The Plea of Guilty

(How to protect your client & your practising certificate)

A short guide to issues arising from the plea of guilty: pleas of convenience and plea traversals

By Eugene Renard, Solicitor Advocate, Legal Aid NSW

This topic is a very broad one and could easily be the topic for a full day's CLE. Mercifully, I only have an hour so I will do my very best to stay within those confines.

The focus of this presentation is protective and comes about out of a desire by me to help other practitioners avoid situations arising in their own practices where there are either complaints or traversals of instructions given.

What is a plea of guilty?

A plea of guilty is a 'formal confession of the existence of every ingredient necessary to constitute the offence.' The plea of guilty admits all the elements of the offence charged but no more: R v Maitland [1963] SASR 332.5

A plea of guilty is a significant step in a criminal case and one that should not be taken lightly without consideration of the consequences.

In R v Balchin (1974) 9 SASR 64 (CCA) the court said in a joint judgment (at 67): *[I]t could well constitute a breach of professional duty to an accused person if his counsel without specific authority to do so, should make any admission which could be detrimental to the interests of the accused, or which otherwise might have the effect of depriving him of a fair trial.*

In R v Birks (1990) 19 NSWLR 677; 48 A Crim R 385 Lusher J said (at 702; 409): *[I]n a criminal trial an admission, and a waiver is in the nature of an admission, can only be made by an accused on the advice of counsel, sensibly and usually in writing, which is difficult to obtain or give in the run of a vigorous cross-examination. Lastly, an accused cannot be required to make an admission or even to consider one.*

It is important to remember in the grind of a list day or the rigours of criminal practice, **not** to lose sight of the fact that a plea of guilty is an admission by your client to all elements of the offence with which they have been charged.

> Once entered, it is <u>not easily</u> withdrawn. As you will see further on in this paper, the onus is on the applicant (accused) to establish a **miscarriage of justice** *unless* **there has been an honest mistake by the practitioner who entered the plea**

It is crucial, in all cases, to advise a client that they will receive a discount on sentence if they plead guilty or take other steps to shorten or reduce the matter:

"A practitioner must (unless circumstances warrant otherwise in the practitioner's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings." (Sub-rule A.17B under Rule 23 – Advocacy Rules, Solicitors Rules)

Plea of Guilty Checklist

Prior to entering a plea of guilty on behalf of a client for a Local Court matter, a practitioner should consider the following points:

1. **Has my client read/been read the proposed facts?**

   (In GAS v The Queen (2004) 217 CLR 198 at [30] the full bench of the High Court said: In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge's capacity to find potentially relevant facts in a given case.

   In R v Crowley [2004] NSWCCA 256 at [46], Smart AJ said: Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory.1)

   To some extent, this issue has fallen away with present District Court practice notes requiring agreed facts to be signed by the offender. It is vital to your practice that you ensure you have a copy of the agreed facts on sentence (signed by your client), on file, ideally accompanied by a contemporaneous file note written by the solicitor indicating that the client read or was read the facts and agrees with them.

2. **Is my client aware of the applicable maximum penalty? Is there a SNPP?**

   Although the Local Court is limited in its jurisdiction, the maximum penalty is a relevant consideration on sentence as it demonstrates the intention of Parliament

   -particularly important with more and more offences being on Table 1 of Schedule 1 of the *Criminal Procedure Act 1986*

   It's also important to make sure that your client is aware of the SNPP. N.B it does not apply in juvenile matters: s 54D (3) Crimes Sentencing Procedure Act 1999

   If a court is sentencing an offender who was under 18 years at the time a standard non parole period offence is committed, it is to disregard the standard non parole period entirely and even oblique usage entails error: BP v R (2010)

201 A Crim R 379 at [36]; citing McGrath v R (2010) 199 A Crim R 527 at [37], [60]; AE v R [2010] NSWCCA 203 at [23].

3. **Is my client aware of the consequential orders that may be made?**

   - LEPRA identification orders?

