigation that an inquiry is unlikely to produce any additional evidence, or a coroner is unlikely to make any useful recommendations arising out of an inquiry.

Before dispensing with a fire inquiry, it is appropriate to enquire whether one is sought by the property owner, insurer, or fire authorities.

There may be a case for conducting a fire inquiry in the following circumstances:

- there are public health or safety issues which have not been rectified
- an inquiry is likely to produce more evidence than has been obtained by fire investigators
- complaints have been made about fire-fighting services warranting further independent inquiry
- useful recommendations relating to the public interest may be made, or
- a fire was a large-scale event resulting in substantial property damage, and/or significant public interest or concern (for example, the 2019–2020 bush fire season).

An inquiry will not be held in all cases where it appears that a fire has been deliberately lit in suspicious circumstances. There may be little to be gained from an inquiry if, after a thorough police investigation, there is insufficient evidence to charge persons of interest.

Death of a person in a fire

Where a person dies in a fire, a coroner will often hold an inquest into the person's death simultaneously with holding an inquiry into the cause and origin of the fire.

In such cases, while there will be one set of hearings in both matters, two coronial files should be created, one for the inquiry and one for the inquest. There will also be two separate sets of findings pursuant to s 81.

[44-200] State Coroner's Bulletins and Resources

Last reviewed: Jul 2023

State Coroner's Bulletins are issued on coronial matters on a regular basis. Coroners should keep abreast of developments as they are issued: see https://intranet.internal.justice.nsw.gov.au/Divisions/Pages/divisions/coroners-court/Coroners-court.aspx.

The Coroner's Court NSW website is a good starting point at www.coroners.justice.nsw.gov.au.

Additional information can be obtained from:

- *Australian Coronial Law Library* on JIRS/Other Resources at https://jirs.judcom.nsw.gov.au/menus/other_resources.php
- J Abernethy et al, *Waller's Coronial Law and Practice in NSW*, 4th edn, LexisNexis, Sydney, 2010

- H Dillon and M Hadley, *The Australasian Coroner's Manual*, The Federation Press, Sydney, 2015
- I Freckleton and D Ranson, *Death Investigation and the Coroner's Inquest*, Oxford University Press, South Melbourne, 2006 is a comprehensive general introduction to coronial law but has limited practical application

For commentary on the *Coroners Act* 2009, see *Criminal Practice and Procedure NSW*, LexisNexis Butterworths, Vol 4, Sydney, 1998 at [25-s 1]ff.

For information on death-related grief, depression and suicide prevention for the community and professionals, see:

- GriefLink at www.grieflink.asn.au
- Beyondblue and the Black Dog Institute at: www.beyondblue.org.au and www.blackdoginstitute.org.au
- Judicial Wellbeing, Judicial Commission of NSW at https://jirs.judcom.nsw.gov.au/menus/judicial_wellbeing.php.

Coroners Court Practice Notes

- Coronial Practice Note 1 of 2018
- Coronial Practice Note 2 of 2018
- Coronial Practice Note 3 of 2021
- First Nations Protocol

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Extradition

[46-000] Introduction

Magistrates are concerned with four types of extradition proceedings, namely extradition:

(a) to another State or Territory of Australia

(b) from Australia to a country other than New Zealand

(c) from Australia to New Zealand, and

(d) to Australia.

The three principal Commonwealth Acts governing these procedures are respectively:

(a) *Service and Execution of Process Act* 1992

(b) *Extradition Act* 1988, and

(c) *Mutual Assistance in Criminal Matters Act* 1987.

[46-020] Interstate extradition

Overview

The extradition of persons to another State or Territory of Australia is governed by the *Service and Execution of Process Act* 1992 which replaced the 1901 Act. Magistrates should note that they no longer have the power to refuse extradition interstate on the basis of the "unjust, oppressive or too severe a penalty" ground contained in the previous Act.

Apprehension of person on warrant

Section 82(1) of the *Service and Execution of Process Act* 1992 provides that a person named in a warrant issued in one State may be apprehended in another State. The requirement for endorsement of warrants has been abolished. This section does not apply in relation to a person who is in prison. As soon as practicable after being apprehended, the person is to be taken before a magistrate: s 83(1).

Powers of the court

If a copy of the warrant is produced to the magistrate, the court must, subject to ss 84 and 83(10) and (14), either:

(1) order that the person be remanded on bail on condition that the person appears in the State where the warrant was issued at such a time and place that the magistrate specifies: s 83(8)(a), or

(2) order that the person be taken in such custody or otherwise as the magistrate specifies, to a specified place in the place of issue of the warrant: s 83(8)(b). An order under s 83(8)(b) may be suspended for a specified period (s 83(11)) in which event the magistrate must order that the person be remanded on bail or in such custody as is specified: s 83(12).

The bail law of the State or Territory granting the bail applies: s 88(1).

The decision of the court is subject to review by the Supreme Court: s 86(1).

If a copy of the warrant is not produced, the court may order that the person be released, or adjourn the proceedings: s 83(3). If there is a further failure to produce the warrant, the

magistrate may release the person or, if "reasonable cause" is shown, further adjourn the proceedings: s 83(4). The *total* time of the adjournments referred to in s 83(3) and (4) must not exceed five days: s 83(5). If the warrant is not produced within the five days, the person must be released: s 83(7).

The person must be released if the court is satisfied that the warrant is invalid: s 83(10). In *Visser v Commissioner of Australian Federal Police (No 3)*[2012] NSWSC 1387, Button J noted that the "tide of authority" does not require the magistrate to consider whether the issuing of a warrant by a Victorian court is or was an abuse of process. This is a question for the Victorian courts. As Button J observed at [26], "the applicant has not pointed to any defect in the warrant that establishes that it is invalid. There is nothing on its face that suggests that it is defective."

The magistrate may adjourn the proceedings, and another magistrate may continue to conduct the proceedings: s 83(14). A magistrate is not bound by the rules of evidence: s 83(14).

A copy of the warrant sent via facsimile may be acted upon. Section 4 provides that there is a presumption that a document that purports to be a copy of the original is such a copy unless evidence is adduced that raises real doubt that it is a copy of the original.

[46-040] Powers of the court — person under restraint

When a person is taken before a magistrate under s 83, the magistrate must, before dealing with the matter, make reasonable enquiries as to whether the person is under restraint: s 84(1).

A "person under restraint" is defined in s 3(1) as a person who:

(a) is on bail; or

(b) has been conditionally released from prison (whether on parole, licence, work release, home detention or otherwise) before the end of a term of imprisonment to which he or she has been sentenced; or

(c) is subject to the supervision of another person under a probation order; or

(d) is serving a period of home detention or a term of imprisonment by way of periodic detention; or

(e) is subject to;

(i) a community service order; or

(ii) a community based order; or

(iii) an attendance order; or

(iv) a work and development order; or

(v) any other restriction on his or her movements, imposed by law or by order of a court, that is inconsistent with a person complying with a subpoena served on the person under this Act;

but does not include a person who is in prison.

If the person under restraint is on bail, the magistrate must enquire as to the reporting requirements of the bail: s 84(2). The magistrate may, on application, adjourn the proceedings for up to seven days: s 84(5). If the magistrate adjourns the proceedings, he or she must remand the person on bail or in custody, and inform the correction service or police station to which the person is required to report. When the proceedings resume, the person's supervisor or a police officer may make submissions to the magistrate: s 84(6).

If the person under restraint is not on bail, the magistrate must adjourn the proceedings for up to seven days, remand the person on bail or in custody, and give notice to the correction service

of the State in which the person is under restraint. When the proceedings resume, the person's supervisor or a person from the correction service may make submissions to the magistrate: s 84(4).

If a person under restraint is remanded on bail under a s 83(8)(a) order, it is a condition to which the grant of bail is subject that the person must return as soon as practicable to the State where the person was under restraint: s 84(7).

If a person under restraint is remanded in custody under a s 83(8)(b) order, a magistrate may make orders relating to the return of the person in custody to the State where the person was under restraint: s 84(8).

[46-060] Procedure on remand on bail

If an order is made under s 83(8)(a) or (12)(a), an instrument setting out the conditions of bail must be prepared and signed by:

(a) the magistrate or the person who prepared the instrument, and

(b) the person who is subject to the order: s 85(1) and (2).

The person and the court before which the person has been remanded to appear must each be given a copy of the instrument: s 85(3).

The magistrate must revoke the order and make an order under s 83(8)(b) or (12)(b) if the person refuses to sign the instrument or does not comply with a condition of bail: s 85(4).

Entitlement to expenses

A person who has incurred reasonable expenses as a result of compliance (by that person or another person) with:

(a) an order of a magistrate under s 83(8) in relation to a person brought before the magistrate under a warrant to which this section applies, or

(b) an order of that kind made by the Supreme Court of a State under s 86,

is entitled to payment, from the person at whose request the warrant was issued, of an amount equal to those expenses: s 87(2).

Such an entitlement does not exist if:

(a) the warrant was issued because of a person's failure to comply with a subpoena, and

(b) that person:

  (i) is not a person under restraint, or

  (ii) is a person under restraint who has failed to comply with s 36: s 87(3).

The court or authority that issued the warrant may make orders to ensure that the person who incurred those expenses receives the exact amount of those expenses: s 87(4).

If the warrant was issued by a court, the orders may be made by an officer of the court if the rules governing the procedure of the court so provide: s 87(5).

[46-080] Release of persons unnecessarily detained

The person who has been taken into custody pursuant to an order made, may apply to the court of issue, or authority of issue, of the warrant for an order that he or she be released from custody: s 90(2).

The respondent is to be the person at whose request the warrant was issued.

Notice of the application must be served on the respondent:

(a) personally, or

(b) by sending it by post to his or her address for service in the proceeding in relation to which the warrant was issued, or

(c) by sending it by fax to that address, or

(d) by leaving a copy of the application at that address: s 90(4).

The court of issue, or authority of issue, of the warrant may order that the person be released from custody if it is satisfied that it is not necessary for the person to be held in custody in order to secure his or her attendance to give the evidence or produce the document or thing: s 90(5).

The court of issue, or authority of issue, of the warrant may further order that the person be remanded on bail on condition that he or she appear, at a specified time or day, before the court, authority, tribunal or person to which the evidence is to be given or the document or thing is to be produced: s 90(7).

Relief from extradition

The grounds on which a person may seek release have been considerably narrowed from the 1992 Act. The magistrate must order that a person be released if the magistrate is satisfied that the warrant is invalid: s 83(10).

Suppression orders

Magistrates conducting an extradition proceeding under s 83 have the power to order that a report of proceedings and finding of the court not be published: s 96. Section 96(3) specifies the circumstances in which a suppression order may be made. Interim suppression orders may be made: s 98. Suppression orders may be varied or revoked: s 99. A suppression order must specify where it is to be enforceable: s 97(3).

[46-100] Overseas extradition

The *Extradition Act* 1988

The extradition of persons from Australia is governed by the *Extradition Act* 1988 ("the Act"). The overall scheme for which the Act provides was described by the Full Court in *Harris v Attorney–General (Cth)* (1994) 52 FCR 386 at 389 in terms that were accepted by the High Court in *Kainhofer v DPP* (1994) 52 FCR 341 as follows:

> The Act contemplates four stages in extradition proceedings as follows: (1) Commencement; (2) Remand; (3) Determination by a magistrate of eligibility for surrender; (4) Executive determination that the person is to be surrendered. In summary form, the scheme is as follows: The commencement of proceedings is by the issue of a provisional warrant under s 12(1) or by the giving of a notice under s 16(1). Once arrested, the person is required by s 15 to be taken before a magistrate and remanded in custody or on bail for such period as may be necessary for eligibility proceedings to be taken under s 19. Where a person is on remand under s 15 and the Attorney-General has given a notice under s 16(1), provision is made under s 19 for a magistrate to conduct proceedings to determine whether the person is eligible for surrender. If eligibility is so determined by the magistrate, provision is made by s 22 for the Attorney-General to decide whether the person is to be surrendered.

Hearings for the extradition of a person from Australia are often very strongly contested and therefore take considerable time to determine. The matters are usually conducted by representatives of the DPP on behalf of the requesting country. The applicant will often be put to strict proof of the many technical matters required to be proved under the Act.

In determining eligibility to surrender and in making consequential orders, the magistrate exercises administrative functions not the judicial power of the Commonwealth: *Pasini v United Mexican States* (2002) 209 CLR 246 at 254–255.

[46-120] Admissibility of evidence

Particular attention has to be given to the admission of evidence. Section 21 of the Act provides that either the extradited person, or the requesting country, may, within 15 days of the order by a magistrate, apply either to the Federal Court or the Supreme Court for a review of the order. There is then provision for a further appeal to the Full Federal Court and finally to the High Court. Section 21(6)(d) of the Act provides: "[t]he court to which the application or appeal is made shall have regard only to the material that was before the magistrate".

Counsel for either party will be anxious to record all possible objections to evidence because if objection is not taken before the magistrate, objection cannot made at the review: *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282. However, see also *Dutton v O'Shane* [2003] FCAFC 195 where the court held that evidence excluded by the magistrate may be admitted on the review because the material "was before the magistrate".

In *Snedden v Republic of Croatia* [2009] FCA 30 at [26] Cowdroy J, after reviewing various authorities, found:

> In view of the above authorities, it is now established that the Court may take into account as constituting "material that was before the magistrate" any material that was admitted by the Magistrate as well as any material that was rejected by the Magistrate provided that in the course of rejecting the material the Magistrate had engaged in "an active intellectual process" in relation to that material.

Cowdroy J adopted and approved the finding of the Full Court in *Cabal v United Mexican States* [2001] FCA 583 at [189] as follows:

> Proceedings for review brought in this Court under s 21 of the Act are subject to the operation of the provisions of the *Evidence Act* 1995 (Cth) notwithstanding the fact that those provisions are not applicable to the initial proceedings brought before a magistrate under s 19 of the Act.

The admission of evidence before a magistrate under s 19 of the Act is therefore not subject to the *Evidence Act*.

Magistrates hearing contested extradition cases may find helpful the following series of cases:

- *DPP v Rahardja* [2003] NSWLC 11 per Lulham LCM
- *Rahardja v The Republic of Indonesia* [2000] FCA 639 per Tamberlin J
- *Rahardja v The Republic of Indonesia* [2000] FCA 1297 per Wilcox, Spender and Dowsett JJ.

Definitions

The Act defines "magistrate" in s 5 to include: (b) "a magistrate of a State".

The Act applies to a country which is declared by regulation to be an extradition country: s 5. Special provisions relate to New Zealand: see **Extradition to New Zealand** at **[46-160]** ff. In for example, *Vasiljkovic v Commonwealth* (2006) 227 CLR 614 the High Court held that the Commonwealth had power under the external powers to declare by the *Extradition (Croatia) Regulations* 2004 that Croatia was an extradition country.

In *Vasiljkovic*, above, the person sought to be extradited was an Australian citizen. It was argued that Australian citizens are immune from removal by extradition from Australia. The argument was rejected. Gleeson C J remarked at [8]:

> There is nothing in the Act or Regulations that seeks to attach any legal significance to the fact that the plaintiff was at the relevant time a citizen of Australia as well as of Serbia and Montenegro. This represents a legislative choice in keeping with past Australian practice, and with the practice of many, but not all, other nations.

Extradition offences are those which carry a penalty of death or imprisonment of 12 months or more, or other offences included in any extradition treaty: s 5. For discussion regarding the meaning of "imprisonment of 12 months or more": see *Dutton v O'Shane* [2003] FCAFC 195.

An extraditable person is one for whom an arrest warrant has been issued for, or who has been convicted but not sentenced for, or who has not completed a sentence for an extradition offence and who is believed to be outside the country where the offence was committed: s 6.

Provisional warrants

An application on behalf of an extradition country may be made in statutory form (Form 4) to a magistrate for the issue of a warrant (Form 5) for the arrest of a person. If satisfied on the basis of information given by affidavit that the person is an extraditable person in relation to the extraditing country, the magistrate shall issue a warrant in the statutory form: s 12. The person making the affidavit is usually present to adopt the affidavit on oath. The application is generally made in chambers.

On the issue of such a warrant, the magistrate must immediately send to the Commonwealth Attorney-General a report that the warrant has been issued with a copy of the affidavit: s 12(2). A suggested form of report is set out in **Form 5** at **[46-220]**.

The Attorney-General can direct a magistrate to cancel a warrant on the grounds set out in s 12(3).

See *DPP (Cth) v Kainhofer* (1995) 185 CLR 528.

Search warrants

A magistrate may issue a search warrant if informed by affidavit by a police officer that there are reasonable grounds for suspecting that a thing which is material evidence for the extradition offence or proceeds of the offence, is in any place: s 14. The required contents of the warrant are set out in s 14(3).

The magistrate may require a further affidavit giving information as to the grounds for the issue of the warrant: s 14(2)(a). The warrant shall not be issued unless the magistrate is satisfied there are reasonable grounds for the warrant: s 14(2)(b).

See *Cabal v A-G (Cth)* [2001] FCA 583.

Remand under s 15

A person who is arrested under a provisional warrant shall be brought as soon as is practicable before a magistrate and shall be remanded by the magistrate in custody, or, subject to s 15(6) special circumstances, on bail, for such period as may be necessary for proceedings under ss 15A (waiver of extradition), 18 (consent to surrender for extradition) or 19 (determination of eligibility for surrender).

Section 15(6) provides:

> A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand.

The *Bail Act* 2013 does not apply to extradition proceedings. Section 49B *Extradition Act* 1988 provides that any decision to remand or release a person on bail may be made on such terms and conditions as the court thinks fit.

The test for granting bail pursuant to s 15(6) in an extradition matter is a strict one: see generally *Bertran v Vanstone* [1999] FCA 1117. In that matter the applicant had been granted bail in Mexico after his arrest in Australia for the offences for which extradition was sought. The Federal Court upheld the magistrate's decision to refuse bail. The court referred to the Explanatory Memorandum that accompanied the Extradition Bill 1987 which explains the "special circumstances" requirement in s 15(6) as follows at [12]:

> Subclause (6) provides that a person shall not be granted bail unless there are special circumstances. Such a provision is considered necessary because experience has shown that there is a very high risk of persons sought for extraditable offences absconding. In many cases the person is in Australia to avoid arrest in the country where he is alleged to have committed the offence, ie the person left the jurisdiction to avoid justice.

The court found at [14]–[15]:

> In our view that is what the phrase "special circumstances justifying such remand" in s 15(6) means — circumstances different in some way that provides a reason for a more favourable view of the grant of bail than that attending the ordinary run of extradition cases where a person might be expected to be remanded in custody.
>
> If s 15(6) stood alone, we would not have thought that a person who establishes special circumstances justifying remand on bail was necessarily entitled to bail. The sub-section would appear to posit a necessary but not sufficient condition for the grant of bail. However, when subss (2) and (6) are read together, this impression dissipates. Under subs (2) a person is to be remanded in custody "or, subject to subs (6), on bail". Thus, if special circumstances justifying bail are made out, bail is to be granted.

The court went on to point out that the provisions in s 21(6) for the granting of bail in a review of a magistrate's decision by the Federal Court or Supreme Court are different and at [16] "some caution must be exercised in using them in relation to s 15(6)".

The court summarised the approach under s 15(6) at [20] as follows:

> Under s 15(6) one starts with the presumption implicit in the sub-section, and explicit in the Explanatory Memorandum, that ordinarily bail is not to be granted. One then asks whether an applicant has established the existence of special circumstances which displace that presumption. One does not ask whether there are special circumstances in the abstract, but whether there are "special circumstances justifying such remand". In answering the question it is appropriate to take into account the particular circumstances of the applicant together with broad community standards including a predisposition against unnecessary detention in custody.

The cases under s 21(6) referred to, include *Holt v Hogan (No 1)* (1993) 44 FCR 572 at 579 and *Schoenmakers v DPP* (1991) 30 FCR 70.

A person refused bail is not entitled to make another application for release on bail during that remand unless there is evidence of a change in circumstances that might justify a grant of bail: s 15(3).

Upon the conduct of proceedings under ss 18 or 19, further provisions exist for a person to be granted bail (subject to a finding of special circumstances) rather than committed to prison pending a surrender determination by the Attorney-General under s 22.

In *Vasiljokiv v Commonwealth* (2006) 227 CLR 614 it was argued that the power granted by s 15 to magistrates to remand a person, the subject of an extradition application in custody, contravened the general principle that persons should only be deprived of their liberty by

judicial power. It was argued that the *Extradition Act* was constitutionally invalid because it omitted to interpose the judicial power to magistrates before a decision was made by the magistrate depriving the person subject to an extradition request of liberty. The power vested in a magistrate to conduct extradition hearings is administrative in nature, not judicial: *Pasini v United Mexican States* (2002) 209 CLR 246.

The High Court held that the general principle is subject to "exceptional cases" and the hearing of extradition cases and the power to refuse bail came within the description of exceptional cases.

Waiver of extradition

Section 15A enables a person to waive extradition, whether:

- before a decision has been made by the Attorney-General under s 16 as to whether or not to give a s 16 notice that an extradition request has been received: s 15A(1), or
- after the Attorney-General has given a s 16 notice, but before the magistrate has either advised the Attorney-General of the person's consent to surrender under s 18 or determined the person's eligibility for surrender under s 19: s 15A(2).

The magistrate is to make an order that the person be surrendered and advise the Attorney-General in writing that the person wishes to be extradited if satisfied, under s 15A(5), that the person:

- voluntarily waives extradition
- is legally represented or was given adequate opportunity to be legally represented, and
- confirms they wish to waive extradition after the magistrate has informed them that:
  - they cannot apply for the order to be revoked once made
  - the extradition country may not have given or will not be required to give a speciality assurance (that the person will not be tried for other offences) if the order is made
  - after the order is made, they will be surrendered to the extradition country if the Attorney-General makes a surrender determination under s 15B(2).

The magistrate is to issue a warrant committing the person to prison pending a surrender determination by the Attorney-General: s 15A(4)(a). There is no power to consider an application for bail where the person has waived extradition.

If the magistrate is not satisfied of the matters in subsection (5), they must advise the Attorney-General in writing that they have decided not to make an order: s 15A(7).

Notice by Attorney-General

Section 16(1) gives the Attorney-General the discretion to give notice that an extradition request has been received. The notice can only be given if the Attorney-General is of the opinion:

(a) the person is an extraditable person in relation to the extradition country, and

(b) that if the conduct of the person for which surrender of the person is sought, or equivalent conduct had taken place in Australia at the time at which the extradition request was received, the conduct or equivalent conduct would have constituted an extradition offence in relation to Australia.