     (section 134 *Law Enforcement (Powers and Responsibilities) Act)*

     Eg not available for summary offences, possess prohibited drug etc

   - Disqualification periods? Mandatory interlock periods?

   - CPR considerations – does it apply?

   - *Take client through reportable information and reporting obligations*

   - *Advise on length of time for reporting obligations which is offence specific*

   - Loss of firearms licence? Professional consequences?

4. **Does my client understand the 'four routes' available to them (if summary)?**

   - Defend the matter – take all charges to hearing (PNG)

   - Representations – write to the LAC and negotiate on charges/facts?

   - Plead guilty

   - Section 32/Section 20BQ (Cth)

5. **If Indictable – have you canvassed matters in s 72 *Criminal Procedure Act* concerning the discount? Explained what a case conference is? Explained reduction in discounts for later pleas?**

6. **Record an acknowledgment by the client that if they plead guilty they cannot later tell a court that they are not guilty.**

If you can answer yes to all these points and your client has acknowledged the effect of a plea and still wishes to plead guilty, record those instructions, ideally in writing (precedent at end of paper).

Record the reason why they are pleading guilty! It could be as simple as "I instruct you that I committed the offence as charged and I agree with the police facts as outlined" … in a simple case.

There may be cases where a client is pleading guilty but provides another reason altogether. For example, in a domestic violence situation:

"Just plead guilty to it. I know she's lying but I don't want her to have to come to court/ I don't want our children to have to come to court."

Sometimes it might merely be the recognition of a strong crown case and a desire to preserve the discount on sentence:

> *"a plea of guilty is ordinarily a matter to be taken into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial. The extent of the mitigation may vary depending on the circumstances of the case."*[1]

Whatever the reason, it is important that the reason is recorded on your file note/ duty form, ideally capturing the client's words & yours verbatim if possible.

C Craigie SC, as a Public Defender wrote in a very helpful paper (revised by Chrissa Loukas):

> *Let there be no doubt that your client instructs you, not merely that the client wants a guilty plea but is in fact guilty - see R v Turner [1970] 2 QB 321. This principle applies whether the plea has arisen from initial instructions or has arisen as a consequence of the client abandoning early instructions of innocence. To this end, a signed confirmation of instructions to plead, preferably reciting the elements of the offence as applied to the facts, is desirable. The important matters are that guilt is plainly conceded either on the basis of what the client concedes specifically and knows or [particularly in the case of the all too common "I don't remember" instruction] concedes as being the undoubted and provable truth, even if not remembered by the client*

PLEAS OF CONVENIENCE

The law recognises that there are circumstances where a person may plead guilty for other reasons. This might be:

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Each of the above fall under the category of a ***plea of convenience***. The leading authority on this issue is the case of *Meissner v R* (1995) 184 CLR 132.

[1] Siganto v The Queen (1998) 194 CLR 656 at [22]

In *Meissner*, Brennan, Toohey and McHugh JJ said (at 141; 313):

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if the Court does act on such a plea, even if the person entering it is not indeed guilty of the offence.""

The case of *Meissner v R* suggests that there are four criteria that must be met (and should be considered by any lawyer contemplating this course):

1. Is the person of full age?

2. Are they of sound mind and understanding?

3. Is the plea of guilty entered in exercise of a free choice?

4. Is it in the interests of the person entering the plea?

When might it be in the interest of a person to enter a plea of guilty to an offence when they are asserting that they are not guilty?

i) When the Crown has a strong case;

ii) Where the Crown has tendency evidence that they would seek to adduce (such as in child sexual offences) – but consider carefully whether such evidence would be admissible.

iii) Where the plea of guilty might mean the difference between gaol and a community-based sentence

Obviously each case turns on its own facts and the spectre of the discount for a plea of guilty hangs over each criminal matter that is before the Courts.

It is important that as a practitioner you are satisfied that each of the above questions can be answered 'affirmatively' as a yes.

It is advisable that you keep a file note of your advice and set out the reasons why you felt it was in the person's interests to enter the plea of guilty in circumstances where they are asserting their innocence.