The Attorney-General shall not issue the notice if of the opinion that there is an extradition objection in relation to the extradition offence, or all of the extradition offences for which surrender of the person is sought.

In carrying out the function under s 16, the Attorney-General in effect screens the application and provides an initial safeguard against unmeritorious extradition applications.

See generally *Williams v Minister for Justice and Customs* (2007) 157 FCR 286.

Section 16(3) provides for a copy of the s 16 notice and copies of the documents referred to in s 19(2)(a) and if applicable s 19(2)(b) to be given to the person as soon as practicable after the person is remanded under s 15 or the notice is issued, whichever is the later.

Under s 16A, the Attorney-General may give an amended notice at any time prior to the person consenting to surrender under s 18 or the determination of eligibility for surrender under s 19. The notice must not specify any offence/s not in the original notice unless the Attorney-General is satisfied a s 16(1) notice could have been given in the same form as the amended notice: s 16A(4). Requirements for copies of the amended notice and relevant documentation to be provided to the person as soon as possible after remand under s 15 apply: s 16A(7).

Release from remand

Section 17 provides for a direction by the Attorney-General for the release of the person if the Attorney-General decides not to issue a s 16 notice or for any other reason decides that the remand should cease.

Section 17(2) provides that if the Attorney-General:

- has not received an extradition request in relation to the person within 45 days of the date of arrest (s 17(2)(b)(i)), or
- has received a request but has not issued a s 16(1) notice within 50 days of the date of arrest (s 17(2)(b)(ii))

  the person should be brought before a magistrate.

Under s 17(2A), the magistrate must release the person from custody or discharge the recognizances on which bail was granted to the person unless satisfied that:

- in relation to s 17(2)(b)(i):
  - there are exceptional circumstances why the extradition country has not made an extradition request in relation to the person
  - the Attorney-General is likely to receive such a request within a particular period that is reasonable in all the circumstances, and
  - the Attorney-General is likely to determine whether or not to give a s 16(1) notice within a particular period that is reasonable in all the circumstances
- in relation to s 17(2)(b)(ii), the Attorney-General is likely to give a notice within a particular period that is reasonable in all the circumstances.

See *Peniche v Vanstone* (1999) 96 FCR 38.

[46-140] Surrender hearings

Consent to surrender

Where a person has been arrested under a provisional warrant and remanded, and the Attorney-General has issued a notice under s 16 that an extradition request has been received, the person may consent to being surrendered in respect of the offence(s) in the warrant: s 18.

Unless of the view that the consent was not given voluntarily, the magistrate shall advise the person that the effect of consenting is:

(1) committal to prison or release on bail without any proceedings to determine if the person should be extradited, and

(2) surrender to the extradition country if the Attorney-General issues a warrant.

If the person consents to surrender after being so informed, the magistrate issues a warrant to commit the person to prison: s 18(2)(b), unless s 18(3) applies. The Attorney-General is to be immediately informed in writing of the offence or offences in respect of which consent has been given: see *DPP (Cth) v Kainhofer* (1995) 185 CLR 528.

A person must not be released on bail upon consenting to surrender unless there are special circumstances justifying the release: s 18(3).

Determination of eligibility for surrender

Section 19 is the crucial section which sets out the basis of the hearing as to whether the magistrate makes an order that the person is eligible for surrender to the extradition country in relation to the extradition offence.

Section 19(1) provides that the magistrate shall conduct the hearing if:

(a) a person is on remand under s 15

(b) the Attorney-General has given a notice under s 16(1) in relation to the person

(c) an application is made to a magistrate on behalf of the person, or the extradition country for the proceedings to be conducted, and

(d) the magistrate considers that the person and the extradition country have had reasonable time in which to prepare for the conduct of such proceedings.

Section 19(2) provides that the person is only eligible for surrender if:

(a) the supporting documents in relation to the offence have been produced to the magistrate

(b) where the Act applies in relation to the extradition country that any other documents required to be produced are produced

(c) the magistrate is satisfied to dual criminality, that is, if the conduct of the person constituting the offence had taken place in NSW and at the time the extradition request was received, that conduct or that equivalent conduct would have constituted an extradition offence in NSW, and

(d) the person does not satisfy the magistrate that there are substantial grounds for believing that there is an extradition objection in relation to the offence.

Section 19(3) defines "supporting documents" in para 2(a) to mean:

(a) if for an accused person, a duly authenticated warrant issued by the extradition country for the arrest of the person for the offence, or a duly authenticated copy of such a warrant

(b) if a convicted person, such duly authenticated documents as provide evidence of the conviction, the sentence imposed or the intention to impose a sentence and the extent to which a sentence imposed has not been carried out, and

(c) in any case:

  (i) a duly authenticated statement in writing setting out a description of, and the penalty applicable in respect of, the offence, and

  (ii) a duly authenticated statement in writing setting out the conduct constituting the offence.

Section 19(4) permits the magistrate to adjourn the proceedings for a reasonable time to allow minor deficiencies in a document or documents to be remedied.

Section 19(4A) enables the magistrate to adjourn the proceedings for a reasonable time to enable the person and the extradition country more time to prepare for the proceedings in circumstances where the Attorney-General has issued an amended notice under s 16A(2) that specifies one or more different extradition offences that were not in the original s 16(1) notice.

Section 19(5) provides that the person is not entitled to adduce and the magistrate is not entitled to receive evidence to contradict an allegation that the person had engaged in conduct constituting an extradition offence.

Section 19(6) provides that subject to s 19(5) any document that is duly authenticated is admissible in the proceedings.

Section 19(7) sets out the requirements regarding authentication which includes a document which purports to be signed or certified by a judge, magistrate or officer of the extradition country and it purports to be authenticated by the oath or affirmation of a witness or to be sealed with an official or public seal by nominated persons.

Section 19(8) allows the proof of any matter or the admission of any document in the proceedings in accordance with any other law of the Commonwealth or any law of a State or Territory.

Section 19(9) provides that, where in the proceedings a magistrate determines that the person is eligible for surrender to the extradition country in relation to the extradition offence, the magistrate shall:

(a) by warrant in the statutory form, order that the person be committed to prison, or release the person on bail, to await surrender under a surrender warrant or temporary surrender warrant or release pursuant to an order under s 22(5)

(b) inform the person that he or she may, within 15 days after the day on which the order in the warrant is made, seek a review of the order under s 21(1), and

(c) record in writing the extradition offence or extradition offences in relation to which the magistrate has determined that the person is eligible for surrender and make a copy of the record available to the person and to the Attorney-General.

Section 19(9A) provides that the magistrate must not release the person on bail unless there are special circumstances justifying their release.

Section 19(10) provides that if the magistrate determines that the person is not eligible for surrender, the magistrate shall order that the person be released and advise the Attorney-General in writing of the order and of the magistrate's reasons for determining that the person is not eligible for surrender.

Legal considerations regarding s 19

Section 19 has been the subject of numerous decisions in the appellate jurisdiction. The following are some of the applicable principles:

1. Jurisdiction

   New South Wales magistrates are not prohibited by the provision of former s 23(2) *Local Courts Act* 1982 (repealed) from making surrender determinations under s 19 of the Act. Section 23(2) *Local Courts Act* allowed a magistrate with the approval of the Governor "to hold and exercise the functions of the office of Magistrate and another office or appointment". The appellant argued that the "other office or appointment" was restricted to functions in NSW and could not apply to Commonwealth appointments. The High Court rejected such argument: *Williams v United States of America* (2007) 161 FCR 220.

   The position has been clarified under the equivalent provisions of the *Local Court Act* 2007, which replaced the *Local Courts Act* 1982. Schedule 1 Pt 1 cl 5(1) provides that "a Magistrate must not engage in any business or employment outside the duties of his or her office except with the approval of the Governor".

2. Reasonable time in which to prepare — s 19(1)(d)

   In *Brock v United States of America* [2007] FCAFC 3 the person submitted that the circumstances in which he had been held as an "extreme high risk prisoner" on remand under s 15 were such that he was never going to be in a position to able to prepare for a hearing before the magistrate. The Full Court agreed that the primary judge was correct in concluding that in determining whether "a reasonable time to prepare" had been allowed the circumstances of an individual on remand may well be relevant but the weight to be given to them was a matter for the magistrate.

3. The document or documents specifying the offence

   "The conduct of the person constituting the offence" s 19(2)(c) need only specify the acts or omissions that constitute the offence. It is not necessary to provide evidence of those acts or omissions: *De Bruyn v Republic of South Africa* (1999) 96 FCR 290.

4. Dual criminality

   The s 19(3)(c) document will also provide the information required to satisfy s 19(2)(c) (dual criminality). The information may be sufficient to satisfy s 19(3)(c), but not s 19(2)(c).

   Whether a statement satisfies the statutory definition in s 19(3)(c) is a matter of practical judgment and assessment: see *De Bruyn*, above; see also *Griffith v United States of America* (2005) 143 FCR 182. The conduct statement must contain sufficient information about the acts and omissions alleged for each extradition offence, to enable comparison with the Australian offence/s relied on by the requesting State. The magistrate must understand enough about the acts and omissions alleged to be able to compare those with the Australian offence/s relied on by the requesting State to satisfy the dual criminality requirement: *Liem v Republic of Indonesia* [2018] FCAFC 135 at [125]–[129], [138]. It is important the reasons make clear the precise findings made and include an adequate explanation of

the conclusions reached concerning dual criminality: *Liem v Republic of Indonesia*, above, at [125]–[126]. This may require a magistrate to "delve into the detail" of the conduct statement: *Liem v Republic of Indonesia* at [129].

The relationship between s 19(2)(c), (i) and (3)(c)(ii) and the function of the magistrate was explained in *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 299 the court said:

> But it does not follow from the adoption of this legislative scheme either, that the warrants in the present case are invalid because they contain a statement of facts which goes beyond the facts necessarily constituting the offence in Germany, or that the magistrate may have regard only to those facts which are absolutely necessary ingredients of the foreign crime. The magistrate is no expert in foreign law. He is not required to determine what the facts are that are the minimum facts necessary to constitute the foreign crime. That there has been a foreign crime committed is, for the purpose of the proceedings before the magistrate, proved by the warrant duly authenticated. What the facts relevant to that crime are is proved by the duly authenticated statement under s 19(3)(c)(ii). That the offence is an extraditable offence is proved by the s 19(3)(c)(i) document. All the magistrate is required to do is, by reference to Australian law, to determine whether the conduct referred to in the s 19(3)(c)(ii) statement is an offence under the law of a State or Territory of Australia or Commonwealth law.

Whether a s 19(3)(c)(ii) statement adequately sets out the conduct constituting the offence is a matter of practical judgment: see *McDade v United Kingdom* [1999] FCA 1868 at [13]–[17].

5. Authentication of documents — s 19(7) and (7A)

The principles were discussed in *Haddad v Larcombe* (1989) 42 A Crim R 139, (on appeal *Federal Republic of Germany v Haddad* (1990) 21 FCR 496) and in *Rahardja v The Republic of Indonesia* [2000] FCA 639 (and on appeal *Rahardja v Republic of Indonesia* [2000] FCA 1297).

In *Zoeller v Federal Republic of Germany* (1989) 23 FCR 282 at 290 the Full Court stated:

> While a document duly authenticated under s 19(7) is admissible in evidence it can only be acted on if it is understood. For a Tribunal to act upon the document, applying *its* own understanding of the foreign language uncommunicated to the parties would involve an abuse of natural justice. [Emphasis added.]

In the latter case of *Federal Republic of Germany v Haddad* (1990) 21 FCR 496 at 499, the Full Court said:

> We have … extended the statement of principle of the court in *Zoeller's* case; we act on the view that material placed before the Court to satisfy the requirements of s 19(7)(b) should not be received, if written in a language other than English, unless its English meaning is proved or admitted.

6. Extradition objection

The person is not eligible for surrender if the person satisfies the magistrate that there are substantial grounds for believing there is an extradition objection in relation to the offence: s 19(2)(d).

Section 7 provides that there is an extradition objection if:

(a) the extradition offence is a political offence in relation to the extradition country

(b) the surrender of the person is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions, or for a political offence in relation to the extradition country

(c) on surrender, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions

(d) assuming that the conduct constituting the extradition offence had taken place in Australia, that conduct or equivalent conduct would have constituted a military offence under the military law, but not also under the ordinary criminal law of Australia, or

(e) the person has been acquitted or pardoned in the extradition country or Australia or has undergone the punishment provided by the law of that country or Australia in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

The person will often call considerable evidence, including expert evidence to seek to prove an extradition objection: see *Rahardja*, above.

The test under s 7(e) requires an assessment of whether there has been a final determination of the case: *Harris v Attorney-General (Cth)* (1994) 52 FCR 386.

Consent to accessory extradition

If making an eligibility for surrender order either by consent or pursuant to s 19, a magistrate shall, pursuant to s 20, make a surrender order for an offence other than an extradition offence, only if the person consents.

Review of magistrates' orders

Section 21 sets out the provisions relating to a review of the magistrates' orders: see commentary regarding evidence on appeal: see **Admissibility of evidence** at **[46-120]** .

Surrender determination by Attorney-General

Sections 15B (where the person has waived extradition) and 22 (where the person has consented to extradition or an eligibility for surrender determination has been made) provide for the Attorney-General to finally determine whether an eligible person is to be surrendered in relation to a qualifying extradition offence. The sections set out all the matters the Attorney-General is to take into account.

Sections 23, 24, 25 and 26 set out provisions relating to the surrender warrants, temporary surrender warrants and delivery of property if issued by the Attorney-General.

[46-160] Extradition to New Zealand

Extradition between Australia and New Zealand follows a simplified process similar to that between the States and Territories of Australia. Professor EP Aughterson *Extradition: Australian Law and Procedure*, LBC, Sydney, 1995 summarises the current position as follows at p 236:

> Part III of the *Extradition Act* provides for a simplified form for New Zealand, in recognition of Australia's close relationship with that country. The process is frequently referred to as the

> "backing of warrants" procedure and is similar to the procedure which existed prior to 1992 for the return of persons from one Australian State or Territory to another. It involves the indorsement by an Australian magistrate of a New Zealand warrant, authorising the execution of the warrant in Australia by an Australian police officer. A formal requisition for surrender is not required and, other than in relation to temporary surrender warrants, the Attorney-General is not involved in the extradition process. [Footnotes omitted.]

In *Bates v McDonald* (1985) 2 NSWLR 89, Samuels JA explained the backing of warrants in the context of extradition from Australia to New Zealand by noting at 98 that it:

> … takes account not only of the geographical proximity of Australia and New Zealand and the ease and frequency of travel between these two countries, but also their close economic and political relationship and, no less importantly, of their common legal and political traditions.

There is however an important difference. Extradition to New Zealand must be refused and a person released if a magistrate, or on appeal a judge, is satisfied by the person that:

(a) the offence is of a trivial nature

(b) the accusation was not made in good faith or the interests of justice, or

(c) a lengthy delay has elapsed since the offence was allegedly committed

or for any other reason it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand: s 34(2).

It is proposed to summarise the various applicable sections of the Act and to provide some commentary in relation to s 34(2) and (4).

Magistrates hearing contested matters where extradition is sought to New Zealand will find extremely helpful the judgment of His Honour Dillon LCM in *New Zealand v Garchow, Lebler, Moloney* [2005] NSWLC 25. In that case New Zealand sought the extradition of three Catholic brothers against whom serious allegations had been made of sexual misconduct against students at Marylands School, Christchurch. Dillon LCM released Lebler, but made orders for the surrender of Moloney and Garchow. The orders against Moloney and Garchow, who appealed, were overturned by a single judge in the Federal Court. On appeal to a specially convened five-member court of the Full Court, the appeal by New Zealand was upheld and the decision of Dillon LCM in relation to Moloney and Garchow restored.

The three judgments are particularly instructive dealing with nearly all of the aspects of s 34(2). They are reported as follows:

- *New Zealand v Garchow, Lebler, Moloney* [2005] NSWLC 25 per Dillon LCM
- *Moloney and Garchow v New Zealand* (2006) 235 ALR 159 per Madgwick J
- *New Zealand v Moloney and Garchow* (2006) 154 FCR 250 per Black CJ, Branson, Weinberg, Bennett, and Lander JJ.

The judgments will be further discussed in the commentary to s 34(2).

Endorsement of New Zealand warrants

An application may be made in the statutory form to a magistrate for the endorsement of a New Zealand warrant. If informed by affidavit that the person for whose arrest the warrant has been issued is or is suspected of being in or on the way to Australia, the magistrate shall endorse the warrant in statutory form (Form 16) authorising the execution of the warrant in Australia: s 28.

The endorsement *must* be on the warrant itself. In *Samson v McInnes* (1998) 89 FCR 52, the Federal Court held that a warrant was not valid where the endorsement was found on a separate piece of paper, with the consequence that the actions flowing from the warrant were likewise flawed.

Provisional arrest warrants

An application may be made on behalf of New Zealand (Form 18) for the issue of a warrant for the arrest of a person, provided no application has been made for endorsement of a warrant under s 28.

If informed by affidavit that a warrant has been issued in New Zealand, and having regard to any information the magistrate thinks relevant, and where the magistrate considers the issue of a warrant is justified, the warrant shall be issued: s 29.

Search warrants

A magistrate may issue a search warrant if informed by affidavit that there are reasonable grounds (which are set out in the affidavit) for suspecting that there is, in any place, a thing which is of material evidence for the offence or proceeds of the offence in respect of which a warrant has been endorsed or a provisional warrant issued. Section 31(3) sets out the particulars a warrant should contain.

The magistrate may require a further affidavit giving further information as to the grounds for the issue of the warrant: s 31(2)(a). The warrant shall not be issued unless the magistrate is satisfied there are reasonable grounds for the warrant: s 31(2)(b).

Arrest and remand on indorsed or provisional warrants

A person brought before a magistrate shall be remanded for a period necessary for proceedings under s 34 to be conducted (see **Surrender proceedings** at **[46-160]**, below): s 32.

The person shall be remanded in custody unless there are special circumstances justifying remand on bail: s 32(2) and (3). A person is not entitled to apply to another magistrate for release on bail after an application has been refused.

Release from remand

When a person has been so remanded and an indorsed New Zealand warrant has not been obtained and a magistrate is satisfied there has been reasonable time for such a warrant to be obtained, the magistrate shall order the person be released from custody or discharged from bail: s 33.

Surrender proceedings

Where a person is on remand under s 32 and an indorsed New Zealand warrant has been obtained and a request has been made to a magistrate by or on behalf of the person or the government of New Zealand for proceedings to be conducted under s 34, the person may consent to being surrendered to New Zealand in relation to the offence for which the indorsed warrant has been obtained.

Unless of the view that the consent was not given voluntarily, the magistrate shall advise the person that the effect of consenting is:

(a) committal to prison without any proceedings to determine if the person should be extradited, and

(b) the person will be surrendered as soon as practicable.

If the person consents to surrender after being so informed, the magistrate will issue a warrant (Form 21) in accordance with s 38(1) ordering the person to be surrendered to New Zealand as soon as practicable and a warrant (Form 22) to commit the person to prison pending surrender: s 33A(2).

Order for release

The magistrate shall order the person to be released, if satisfied by the person that:

(a) the offence is of a trivial nature

(b) if the person is accused of an offence, the accusation was not made in good faith or in the interests of justice

(c) a lengthy period has elapsed since the alleged offence, or

(d) for any other reason it would be unjust, oppressive or too severe a punishment to surrender the person to New Zealand: s 34(2).

No evidence can be adduced or received which contradicts an allegation that the person has engaged in conduct constituting the offence: s 34(4).

The magistrate is required under s 34(3) if he or she makes an order for surrender, to inform the person that he or she may, within 15 days, seek a review of the order under s 35.

Commentary regarding s 34

It is proposed to deal first with s 34(4) which provides that the magistrate cannot receive evidence to contradict an allegation that the person has engaged in the conduct constituting the offence. In *New Zealand v Moloney* (2006) 154 FCR 250, the Full Court stated at [33]–[35] as follows:

> As Pt III of the Act is intended to relieve New Zealand of the obligation to show or defend even a prima facie case in the Australian courts it is unclear precisely what practical role s 34(4) is intended to play. It may be that it merely makes explicit what is in any event implicit in the statutory scheme. Subject to one qualification, which is discussed below, an extradition proceeding involving New Zealand does not allow for any consideration of the strength of the case against the person whose surrender is sought.
>
> …
>
> We conclude this survey of the statutory scheme by noting that there is nothing in the language of s 34(2) that suggests that an Australian magistrate, concerned with the possible application of that section, ought ordinarily to engage in a wide-ranging consideration of the merits, or otherwise, of the New Zealand criminal justice system. The scheme of Pt II of the *Extradition Act* suggests that the issue of injustice is to be more narrowly focused than this. It also suggests that a finding of injustice would not be made lightly.

The exception to which the Full Court referred in [33] above are cases where:

> The courts have accepted that it would be oppressive to order surrender if there was no real chance of a conviction or that the allegations against the accused were wholly misconceived or could not possibly be right: at [59].

Dillon LCM in *New Zealand v Garchow*, above, remarked at [93]:

> The guilt or innocence of the accused is, generally speaking, irrelevant to the proceedings. There may be cases in which an accused is able to demonstrate that a prosecution case is futile from the outset, in which case it is appropriate not to extradite the person, but these are very rare and are exceptions to the general rule: see, for example, *Kenneally v New Zealand* (1999) 91 FCR 292.

The consequence is that the magistrate may, notwithstanding s 34(4), have to consider carefully the allegations against the person in order to determine the decision required under s 34(2). The person is entitled to lead evidence as to the nature or quality of the case to be led against him or her which goes to any of the grounds provided for in s 34(2). This is illustrated by the following three cases:

1. In *New Zealand v Venkataya* (1995) 57 FCR 151, it was alleged that the person had committed a number of serious sexual offences over a lengthy period between 14 and 20 years earlier. The magistrate ordered the person's release on the basis that a number of important records concerning the police investigation that were relevant to the defence had been lost. He also took into account the hardship he would suffer from the loss of his business if he was forced to return to New Zealand. On review, Sackville J concluded that although the case was a difficult one, the very great delay in bringing the charges against the first respondent and the irremediable prejudice that had been demonstrated by reason of the destruction of important evidence meant that the magistrate's decision should be confirmed.

2. In *Bannister v New Zealand* (1999) 86 FCR 417, the allegation against the person did not particularise specific incidents, but rather alleged acts of rape and indecent assault each between certain dates. It was the practice in New Zealand to bring "representative" or "specimen charges". That practice was inconsistent with the very strong views of the High Court of Australia in *S v The Queen* (1989) 168 CLR 266. In *R v Accused* [1993] 1 NZLR 385 the New Zealand Court of Appeal declined to follow *S v The Queen*. It was argued in *Bannister* that it would be unjust within the meaning of s 34(2) to surrender the person to face trial on representative charges which the High Court had found to give rise to a risk of a miscarriage of justice. The Full Court refused to surrender the person stating at [26]–[29]:

   > We conclude that it is appropriate, in considering whether, "for any other reason" it would be unjust or oppressive, pursuant to s 34(2), to surrender the appellant to New Zealand, to have regard to the quality of the trial which he would be likely to receive. Clearly enough, the standards to be applied to that issue are those which prevail in the Australian community. No court should be eager to pass judgment upon the process of another judicial system, particularly where the two systems share a common jurisprudential history and operate in societies which are, in many respects, similar. This is particularly so where, as in the case of Australia and New Zealand, the respective legislatures have demonstrated a clear desire to facilitate interaction at all levels. We do not suggest that criminal trials in New Zealand are generally more or less fair than similar proceedings in this country. However, on this very important procedural point, the two systems have diverged. In considering the present application, we can only apply the decision of our own ultimate appellate court.
   >
   > …
   >
   > We can, however, act only upon the evidence as it is before us and the submissions made in respect of that evidence. The intimation made on behalf of New Zealand that it intends to proceed upon the four counts as representative charges in the way discussed in *R v Accused* leads us to conclude that it would be unjust or oppressive to return the appellant to New Zealand. It may be possible for a further application for extradition to be made in a way which resolves the difficulties which we have identified.

3. In his very extensive judgment in *New Zealand v Garchow*, above, Dillon LCM discussed numerous matters which would impact upon a decision as to whether because of delay, or for any other reason, it would be unjust, oppressive or too severe a penalty to surrender the persons to New Zealand. He considered very strong arguments that important differences

in the way in which the trials would proceed in New Zealand than in Australia. Dillon LCM refused to surrender the person *Lebler* because of the extreme delay in his case of some 40 to 50 years, his age, 81 years, and his very poor health. He concluded at [115]:

> I am, of course, conscious of the gravity of the offences alleged against Br Lebler. Some of them are the most serious of all alleged against the opponents. If he is guilty of those offences it is tragic that the complaints were not brought forward at a much earlier time. It is, however, of the utmost importance that convictions for serious crime be obtained fairly. One of the key features of a fair trial is that the accused has a real chance of mounting any defence reasonably open to him or her. In my view, due to his infirmity and the passage of time, any conviction obtained against Br Lebler could not be obtained by a fair trial. It follows that he must be released.

Dillon LCM ordered the surrender of the persons Moloney and Garchow (*New Zealand v Garchow, Lebler, Moloney* [2005] NSWLC 25). They appealed. There was no appeal by New Zealand regarding Lebler.

Madgwick J upheld their appeals. He relied on the lengthy delay since the offences were committed. He relied on six other factors (see [7] of the Full Court judgment) but his decision was largely based on his finding that in Australia, but not New Zealand, accused persons in the position of Moloney and Garchow would be entitled to what is described in Australia as a "*Longman* warning". Madgwick J stated at [110]:

> The *Longman* requirement is, in my opinion, analogous to the rejection by the High Court of "representative charges" in Australia considered by this court in *Bannister*.

New Zealand appealed to the Full Court which found that Madgwick J gave too much weight to the need for a "*Longman* warning" in assessing whether the persons Moloney and Garchow would receive a fair trial in New Zealand: see *New Zealand v Moloney* (2006) 154 FCR 250 at [222]. It distinguished *Bannister's* case and held that the differences between the rules of evidence and procedure covering severance of counts involving sexual offences between Australia and New Zealand did not warrant the conclusion that it would be unjust to return the persons to New Zealand.

These are summaries only and the judgments referred to here should be considered carefully by any magistrate hearing a contested extradition hearing to New Zealand.

Further principles regarding s 34

1. No discretion under s 34

   Section 34(2) requires a magistrate to make a judgment, not to exercise a discretion. If the court is satisfied that the person seeking to prove oppression or injustice has done so, it must release him or her: *Garchow* per Dillon LCM at [95]; *Moloney* per Full Federal Court at [75].

2. Onus of proof

   The person opposing the extradition bears the onus, on the balance of probabilities, of proving in his case that, for a relevant reason "it would be unjust, oppressive or too severe a punishment to surrender" to New Zealand.

3. "Trivial nature"

   An offence of a "trivial nature" in s 34(2) is a reference to the charge as recited, rather than an examination of the evidence supporting that charge. However, it may be appropriate that particulars of the charge be provided to the person named to assist in making out his or her case: *Narain v DPP* (1987) 70 ALR 697 at 700 per Fox J.

4. Accusations not made in good faith

   Whether an accusation was not made in good faith or in the interests of justice (see s 34(2)(b)) requires an examination of the motives of the person who lays the information and not the person making the complaint to the police: *Narain v DPP*, above. In construing s 27(b) of the *Extradition Act* 1966 (the corresponding provision of that Act to s 34(2) of the 1988 Act) Samuels JA in *Bates v McDonald* (1985) 2 NSWLR 89 said at 99:

   > An accusation not made in good faith is one made without an honest belief in its truth.

5. Unjust or oppressive

   In determining if for any other reason it would be "unjust" to surrender a person to New Zealand, the risk of prejudice to the accused in the conduct of his trial is considered. The term "oppressive" directs the magistrate to consider the hardship to the accused resulting from changes to his or her circumstances that have occurred after the alleged offence and before the arrest: *Kakis v Government of the Republic of Cyprus* [1978] 1 WLR 779 at 782–783.

[46-180] Extradition to Australia

Generally magistrates play little part in applications for extradition to Australia. However magistrates may be required to take evidence in Australia for use in such matters: see s 43, *Extradition Act*. Where the Attorney-General authorises the taking of evidence for use in any proceedings for the surrender of the person to Australia, the evidence of each witness shall be reduced to writing: s 43. Each page of the evidence of each witness is to be certified as follows:

> I, [*insert name, designation or magistrate*] certify that this is the original document containing the testimony of [*insert name of witness*] and presented in evidence before me at [*insert location and date*].
>
> [*Signature of magistrate*]

Each exhibit is also to be certified:

> This is the [*true copy/original*] of exhibit [*insert exhibit number*] shown to [*insert name of witness*] at the time of the making of the [*statement/ affidavit*] herein.
>
> This [.....] day of [.....] 20[.....]
>
> Before me at [*insert location and date*]
>
> [*Signature of magistrate*]

The evidence exhibit and a certificate (Form 26) are to be sent to the Attorney-General.

No legal representation

In proceedings under s 43 no legal or other representative of the person is entitled to appear: s 43(3).

[46-200] Mutual assistance in criminal matters

Requests by foreign countries

Magistrates may be required to take evidence or to issue a warrant in Australia for use in a criminal matter in a foreign country. Where a request is made by a foreign country that evidence be taken in Australia or documents or other articles in Australia be produced for the purposes of proceedings in relation to a criminal matter in the foreign country, the Attorney-General may, by writing, authorise the taking of evidence or the production of the documents or other articles for transmission to the foreign country.

The *Mutual Assistance in Criminal Matters Act* 1987 is a quite lengthy, detailed but generally straightforward Commonwealth Act. It is essential that magistrates who are required to deal with an application under the Act consider the detailed provisions in the Act for the various types of application. The following is a very basic summary of some of the application but is no substitute for a careful consideration of the Act.

Where the Attorney-General so authorises, the magistrate may take the evidence on oath and shall cause the evidence to be put in writing and shall certify that the evidence was taken by the magistrate and cause the writing so certified to be sent to the Attorney General: s 13(2) *Mutual Assistance in Criminal Matters Act*.

The evidence of any witness may be taken in the presence or absence of the person to whom the proceedings in the foreign country relates or of the person's legal representative.

The person to whom the proceedings relate or any other person giving evidence or producing documents or articles and the relevant authority of the foreign country may be legally represented at the hearing.

The certificate under s 13(2) *Mutual Assistance in Criminal Matters Act* shall state whether, when that evidence was taken or the documents or other articles were produced, the person to whom the proceedings relate or that person's legal representative or any other person giving evidence or producing documents or articles or that person's legal representative was present: s 13(5) *Mutual Assistance in Criminal Matters Act.*

Criminal matter

Criminal matter includes:

(a) a criminal matter relating to revenue (including taxation and customs duties)

(b) a criminal matter relating to foreign exchange control

(c) a matter relating to the forfeiture or confiscation of property in respect of an offence

(d) a matter relating to the imposition or recovery of a pecuniary penalty in respect of an offence, and

(e) a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy a pecuniary penalty imposed, in respect of an offence,

whether arising under Australian law or a law of any foreign country: s 3 *Mutual Assistance in Criminal Matters Act*.

Requests by foreign countries for search and seizure

The Attorney-General may authorise a police officer, in writing, to apply to a magistrate for a search warrant requested by a foreign country where there are reasonable grounds to believe that a thing relevant to the investigation relating to a criminal matter is located in Australia.

The procedure to be followed, the tests and requirements to be satisfied, the contents of the warrant, the things authorised by a search warrant, restrictions on personal searches are set out in ss 38A, 38B, 38C, 38D, 38E, 38F and 38G *Mutual Assistance in Criminal Matters Act*. Sections 38H and 38I set out the requirements for and formalities relating to warrants issued by telephone.

[46-220] Form 5 — Warrant for arrest under subsection 12(1)

Form 5 of the *Extradition Act* 1988.

[46-240] Form 26 — Notice directing magistrate or eligible Judge to cancel warrant

Form 26 of the *Extradition Act* 1988.

Contempt of court

[48-000] Introduction

The court's powers in relation to contempt are found in s 24 *Local Court Act* 2007. Those powers are the same as the District Court with respect to contempt of court committed in the face or hearing of the court: s 24(1).

See generally:

Civil Trials Bench Book at [**10-0000**]ff

Criminal Trial Courts Bench Book at [**1-250**]ff.

[48-020] Has there been a contempt in the face of the court

Contempt in the face of the court is an act which has the tendency to interfere with or undermine the authority, performance or dignity of the courts or those who participate in their proceedings: *Witham v Holloway* (1995) 183 CLR 525 per McHugh J at 538-539.

Examples of contempt include:

- abusing and swearing at a magistrate: *Prothonotary of the Supreme Court of NSW v Hall* [2008] NSWSC 994
- filming witnesses with a view to intimidation: *Prothonotary of the Supreme Court of NSW v Rakete* (2011) 202 A Crim R 117
- prevaricating or refusing to answer questions: *Keeley v Brooking* (1979) 143 CLR 162
- refusing to take the oath or give evidence: *Smith v R* (1991) 25 NSWLR 1
- refusing to leave the court when directed: *In the matter of Bauskis* [2006] NSWSC 908
- disobeying court orders including subpoena: *O'Shane v Channel Seven Sydney Pty Ltd* [2005] NSWSC 1358.

Generally, rudeness and even extreme discourtesy by legal practitioners, will not be considered to be contempt: *Toner v AG (NSW)* (unrep, 19/11/91, NSWCA). Further, like police, judges and magistrates are, by their training and temperament, able to resist the sting of insults directed to them: see *Coleman v Power* (2004) 220 CLR 1 at [200]. In *Ferguson v Walkley* (2008) 17 VR 647, Harper J said at [36]:

> It is no offence simply to be angry with the authorities (including, of course, judicial authority). Some people can articulate their anger in measured language that clearly explains their reasons for feeling as they do. Others, especially when their anger is combined with high emotional stress, or alcohol, or other debilitating factors, cannot … Depending always on all the relevant evidence, it would probably be quite wrong to charge someone with an offence simply because such language was used in anger.

[48-040] Alternatives to summary charge

All options other than a summary charge of contempt should be considered first. Summary proceedings should only be instituted where it is urgent and imperative that the punishment be immediate. Summary proceedings are a last option, should be exercised with restraint, and only used in exceptional circumstances: *Keeley v Brooking* (1979) 143 CLR 162.

It is preferable that the court explore all options other than charging and hearing the matter summarily, as the magistrate may be the victim, a witness, the prosecutor and the judge of fact and ultimately of penalty. In *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, Kirby P said at 452:

> The combination, in the judge, of four such inimical functions is not only unusual, it is so exceptional that, though it may sometimes be required to deal peremptorily with an emergency situation, those occasions will be rare indeed. Especially will they be rare where, as in this State, a facility is provided in the Court of Appeal to relieve the judge of such an embarrassing concatenation of functions.

Other options that should be considered include:

- a warning, reprimand or exclusion from court
- an opportunity for the alleged contemnor to seek legal advice
- a "cooling off" period followed by an opportunity for apology
- whether an offence under a legislative provision has occurred, including a breach of the *Court Security Act* 2005, in which case the matter may be referred for prosecution
- whether, if the conduct involves a legal practitioner, a complaint could be made under the *Legal Profession Act* 2004
- in civil matters, where the conduct involves a legal practitioner, whether an order under s 99 *Civil Procedure Act* 2005 could be utilised
- whether the matter should be referred to the Supreme Court under s 24(4) *Local Court Act* 2007. If so, the reference is sent to the prothonotary
- whether disrespectful behaviour ought be referred to the Attorney General under s 24A(7) *Local Court Act* 2007.

The decision to proceed to a charge for contempt is a power to be used sparingly and only in serious cases. Its usefulness depends upon the wisdom and restraint with which it is exercised: *Ex p Bellanto; Re Prior* [1963] NSWR 1556 at 1566.

[48-060] Referral to the Supreme Court

Section 24(4) *Local Court Act* 2007 enables the court to refer a matter to the Supreme Court for determination where it:

(i) is alleged by another party, or

(ii) appears to the Court on its own view that a person has committed a contempt of court.

In either case, before exercising its power of referral, the court *must* afford procedural fairness to a proposed contemnor: *Prothonotary of the Supreme Court of NSW v Dangerfield* [2016] NSWCA 277 at [59], [77]. Failing to do so may render subsequent proceedings in the Supreme Court a nullity: *Prothonotary of the Supreme Court of New South Wales v Chan (No 23)* [2017] NSWSC 535 at [64].

This is because an exercise of the s 24(4) referral power involves potential prejudice to the alleged contemnor, as the penalty which can be imposed by the Supreme Court is greater than that which the Local Court can impose if it decides to deal with the contempt itself under s 24(1): *Dangerfield* at [56]; *Chan* at [29].

Further, in instances where the Local Court comes to its own view that a person is in contempt, the referral of the matter to the Supreme Court requires proceedings to be commenced by the Prothonotary. There is no capacity for a referral to the Prothonotary to obtain advice as to whether or not proceedings should be commenced: *Chan* at [54].

Exercising the power of referral requires the court to make two decisions:

1. Whether it appears to the court on its own view that the person is guilty of contempt of court, and
2. Whether the court should refer the matter to the Supreme Court for determination: *Dangerfield* at [52].

Suggested approach (see *Dangerfield* at [51]ff and *Chan* at [59]–[61])

1. Advise the alleged contemnor of the two procedural options available under s 24 and their consequences.
2. An adjournment may be needed to enable the alleged contemnor to receive advice from their legal practitioner (or seek advice, if unrepresented).
3. Provide the alleged contemnor with an opportunity to address the question of how their alleged contempt should be dealt with, including whether the Local Court should itself deal with the matter.
4. A party (other than the court) raising an allegation of contempt should also be provided with the opportunity to respond to any submissions of the alleged contemnor.

Sample order

On [*date*] in proceedings between [*names of parties*] in the [*court*] at [*place*], [*name of contemnor*] [*describe conduct — for example, refused to answer material questions put to him/her in cross-examination, as indicated in the attached transcript*]. I have formed the view that this conduct amounted to a contempt of court. Pursuant to s 24(4) *Local Court Act* 2007, I refer this matter to the Supreme Court for determination in accordance with Pt 55 r 11(3) Supreme Court Rules.

[48-080] Summary charge

In the event it is considered that none of the above-mentioned options should be utilised as an alternative to a summary charge, the person in contempt should be orally charged by the magistrate.

Sample order

[*Name*], you are hereby charged with contempt of court in that on [*date*] in the [*court*] at [*place*] in proceedings before me between [*names of parties*] [*set out conduct — [for example, when the witness AB was passing near you on the way to the witness box for the purpose of giving evidence, you loudly said words to the effect "you're gone"*] and that, as a result, you conducted yourself in a manner that had a real tendency to interfere with the administration of justice.

If the contemnor is not present a warrant may be issued: s 24(1) and (3) *Local Court Act* 2007, s 199 *District Court Act* 1973.

[48-100] Adjournment for defence to charge

The charged person must be afforded a reasonable opportunity to make a defence to the charge, which will in most cases require an adjournment and the provision of information on legal aid. It is possible, but would be unusual, for the charged person to be held in custody. Bail must be considered: s 90 *Bail Act* 2013.

[48-120] The hearing

Where there is a plea of not guilty, a hearing is required. The magistrate is entitled to make use of his or her own observations, and should inform the defendant of these. Witnesses may be called by the court. The defendant has a right to, but is not obliged to give and call evidence. After the hearing, the magistrate determines the matter of the charge with the criminal standard of proof required: *Coward v Stapleton* (1953) 90 CLR 573.

[48-140] Penalty

If the defendant is found guilty, the court may punish by a fine not exceeding 20 penalty units or by imprisonment for a period not exceeding 28 days: s 24 *Local Court Act* 2007; s 199 *District Court Act* 1973.

The power to punish for contempt is exercised to vindicate the integrity of the court and of its proceedings, and is rarely if ever exercised to vindicate the personal dignity of a judge: *Lewis v Ogden* (1984) 153 CLR 682.

For considerations on penalty for abuse to the court: see *Prothonotary of the Supreme Court of NSW v Hall* [2008] NSWSC 994.

For considerations on penalty for refusing to give evidence: see *Principal Registrar of Supreme Court of (NSW) v Tran* (2006) 166 A Crim R 393 which includes a schedule of comparable sentences for contempt of that type.

[48-160] Purging contempt

Generally, contemnors should be given an opportunity to purge their contempt, particularly where there is a refusal to give evidence: *Smith v R* (1991) 25 NSWLR 1. There is an overriding power to discharge a contemnor prior to the expiration of sentence: s 24(2) *Local Court Act* 2007.

[48-180] Offence of disrespectful behaviour

An accused person, defendant, party to, or person called to give evidence in proceedings before the court commits an offence if they intentionally engage in behaviour in court during the proceedings which is disrespectful to the court or presiding magistrate: s 24A(1) *Local Court Act* 2007. The maximum penalty is 14 days imprisonment and/or 10 penalty units.

The offence does not apply to police prosecutors or Australian legal practitioners when they are acting in those capacities: s 24A(3).

"Behaviour" includes any act or failure to act: s 24A(2).

Whether behaviour is disrespectful to the court is determined according to established court practice and convention: s 24A(1)(c).

The elements of an offence under s 200A(1) *District Court Act* 1973, in identical terms to s 24A(1), were discussed in *Elzahed v Kaban* [2019] NSWSC 670. Justice Harrison concluded that the offence criminalises certain behaviour in a two-step process:

1. the requirement of intentional behaviour: s 24A(1)(b); and
2. the requirement that the behaviour be disrespectful: s 24(1)(c).

The prosecution must prove each beyond reasonable doubt. However, the prosecution is not required to prove that in performing the relevant behaviour the offender intended to cause the consequence for which s 24A(1)(c) provides: *Elzahed v Kaban*, above, at [37]–[38].

The only mental element is with respect to 1 above, that is, the act or omission in question be intentional: *Elzahed v Kaban* at [43]. Section 24A(1)(c) is in terms generally associated with an objective test which is assessed by reference to established court practice and convention, not by reference to an accused's knowledge of established court practice or convention: *Elzahed v Kaban* at [45]. In *Elzahed v Kaban*, the prosecution led evidence of established court practice and convention. The relevant disrespect in s 24A(1)(b) does not need to be serious, nor need there be an intention to communicate disrespect or knowledge of the relevant court practice and convention: *Elzahed v Kaban* at [46], [56], [73], [86].

[48-200] Disrespectful behaviour — procedure

Proceedings for offences of disrespectful behaviour in any court are summary in nature and are to be dealt with in the Local Court: see s 200A(4) *District Court Act* 1973; s 131(4) *Supreme Court Act* 1970; s 67A(4) *Land and Environment Court Act* 1979; s 103A(4) *Coroners Act* 2009. Note the Supreme Court may also hear such offences arising from conduct in that court in its summary jurisdiction.

Proceedings are dealt with in the Children's Court if the person is a child (s 24A(4)(a)) or the Local Court if the person is an adult (s 24A(4)(b)). Such proceedings:

- must commence within 12 months of the alleged offence: s 24A(5);
- by a person authorised, in writing, by the Secretary of the Department of Justice: s 24A(6); and
- can only commence with the Attorney General's authorisation: s 24A(8).

A magistrate can refer disrespectful behaviour in proceedings over which they presided to the Attorney General: s 24A(7).

An official transcript or official audio or video recording of the proceedings is admissible in evidence and is evidence of the matter included in the transcript or audio or video recording: s 24A(9). The relevant magistrate cannot be required to give evidence in the proceedings: s 24A(10).

Proceedings for contempt may still be brought in respect of behaviour that constitutes an offence against s 24A(1), but a person cannot be prosecuted for both: s 24A(11) and (12).

[48-220] Disrespectful behaviour — sentencing

General deterence is an important consideration for offences of disrespectful behaviour: *Elzahed v Kaban* [2019] NSWSC 1466 at [83]. In that case Harrison J dismissed an appeal

against a sentence of 75 hours community service for offences against s 200A *District Court Act* 1973. His Honour concluded that a s 10 order was not appropriate because the offending was not trivial, involving multiple offences directed to the maintenance of respect for the judicial process: *Elzahed v Kaban* at [81]–[82]. In rejecting a submission that recording a conviction carried an element of extra-judicial punishment, his Honour said at [84]:

> there is a considerable prospect in the particular circumstances of this case that public opprobrium might actually be increased by a failure to record a conviction for offences that seem clearly to have been created in response to community expectations.

On sentence, no distinction should be drawn between the term "judge" and "court" for the purposes of an offence, as references to both do no more than inform the task of determining whether the conduct in question is disrespectful; the judge is the personification of the court: *Elzahed v Kaban* at [19]–[20].

Court Security Act 2005

The objects of the Act are to provide for the secure and orderly operation of courts and to provide judicial officers and security officers with functions and authorities for that purpose: s 3.