The practical consideration where your client is charged with serious offences and wants to plead guilty but refuses to admit to you that they are in fact guilty of what they are charged with (or are only guilty of some of it, and not all?) is that it is imperative that you get **signed written instructions** from your client which reflect that position.

In *R v Allison* [2003] QCA 125, Jerrard JA at [26]:

> "[e]xperience shows that some people charged with serious offences (and particularly offences of incest or indecently dealing with children) wish both to maintain to their lawyers that they are actually innocent, and also to plead guilty. In those circumstances it is imperative that these lawyers ensure that no plea be taken until (written) instructions have been obtained in which the person charged describes a wish or willingness to plead guilty, and an understanding that by so doing, he or she will be admitting guilt. If those instructions are obtained and adhered to a lawyer may properly appear on the plea.

It is vital in this profession that we record our instructions with a signed written document that reflects the position as client and lawyer understand it to be. This protects you!

By adopting the checklist and recording the reasons in the client's own words in "quotation marks" in a file note it will become much more difficult for the client to argue later that"

1. They didn't receive proper advice

2. They didn't intent to plead guilty

Plea Traversals 'miscarriage of justice'

An accused can apply to withdraw a plea of guilty to the sentencing court prior to the finalisation of the sentence or to an appeal court on an appeal against conviction where a plea of guilty is entered in the Local Court.

The Court's approach to a proposed change of plea or to an asserted want of understanding of what was involved in a plea of guilty is with **"caution bordering on circumspection"**, since such a plea in law is an admission of all the legal ingredients of the offence and is the most cogent admission of guilt that can be made: (see Lee J in *Sagiv*.)

In *Meissner*, Brennan, Toohey and McHugh JJ said (at 141; 313):

> "A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in the exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if the Court does act on such a plea, even if the person entering it is not indeed guilty of the offence."

In *Wong*, after setting out [32] to [33] from *Hura*, Howie J stated:

> *"[16] The authorities referred to in the above passage show that the issue is one of the integrity of the plea of guilty and the question to be determined is whether a miscarriage of justice would arise if the court acted upon the plea of guilty to convict and sentence the defendant. I simply do not comprehend how a court can resolve that issue or determine that question without evidence from the person who entered the plea of guilty. It may well be the case that evidence from the legal representatives who acted for the defendant at the time the plea was entered might need to be placed before the court."*

Whether upon an application for leave to withdraw a plea, or leave to appeal or upon a conviction appeal, the starting point for determining whether the application should be successful is whether a **miscarriage of justice** has occurred or would occur should the sentence proceed or stand. The burden for showing that such a miscarriage of justice has or would occur is upon the applicant

In *R v Hura* it was said that a number of circumstances had been identified when a conviction may be set aside notwithstanding a plea of guilty. In Mao v DPP (NSW) [2016] NSWSC 946 Harrison J expanded on these circumstances which is a non-exhaustive list:

- the appellant did not appreciate the nature of the charge to which the plea was entered (*R v Ferrer-Esis* (1991) 55 A Crim R 231 at 233)

- that the plea was not a free and voluntary confession; where the plea is based on admission of evidence which should have been excluded (*R v Chiron* at 220);

- *R v Chiron [1980] 1 NSWLR 218 :*

  At a trial for rape, the complainant gave evidence that, in May 1977, after a slight collision between her motor vehicle and the defendant's, they exchanged certain particulars, and that the defendant then assaulted her, handcuffed her, said he was a policeman and was arresting her for drunken driving and drove her to his place of residence, where he raped her. He then drove her back to her car.

  The prosecution sought to introduce evidence that, in January 1975 in Melbourne, the defendant was involved in a collision in which the other driver concerned was a woman; and that, arising out of this incident, the defendant was charged with assault with intent to commit rape, to which charge he pleaded guilty.