Set out below is a summary of the main features of the Act.

[50-000] Definitions

"Court premises" means the premises or place where a court is held and includes a forecourt, yard, parking area, toilet facility and other area used with the premises, an entrance or exit from the premises where the court is held and where an audio/visual link is used: s 4.

"Security officer" means a sheriff or person appointed by the sheriff under the Act: s 4.

[50-020] Entry and use of court premises

1. **Members of the public**

   Subject to any law as to who may be present in a court or court premises, or any implied jurisdiction of the court to regulate its own proceedings, a member of the public has a right to enter and remain in an area of court premises open to the public if:

   (a) the orders of the judicial officer have been complied with, and

   (b) directions of the security officer have been complied with: s 6.

2. **Journalists**

   Journalists can enter and stay in court premises open to the public that is outside the building in which the court is housed or sitting to make a media report provided they are not obstructing or impeding others from access to the building: s 6(2).

Power to close court

If a judicial officer considers it necessary for securing order and safety in court premises or a part of court premises, the judicial officer may order members or specified members of the public to leave any part of the court premises or may order they not be admitted to the court premises or part of the premises.

It is an offence for a person to contravene an order of a judicial officer (maximum penalty 50 pu): s 7.

Possession of restricted items in court premises

It is an offence for a person without reasonable excuse to be in possession of a restricted item while in court premises. Restricted items includes firearms and knives: s 8. Penalty from 5 pu through to 20 pu and/or 2 years depending on prior convictions for possession of a knife.

Exemptions apply to exhibits, police officers and where a judicial officer has given approval.

Use of recording devices in court premises

It is an offence for a person to use a recording device to record sound or images in court premises. Maximum penalty of 200 pu and/or 12 months: s 9.

The prohibition is subject to a number of exceptions including devices that have been expressly permitted by the judicial officer, those for transcribing court proceedings and use of

recording devices by a journalist exercising a right under s 6(2). That right applies to an area outside the building in which the court is housed or sitting. This right does not include a right to record proceedings without the permission of the judicial officer.

It would not prohibit a person using a mobile phone that has a recording function from making a call but would prohibit the use of the phone to record court proceedings and would prohibit taking photos in court premises (see definition of court premises above).

[50-040] Court security powers

Section 10 outlines the power of a security officer to require a person entering or within court premises to submit to a scanner search, a personal search, to stop a vehicle being driven in or within the court premises, to search a car, to produce the thing detected for inspection, and to require the person to answer questions about the thing found.

Section 10 also outlines the various preconditions for the search, for example, that the need for a belief on reasonable grounds that the person possesses a restricted item (eg firearm, knife) or offensive implement, the restrictions on who may carry out the search and the age of the person who may be searched.

Power to confiscate restricted items and other things

A security officer may in court premises take possession of a thing the officer has reasonable grounds to believe is a restricted item, offensive implement, a recording device or recording medium used in a recording device that is used in contravention of s 9: s 12.

The security officer must consider whether to return it or hand it to the police depending on an assessment as to whether the item is further required and whether it is lawful for the person to have possession of the item. The section sets out the various appeal provisions open to a person following confiscation.

[50-060] Power to ask for identification particulars

A security officer may, on providing certain information to the person and giving a warning as required under the Act, require a person entering or in court premises to disclose their name, address and reason for the visit to the court premises, if the officer believes on reasonable grounds, the person is carrying a restricted item or offensive implement or that the person has committed an offence in court premises: s 13.

A failure to comply with the request is an offence. Penalty 2 pu.

[50-080] Power to give reasonable directions

A security officer may give a direction to a person in court premises to reduce or eliminate obstruction of another person, harassment, intimidation or conduct that is causing or likely to cause fear to another person: s 14.

[50-100] Powers of arrest

A security officer can, without a warrant, arrest a person in court premises for any offence under the *Court Security Act*: s 16(1). There are various restrictions on the power of arrest outside court premises: s 16(2).

Use of force

A security officer exercising a power under the Act may use such force as is reasonably necessary to exercise the power.

[50-120] Limitations on the exercise of powers

Sections 19 and 20 detail the limitations and safeguards in the exercise of powers by the security officer.

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Review and Appeals

[52-000] Introduction

Last reviewed: November 2023

The principal Act dealing with appeals and reviews is the *Crimes (Appeal and Review) Act* 2001 and, unless otherwise specified, all references to sections in this chapter relate to this Act. Matters dealt with under this Act include the following:

- criminal appeals to the District Court, Supreme Court, Land and Environment Court
- review by the Local Court of Local Court decisions, including AVOs,
- appeals in relation to application notices commenced under the *Local Court Act* 2007.

[52-020] Local Court review of Local Court decisions

Criminal

The relevant provisions are found in ss 4–10 Pt 2 *Crimes (Appeal and Review) Act* .

The main features include:

- the application for annulment of conviction or sentence is to be made to the same Local Court: s 4(1).

  Note: Although the hearing of the application must take place at the same court where the original decision was made, an application can be filed at any Local Court registry.

- it must be made within two years of the conviction or sentence: s 4(2)
- it can be made by the defendant only if the defendant was not before the court when the conviction or sentence was imposed (s 4(1)) and the court is satisfied in a defendant's application that the defendant was unaware of proceedings, was hindered by accident, illness, misadventure or other cause or it is in the interests of justice to do so: s 8(2)
- the Local Court may on its own motion in the interests of justice annul a conviction or sentence made or imposed by the court if the defendant was not before the court when the conviction or sentence was imposed: s 4A
- the Local Court must grant an annulment application by a defendant if satisfied the defendant was not aware of the proceedings until they were completed, or was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original proceedings: see s 8(2)

  Note: The provisions of this subsection should be widely construed, and the word "misadventure" read widely. See *Miller v DPP* [2004] NSWCA 90 at [39].

- an annulment application by the prosecutor must be granted if the court is satisfied that, having regard to the circumstances of the case, there is just cause for doing so: s 8(1)
- an annulment may be granted in relation to a finding of guilt made by the Local Court, whether or not the court proceeds to conviction: s 10A.

Note: "sentence" is defined in s 3. "Conviction" is only defined insofar as it relates to Children's Court proceedings: s 3(2)(a).

- the application can be dealt with in open court, in the presence or absence of the parties or in private: s 7
- a defendant may not make an application for annulment if a written plea of guilty was submitted pursuant to s 182 *Criminal Procedure Act*: s 4(1B).

Sometimes a defendant will make an application to annul a conviction believing it is necessary so as to potentially seek a non-conviction order on sentence. However, it is not necessary. Where a court, dealing with an absent defendant, records a conviction or finding of guilt and issues a warrant, there is no bar to a defendant when subsequently facing sentence being dealt with "without conviction". For the meaning of "conviction", see *DPP v Arab* [2009] NSWCA 75 at [31]–[36].

A defendant who does not appear but is represented by a lawyer at the time of conviction or sentence cannot make an annulment application. A defendant may appear personally or be represented by an Australian legal practitioner: ss 3 and 36 *Criminal Procedure Act*; *McKellar v DPP* [2014] NSWSC 459 at [34].

The history and application of s 8 was considered in *Miller v DPP*, above, which examined the predecessor to s 4 (namely s 100K *Justices Act* 1902). The court offered the following guidance:

> The use of the word "hindered" is instructive. It does not only mean "prevented" but also "impeded" or "obstructed" [at [25]]
>
> …
>
> something more or less difficult but not impossible [at [40]].

In considering the words "taking action in relation to the relevant proceedings", the court said at [41]:

> it would seem that the legislature has chosen wide vague words with the intention that if the defendant is hindered by misadventure or otherwise from doing some act or thing in relation to the proceedings not limited to attending court, then a magistrate would have jurisdiction under the section to annul the conviction or sentence.

Review of apprehended violence orders

Section 84 *Crimes (Domestic and Personal Violence) Act* 2007 provides that a defendant may make an application under Pt 2 *Crimes (Appeal and Review) Act* for the annulment of an apprehended violence order in the same way as a defendant may make application for annulment of conviction or sentence arising from a court attendance notice dealt with under the *Criminal Procedure Act*.

Section 84(1B) *Crimes (Domestic and Personal Violence) Act* provides that the court may grant an annulment if it is satisfied that there is just cause to do so.

The section also provides a right of appeal to the District Court.

Review and appeal provisions — application notice proceedings

The *Local Court Act* contains the provisions relating to commencement of proceedings by way of application notice. It also contains the appeal provisions. Section 70 *Local Court Act* provides

that an application for annulment of an order may be made in accordance with the *Crimes (Appeal and Review) Act*. The section also provides for appeals to the District and Supreme Court in the same way.

[52-040] Appeals to Supreme Court

Last reviewed: November 2023

The law relating to criminal appeals to the Supreme Court is set out in Pt 5 *Crimes (Appeals and Review) Act* 2001. Appeals from civil claims decisions are found in s 180 *Civil Procedure Act* 2005.

Appeals may be made against a conviction or sentence on questions of law and/or fact, and the leave of the Supreme Court is required in respect of appeals involving a question of fact: ss 52(1), 53(1). A "conviction" includes a finding of guilt without formal order of conviction: *Darlington v DPP (NSW)* [2023] NSWSC 1139 at [9]–[12]; *Selkirk v DPP* [2020] NSWSC 1590 at [27]–[28].

An appeal is instituted by filing a summons. It must be instituted within a certain time. If a party is unable to institute the appeal within the stipulated time, the party may seek an extension of time. If the application is made within the time fixed, a magistrate may extend the time: r 6 Pt 51B Supreme Court Rules 1970.

A magistrate may revise a transcript of reasons for a decision, by altering the transcript where the reasons expressed do not reflect what the magistrate meant to say; or where there is some infelicity of expression which the magistrate wishes to change, however, the substance of the reasons may not be changed: M Gleeson, "Revising Transcripts of Summings-up" (1997) 9(4) *JOB* 25. If a magistrate wishes to consider whether to revise a transcript, the registrar should be requested to inform the party instituting the appeal, that the magistrate intends to review the transcript to determine whether it should be revised. The party instituting the appeal should be informed of the magistrate's decision within the time frame set under r 6 Pt 51B Supreme Court Rules. A copy of the transcript should be obtained through the registrar.

The execution of a sentence is stayed when a notice of appeal is given, unless the appellant is in custody. Subject to certain qualifications in s 63(2A), so too is any licence disqualification or suspension which operated automatically upon conviction for an offence: s 63(2C). If the appellant is in custody, sentence is stayed when the appellant is entitled to be released on bail under s 14 *Bail Act* 2013, or bail is dispensed with: s 63(2)(c).

A copy of the summons instituting the appeal will usually be sent to the magistrate who made the determination. When the Supreme Court determines the appeal, the court may remit the matter to the magistrate who made the conviction or order, or imposed the sentence, to hear and determine the matter of the appeal: s 55. On receipt, the magistrate should request the registrar where the proceedings were held to list the matter.

[52-060] Appeals to District Court

The law relating to appeals to the District Court is set out in Pt 3 *Crimes (Appeal and Review) Act*.

The execution of a sentence is stayed when a notice of appeal is given, unless the appellant is in custody. Subject to certain qualifications in s 63(2A), so too is any licence disqualification or suspension which operated automatically upon conviction for an offence: s 63(2C). If the appellant is in custody, sentence is stayed when the appellant is entitled to be released on bail under s 14 *Bail Act* 2013 or bail is dispensed with: s 63(2)(c).

Appeals to the District Court against conviction or sentence may be made within 28 days or within three months from conviction or sentence by leave of the District Court: ss 11 and 12. For a discussion of the operation of these provisions and the powers of the District Court on appeal, see *Huynh v R* (2021) 105 NSWLR 384 at [22]–[35].

Appeals against sentence are by way of rehearing of evidence: s 17. Appeals against conviction are by way of rehearing on the transcripts of evidence, subject to a grant of leave to call fresh evidence or for witnesses to attend: s 18.

When the District Court determines an appeal, it does not have the power to remit the matter to the magistrate who made the determination.

[52-080] Civil appeals

The provisions for appeals in civil matters are found in Pt 50 Uniform Civil Procedure Rules 2005. An appeal does not operate to stay (see *Civil Trials Bench Book* **Stay of execution** at **[9-0000]**) at the proceedings in the Local Court unless ordered by the appellate court or the Local Court: r 50.7 Uniform Civil Procedure Rules.

[52-100] Appeals to Land and Environment Court

The law relating to appeals to the Land and Environment Court is set out in Pt 4 *Crimes (Appeal and Review) Act* 2001.

The execution of a sentence is stayed when a notice of appeal is given, unless the appellant is in custody. If the appellant is in custody, sentence is stayed when the appellant is entitled to be released on bail under s 14 *Bail Act* 2013 or bail is dispensed with: s 63.

When the Land and Environment Court determines an appeal, it does not have the power to remit the matter to the magistrate who made the determination.

[52-120] Bail pending appeal

Section 8 *Bail Act* 2013 effectively allows for a bail decision to be made while substantive proceedings for an offence, including any appeal against conviction or sentence, are in progress. A previous grant of bail ceases to have effect when proceedings for an offence at first instance conclude, but a fresh bail decision can be made if an appeal is lodged: s 12.

Section 18(j) *Bail Act* provides that when determining the existence of any unacceptable risks for the purpose of a bail decision, in a case where proceedings on an appeal against conviction or sentence are pending, one of the required considerations is "whether the appeal has a reasonably arguable prospect of success". The argument in favour of bail will be stronger where there is a real likelihood that a person could serve a significant proportion of the sentence prior to their appeal being heard: see *DPP (Cth) v Cassaniti* [2006] NSWSC 1103.

Warrants for arrest in criminal proceedings in the Local Court

[54-000] Warrants for arrest — Table

Arrest warrants may be issued in the following circumstances under various Acts.

A magistrate may revoke a warrant issued by any other magistrate, but not a warrant issued by a judge: s 240 *Criminal Procedure Act* 1986.

It is advisable that warrants not be issued for defendants in matters punishable by a fine only.

Name	Description	Power
A Before conviction		
Arrest warrant – for arrest before a matter comes to court	Usually when police cannot locate the suspect. Not issued by the court but by a registrar or other authorised officer	*Criminal Procedure Act* 1986 • s 54: indictable charges • s 181: summary charges
At or during committal – fail to appear	Magistrate may issue a warrant for arrest	s 54(3A) *Criminal Procedure Act*
Before conviction in summary proceedings – fail to appear at court	Magistrate may issue a warrant for arrest	s 181(3A) *Criminal Procedure Act*
In AVO proceedings, to bring a defendant before the court	Take into consideration the personal safety of the protected person. Magistrate or registrar of a court may issue the order	s 88 *Crimes (Domestic and Personal Violence) Act* 2007
To bring an adult to court where they are in custody but not bail refused	Magistrate or registrar of a court may issue the order – concerns persons who are "inmates" as defined	s 77 *Crimes (Administration of Sentences) Act* 1999
To bring a juvenile to court where they are not bail refused	Magistrate or registrar of a court may issue the order	s 42 *Children (Detention Centres) Act* 1987
B After finding of guilt, conviction or committal		
After finding of guilt or conviction in matters being dealt with summarily – offender is absent	Magistrate may issue an arrest warrant to bring the person to court for sentence	s 25(2) *Crimes (Sentencing Procedure) Act* 1999
After committal	Warrant committing an accused to a correctional centre after committal for trial or sentence	s 109 *Criminal Procedure Act*
Failure to appear after suspected failure to comply with intervention program	Where the court is satisfied the person's whereabouts are unknown, or if he or she fails to attend	s 100R(2), (2A) *Crimes (Sentencing Procedure) Act*
C After sentence		
To correct a sentence	Where the person does not appear or if the court is of the opinion that they will not appear	s 43(3)(a) and (b) *Crimes (Sentencing Procedure) Act*
Alleged breach of bond/suspended sentence – juvenile	Where the court is satisfied the person's whereabouts are unknown, or if he or she fails to attend	s 41(1)(d) *Children (Criminal Proceedings) Act* 1987
Alleged breach of CCO	Where the court is satisfied the person's whereabouts are unknown, or if he or she fails to attend.	s 107C(2), (3) *Crimes (Administration of Sentences) Act*
Alleged breach of CRO	Where the court is satisfied the person's whereabouts are unknown, or if he or she fails to attend.	s 108C(2), (3) *Crimes (Administration of Sentences) Act*
Alleged breach of CSO – juveniles	Where a person fails to attend	s 23 *Children (Community Services Orders) Act* 1987
Other circumstances		

Name	Description	Power
Where a witness fails to appear in response to a subpoena	Discretionary. Must be an application to the court, and applicant must establish "no just or reasonable excuse" for failure to comply: see *Peters v Asplund* [2008] NSWSC 1061. The party applying for a warrant must have complied with the requirements for subpoenas in Ch 4, Pt 3	s 229 *Criminal Procedure Act*
In application proceedings under *Local Court Act* 2007, Pt 4 – where a respondent fails to appear	Discretionary. Where magistrate satisfied that respondent had notice of the date, time and place of the proceedings	s 65 *Local Court Act* 2007
Where a forensic/correctional patient: • escaped from a mental health facility and is outside NSW, or • is the subject of an apprehension order under Pt 5, Div 9.	Where the court is satisfied a credible person has shown reasonable cause to suspect the criterion identified in column 1.	s 114 *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020

Warrants issued before 24 September 2018 under s 98 *Crimes (Sentencing Procedure) Act* 1999 (as in force before 24 September 2018) in respect of s 9 bonds and s 10 bonds continue to have effect: Sch 2, Pt 29, cll 74(6), 75(6).

Costs in criminal matters

[56-000] Introduction

Costs may be awarded to successful parties in criminal proceedings in the Local Court pursuant to four statutes: *Criminal Procedure Act* 1986, *Costs in Criminal Cases Act* 1967, *Crimes Act* 1900 and the *Suitors' Fund Act* 1951. As a matter of policy, the Police Service, and Commonwealth and State Directors of Public Prosecution do not ordinarily apply for professional costs against unsuccessful defendants, although witness expenses and court costs may be sought. Private informants, and bodies such as councils, the Royal Society for the Prevention of Cruelty to Animals NSW and the Roads and Maritime Services, however, will usually seek professional costs against unsuccessful defendants.

For non-criminal matters (proceedings by way of application notice), the power to award costs is found in s 69 *Local Court Act* 2007.

[56-020] Circumstances in which costs may be ordered

1. At the end of a *committal*, costs to the defendant, where the defendant is discharged or the matter is withdrawn, or where the defendant is committed for trial/sentence for an indictable matter which is not the same as the offence the subject of the court attendance notice: s 116 *Criminal Procedure Act.*
2. At the end of *summary* proceedings, costs to the defendant if the matter is dismissed, withdrawn or the proceedings are invalid: s 213 *Criminal Procedure Act.*
3. At the end of *summary* proceedings, costs to the prosecutor if the defendant is convicted or an order is made against the defendant: s 215 *Criminal Procedure Act.*
4. If the matter (summary or committal) is *adjourned*, costs against either defendant or prosecutor if satisfied other party has incurred additional costs because of unreasonable conduct/delay of the party against whom the order is made: s 118 (committal), s 216 (summary) *Criminal Procedure Act.*

Amount of costs

The amount of costs must be just and reasonable.

Onus

The onus is on the applicant on the balance of probabilities: *Dong v Hughes* [2005] NSWSC 84. The applicant should specify the grounds on which the application is made.

Procedural fairness

Before making an order adverse to a party's interests, the court must give them an opportunity to be heard. This includes in relation to a party seeking costs in circumstances where the other party accepts (by their silence or otherwise) a costs order is appropriate: *Safework NSW v Williams Timber Pty Ltd* [2021] NSWCCA 233 at [29]–[32].

Limit on circumstances when costs may be awarded against a public informant

Restrictions are placed on awarding professional costs (as defined in *Criminal Procedure Act*) in favour of a defendant in committal proceedings (s 117 *Criminal Procedure Act*) or summary

proceedings (s 214 *Criminal Procedure Act*). The test is essentially the same and picks up the test from the *Justices Act*, requiring the court to be satisfied it is just and reasonable on one of the following grounds to award costs:

- that the investigation into the alleged offence was conducted in an unreasonable or improper manner
- that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecution in an improper manner
- that the prosecution unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the defendant might not be guilty or that, for any other reason, the proceedings should not have been brought,
- that other exceptional circumstances relating to the conduct of the proceedings by the prosecution justify an award of costs.

The limitation applies to police and public officers including council employees acting in an official capacity, and RSPCA officers.

[56-040] Criminal Procedure Act 1986 grounds

That the investigation into the alleged offence was conducted in an unreasonable or improper manner.

Proceedings initiated without reasonable cause

In *Canceri v Taylor* (1994) 123 ALR 667 at 676 (per Moore J) it was held that the test, was whether on the facts known to the informant at the time proceedings commenced, there was no substantial prospect of success. If on the informant's own version of events there was clearly no prospect of success, the proceedings will have been commenced without reasonable cause. It will not be unreasonable, however, to commence proceedings if success depends on one or more arguable points of law.

Unreasonable failure to investigate relevant exculpatory matters

If a prosecution fails, and it emerges during the proceedings that the prosecution was aware of matters which suggested that the defendant may not be guilty of the offence, or for some other reason ought not be prosecuted for the offence, and did not reasonably investigate those matters, it may raise the application of this category of costs.

Other exceptional circumstances relating to the conduct of the proceedings

The defendant must establish something about the conduct of the proceedings being an exceptional circumstance other than some matter referred to in (b) or (c). The mere fact proceedings are resolved in the defendants favour is not enough: *Fosse v DPP* [1999] NSWSC 367.

Exceptional circumstances mean what it says as a matter of ordinary English. Mere proffering of no evidence is not enough, nor is mere reliance on exculpatory statements of the defendant. Neither is remarkable in itself or in combination: *Dong v Hughes* [2005] NSWSC 84.

"Just and reasonable"

The court must be satisfied, on one of the grounds above, that it is "just and reasonable" to award costs. The meaning of "just and reasonable" was considered in *Caltex Refining Co Pty Ltd v Maritime Services Board (NSW)* (1995) 36 NSWLR 552:

- the requirement that such an order must be both just and reasonable entails both that there will be a fair hearing on the merits of the application for the order, and that the terms of the order finally made will be in themselves reasonable
- the judge must specify the quantum of the costs order,
- the judge, in so reaching a final decision, must act, of course, judicially. This must entail, at the very least, a clear, and sufficiently exposed, process of reasoning to a quantum of costs. A result which is, in truth, nothing more than an intuitive stab in the dark is neither just nor reasonable.