  The trial judge ruled, over the objection of the defence, that the evidence was admissible, on the basis that it was "similar fact" evidence within the principles set out in Makin v Attorney-General (NSW) [1894] AC 57 and Markby v The Queen (1978) 52 ALJR626.
  The defendant, then, in the light of certain advice given him by his counsel, and of a comment by the trial judge that (so the defendant understood) admission of the evidence would be "sudden death" to his chances of acquittal, changed his plea to guilty, and was convicted.

  On appeal,

  Held: (1) (By the Court) The trial judge's decision that the contested evidence was admissible was erroneous.

  (2) (By Street CJ and Nagle CJ at CL) If the defendant had not changed his plea, and the trial had proceeded to conviction, the conviction would have been set aside by reason of the judge's error, and a new trial ordered.

  (3) (By Street CJ) Since it was the decision to admit the evidence, with the consequential significance attaching to it in the defendant's mind, which was the predominating factor leading to the change of plea, that plea must be regarded as tainted. It was not a free and voluntary confession; and, so, was not properly available to the jury as a basis for returning a verdict of guilty.

  (4) (By Nagle CJ at CL) (a) The defendant, when he changed his plea to guilty, was acting freely and voluntarily; but, because the change had been induced by an incorrect ruling of the trial judge, there had been a miscarriage of justice within s 6(1) of the Criminal Appeal Act, 1912.

- that the plea was not attributable to a genuine consciousness of guilt (*R v Murphy* at 191);

- that the plea was induced by threats or other impropriety where the appellant would not otherwise have pleaded guilty, so that the plea was not really attributable to a genuine consciousness of guilt (*R v Cincotta*, CCA, 1 November 1995);

- that the plea was equivocal and made in circumstances suggesting that it was not a true admission of guilt (*R v Maxwell* (1995) 184 CLR 501 at 511); and

- that the appellant was not in possession of all the facts and did not entertain a genuine consciousness of guilt (*R v Davies* at 485).

- Where there was 'mistake or other circumstances affecting the integrity of the plea as an admission of guilt': *Sagiv* (at 80)

- the failure of the appellant to appreciate the nature of the charge and difficulties with an interpreter lead to the appeal being upheld; *Iral* [1999] NSWCCA 368

- where the advice of trial counsel to enter the plea was held to be imprudent and inappropriate thus occasioning a miscarriage of justice; *Wilkes* (2001) 122 A Crim R 310

- senior counsel's inappropriate advice on the applicant's ability to challenge a relevant matter of fact occasioned a miscarriage of justice; *McLean* (2001) 121 A Crim R 484

  Factual dispute about whether or not importing of cannabis was 11 tonnes (as asserted by the Crown) or 2 tonnes (as asserted by offender MacLean) – client was not advised fully about the possibility of disputing facts, calling witnesses, asking judge to examine the evidence to resolve the issue of the disputed facts Could be a relevant avenue for local court matters – where sentenced on basis of police facts that may/may not be agreed i.e as to matters of weight in drug matters.

- Improper pressure by counsel (*KCH* (2001) 124 A Crim R 233, *Bercheru* [2001] NSWCCA 102 and *Toro-Martinez* (2000) 114 A Crim R 533.)

- Where, in offering a plea, an accused did not appreciate the nature of the charges or did not intend to admit his or her guilt, or where the applicant, on the admitted facts, would not in law have been convicted of the offences charged. Lawson v The Queen [2011] NSWCCA 44 (22 March 2011) at [32])

- A court may also go behind a plea of guilty where the plea is entered after a trial judge has erroneously decided to admit evidence that would be fatal to the defence, (Lawson)

- Where an accused person is induced by threats from a fellow accused or police officer to plead guilty where otherwise he or she would have pleaded not guilty: R v Murphy (1965) VR 187 at 190.

These are instances of where a miscarriage of justice may be found, not exhaustive statements of the test for miscarriage of justice.

Typical procedure:

What do you do if your ex-client wants to traverse a plea of guilty that you entered?

If you are around for long enough you may eventually encounter a client who wishes to turn back time and undo the plea which they had entered. They will customarily engage another lawyer to act on their behalf.

It would be a totally natural response in this situation to feel nervous. No lawyer likes the idea of another lawyer or a court scrutinising their advice of the process of them obtaining instructions.

But remember – it is not the end of the world.

First, consider whether the plea of guilty was simply entered by you as an honest mistake. In that circumstance the court will likely allow the plea to be withdrawn without too much fuss.

If it isn't a mistake, can I suggest the following steps?

1. Pray that you've followed the procedure outlined at the start of this paper. Check your file. Breathe a sigh of relief that you have.

2. Find out the basis for the client's application? Are they being critical of your conduct/performance/advice as their former lawyer? If so, remember – you are entitled to defend yourself? Why: the High Court says so

Mann v Carnell

At common law a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality and who may relinquish that entitlement.

Inconsistency between the conduct of the client and maintenance of the benefit of that confidentiality which effects a waiver of that privilege:

Examples:

i. Disclosure by a client of the client's version of a communication with a lawyer
This entitles the lawyer to give their account of the communication

ii. The institution of proceedings for professional negligence against a lawyer
The lawyer's evidence as to advice given to the client will be received.

Waiver can be express or implied.

Client can expressly waive privilege in the context of a plea traversal to reveal communication or conduct of their former lawyer ***however,*** *if they do not expressly waive privilege then consider whether there has been an implied waiver.*

If the client is asserting incorrect advice or being critical of the previous lawyer's conduct then privilege is impliedly waived which opens up the avenue for the prosecution to call the former lawyer as a witness

The prosecution may ask you to provide an affidavit as to the advice you gave the client – it is important to ascertain whether there has been an express or implied waiver of privilege by asking the prosecution to indicate to you whether privilege has been waived – ideally by getting a copy of a signed waiver from the client, or alternatively, getting a copy of the affidavit the client has made in support of the traversal.

In the Court of Criminal Appeal decision of *Momoa v R* [2020] NSWCCA 328 the Court held that a legal practitioner's overriding duty to the court requires them to provide an affidavit responding to the applicant's concerns (that appeal involved an allegation of incompetence of counsel but in the author's view the same considerations apply equally to a traversal application, where the client is critical of the former lawyer's advice or performance):

9. *Before leaving this topic, however, it is appropriate to record something about the obligations of a legal practitioner in such a case. The solicitor's correspondence indicates that she was uncertain as to whether she should provide an affidavit in response to a request from the Director of Public Prosecutions. To put that issue beyond doubt, she should have. No issue of client legal privilege arose, the client having waived it. Her overriding duty was to the Court. As already explained, her response to the allegations would have been relevant to determining whether a miscarriage of justice had occurred. That is always an important question; it was important in the present case because it involved the liberty of a young man who is barely an adult and who (as is now clearly established by the evidence tendered by his current representatives) suffers from a mental illness for which he was unmedicated at the time of the offences.*

10. *The correspondence indicates the solicitor may have apprehended that she should be communicating with the new solicitor for the applicant rather than assisting the Crown. That was misconceived. As already explained, it is perfectly proper for the Crown to seek an affidavit in such cases. Indeed, it is arguably more appropriate for such evidence to be presented by the prosecutor, whose primary obligation in such a case is to assist the court, than by the lawyer making the allegation of incompetence. I accept that it might be confronting or uncomfortable for a lawyer to give an account of their conduct of a case in the face of an*

allegation of incompetence but it should go without saying that such feelings must give way to the interests of justice and the lawyer's higher duty to the Court.

It is important, in drafting the affidavit in reply, that you respond to any allegations made by the client. Consider annexing records from the file such as file notes, correspondence, signed instructions.

Briefed for the traverser – practical steps

It is suggested that the following are the practical steps to take when instructed to appear for a person seeking to traverse their plea of guilty:

1. Obtain the original file from the former solicitor, including correspondence, emails, file notes. (this can be obtained by written authority signed by your client)

2. Check whether there are signed instructions/facts. Check whether those instructions adequately reflect the specific issues in the case with regard toQ1-5 on p 2-3 of the paper, above.