The defendant's conduct in relation to the investigation or conduct of proceedings may be a factor to be considered when deciding whether it is "just and reasonable" to exercise the discretion. In *Latoudis v Casey* (1990) 170 CLR 534, Mason CJ said at 544:

> However, there will be cases in which, when regard is had to the particular circumstances, it would not be just and reasonable to order costs against the prosecutor or to order payment of all the defendant's costs. If, for example, the defendant, by his or her conduct after the events constituting the commission of the alleged offence, brought the prosecution upon himself or herself, then it would not be just and reasonable to award costs against the prosecutor.
>
> I agree with Toohey J that, if a defendant has been given an opportunity of explaining his or her version of events before a charge is laid and declines to take up that opportunity, it may be just and reasonable to refuse costs. Likewise, if a defendant conducts his or her defence in such a way as to prolong the proceedings unreasonably, it would be just and reasonable to make an award for a proportion of the defendant's costs.

See also Toohey J at 565.

But ordinarily, if a successful defendant makes out one or more of the grounds in ss 117 or 214 *Criminal Procedure Act*, he or she ought to be awarded costs.

[56-060] Costs in Criminal Cases Act 1967

Magistrates may grant certificates under s 2 *Costs in Criminal Cases Act* in relation to both committal proceedings and summary hearings (whether a hearing has been held on the merits or not) where a defendant is successful.

It is not available following a discharge of the defendant at committal, there being no "trial" within the meaning of the Act: *DPP v Howard* (2005) 64 NSWLR 139.

The test

To grant a certificate under s 2, the magistrate must be satisfied that:

- if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings; and
- that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

In *R v McFarlane* (unrep, 12/8/94, NSWSC) per Blanch J described the test as:

> a hypothetical exercise in the sense that the question is whether it would have been reasonable to prosecute at the time of [the] institution [of the proceedings] if the hypothetical prosecutor

had possession of evidence of all the relevant facts including those established even after the trial and on [the] application: see *Allerton v Director of Public Prosecutions (NSW)* (1991) 24 NSWLR 550.

[56-080] Crimes (Domestic and Personal Violence) Act 2007

Costs in apprehended violence order proceedings — applicants and defendants

Pursuant to s 99(3), the court may, subject to s 99A, award professional costs to the applicant or defendant in apprehended violence order (AVO) proceedings. The amount of costs is to be just and reasonable: s 213(2) *Criminal Procedure Act*.

An order for professional costs against an unsuccessful applicant who is a protected person in AVO proceedings may only be made if satisfied the application was made frivolously or vexatiously: s 99A(1).

Police applicants — apprehended domestic violence orders

Professional costs against a police officer who is an applicant in apprehended domestic violence order proceedings cannot be awarded unless satisfied the officer made the application knowing it contained a matter that was false or misleading in a material particular, or deviated from the reasonable case management of the proceedings so significantly as to be inexcusable: s 99A(2).

The mere fact a protected person in apprehended domestic violence order proceedings:

- indicates they will give unfavourable evidence
- indicates that they do not want an AVO or have no fears, or
- gives unfavourable evidence or fails to attend to give evidence,

does not give rise to a ground to award costs against an applicant police officer in such proceedings: s 99A(3).

[56-100] Suitors' Fund Act 1951

The *Suitors' Fund Act* has very little application in the Local Court in criminal matters (although more so in civil law proceedings). It covers cases when criminal proceedings are halted as a result of the death or prolonged illness of a magistrate that abort the proceedings. Application is made by the parties to the Director General of the Attorney General's Department. For the purposes of the application, the magistrate must issue a certificate under s 6A(1)(c)(ii) of the Act.

[56-120] Miscellaneous matters

Time for making of a costs application

An application for costs must be brought (if at all) at the time of the discharge of the defendant (at the conclusion of committal proceedings) or at the time of the dismissal of the information (in a summary hearing: see *Fosse v Director of Public Prosecutions (NSW)* (1989) 16 NSWLR 540). After that time, the magistrate will be functus officio and have no power to hear a costs application.

Note: There is no general power to order costs as a result of delay due to illness of the magistrate, legal representative or witness.

Quantum of costs

The costs ordered must be "reasonable" in all the circumstances. What will be reasonable will be determined from a consideration of all the relevant factors, bearing in mind the purpose of awarding costs. In *Latoudis v Casey*, Mason CJ said at 543:

> If one thing is clear in the realm of costs, it is that, in criminal as well as civil proceedings, costs are not to be awarded by way of punishment of the unsuccessful party. They are compensatory in the sense that they are awarded to indemnify the successful party against the expense to which he or she has been put by reason of the legal proceedings.

It is an error to use the refusal to make a costs order to ameliorate the penalty. Any such amelioration should be by way of mitigation of a fine, not reducing the amount awarded as costs: *Safework NSW v Williams Timber Pty Ltd*, above, at [26], [41], [45].

Once the magistrate has decided to award costs, it is frequently useful to invite the parties to discuss quantum and to seek to reach an agreement. If unresolved, a hearing on quantum will be required. If that cannot be done on the day of the hearing, it is advisable to set a timetable requiring that evidence be filed and exchanged in affidavit form.

There is no applicable scale of costs.

It is advisable to request that an account of costs be provided to the court. A copy of the costs agreement between the solicitor and client can also be requested to determine what is "just and reasonable".

The onus is on the party seeking costs to establish an entitlement to costs and that the claim is just and reasonable.

Reasons

While costs are in the magistrate's discretion, reasons must be provided for orders made in relation to costs: *Ramskogler v DPP (NSW)* (1995) 82 A Crim R 128.

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Crimes (Forensic Procedure) Act 2000

Note: All references to sections in this chapter are, unless otherwise stated, references to the *Crimes (Forensic Procedures) Act* 2000.

[58-000] Nature of application

Thirteen types of application come before the Local or Children's Court: Pt 4 *Local Court Act* 2007 and Pt 8 Div 2 Local Court Rules 2009.

In each application, specific reasons must be given, having regard to the evidence before the court.

The types of procedures that can come before a magistrate are:

1. **Interim order application** (*Order form "A"*)

   Where an application comes before an "authorised officer" under s 32 for an interim order for the carrying out of a forensic procedure that must be carried out without delay. A magistrate is an "authorised officer" under the Act for the purposes of interim order applications: s 3 (cf. s 3 *Law Enforcement (Powers and Responsibilities) Act* 2002).

   A suspect, including a child, does not have a right to a hearing when an interim order is made: *Kindermann v JQ* [2020] NSWSC 1268 at [37]. The special requirements which apply to a child (as well as certain others) for a final order do not apply to interim orders: *Kindermann v JQ* at [40]. See further **[58-040] Procedural requirements**, below, and the Children's Court chapter at **[38-020]**, **Criminal procedure generally**.

2. **Final order — confirmatory/disallowance application** (*Order form "B"*)

   Where an authorised officer has made an interim order it operates until a magistrate at a hearing held under Pt 5 ss 24–31 "confirms … or disallows the interim order", whether or not the suspect consents to the carrying out of the forensic procedure after the interim order is made, but before it is confirmed or disallowed: s 32(3). However, a sample taken upon the making of an interim order is not to be analysed until a final order is made, unless it is likely to perish: s 38.

   Note: the terms "confirm" and "disallow" would not admit a power to vary the interim order, eg by adding another procedure.

   The interim order cannot be withdrawn and it must be confirmed or disallowed after a consideration of the matters under s 24: *Kerr v Commissioner of Police (NSW)* [2001] NSWSC 637 at [57] (refers to s 25 which preceded s 24).

   The court also held at [42] that:

   > Whether or not the samples were taken within the fixed time [by an authorised officer] … does not bear upon the legality and validity of the order made by the justice.

   Where the suspect is a child, an incapable person or identifies as an Aboriginal or Torres Strait Islander, and is present at the hearing, an interview friend must be present and the suspect has a right to legal representation: s 30; *Kindermann v JQ* at [31]–[32]. See further **[58-040] Procedural requirements**, below.

3. **Final order (original application)** (*Order form "B"*)

   Where an application comes before a magistrate in the first instance under s 26 for an order under s 24.

4. **Repeated application** (*Order form "C"*)

   Where an application comes before a magistrate for a second or subsequent time for an order under s 27(3) on a suspect on whom a forensic procedure has already been carried out under s 24.

5. **Convicted serious indictable offender application** (*Order form "D"*)

   Where an application comes before the court under ss 62–63, for non-intimate (ss 62(1)(c) and 74) or intimate (ss 63(1)(b) and 74) forensic procedures on a person who is serving a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention.

   A serious indictable offence is defined in s 3 as an offence that carries life or a maximum penalty of 5 years imprisonment under the law of NSW or a participating jurisdiction.

6. **Untested former offender application** (*Order form "E"*)

   Where an application comes before the court for non-intimate (ss 75B–75L) or intimate (ss 75C–75L) forensic procedures on a person who is an untested former offender.

   An untested former offender is defined in s 75A(3) as someone who has served a sentence of imprisonment for a serious indictable offence in a correctional centre or other place of detention and who is served with a court attendance notice in respect of an indictable offence, whose DNA profile does not appear to be contained in the offenders index of the DNA database system (as defined in s 90).

   The reference to a person who "is served" with a court attendance notice does not require that the offence alleged in the CAN be undetermined at the time of making the application. Rather, it should be construed as meaning "any person upon whom a court attendance notice has been served": *Daley v Brown* [2014] NSWSC 144 at [76]–[77].

7. **Untested registrable persons application** (*Order form "F"*)

   Where an application comes before the court for non-intimate (ss 75Q–75ZC) and intimate (ss 75R–75ZC) forensic procedures on a person who is an untested registrable person.

   An untested registrable person is defined in s 75P(3) as a registrable person under the *Child Protection (Offenders Registration) Act* 2000, who is required to comply with reporting obligations under that Act, and whose DNA profile does not appear to be contained in the offenders index of the DNA database system (as defined in s 90).

8. **Volunteers and other persons application** (*Order form "G"*)

   Where an application comes before the court in circumstances where the applicant cannot obtain informed consent of the parent or guardian of a volunteer who is:

   - a child (ss 76(2A)(b) and 80), or
   - an incapable person (ss 76(2B)(b) and 80).

   Section 76 provides for the following categories of "volunteer" s 76A:

   - a person (other than a child or an incapable person) who consents to a request by a police officer to undergo a forensic procedure
   - a child who consents and whose parent or guardian consents to a request by a police officer to undergo a forensic procedure, and
   - an incapable person whose parent or guardian consents to a request by a police officer to undergo a forensic procedure but is not a suspect or an excluded volunteer.

     The circumstances in which a person is an "excluded volunteer" are set out in s 76A.

9. **Children under 10 years of age application** (*Order form "H"*)

Where an application comes before the court under s 81F for an order carrying out a forensic procedure on a child under the age of 10 years for the purpose of investigating an offence, assisting in locating or identifying a missing person, or assisting in identifying a deceased person. The application may be made generally or where the informed consent of a child's parent or guardian cannot be obtained or has been withdrawn (s 81C).

10. **Order for retention of forensic material taken from a child under 10 years of age application** (*Order form "I"*)

Where an application comes before the court for the retention of forensic material taken from a child under 10 years of age.

Such forensic material is to be destroyed:

- as soon as reasonably practicable after 12 months have elapsed since collection, unless criminal proceedings for an offence to which the investigation relates have not yet concluded, or
- within 12 months of collection, in the case of forensic material obtained to assist in locating or identifying a missing person or identifying a deceased person (s 81M(3)).

  Where a parent or guardian withdraws consent to the retention of forensic material after collection, such material is to be destroyed as soon as practicable after consent is withdrawn unless the court has made an order to retain the material under s 81N (ie, where the material collected relates to the investigation of a serious indictable offence): s 81D(2).

11. **Order for retention of forensic material where a volunteer withdraws consent to a forensic procedure** (*Order form "J"*)

Where an application comes before the court for an order that forensic material or information obtained from carrying out a forensic procedure on a volunteer who subsequently withdraws consent (s 79) may be retained: s 81.

12. **Order for extension of the retention period of forensic material obtained where the Act requires its destruction** (*Order form "K"*)

Where an application comes before the court for an extension of the period after which forensic material must be destroyed (s 88), relating to material obtained under:

- Pt 3 — Forensic procedure on suspect with consent
- Pt 4 — Non-intimate forensic procedures on suspects by order of senior police officer, or
- Pt 5 — Forensic procedures authorised on suspects by order of a magistrate or other authorised officer.

13. **Order to match DNA profile placed on the DNA database system of a volunteer who is a child or incapable person** (*Order form "L"*)

Where an application comes before the court for an order allowing the matching of a DNA profile of a volunteer child or incapable person placed on the DNA database system with another DNA profile on the system.

Section 93A restricts the indices of the DNA database system on which a volunteer child or incapable person's DNA profile may be placed and provides that the profile can only be used for the purpose for which it was placed on the database. Such a person's profile must

not be matched with any DNA profile on the same or another index of the DNA database system for any other purpose, unless otherwise ordered by a Magistrate upon consideration of the criteria set out in s 93A(2).

[58-020] Substantive matters

- The onus rests upon the prosecution on the balance of probabilities: s 103.
- Where the Act requires something to be done if practicable, the onus rests upon the prosecution on the balance of probabilities that it was not practicable: s 104.
- The burden lies on the prosecution on the balance of probabilities that a person who identifies as an Aboriginal person or Torres Strait Islander has waived their rights provided for in the Act: s 106.
- An application is not a "criminal proceeding" for relevant purposes under the *Children (Criminal Proceedings) Act* 1987 or the *Evidence Act* 1995: *L v Lyons* (2002) 56 NSWLR 600 at [28], [33], [35] and [43].
- Authorisation under the Act can only be granted strictly in accordance with its provisions: *Walker v Bugden* (2005) 155 A Crim R 416.
- The purpose of the Act is:

  > not to enable investigating police (or other authorised persons) to identify a person as a suspect: it is to facilitate the procurement of evidence against a person who is already a suspect: *Orban v Bayliss* [2004] NSWSC 428 at [31]; *Walker v Bugden* at [18].

- The test is "reasonable belief", not suspicion: *Walker v Bugden* at [37] and [43] following *George v Rockett* (1990) 170 CLR 104 at 115:

  > Facts that can reasonably ground a *suspicion* may be substantially less than would be reasonably required to ground a *belief*
  >
  > …
  >
  > It is clear that an applicant for a final order under the *Forensic Procedures Act* must place before the magistrate information which enables the latter to be able to assess whether or not there are reasonable grounds for the asserted belief. The mere assertion or contention in an affidavit that there are reasonable grounds to believe that a forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence is clearly insufficient: see *Orban* (supra) at [40]. The factual foundation constituting reasonable grounds for the specified belief must be given with sufficient particularity to permit an authorising magistrate to be in a position to determine whether there are reasonable grounds to believe that the forensic procedure might produce the outcome or result referred to in the sub-paragraph.

- The magistrate must bring his/her own independent evaluation to the evidence which the prosecution contends amounts to reasonable grounds to believe that
  - the suspect committed the relevant offence
  - there existed reasonable grounds for believing that any of the forensic procedures sought might produce evidence tending to confirm or disprove the respondent committed the relevant offence, and
  - the forensic procedures are justified in all the circumstances (taking into account the s 24(2) criteria). It is insufficient to simply recount that it is alleged that the suspected person committed the relevant offence: *Orban v Bayliss* at [56].

- It is not necessary for the evidence obtained from a forensic procedure to be capable of establishing all the elements of the offence in order to amount to "evidence tending to confirm or disprove that the suspect has committed the offence"; indeed, it is difficult to envisage a case where every element could be proved by such evidence: *KC v Sanger* [2012] NSWSC 98 at [100].
- It is necessary to pay particular and individual attention to the type of procedure sought against the anticipated evidence to be obtained from it and the requirements to be considered under s 24(4): see *Police v JW* [2007] NSWLC 30 as to the interpretation of "physical integrity": see also *Orban v Bayliss* at [32] and [54] which predates the s 24(4) amendment.

  Simpson J in *Orban v Bayliss* at [54] said of the requirement under s 25(g) (now repealed) that the forensic procedure was "justified in all the circumstances":

  > Application of s 25(g) requires a balancing of, *inter alia*, the invasiveness of a compulsory procedure, against the anticipated evidence to be obtained from it, and the requirements of the administration of justice in the most accurate solution of a particular crime. This question also was not addressed. That also constitutes an error of law.

- The test whether it "is justified in all the circumstances" also applies for a repeated forensic procedure: s 27(3)(c); convicted serious indictable offender: s 74(5); untested former offender: s 75L(2); and volunteers: s 80(2)(f) — note also the additional criteria (a)–(e). Although no specific reference is made to the s 24(4) criteria, in these provisions that those criteria would still be of relevance as "de facto" circumstances to consider.
- Approach with caution any pro forma application form used by police: *Orban v Bayliss* at [14]–[16], [46] and [50]–[51]: ss 24–25 since amended.

  Note: the words of caution that "the process of consideration required by the provisions of s 25 (now s 24) is not merely a ritualistic one to be addressed in a peremptory fashion without due regard to the import of those provisions": *Walker v Bugden* at [28] following *George v Rockett* at 111.

- See *Police v JW* [2007] NSWLC 30 as to whether alleged police misconduct or impropriety in making an application for an interim order and carrying out the procedure under that order can be considered in an application for a final order, particularly the right of an incapable suspect to an interview friend or lawyer under s 54 — relationship between ss 24 and 82 (inadmissibility of evidence following improper forensic procedure) considered.

[58-040] Procedural requirements (Pt 5 ss 26–31) — confirmatory/ disallowance or original or repeated applications

(These are the usual applications that come before the court.)

The application — ss 26–27

- Can only be made by an "authorised applicant" (s 3) and no other person (ss 26, 27 and 33).
- The application must:
  - be in writing
  - be supported by evidence on affidavit or oath
  - specify the type of procedure to be carried out.
- Where a magistrate has refused an application the authorised applicant (or any other person aware) may not make a further application to carry out the same forensic procedure unless

additional information is provided that justifies the making of the further application: s 26(3). There is no statutory requirement to consider common law principles such as double jeopardy or whether to grant the application would undermine the fundamental principle of finality of litigation: *Prott v Munro* [2013] NSWCA 241 at [24].

- Warrants or summonses may issue depending upon whether the suspect is under arrest (s 28) or not under arrest (s 29) for the attendance of the suspect at the hearing.

Hearing procedure — s 30

- An order may be made in the presence of the suspect concerned or, at the discretion of the magistrate, ex parte.
- A child/incapable person/Aboriginal and Torres Strait Islander suspect (unless the Aboriginal and Torres Strait Islander suspect waives) must have an "interview friend" present (if the suspect is present) and may be represented by a legal practitioner. However, the interview friend may be excluded if they unreasonably interfere with or obstruct the hearing: s 30(8).
- At the beginning of the hearing the court must ask the suspect (if present at the hearing) whether they identify as an Aboriginal and Torres Strait Islander.
- A legal practitioner may represent any other suspect.
- The suspect or legal representative may:
  - cross-examine the applicant
  - call or cross-examine any other witness, but only with leave (substantial reasons required, in the interests of justice), and
  - address the magistrate.

The order — s 31

- If the magistrate makes an order the order must:
  - specify the procedure authorised
  - give reasons for making the order
  - ensure a written record is kept of the order
  - order the suspect to attend for the carrying out of the procedure (the magistrate may give directions as to the time and place at which the order is to be carried out)
  - inform the suspect reasonable force may be used to ensure the suspect complies.

Non-publication of suspect identity — s 43

Section 43 restricts publication of the name or information likely to enable the identification of the suspect of proceedings under the Act unless the suspect charged or the magistrate authorises publication.

[58-060] Warrants or summonses that a magistrate may issue for the attendance of "suspects"

- *under arrest — s 28*

  A magistrate may issue a warrant to secure the attendance of a suspect under arrest for the hearing of an application under Pt 5.
- *not under arrest — s 29*

A magistrate may issue a summons or a warrant to secure the attendance of a suspect not under arrest for the hearing under of an application under Pt 5.

- *not under arrest to carry out a forensic procedure — s 41*

  Where an order for a forensic procedure on a suspect has been made under the Act a magistrate or other authorised officer may issue a warrant to secure the attendance of a suspect for the purpose of carrying out the forensic procedure.

[58-080] Costs

The court has the power to award costs in forensic procedure application proceedings pursuant to s 69 *Local Court Act* 2007, such proceedings being a class of application proceedings under Pt 4. The power to award costs extends to circumstances where an invalid forensic procedure application is dismissed: *Baglin v JG* [2014] NSWSC 902.

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Involuntary drug and alcohol treatment

[60-000] Introduction

The *Drug and Alcohol Treatment Act* 2007 (the Act) replaces the *Inebriates Act* 1912 and provides the legislative basis for an involuntary detention, treatment and stabilisation regime for persons with severe substance dependence, with the stated aim of protecting the health and safety of such persons.

The functions of magistrates under the Act are to:

- determine applications for orders for assessment — [60-060]
- review dependency certificates — [60-140]
- determine applications to extend dependency certificates — [60-240].

Section 3(2) requires that the functions conferred by the Act be approached on the basis that:

- the involuntary detention and treatment of a person is a consideration of last resort
- the interests of the person are paramount in making a decision
- the person is to receive the best possible treatment in the least restrictive environment that will enable treatment to be effectively given, and
- interference with the rights, dignity and self-respect of the person is to be kept to the minimum necessary.

[60-020] Definitions

The following expressions are either defined in the Act (denoted below by ***bold italics***) or the subject of guidance under service agreements in place between the Local Court and NSW Health (denoted below by *italics*).

- ***Accredited medical practitioner*** refers to a medical practitioner appointed by the Director-General, NSW Health.
- *Benefit from treatment refers* to the likelihood of treatment being completed and resulting in quality of life and health related improvements.
- *Loss of capacity* to make decisions refers to the reduced capacity to make decisions about substance use or personal welfare due to intense compulsion to engage in substance abuse.
- *Risk of serious harm* refers to risks relating to life threatening morbidity, self-neglect and self-harm.
- ***Severe substance dependence*** refers to the situation where a person:
  (a) has a tolerance to a substance, and
  (b) shows withdrawal symptoms when the person stops using, or reduces the level of use of the substance, and
  (c) has lost the capacity to make decisions about his or her substance use and personal welfare due primarily to his or her dependence on the substance.

  A list of substances for the purposes of the above definition is set out in Sch 1 of the Act.

[60-040] Availability

The Involuntary Drug and Alcohol Treatment (IDAT) program that operates under the Act involves short-term care with medically supervised involuntary withdrawal for patients whose decision making capacity is affected by their substance use. It also involves a voluntary rehabilitation and support component upon completion of the involuntary inpatient period.

Following a trial in the Nepean Health district in 2009-2010, the application of the Act was extended in September 2012 to enable the intake of patients to the IDAT program from across the state.

Treatment centres currently operate in two locations:

- Herbert Street Clinic at Royal North Shore Hospital, St Leonards — which generally services metropolitan Sydney and surrounding regional areas including Wollongong, Newcastle, Central Coast and Lithgow.
- Lachlan IDAT Unit at Bloomfield Hospital, Orange — which generally services all other regions.

[60-060] Order for assessment

Intake into the IDAT program requires a person to be assessed by an accredited medical practitioner, at the request of a medical practitioner, to determine whether a dependency certificate should be issued that authorises the person's detention at a treatment centre for up to 28 days.

Under s 9, the accredited medical practitioner must be satisfied that certain criteria are met before issuing a certificate, namely that:

(a) the person has a severe substance dependence

(b) care, treatment or control of the person is necessary to protect the person from serious harm

(c) the person is likely to benefit from treatment for his or her substance dependence but has refused treatment, and

(d) no other appropriate and less restrictive means for dealing with the person are reasonably available.

If applicable, the accredited medical practitioner may consider the risk of harm to any children or other dependants of the person. There must also be a bed available at a treatment centre, as the effect of issuing a dependency certificate is that the person will be transported to and detained in the centre.

If the accredited medical practitioner is unable to access the person for the purpose of carrying out the assessment, a referring medical practitioner may seek an order for assessment from a magistrate or authorised officer (that is, a registrar, deputy registrar or clerk grade 3/4 and above): s 10.

[60-080] Application

An application (Form 13) for an order authorising an accredited medical practitioner to visit and assess a person to ascertain whether a dependency certificate should be issued is filed with the court registry. The application must be sworn and include evidence of the matters of which the magistrate must be satisfied before making an order: see **[60-220]**.

It may seek that any order include an authorisation for the accredited medical practitioner to be accompanied by a police officer (where there are serious concerns as to the safety and welfare of the person or others if the person was to be taken to a treatment centre without police assistance: see s 23) or other person.

The registry will make enquiries as to the availability of a bed prior to the listing and determination of the application.

[60-100] Listing

Applications are listed and determined in court. However, s 41 prohibits the identification of a person to whom any proceedings under the Act relate, or of any person who is a witness or is mentioned or otherwise involved in the proceedings.

[60-120] Determination

An order for assessment may only be made if the magistrate is satisfied that the person:

(a) is likely to have a severe substance dependence, and

(b) is likely to be in need of protection from serious harm or others are likely to be in need of protection from serious physical harm, and

(c) could not be assessed because of physical inaccessibility, unless an order is made, and

(d) is likely to benefit from the treatment.

If it is considered there is insufficient evidence in the application to enable the determination of any of those matters, the agreed practice is for the application to be adjourned for up to 7 working days for further evidence to be collected.

The agreed timeframe for acting upon an order for assessment is 7 working days, with a new order to be sought if an assessment is not carried out under the original order within that period.

The accredited medical practitioner is to inform the registry of the outcome of an order for assessment (Form 2). If a dependency certificate has issued as a result of the assessment, a copy will be provided and a review hearing before a magistrate will be required.

[60-140] Review of dependency certificate

Under s 14, if an accredited medical practitioner issues a dependency certificate providing for the involuntary detention and treatment of a person, they:

(a) must not be detained for more than 28 days from the date of issue of the certificate, and

(b) are to be brought before a magistrate as soon as is practicable for the certificate to be reviewed.

A review will generally be held within 7 days of the issue of a dependency certificate. Hearings are held at the treatment centre, with the magistrate attending on a regular day of the week as required.

The review may be attended by the person, their primary carer, the accredited medical practitioner and/or IDAT program staff, and other medical witnesses.

[60-160] Procedure

Proceedings are to be conducted as quickly as possible, with as little formality and technicality as the proper consideration of the matter permits: s 37(1).

The accredited medical practitioner is responsible for making arrangements to ensure all appropriate medical witnesses and other relevant medical evidence concerning the person is

before the magistrate: s 34(2). A summons may be issued, either at the request of a person involved in the proceedings or of the magistrate's own motion, requiring a person to attend as a witness in the proceedings or produce documents relating to the proceedings (or both): s 39(1).

The rules of evidence do not apply to the conduct of a review hearing. The magistrate may inform himself or herself as is considered appropriate and as the proper consideration of the matter permits: s 37(2). An oath may be administered to any person giving evidence: s 37(6).

The proceedings are open to the public, but the magistrate may order that they be conducted in private or that the publication of any report of the proceedings, the evidence or names of persons involved in the proceedings be prohibited or restricted: s 37(3), (4). Such an order may be made if it is desirable to do so for the welfare of the person or for any other reason, either upon the application of the person or anyone else appearing in the proceedings, or of the magistrate's own motion.

The dependent person is entitled to be legally represented but may choose not to be, or with the leave of the magistrate may nominate another person to represent them: s 37(7). The Mental Health Advocacy Service provides legal representation. An interpreter may assist the person if they are not able to communicate adequately in English: s 37(5).

The primary carer of the person may appear in the proceedings if the magistrate grants leave: s 37(9). They, or any other person appearing in the proceedings, may also be legally represented if the magistrate grants leave: s 37(9).

The proceedings must be recorded: s 42(1). The registry staff member accompanying the magistrate provides a hand-held recording device for that purpose.

[60-180] Practical arrangements

The treatment centre provides a room for the conduct of the review hearings that has a suitable layout and is fitted out to ensure:

- there are at least two entry/exit points, one of which is an accessible emergency exit into a secure area
- a duress alarm or other security mechanism is fitted and in working order
- there is a reasonable distance between the magistrate and the person
- the person is seated in such a position that they are not able to block the exits to the room or access to any duress alarm or emergency telephone
- no item of furniture or fitting can be thrown or used as a weapon
- all moveable items are removed or fastened so they cannot be thrown, except for drinking cups and water jugs, which are to be made of plastic, foam or other soft material
- sound recording equipment can be placed in a position where the person cannot access it.

[60-200] Determination

The magistrate is required to determine whether or not, on the balance of probabilities, the person meets the criteria for detention under s 9: s 34(3). To this end, the magistrate must consider the following matters set out in s 34(4):

(a) the reports and recommendations of any accredited medical practitioner who has examined the person

(b) any proposed further treatment for the person and the likelihood the treatment will be of benefit to the person

(c) the views of the person (if any)

(d) any cultural factors relating to the person that may be relevant to the determination

(e) any other relevant information given to the magistrate.

[60-220] Order

If the magistrate is satisfied, having regard to the matters in s 34(4), that the person meets the criteria for detention under s 9, he or she may make an order that confirms the issuing of the dependency certificate, either:

- for the period originally specified in the certificate, or
- a shorter period (in which case the certificate only has effect for the shorter period).

If the magistrate is not so satisfied, he or she must order that the person be discharged from the treatment centre and the dependency certificate is of no further effect.

If the magistrate considers it is in the best interests of the person to do so, the proceedings may be adjourned for up to 7 days: s 38(1). The dependency certificate continues to have effect (subject to the existing expiry date specified in the certificate): s 38(2).

[60-240] Extension of dependency certificate

[60-260] Application

Under s 34, an application to extend a dependency certificate may be made by an accredited medical practitioner if he or she:

(a) is satisfied the person is suffering from drug or alcohol related brain injury, and additional time is needed to carry out treatment and plan the person's discharge, and

(b) presents, with the application, a proposed treatment plan to be followed during the additional time granted.

The application (Form 7) must be signed by the accredited medical practitioner and set out his or her reasons for being satisfied of the above matters. A copy of the proposed treatment plan is to be attached. The application is to specify the period of the extension sought. A dependency certificate may only be extended so as to continue for a period of up to 3 months from the date it was originally issued: s 35(2).

The application must be considered within 7 days: s 35(1).

[60-280] Determination

The magistrate is to determine whether or not the detention and treatment period for the person should be extended, and if so for how long, having regard to (s 35(3)):

(a) the treatment proposed in the treatment plan

(b) the length of the extension sought

(c) whether or not it is likely the additional treatment will benefit the person

(d) the views of the person (if any)

(e) any relevant cultural factors relating to the person, and

(f) any other relevant information.

[60-300] Procedure and practical arrangements

The same procedures and practical arrangements as for review hearings apply.

Non-publication and suppression orders

[62-000] Circumstances in which automatic non-publication or suppression provisions apply

1. A number of legislative provisions specify certain circumstances in which an automatic non-publication or suppression provision applies. These provisions are set out at **Table A**. There is *no need* to make a non-publication or suppression order where an automatic provision applies.

[62-020] Court-made non-publication and suppression orders

2. A form to assist in the making and recording of non-publication and suppression orders is set out in the Annexure.

   (a) ***Court Suppression and Non-Publication Orders Act 2010***

   The *Court Suppression and Non-Publication Orders Act* 2010 (the Act) commenced on 1 July 2011. The Act adopts model provisions developed for the Standing Committee of Attorneys General with the intention of harmonising laws on suppression and non-publication orders.

Application

The Act applies to civil and criminal proceedings.

Section 3 distinguishes between:

- Non-publication orders, which prohibit or restrict the publication of information (but do not otherwise prohibit or restrict the disclosure of information), and
- Suppression orders, which more broadly prohibit or restrict the disclosure of information, whether by publication or otherwise.

To "publish" means to disseminate or provide access to the public or a section of the public by any means.

Section 4 specifies that the Act does not limit any other powers of the court to regulate its proceedings or deal with a contempt of court.

Most other specific legislative provisions for automatic or court-ordered non-publication or non-disclosure continue to apply (see Table B). Section 5 provides that the Act does not limit or affect the operation of any other provision of an Act that prohibits or restricts, or authorises a court to prohibit or restrict, the publication or other disclosure of information in connection with proceedings.

However, the Act has repealed and replaces the following provisions:

- Section 292 *Criminal Procedure Act* which enabled the court to make suppression and non-disclosure orders as it considered necessary to protect of the safety and welfare of protected confiders.
- Section 302 *Criminal Procedure Act* which enabled the court to suppress publication of evidence in proceedings for prescribed sexual assault offences.
- Section 72 *Civil Procedure Act* which enabled the court to prohibit the publication or disclosure of information tending to reveal the identity or any party to or witness in proceedings.

Power to make an order

Section 7 enables the court to make a suppression or non-publication order on one or more of the grounds set out in s 8 that would prohibit or restrict the publication or other disclosure of:

(i) information that would identify or is otherwise concerned or associated with a party to or witness in proceedings before the court, or

(ii) information that comprises evidence, or information about evidence, given in proceedings before the court.

Section 8(2) requires the court to specify the ground/s on which an order is made, which are set out in s 8(1) as follows:

(i) the order is necessary to prevent prejudice to the proper administration of justice,

(ii) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

(iii) the order is necessary to protect the safety of any person,

(iv) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),

(v) it is otherwise necessary in the public interest for the order to be made and the public interest significantly outweighs the public interest in open justice.

When considering whether to make an order, the court must also take into account "a primary objective of the administration of justice" set out in s 6, namely, "to safeguard the public interest in open justice".

Procedure for making an order

An order can be made at any stage of proceedings or after the conclusion of proceedings, upon the application of a party or on the court's own initiative: s 9(1), (3).

Section 9(2) provides a number of persons with an entitlement to be heard by the court on an application:

- the applicant for the order
- a party to the proceedings
- a Commonwealth or State or Territory Government or Government agency representative
- a news media organisation
- any other person who, in the court's opinion, has a sufficient interest.

Content of order

An order:

- Must specify the information to which it applies: s 9(5)
- Must be sufficiently particular to ensure that it is limited to achieving the purpose for which it is made: s 9(5)
- May be subject to conditions or exceptions as the court thinks fit: s 9(4).

Sample order

I make a [*suppression/non-publication*] order on the basis that in this case [*set out ground from s 8, eg the order is necessary to prevent prejudice to the proper administration of justice*], notwithstanding that a primary objective of the administration of justice is to safeguard the public interest in open justice.

The [*publication/disclosure*] of information that [*set out brief description, eg will reveal or is likely to reveal the identity of witness in proceedings before the court*] is [*prohibited/restricted*].

[*If publication/disclosure is restricted, set out details of restriction, eg the witness may only be referred to by the pseudonym Miss X*.]

This order remains in force until [*insert date/event, eg the court orders otherwise*].

This order applies to the [*disclosure/publication*] of information in [*insert location, eg New South Wales*].

[*If order is to apply outside New South Wales*] I am satisfied that it is necessary for the order to apply outside of New South Wales to achieve the purpose of [*insert ground upon which order is made*].

Interim order

Section 10 enables the court to make an interim order without determining the merits of an application. If the court makes an interim order, it must then determine the application as a matter of urgency.

Where an order applies

Pursuant to s 11, an order may be made to apply in New South Wales or to anywhere in the Commonwealth outside New South Wales. Subsection (3) requires that if making an order that applies outside New South Wales, the court must be satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made.

Duration of order

Section 12 provides that an order should operate for no longer than reasonably necessary to achieve the purpose for which it is made. Its duration is to be limited by reference to a fixed or ascertainable period or future event as specified in the order.

Reviews and appeals

Section 13 sets out enables the court that made an order to review the order, either on the application of a person entitled to apply for the review or on its own initiative. Persons entitled to apply for a review are set out in subs (2) and are the same as those entitled to be heard in relation to an application for an order. Upon review, the court may confirm, vary or revoke and order, and may also make an additional order under the Act.

Section 14 provides for appeals against an original court's decision:

- whether or not to make an order
- on a review of an order
- not to conduct a review

to be made with leave of the appellate court, that is, the Supreme Court or any other court to which an appeal would lie from a final judgment of the original court. Appeals are to be heard by way of rehearing, in which fresh or additional evidence may be adduced.

Contraventions of orders

Contravention of an order may be dealt with as an offence under s 16(1) of the Act, or as a contempt of court. Section 16(1) provides that a person commits an offence if he or she engages in conduct that constitutes a contravention of an order, and is reckless as to whether that conduct constitutes a contravention.

(b) ***Other legislation***

In addition to the *Court Suppression and Non-Publication Orders Act*, a number of legislative provisions continue to specify certain circumstances in which the court may or must make a non-publication or suppression order.

These provisions are set out at **Table B**.

Provisions relevant to proceedings under various Commonwealth Acts are set out at **Table C**.

(c) ***Common law***

Section 4 *Court Suppression and Non-Publication Orders Act* preserves the common law in respect of suppression and non-publication orders.

See *Criminal Trial Courts Bench Book*, **Closed court, suppression and non-publication orders** at [**1-349**].

[62-040] Table A — Automatic non-publication/suppression provisions

Category	Legislation	Details
All proceedings	s 195 *Evidence Act* 1995	A person must not, without the express permission of a court, print or publish: (a) any question that the court has disallowed under s 41 (Improper questions), or (b) any question that the court has disallowed because any answer that is likely to be given to the question would contravene the credibility rule, or (c) any question in respect of which the court has refused to give leave under Pt 3.7 (Credibility).
AVO proceedings – where child involved	s 45(1) *Crimes (Domestic and Personal Violence) Act* 2007	The name of a child under the age of 16 yrs who is involved in AVO proceedings (whether as a person in need of protection, a witness or who is otherwise likely to be involved) must not be published or broadcast before the proceedings are commenced or after the proceedings have been commenced and before they are disposed of.

Category	Legislation	Details
Bail	s 89 *Bail Act* 2013	A person must not publish the fact that a named person is a prohibited associate of an accused person (including information calculated to identify a person as such). This does not apply to the publication of an official report of the court proceedings: s 89(4).
Child protection – registrable persons	s 18 *Child Protection (Offenders Prohibition Orders) Act* 2004	In proceedings for an order under this Act, a person must not publish information that identifies or is likely to identify a registrable person, victim or person identified as a person at risk.
Children at risk of significant harm	s 29(1)(f) *Children and Young Persons (Care and Protection) Act* 1998	Where a person makes a report to the Director General in respect of a child at risk of significant harm, which is then used in care proceedings in the Children's Court, coronial proceedings or other proceedings authorised by subs (1)(d), the identity of the person who made the report must not be disclosed unless consent is given or leave of the court is obtained.
Children's Court proceedings (except crime) – where child involved	s 105 *Children and Young Persons (Care and Protection) Act* 1998	At any time before, during or after proceedings, the name of a child or young person: (a) who appears, or is reasonably likely to appear, as a witness before the Children's Court in any proceedings, or (a1) who is involved, or is reasonably likely to be involved, in any capacity in any non-court proceedings, or (b) with respect to whom proceedings before the Children's Court are brought or who is reasonably likely to be the subject of proceedings before the Children's Court, or (c) who is, or is reasonably likely to be, mentioned or otherwise involved in any proceedings before the Children's Court or in any non-court proceedings, or (d) who is the subject of a report under ss 24, 25, 27, 120, 121 or 122 must not be published or broadcast in any form that may be accessible by a person in NSW.
Coronial matters	s 75 *Coroners Act* 2009	A person must not publish any of the following matters without the express permission of the coroner in the coronial proceedings concerned: (a) any question asked of a witness that the coroner has forbidden or disallowed, (b) any warning that a coroner has given to a witness that he or she is not compelled to answer a question, (c) any objection made by a witness to giving evidence on the ground that the evidence may tend to prove that the witness has committed an offence.
Criminal proceedings – prescribed sexual offences	s 578A *Crimes Act* 1900	Nothing may be published that identifies a complainant in relation to a prescribed sexual offence, except where authorised by the court or with the consent of the complainant. The court is not to authorise a publication without seeking and considering the views of the complainant, and being satisfied that the publication is in the public interest.

Category	Legislation	Details
Criminal proceedings – where child involved	s 15A(1) *Children (Criminal Proceedings) Act* 1987	The name of a person must not be published or broadcast in a way that connects the person with criminal proceedings if: (a) the proceedings relate to the person and the person was a child when the offence to which the proceedings relate was committed, or (b) the person appears as a witness in the proceedings and was a child when the offence to which the proceedings relate was committed (whether or not the person was a child when appearing as a witness), or (c) the person is mentioned in the proceedings in relation to something that occurred when the person was a child, or (d) the person is otherwise involved in the proceedings and was a child when so involved, or (e) the person is a brother or sister of a victim of the offence to which the proceedings relate, and that person and the victim were both children when the offence was committed. **Note:** the exceptions prescribed in ss 15B–F (ie, official report of proceedings, person convicted of a serious children's indictable offence, with consent, child deceased, and traffic offences not dealt with by Children's Court).
Family law proceedings	s 121 *Family Law Act* 1975 (Cth)	It is an offence to publish any account of any proceedings, or of any part of any proceedings, under this Act that identifies: (a) a party to the proceedings (b) a person who is related or associated with a party to the proceedings or allegedly concerned in the matter to which the proceedings relate, or (c) a witness to the proceedings.
Forensic procedures	s 43 *Crimes (Forensic Procedures) Act* 2000	Where a magistrate authorises the carrying out of a forensic procedure on a suspect under s 24, a person must not publish information that would identify the suspect unless the suspect has been charged with the offence or the magistrate authorises the publication.
Involuntary drug and alcohol treatment	s 41 *Drug and Alcohol Treatment Act* 2007	A person must not, whether before or after the proceedings are completed and without the consent of the magistrate, publish or broadcast the name of any person: (a) to whom the proceedings relate, or (b) who appears as a witness in the proceedings, or (c) who is mentioned or otherwise involved in the proceedings.
Parentage matters	s 25 *Status of Children Act* 1996	A person must not publish the name, or the particulars relating to the identity, of any person by, or in relation to whom, an application for a declaration of parentage or for an annulment order under Div 2 or 3 is brought.

Category	Legislation	Details
Sentencing	s 100H *Crimes (Sentencing Procedure) Act* 1999	A person must not publish information identifying a named person (other than the offender) in a non-association order.
Transmission of sounds or images in court	s 9A(1) *Court Security Act* 2005	A person must not use any device to transmit sounds or images from a room or other place where a court is sitting to any person or place outside; by posting entries containing sounds, images or information on social media sites or any other website or broadcasting or publishing by means of the internet; or by making the sounds, images or information accessible to any person outside that room or other place. **Note:** the exceptions prescribed in ss 9A(2)(a)–(e) (ie, device used for another purpose, transmission via audio link/AVL/CCL etc, approved transmission by judicial officer, transmission for the purpose of transcription, transmission by prosecutors to other (non-witness) prosecutors).

[62-060] Table B — Non-publication/suppression provisions requiring a court order

Category	Legislation	Details
Adoption information matters	s 186(2) *Adoption Act* 2000	In adoption information proceedings, the court or tribunal may make an order forbidding publication of all or any of the information mentioned in the proceedings relating to an adopted person, birth parent, adoptive parent, relative or other person.
Any proceedings before a recognised court (including criminal proceedings) (cf, use of interstate audio/audio visual links)	s 15 *Evidence (Audio and Audio Visual Links) Act* 1998	A recognised court may prohibit or restrict the publication of evidence given in the proceeding, or of the name of a party to, or a witness in, the proceeding.
Apprehension under warrant (Cth)	s 96 *Service and Execution of Process Act* 1992 (Cth)	Where a person is taken before a magistrate after apprehension under a warrant pursuant to s 83, the magistrate may order that a report of any part of the proceeding or review held in public or any publicly made finding of fact made by the magistrate is not to be published. An order must not be made without being satisfied of one of the matters set out in subs (3).

Category	Legislation	Details
Assumed identities	s 28 *Law Enforcement (Controlled Operations) Act* 1997	Unless it considers that the interests of justice otherwise require, the court must make an order for suppression of evidence given before it as, in its opinion, will ensure that the identity of a participant in an authorised operation is not disclosed. It may also make orders prohibiting the publication of any information that may identify such a person.
	s 34 *Law Enforcement and National Security (Assumed Identities) Act* 2010	Unless it considers that the interests of justice otherwise require, the court must make an order for suppression of evidence given before it as, in its opinion, will ensure that the identity of a person in respect of whom an authority is or was in force is not disclosed. It may also make orders prohibiting the publication of any information that may identify such a person.
		See also: • s 26 *Witness Protection Act* 1995 witnesses who are participants in the NSW Witness Protection Program • s 28 *Witness Protection Act* 1994 (Cth) witnesses who are participants in the National Witness Protection Program.
AVO proceedings – persons other than children	s 45(2) *Crimes (Domestic and Personal Violence) Act* 2007	The court may direct that the name of a person who is involved in AVO proceedings (whether as a person in need of protection, a witness or person who is otherwise likely to be involved) must not be published or broadcast before the proceedings are commenced or after the proceedings have been commenced and before they are disposed of.
Coronial matters	s 74 *Coroners Act* 2009	A coroner may order that any evidence in coronial proceedings not be published if of the opinion that it would be in the public interest to do so.
	s 75	A coroner may make a non-publication order prohibiting or restricting the publication of a report of the proceeding or any matter identifying the dead person or a relative of the dead person if it appears that a death or suspected death was self-inflicted.
DPP-initiated proceedings (Cth)	s 16A *Director of Public Prosecutions* Act 1983 (Cth)	In proceedings taken or carried on by the Commonwealth DPP in relation to civil remedies or pecuniary penalties or in application proceedings for a restraining order under the *Proceeds of Crime Act*, the court may make orders prohibiting or restricting the publication of particular evidence or information as appear necessary in order to prevent prejudice to the administration of justice.

Category	Legislation	Details
Involuntary drug and alcohol treatment	s 37 *Drug and Alcohol Treatment Act* 2007	In proceedings relating to the review or extension of a dependency certificate, if the magistrate is satisfied that it is desirable to do so for the welfare of the dependent person or for any other reason, the magistrate may (of their own motion or on the application of the person or another person appearing at the proceedings) make various orders, including an order prohibiting or restricting: • the publication or broadcasting of any report of the proceedings • the publication of evidence given in the proceedings, whether in public or in private, or of matters contained in documents lodged with or received in evidence by the magistrate • the disclosure to some or all of the parties to the proceedings of evidence given before the magistrate, or of the contents of a document lodged with or received in evidence by the magistrate, in relation to the proceedings.
Lie detectors	s 6 *Lie Detectors Act* 1983	Where output from an instrument or apparatus that has been used in the commission of an offence against this Act, or an analysis or opinion in relation to such output, is admitted into evidence for the purpose of proving the commission of the offence, the court may make an order forbidding publication of the evidence or a report of the evidence.
Professional confidential relationship privilege	s 126E *Evidence Act* 1995	The court may make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of a protected confider.
Referee reports regarding questions of benefit to minors	s 43(5) *Minors (Property and Contracts) Act* 1970	The court may make such orders as it thinks fit for the purpose of preventing or limiting publication of a referee report filed under s 43.
Surveillance devices	s 42 *Surveillance Devices Act* 2007	The court must make an order prohibiting or restricting publication of information disclosed in the proceeding that could reasonably be expected to reveal details of surveillance device technology or methods of installation, use or retrieval of surveillance devices, unless the interests of justice require otherwise. The order is to contain such prohibitions or restrictions as the court considers necessary to ensure that those details are not revealed.

[62-080] Table C — Commonwealth suppression and non-publication provisions

Category	Legislation	Details
Criminal proceedings	s 93.2 Criminal Code	At any time before or during the hearing of an application or other proceedings, the judge or magistrate, may, if satisfied that such a course is expedient in the interest of the security* or defence of the Commonwealth, order that no report of the whole or a specified part of or relating to the application or proceedings shall be published. * Criminal Code provision only. **Note:** • Both sections are apply to proceedings before a court exercising federal jurisdiction, whether under or in pursuance of the Act in question or otherwise. • Both sections also contain provisions for: – excluding some or all members of the public from all or part of the proceedings, and – making orders (including after the proceedings have concluded) preventing access to evidence or other information in the proceedings without the approval of the court.
Family law proceedings	s 121 *Family Law Act* 1975	[*Automatic*] A person who publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies: (a) a party to the proceedings (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate, or (c) a witness in the proceedings, is guilty of an offence punishable upon conviction by imprisonment for a period not exceeding one year. **Note:** subs (3) contains a list of identifying particulars and other circumstances, the publication of which will be taken to have identified a person.

Category	Legislation	Details
Interstate extradition	s 96 *Service and Execution of Process Act* 1992	[*Court ordered*] The magistrate or court may, on application, order that a report of: (a) a part of the proceeding or review held in public, or (b) a finding publicly made by the magistrate or court, is not to be published. **Note:** • Subs (3) provides an order may only be made where satisfied that publication would give rise to a substantial risk of: – prejudice to the fair trial by jury of a person charged with a Commonwealth or State offence – death or personal injury being suffered by a witness or member of the witness' family – damage to the property of a witness or a member of the witness' family – prejudice to the prosecution of a Commonwealth or State offence or a proceeding to recover a pecuniary penalty – prejudice to an investigation preparatory to such a prosecution or proceeding – prejudice to national security – if the proceeding concerns a sexual offence — identification of a victim of the alleged offence, or – if the proceeding involves the welfare or a child, or an offence where a child is the victim or alleged perpetrator – identification of the child. • See further ss 97–103 for provisions regarding interim orders, duration of orders, variation and revocation of orders, etc.

[62-100] Annexure — Non-publication/suppression order form

Non-publication/suppression order

Category	Legislation	Details
Order made:	❑ On application (*specify applicant name*):	
	❑ On the initiative of the court.	
Nature of order:	❑ Interim[1]	❑ Determined on merits

[1] The *Court Suppression and Non-publication Orders Act* allows for the making of interim non-publication and suppression orders. An interim order may be made without determining the merits of an application and continues until the application is determined or the order is revoked by the court: s 10(1).

Category	Legislation	Details
Type of order:	❑ Non-publication[2]	❑ Suppression[3]

[2] A non-publication order is an order that prohibits or restricts the publication of information (but does not otherwise prohibit or restrict the disclosure of information). To "publish" means to disseminate or provide access to the public or a section of the public by any means.

[3] A suppression order is an order that prohibits or restricts the disclosure of information, whether by publication or otherwise. It is broader than a non-publication order.

Information to which the order applies (the "relevant information"):

.....

.....

.....

.....

Manner of restraint: Publication/disclosure (*select applicable*) of the relevant information is:

❑ Prohibited

❑ Restricted in the following manner:

.....

.....

.....

Duration of order: Until (*select applicable*):

❑ Date .....

❑ Event .....

Where order applies:[4]

❑ New South Wales

❑ Other (*specify*): .....

❑ The court is satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made.

[4] The *Court Suppression and Non-publication Orders Act* allows for the making of orders that apply in New South Wales or anywhere in the Commonwealth: s 11(1). If making an order that applies outside New South Wales, the Court must be satisfied that having the order apply outside New South Wales is necessary for achieving the purpose for which the order is made: s 11(2).

Order made pursuant to:

❑ Section 7 *Court Suppression and Non-publication Orders Act*

❑ The court has taken into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.[5]

[5] This is a required consideration pursuant to s 6 *Court Suppression and Non-publication Orders Act*.

Ground/s for order (select one or more):[6]

[6] These grounds are specified in s 8. An order made under the *Court Suppression and Non-publication Orders Act* must specify the ground/s on which it is made: s 8(2).

- ❑ Order is necessary to prevent prejudice to the proper administration of justice.
- ❑ Order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security.
- ❑ Order is necessary to protect the safety of any person.
- ❑ Order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency).
- ❑ It is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

❑ *Coroners Act* 2009

❑ s 74 ❑ s 75

❑ s 45(2) *Crimes (Domestic and Personal Violence) Act* 2007

❑ s 16A *Director of Public Prosecutions Act* 1983 (Cth)

❑ s 126E *Evidence Act* 1995

❑ s 28 *Law Enforcement (Controlled Operations) Act* 1997

❑ s 6 *Lie Detectors Act* 1983

❑ s 96 *Service and Execution of Process Act* 1992 (Cth)

❑ s 42 *Surveillance Devices Act* 2007

❑ s 28 *Witness Protection Act* 1994 (Cth)

❑ Other (*specify*):

The order is made for the following reason/s (*specify if applicable*): .....

.....

.....

Magistrate .....

Court location .....

Date .....

[62-120] Review of order

The order is:

❑ Confirmed

❑ Revoked

❑ Varied as follows:

.....

.....

.....

The court makes the following other order/s (*specify if applicable*):

Magistrate .....

Court location .....

Date .....

Oaths

[64-000] Oaths and affirmations — Ch 2 Pt 2.1 Div 2 Evidence Act 1995

Subject to the provisions of s 13, a witness (see Dictionary section of the *Evidence Act*) must before giving evidence take an oath or make an affirmation: s 21.

Similarly a person acting as an interpreter must take an oath or make an affirmation before acting as an interpreter: s 22.

A witness or an interpreter may choose whether to take an oath or to make an affirmation and the court is to advise the individual of the right to choose: s 23. Generally this will be attended to by the court officer: s 24.

It should also be noted that it is no longer necessary that an oath be taken on a religious text.

[64-020] Forms of oath and affirmation

Sections 21(4), 22(2) and Sch 1 provide for the forms of the oaths and affirmations.

Oaths by witnesses

I swear (or the person taking the oath may promise) by Almighty God (or the person may name a god recognised by his or her religion) that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Oaths by interpreters

I swear (or the person taking the oath my promise) by Almighty God (or the person may name a god recognised by his or her religion) that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

Affirmations by witnesses

I solemnly and sincerely declare and affirm that the evidence I shall give will be the truth, the whole truth and nothing but the truth.

Affirmations by interpreters

I solemnly and sincerely declare and affirm that I will well and truly interpret the evidence that will be given and do all other matters and things that are required of me in this case to the best of my ability.

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Right of appearance

[66-000] Introduction

The right of appearance for a party and the right of a party to conduct a case are contained in:

- ss 36A, 37 *Criminal Procedure Act* 1986 for indictable/summary matters
- s 57, 58 *Local Court Act* 2007 for application proceedings.

Both sets of provisions are in similar terms. The following observations are made:

1. An individual responsible for initiating proceedings (eg, court attendance notice), or who has conduct of proceedings (eg, DPP) will have the right to appear and conduct a case personally or by his/her lawyer.
2. A police prosecutor has a statutory right of appearance when representing another police officer and may conduct the case without seeking leave of the court.
3. A police prosecutor also has a statutory right of appearance when representing a prosecutor in proceedings for an offence for which a penalty notice was issued.
4. A police prosecutor must seek leave to appear for and conduct a case on behalf of a public officer who is not a police officer such as the RTA in licence appeals.
5. The court retains a discretion at common law to grant leave to persons such as police prosecutors in 4 above and to other persons who otherwise do not have a statutory right of appearance.

[66-020] Criminal Procedure Act provisions

Section 36 provides:

> Representation and appearance
>
> 1. A prosecutor or accused person may appear personally or by an Australian legal practitioner or other person empowered by an Act or other law to appear for the prosecutor or accused person.
> 2. A prosecutor who is a police officer may appear personally or by a person permitted by subsection (1) or by a police prosecutor.

The term "prosecutor" has a wide definition covering the majority of criminal matters where the investigating police officer institutes proceedings by issuing and filing a court attendance notice: s 3 provides:

> prosecutor means the Director of Public Prosecutions or other person who institutes or is responsible for the conduct of a prosecution and includes (where the subject matter or context allows or requires) an Australian legal practitioner representing the prosecutor.

The term "accused person" is defined in s 3 as:

> accused person includes, in relation to summary offences, a defendant and, in relation to all offences (where the subject matter or context allows or requires), a barrister or solicitor representing an accused person.

Section 36A provides:

> Representation and appearance in penalty notice matters
>
> (1) In any criminal proceedings relating to an offence for which a penalty notice was issued under this or any other Act, the prosecutor of the offence may be represented and appear by a police prosecutor.
>
> (2) Nothing in this section:
>
> (a) requires a police prosecutor to represent or appear for any person, or
>
> (b) prevents any person from appearing personally, or being represented and appearing by an Australian legal practitioner or other person empowered by an Act or other law to appear for the person, in any proceedings.

This provision was inserted by the *Fines Amendment Act* 2008 with effect from 25 June 2008 in order to remove the court's discretion to refuse leave for police prosecutors to appear in such proceedings. The parliamentary intention was to "recognise the longstanding practice of the State Debt Recovery Office of using the services of police prosecutors in the Local Court when prosecuting matters that have been the subject of a penalty notice".

Section 37 provides:

> Conduct of case
>
> (1) the prosecutor's case may be conducted by the prosecutor or by the prosecutor's Australian legal practitioner or any other person permitted to appear for the prosecutor (whether under this or any other Act).
>
> (2) the accused person's case may be conducted by the accused person or by the accused person's Australian legal practitioner or any other person permitted to appear for the accused person (whether under this or any other Act).

The effect of the above sections is that a police prosecutor may conduct a case under s 37 without leave where he/she is representing a police officer or prosecutor who has issued a penalty notice, because, to use the words of s 37(1), the police prosecutor is a person permitted to appear for the prosecutor under this Act by virtue of s 36(2) or s 36A(1).

[66-040] Residual discretion to grant leave

The Local Court has an implied power to grant leave to persons not otherwise having a right of appearance, such as an unadmitted police prosecutor or in the case of a defendant, permitting a McKenzie friend to assist. It would be rare to refuse leave to a police prosecutor to appear for an informant: see generally *Connor v Petelo* [2005] NSWSC 1025.

Correctional centres and visiting magistrates

Note: All references to sections of legislation in this chapter are, unless otherwise stated, references to sections of the *Crimes (Administration of Sentences) Act* 1999.

[68-000] Introduction

The *Crimes (Administration of Sentences) Act* 1999 makes provision, inter alia, for breaches by inmates against correctional centre discipline to be dealt with by a magistrate, designated as a visiting magistrate, in the correctional centre complex.

[68-020] Visiting magistrates — s 227

Section 227 provides that for each correctional complex or correctional centre there shall be a visiting magistrate, being a magistrate appointed by the Chief Magistrate. Before performing duty at any particular correctional centre, a magistrate should enquire as to whether he or she has been appointed as a visiting magistrate to that correctional centre.

Visiting magistrates should always carry a magistrate's identification card as proof of identity may be required: cl 93 *Crimes (Administration of Sentences) Regulation* 2014.

Correctional centre inspections — s 229

A visiting magistrate and indeed any magistrate may visit and examine any correctional complex or correctional centre at any time he or she thinks fit. There is, however, no longer any requirement of a visiting magistrate to examine the correctional centre.

Inquiries — s 230

Section 230 makes provision for the holding of an inquiry and reporting upon any matter relating to the security, good order, control and management of a correctional complex or correctional centre. Such inquiries have certain powers, as outlined in s 230, under the *Royal Commissions Act* 1923. Such an inquiry is at the request of the Minister and is quite distinct and separate from the general visiting magistrate hearings mentioned below.

Breach of correctional centre discipline — s 51

Pursuant to s 51 of the Act, the regulations may provide that contravention (by act or omission) of certain provisions of the regulations by an inmate is declared to be a correctional centre offence if it occurs while the inmate is within a correctional centre or is deemed to be in the custody of the Governor of a correctional centre.

Contravention of certain regulations may be dealt with by the Governor if satisfied beyond reasonable doubt that the allegation has been proved and may impose one of a specified number of penalties: s 53.

[68-040] Jurisdiction of visiting magistrate — s 54

A visiting magistrate to a correctional centre may hear and determine any matter referred to him by the Governor of a correctional centre where an inmate has been charged by the Governor with a correctional centre offence.

The Governor may refer all matters where the Governor is satisfied the seriousness of the matter is such that it should be referred to a visiting magistrate: see s 54.

The visiting magistrate has jurisdiction to hear an allegation of a breach of correctional centre discipline if such offence allegedly occurred while the inmate was within a correctional centre or was deemed to be in the custody of the Governor of a correctional centre: s 55. It may be dealt with even though the breach occurred while the inmate was within another correctional complex or correctional centre or in the custody of the Governor of another correctional centre: see s 65.

Section 55(5) provides: Any hearing in proceedings before a visiting magistrate shall be held:

(a) in the correctional centre at which the inmate is in custody; or

(b) if the visiting magistrate is satisfied that it is in the interests of justice for it to be held elsewhere — at any other place appointed by the magistrate.

The Act makes provision for the appearance of inmates and/or witnesses by way of audio visual link where those facilities are reasonably available: s 55(5A)–(5B).

Transfer of proceedings to another correctional centre — s 55(6)

A visiting magistrate may transfer proceedings to the visiting magistrate for another correctional centre to which the inmate has been transferred: s 55(6).

Transfer of proceedings to a Local Court — s 58

If the visiting magistrate, on the hearing of a charge against an inmate, is of the opinion that the alleged offence could be prosecuted either summarily in a local court or on indictment, and that it should be so prosecuted, the visiting magistrate shall terminate the hearing and order the inmate to be conveyed to a local court to be dealt with according to law: s 58.

[68-060] Procedure at hearings before a visiting magistrate — s 55

The *Crimes (Administration of Sentences) Act* provides that procedures under the *Criminal Procedure Act* 1986 apply in relation to hearings before a visiting magistrate, subject to any modifications prescribed by regulations or as the visiting magistrate considers appropriate: s 55. There is nothing in the regulations to modify procedure.

The hearing of a breach of correctional centre discipline is, procedurally, the same as hearing any other criminal case in a Local Court, whether it is being dealt with as a plea of guilty or a plea of not guilty. The location is naturally different. Generally matters are heard in a room set aside in the correctional centre. Parties sit at desks suitably located around the room. Evidence is usually recorded, either by a shorthand writer or by sound recording, depending upon the location: see s 39 *Criminal Procedure Act*.

Section 55(5A) provides for the hearing of proceedings or the giving of evidence by way of audio visual link from the correctional centre where the defendant or any inmate called as a witness is in custody. The magistrate may also direct other persons, not being inmates, to give evidence by audio visual link. Procedural fairness must apply: s 55(5B).

Sections 5D, 20A, 20B and 20D–20F of the *Evidence (Audio and Audio Visual Link) Act* 1998 apply with such modifications as the magistrate sees fit.

The Prosecution is conducted by a legal officer from the Department of Corrective Services. Sometimes, in the country, local practitioners prosecute under instruction from the Department of Corrective Services. The inmate is entitled to be represented by a barrister or solicitor: s 55(4). This is usually attended to by a solicitor from the Legal Aid Commission.

A correctional centre officer invariably is assigned to assist by calling witnesses and swearing in those witnesses.

Adjournments

Adjournments are dealt with in the same manner as in the local court. As to the listing of defended matters, in the Sydney metropolitan area the diary is maintained by the officer of the Department of Corrective Services. Those visiting magistrates at other correctional centres maintain their own diary.

Standard of proof — s 56

The standard of proof required when a plea of not guilty has been entered to a charge is the criminal standard, beyond a reasonable doubt: s 56.

Antecedents

After receiving a plea of guilty or finding an allegation proved, the visiting magistrate will receive from the prosecution details of the time the inmate has spent in a correctional centre and whether or not there have been other breaches of correctional centre discipline. Criminal convictions will not be tendered and are not relevant to determine what, if any, penalty should be imposed.

[68-080] Penalties — s 56 and cl 163

Section 56 provides that one and no more than one of a number of penalties may be imposed by the visiting magistrate. The penalties are:

(1) Reprimand and caution;

(2) Deprivation, for up to 90 days, of such withdrawable privileges as the visiting magistrate may determine.

The following amenities or privileges have been prescribed: cl 163 *Crimes (Administration of Sentences) Regulation* 2014:

(a) attendance at the showing of films or videos or at concerts or other performances,

(b) participation in or attendance at any other organised leisure time activity,

(c) use of, or access to, films, video tapes, records, cassettes, CDs or DVDs,

(d) use of, or access to, television, radio or video, cassette, CD or DVD players, whether for personal use or for use as a member of a group,

(e) use of, or access to, a musical instrument, whether for personal use or for use as a member of a group

(f) use of library facilities, except in so far as their use is necessary to enable study or research to be undertaken by an inmate in the inmate's capacity as a student who is enrolled in a course of study or training,

(g) ability to purchase goods (including under cl 177),

(h) keeping of approved personal property (including goods purchased or hired under cl 177),

(i) pursuit of a hobby,

(j) use of telephone, except for calls to legal practitioners and exempt bodies,

(k) participation in contact visits,

(l) permission to be absent from a correctional centre under a local leave permit or interstate leave permit.

(3) Confinement to a cell for up to 28 days, with or without deprivation of withdrawable privileges;

(4) Cancellation of any right to receive payments under section 7 for up to 14 days, but to the extent only to which those payments are additional to the payments made at the base rate to inmates generally or to inmates of a class to which the inmate belongs;

(5) Extension, by up to at 6 months at a time, of:

(a) the term of the inmate's sentence, and

(b) in the case of an offence occurring during a non-parole period of the inmate's sentence, the non-parole period of the sentence;

(6) Imposition of a sentence of imprisonment for a period not exceeding 6 mths.

(7) Section 56A: A special penalty is provided for possession of a mobile phone, a SIM card, a mobile phone charger, or any part of any of those items. Offenders may be deprived of withdrawable privileges as may be defined for a period of up to 6 months, rather that the 90 days otherwise provided by s 56.

Although the allegation is proved, the visiting magistrate, if of the opinion that a penalty should not be imposed, may dismiss the charge: s 56(2).

Penalties (2), (3) and (4) above take effect immediately. It is not unusual to receive a request that, for example, confinement to cells commence sometime in the future to allow a visit to take place the next day. There is no power in the Act to date those penalties from some date in the future.

[68-100] Cumulative punishment — s 60

Section 60 of the *Crimes (Administration of Sentences) Act* provides that if:

(a) an inmate is charged with two or more correctional centre offences; and

(b) those charges are determined together or arise out of a single incident;

any cumulative penalties imposed for those offences must not, in respect of any particular kind of penalty, exceed the maximum penalty that may be imposed in relation to a single correctional centre offence.

Compensation — s 59

A visiting magistrate may order an inmate, if such inmate has caused any loss of or damage to property as the result of committing a correctional centre offence, to pay compensation, to the Crown or, if the property belongs to some other person, to that other person. The compensation is paid out of any money held by a Governor on behalf of an inmate or out of any other money otherwise payable to the inmate under the Act or regulations: s 59. Compensation cases are nearly always referred to the magistrate as the Governor is limited to $500 compensation. There is no longer any monetary limit under the Act for magistrates.

Recording of punishment — s 61

It is mandatory for a Governor to cause to be recorded, when a punishment is imposed, the following:

(a) a statement of the nature and date of the offence;

(b) the name of the inmate;

(c) the date of sentence;

(d) the penalty imposed; and

(e) any order under s 59 for the payment of compensation.

[68-120] Appeals against decisions of visiting magistrates — s 62

An inmate may appeal to the District Court under Pt 3 *Crimes (Appeal and Review) Act* 2001, as if the penalty were a sentence from a court attendance notice dealt with under the *Criminal Procedure Act*.

[68-140] Other criminal proceedings for the same offence — s 63

Section 63 provides:

(1) For the purpose of determining whether proceedings for a criminal offence may be brought for the act or omission giving rise to a correctional centre offence, the decision of a visiting magistrate in proceedings for the correctional centre offence is taken to be the decision of a court in proceedings for a criminal offence.

(2) Proceedings for a correctional centre offence are not to be commenced or continued under this Division if proceedings for a criminal offence have been commenced in a court for the act or omission giving rise to the correctional centre offence.

Form of orders — s 56 and cl 163

Allegation proved *or* charge dismissed.

[*Where allegation proved, specify one of the following available penalties*]:

– the inmate is reprimanded and cautioned

– the inmate is deprived of the withdrawable privilege of [*specify — see cl 163*] for a period of [*specify — up to 90 days, or in the case of use/possession of a mobile phone offences under s 56A, up to 6 months*]

– the inmate is confined to his/her cell for a period of [*specify — up to 28*] days, [*specify if applicable*] with deprivation of the withdrawable privilege/s of [*specify — see cl 163*]

– the inmate's rights to payment for [*specify — eg, work done*] are cancelled for a period of [*specify — up to 14*] days.

– the term of the inmate's sentence, [*if applicable*] and the non-parole period of the inmate's sentence, is extended by a period of [*specify — up to 6 months*]

– the inmate is sentenced to imprisonment for a period of [*specify — up to 6 months*].

It is ordered that the inmate pay to the Crown (or some other person) an amount of $[.....] as compensation for the loss (or damage) caused by this offence.

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Legal Profession Uniform Conduct Rules

[70-000] Rules

Last reviewed: November 2023

- Legal Profession Uniform Conduct (Barristers) Rules 2015,
- Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

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Judicial officers giving testimonials

[72-000] General guidance

The Commission has received some communications expressing concern about some judicial officers who have given evidence or provided written material by way of testimonial which has been used in court as character material and enquiring whether the Commission would be prepared to indicate its views on the matter. The Commission has considered the implications of a judicial officer so involving him or herself. It believes there may be some measure of confusion and that it would be desirable for it to express general guidance for all judicial officers. In so doing, the Commission wishes to emphasise that it is concerned to ensure that the reputation of individual judicial officers and of the courts generally is not liable to the risk of attack.

Generally speaking, the Commission expresses the view that judicial officers should not give character evidence nor issue written testimonials directed to the same issue. This general statement is subject to two qualifications:

(a) there would be no objection to a judicial officer so acting when it would be unjust or unfair to deprive the beneficiary of special knowledge possessed by the judicial officer; and

(b) there would be no objection to a judicial officer providing a person who had been a member of the judicial officer's personal staff with a reference relating to employment.

Cases have come to the notice of the Commission in which references from judicial officers have been tendered. These have been regarded as a real source of embarrassment to the presiding officer who, on occasions, has had to ignore or reject the opinions there offered. It would of course, be the more so if upon giving evidence viva voce the witness were cross examined adversely. The Commission therefore indicates that it considers it desirable that all judicial officers should adhere to these views and that if any occasion arises which provides doubt, the individual should seek the advice of the head of the jurisdiction.

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Bias

see *Civil Trials Bench Book* — Disqualification for bias at [1-0000]–[1-0060]

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Local Court Practice Notes

Case management of criminal proceedings in the Local Court

Last reviewed: November 2023

- Practice Note Crim 1 Case management of criminal proceedings in the Local Court

  Attachments

  A Notice of appearance

  B Listing advice

  C Application to vacate a hearing

  D Application to give evidence via AVL

  E Evidence of domestic violence complainant in criminal proceedings

Domestic and personal violence proceedings

Last reviewed: November 2023

- Practice Note No 2 of 2012: Domestic and personal violence proceedings

  Attachments

  Timetable for statements

Specialist Family Violence List Pilot

Last reviewed: November 2023

- Practice Note: Specialist Family Violence List Pilot

Procedures to be adopted for committal proceedings before the Local Court on and from 26 June 2017 to 29 April 2018

Last reviewed: November 2023

- Practice Note: Committal Proceedings Comm 1

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  Summary of processes of criminal matters in the Local Court

Procedures to be adopted for committal proceedings relating to offences commenced on and from 30 April 2018 to 8 January 2023 in the Local Court

Last reviewed: November 2023

- Practice Note: Committal proceedings Comm 2

  Attachments

  Progress of Committal Proceedings through the Local Court

Procedures to be adopted for committal proceedings relating to offences commenced on or after 9 January 2023 in the Local Court

Last reviewed: November 2023

- Practice Note: Committal proceedings Comm 3

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  Progress of Committal Proceedings through the Local Court

Civil procedure

Last reviewed: November 2023

- Practice Note Civ 1 Case management of civil proceedings in the Local Court

  Annexures

  A General Division — Standard Directions

  B Local Court — Civil listing advice

  C Application for witness to give evidence via telephone or audio visual link

  D Pre-trial review sheet

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Form of address in court

Last reviewed: November 2023

- Practice Note No 1 of 2004

Identity theft prevention and anonymisation policy

Last reviewed: November 2023

- Practice Note No 1 of 2008

Recording of court proceedings

Last reviewed: November 2023

- Practice Note No 1 of 2013

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  Form of Application by Media Representative

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1839 3	1865 1	1891 5	1917 2	1943 6	1969 4	1995 1	2021 6	2047 3	2073 1
1840 11	1866 2	1892 13	1918 3	1944 14	1970 5	1996 9	2022 7	2048 11	2074 2
1841 6	1867 3	1893 1	1919 4	1945 2	1971 6	1997 4	2023 1	2049 6	2075 3
1842 7	1868 11	1894 2	1920 12	1946 3	1972 14	1998 5	2024 9	2050 7	2076 11
1843 1	1869 6	1895 3	1921 7	1947 4	1973 2	1999 6	2025 4	2051 1	2077 6
1844 9	1870 7	1896 11	1922 1	1948 12	1974 3	2000 14	2026 5	2052 9	2078 7
1845 4	1871 1	1897 6	1923 2	1949 7	1975 4	2001 2	2027 6	2053 4	2079 1
1846 5	1872 9	1898 7	1924 10	1950 1	1976 12	2002 3	2028 14	2054 5	2080 9

1

JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4	1 2 3 4
8 9 10 11 12 13 14	5 6 7 8 9 10 11	5 6 7 8 9 10 11
15 16 17 18 19 20 21	12 13 14 15 16 17 18	12 13 14 15 16 17 18
22 23 24 25 26 27 28	19 20 21 22 23 24 25	19 20 21 22 23 24 25
29 30 31	26 27 28	26 27 28 29 30 31
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1	1 2 3 4 5 6	1 2 3
2 3 4 5 6 7 8	7 8 9 10 11 12 13	4 5 6 7 8 9 10
9 10 11 12 13 14 15	14 15 16 17 18 19 20	11 12 13 14 15 16 17
16 17 18 19 20 21 22	21 22 23 24 25 26 27	18 19 20 21 22 23 24
23 24 25 26 27 28 29	28 29 30 31	25 26 27 28 29 30
30		
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1	1 2 3 4 5	1 2
2 3 4 5 6 7 8	6 7 8 9 10 11 12	3 4 5 6 7 8 9
9 10 11 12 13 14 15	13 14 15 16 17 18 19	10 11 12 13 14 15 16
16 17 18 19 20 21 22	20 21 22 23 24 25 26	17 18 19 20 21 22 23
23 24 25 26 27 28 29	27 28 29 30 31	24 25 26 27 28 29 30
30 31		
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4	1 2
8 9 10 11 12 13 14	5 6 7 8 9 10 11	3 4 5 6 7 8 9
15 16 17 18 19 20 21	12 13 14 15 16 17 18	10 11 12 13 14 15 16
22 23 24 25 26 27 28	19 20 21 22 23 24 25	17 18 19 20 21 22 23
29 30 31	26 27 28 29 30	24 25 26 27 28 29 30
		31

2

JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1 2 3	1 2 3
7 8 9 10 11 12 13	4 5 6 7 8 9 10	4 5 6 7 8 9 10
14 15 16 17 18 19 20	11 12 13 14 15 16 17	11 12 13 14 15 16 17
21 22 23 24 25 26 27	18 19 20 21 22 23 24	18 19 20 21 22 23 24
28 29 30 31	25 26 27 28	25 26 27 28 29 30 31
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4 5	1 2
8 9 10 11 12 13 14	6 7 8 9 10 11 12	3 4 5 6 7 8 9
15 16 17 18 19 20 21	13 14 15 16 17 18 19	10 11 12 13 14 15 16
22 23 24 25 26 27 28	20 21 22 23 24 25	17 18 19 20 21 22 23
29 30	26 27 28 29 30 31	24 25 26 27 28 29 30
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4	1
8 9 10 11 12 13 14	5 6 7 8 9 10 11	2 3 4 5 6 7 8
15 16 17 18 19 20 21	12 13 14 15 16 17 18	9 10 11 12 13 14 15
22 23 24 25 26 27 28	19 20 21 22 23 24 25	16 17 18 19 20 21 22
29 30 31	26 27 28 29 30 31	23 24 25 26 27 28 29
		30
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1 2 3	1
7 8 9 10 11 12 13	4 5 6 7 8 9 10	2 3 4 5 6 7 8
14 15 16 17 18 19 20	11 12 13 14 15 16 17	9 10 11 12 13 14 15
21 22 23 24 25 26 27	18 19 20 21 22 23 24	16 17 18 19 20 21 22
28 29 30 31	25 26 27 28 29 30	23 24 25 26 27 28 29
		30 31

3

JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5	1 2	1 2
6 7 8 9 10 11 12	3 4 5 6 7 8 9	3 4 5 6 7 8 9
13 14 15 16 17 18 19	10 11 12 13 14 15 16	10 11 12 13 14 15 16
20 21 22 23 24 25 26	17 18 19 20 21 22 23	17 18 19 20 21 22 23
27 28 29 30 31	24 25 26 27 28	24 25 26 27 28 29 30
		31
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1 2 3 4	1
7 8 9 10 11 12 13	5 6 7 8 9 10 11	2 3 4 5 6 7 8
14 15 16 17 18 19 20	12 13 14 15 16 17 18	9 10 11 12 13 14 15
21 22 23 24 25 26 27	19 20 21 22 23 24 25	16 17 18 19 20 21 22
28 29 30	26 27 28 29 30 31	23 24 25 26 27 28 29
		30
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1 2 3	1 2 3 4 5 6 7
7 8 9 10 11 12 13	4 5 6 7 8 9 10	8 9 10 11 12 13 14
14 15 16 17 18 19 20	11 12 13 14 15 16 17	15 16 17 18 19 20 21
21 22 23 24 25 26 27	18 19 20 21 22 23 24	22 23 24 25 26 27 28
28 29 30 31	25 26 27 28 29 30 31	29 30
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5	1 2	1 2 3 4 5 6 7
6 7 8 9 10 11 12	3 4 5 6 7 8 9	8 9 10 11 12 13 14
13 14 15 16 17 18 19	10 11 12 13 14 15 16	15 16 17 18 19 20 21
20 21 22 23 24 25 26	17 18 19 20 21 22 23	22 23 24 25 26 27 28
27 28 29 30 31	24 25 26 27 28 29 30	29 30 31

4

JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4	1	1
5 6 7 8 9 10 11	2 3 4 5 6 7 8	2 3 4 5 6 7 8
12 13 14 15 16 17 18	9 10 11 12 13 14 15	9 10 11 12 13 14 15
19 20 21 22 23 24 25	16 17 18 19 20 21 22	16 17 18 19 20 21 22
26 27 28 29 30 31	23 24 25 26 27 28	23 24 25 26 27 28 29
		30 31
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5	1 2 3	1 2 3 4 5 6 7
6 7 8 9 10 11 12	4 5 6 7 8 9 10	8 9 10 11 12 13 14
13 14 15 16 17 18 19	11 12 13 14 15 16 17	15 16 17 18 19 20 21
20 21 22 23 24 25 26	18 19 20 21 22 23 24	22 23 24 25 26 27 28
27 28 29 30	25 26 27 28 29 30 31	29 30
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1 2	1 2 3 4 5 6 7
7 8 9 10 11 12 13	3 4 5 6 7 8 9	8 9 10 11 12 13 14
14 15 16 17 18 19 20	10 11 12 13 14 15 16	15 16 17 18 19 20 21
21 22 23 24 25 26 27	17 18 19 20 21 22 23	22 23 24 25 26 27 28
28 29 30 31	24 25 26 27 28 29 30	29 30
	31	
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5	1	1 2 3 4 5 6
6 7 8 9 10 11 12	2 3 4 5 6 7 8	7 8 9 10 11 12 13
13 14 15 16 17 18 19	9 10 11 12 13 14 15	14 15 16 17 18 19 20
20 21 22 23 24 25 26	16 17 18 19 20 21 22	21 22 23 24 25 26 27
27 28 29 30 31	23 24 25 26 27 28 29	28 29 30 31
	30	

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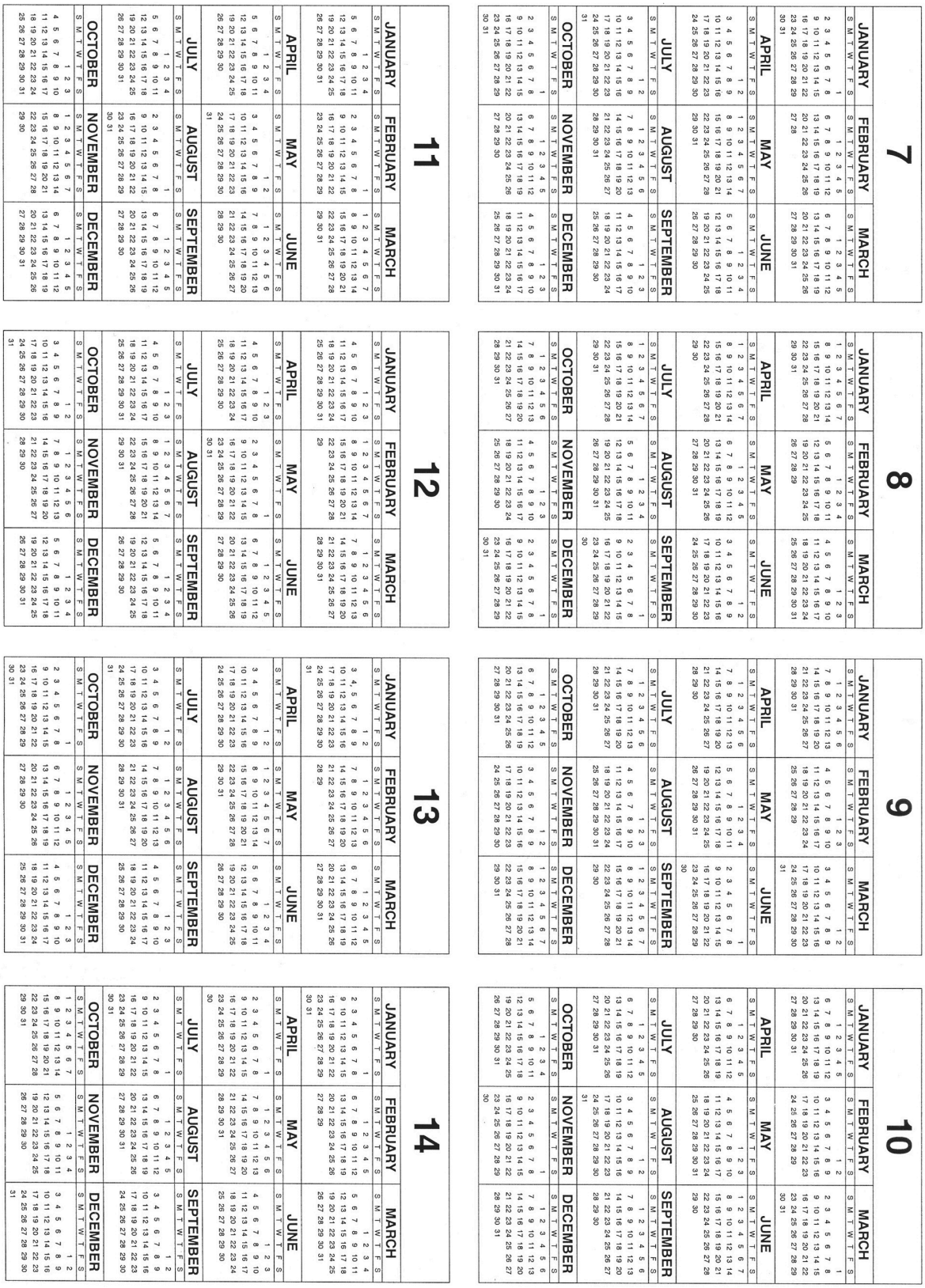
JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6 7	1 2 3 4 5 6 7	1 2 3 4 5 6 7
8 9 10 11 12 13 14	8 9 10 11 12 13 14	8 9 10 11 12 13 14
15 16 17 18 19 20 21	15 16 17 18 19 20 21	15 16 17 18 19 20 21
22 23 24 25 26 27 28	22 23 24 25 26 27 28	22 23 24 25 26 27 28
29 30 31		29 30 31
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4	1 2	1 2 3 4 5 6
5 6 7 8 9 10 11	3 4 5 6 7 8 9	7 8 9 10 11 12 13
12 13 14 15 16 17 18	10 11 12 13 14 15 16	14 15 16 17 18 19 20
19 20 21 22 23 24 25	17 18 19 20 21 22 23	21 22 23 24 25 26 27
26 27 28 29 30	24 25 26 27 28 29 30	28 29 30
	31	
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3 4 5 6	1	1 2 3 4 5
7 8 9 10 11 12 13	2 3 4 5 6 7 8	6 7 8 9 10 11 12
14 15 16 17 18 19 20	9 10 11 12 13 14 15	13 14 15 16 17 18 19
21 22 23 24 25 26 27	16 17 18 19 20 21 22	20 21 22 23 24 25 26
28 29 30 31	23 24 25 26 27 28 29	27 28 29 30
	30 31	
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3	1 2 3 4 5 6 7	1 2 3 4 5
4 5 6 7 8 9 10	8 9 10 11 12 13 14	6 7 8 9 10 11 12
11 12 13 14 15 16 17	15 16 17 18 19 20 21	13 14 15 16 17 18 19
18 19 20 21 22 23 24	22 23 24 25 26 27 28	20 21 22 23 24 25 26
25 26 27 28 29 30 31	29 30	27 28 29 30 31

6

JANUARY	FEBRUARY	MARCH
S M T W T F S	S M T W T F S	S M T W T F S
1 2	1 2 3 4 5 6	1 2 3 4 5 6
3 4 5 6 7 8 9	7 8 9 10 11 12 13	7 8 9 10 11 12 13
10 11 12 13 14 15 16	14 15 16 17 18 19 20	14 15 16 17 18 19 20
17 18 19 20 21 22 23	21 22 23 24 25 26 27	21 22 23 24 25 26 27
24 25 26 27 28 29 30	28	28 29 30 31
31		
APRIL	**MAY**	**JUNE**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3	1	1 2 3 4 5
4 5 6 7 8 9 10	2 3 4 5 6 7 8	6 7 8 9 10 11 12
11 12 13 14 15 16 17	9 10 11 12 13 14 15	13 14 15 16 17 18 19
18 19 20 21 22 23 24	16 17 18 19 20 21 22	20 21 22 23 24 25 26
25 26 27 28 29 30	23 24 25 26 27 28	27 28 29 30
	30 31	
JULY	**AUGUST**	**SEPTEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2 3	1 2 3 4 5 6 7	1 2 3 4
4 5 6 7 8 9 10	8 9 10 11 12 13 14	5 6 7 8 9 10 11
11 12 13 14 15 16 17	15 16 17 18 19 20 21	12 13 14 15 16 17 18
18 19 20 21 22 23 24	22 23 24 25 26 27 28	19 20 21 22 23 24 25
25 26 27 28 29 30 31	29 30 31	26 27 28 29 30
OCTOBER	**NOVEMBER**	**DECEMBER**
S M T W T F S	S M T W T F S	S M T W T F S
1 2	1 2 3 4 5 6	1 2 3 4
3 4 5 6 7 8 9	7 8 9 10 11 12 13	5 6 7 8 9 10 11
10 11 12 13 14 15 16	14 15 16 17 18 19 20	12 13 14 15 16 17 18
17 18 19 20 21 22 23	21 22 23 24 25 26 27	19 20 21 22 23 24 25
24 25 26 27 28 29 30	28 29 30	26 27 28 29 30 31
31		



Approximate sunrise and sunset at Sydney

This table is expressed in Eastern Standard Time, ten hours ahead of Greenwich Mean Time.

January			February			March		
	Rises	Sets		Rises	Sets		Rises	Sets
5	4.51	7.10	2	5.17	7.00	2	5.44	6.31
12	4.57	7.10	9	5.24	6.54	9	5.49	6.22
19	5.03	7.08	16	5.31	6.47	16	5.55	6.13
26	5.10	7.05	23	5.37	6.40	23	6.00	6.03
						30	6.06	5.54

April			May			June		
	Rises	Sets		Rises	Sets		Rises	Sets
6	6.11	5.44	4	6.32	5.12	1	6.52	4.54
13	6.16	5.35	11	6.37	5.06	8	6.55	4.53
20	6.21	5.27	18	6.42	5.01	15	6.58	4.53
27	6.27	5.19	25	6.47	4.57	22	7.00	4.54
						29	7.01	4.56

July			August			September		
	Rises	Sets		Rises	Sets		Rises	Sets
6	7.01	4.59	3	6.47	5.17	7	6.06	5.41
13	6.59	5.03	10	6.40	5.22	14	5.57	5.46
20	6.56	5.07	17	6.33	5.27	21	5.47	5.51
27	6.52	5.12	24	6.24	5.32	28	5.37	5.56
						31	6.16	5.36

October			November			December		
	Rises	Sets		Rises	Sets		Rises	Sets
5	5.28	6.01	2	4.54	6.24	7	4.37	6.56
12	5.18	6.06	9	4.48	6.31	14	4.38	7.02
19	5.10	6.12	16	4.43	6.37	21	4.41	7.06
26	5.02	6.18	23	4.40	6.44	28	4.45	7.09
						30	4.38	6.50

Allowance must be made for Central and Western Standard Times and for Regional Summer Times when applicable.

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