3. Consider the substance of your client's complaint. Consider the issues in the case. Consider legal issues that might arise in the context of the case.
4. Make a list of the issues in the case and the legal issues.

5. Against this list – check whether the client was apparently advised of those issues by reference to the existing file notes/ correspondence.

6. Get the client's instructions about the circumstances of the making of the plea and the advice they were given.

7. Consider the various recognised categories of miscarriage of justice set out in Annexure A to the paper.

8. Draft the affidavit in light of steps 1-5 above.

In conclusion, I suggest that should the steps in the first part of the paper be taken, you are unlikely to ever encounter a scenario where you are called as a witness in a plea traversal hearing. However, an analysis of those steps is useful in preparing an application should you be briefed for a party seeking to withdraw their plea of guilty.

A final note. These applications do not make one popular with their fellow practitioners. They are difficult applications to make. Practitioners should closely consider the merits of any such application and advise their client accordingly.

Annexure A: Plea Traversal Ready Reckoner

PLEA TRAVERSAL READY RECKONER

Circumstances that may not give rise to a ***'miscarriage of justice'*** or may be suggestive of a plea of convenience:

- Simply because the person claims they were innocent (The ultimate question is **not** the guilt or innocence of the person, but the integrity of the plea itself (R v Rae (No 2) (2005) 157 A Crim R 182, Loury v Regina [2010] NSWCCA 158 at [97] per Whealy J)
- Simply because the person has pleaded guilty for some reason other than guilt (In Meissner v R (1995) 184 CLR 132 the High Court held that a 'person' can plead guilty to a charge whether or not they believed themselves to be guilty) ("The convenience plea")

Circumstances that may give rise to a plea of convenience

- Plead guilty to a less serious charge or less charges in the hope of a better penalty and to avoid (*Regina v SL [2004] NSWCCA 397)*
- Wishing to have a matter disposed of as quickly and conveniently as possible in order to avoid having to return to Court. Often this might be due to the anxiety, bail conditions such as daily reporting and/or strict curfews.
- Recognition of a **strong Crown** case: Some clients are too embarrassed to confess the nature of their conduct to their lawyers. This is quite common in domestic violence matters and matters involving allegations of sexual misconduct.
- They can't remember the alleged offence. Important to ensure they acknowledge that they are accepting the police case without challenge. CF if they advise mental illness/head injury investigate s 32/fitness
- Settling on the day of the hearing to a good offer from the Crown/Prosecution

Circumstances that may give rise to a ***'miscarriage of justice':***

- the appellant did not appreciate the nature of the charge to which the plea was entered (*R v Ferrer-Esis* (1991) 55 A Crim R 231 at 233)
- that the plea was not a free and voluntary confession (*R v Chiron* at 220);
- that the plea was not attributable to a genuine consciousness of guilt (*R v Murphy* at 191);
- that the plea was induced by threats or other impropriety where the appellant would not otherwise have pleaded guilty, so that the plea was not really attributable to a genuine consciousness of guilt (*R v Cincotta*, CCA, 1 November 1995);
- that the plea was equivocal and made in circumstances suggesting that it was not a true admission of guilt (*R v Maxwell* (1995) 184 CLR 501 at 511); and
- that the appellant was not in possession of all the facts and did not entertain a genuine consciousness of guilt (*R v Davies* at 485).
- Where there was 'mistake or other circumstances affecting the integrity of the plea as an admission of guilt': *Sagiv* (at 80)
- the failure of the appellant to appreciate the nature of the charge and difficulties with an interpreter lead to the appeal being upheld; *Iral* [1999] NSWCCA 368
- where the advice of trial counsel to enter the plea was held to be imprudent and inappropriate thus occasioning a miscarriage of justice; *Wilkes* (2001) 122 A Crim R 310
- senior counsel's inappropriate advice on the applicant's ability to challenge a relevant matter of fact occasioned a miscarriage of injustice; *McLean* (2001) 121 A Crim R 484
- Improper pressure by counsel (*KCH* (2001) 124 A Crim R 233, *Bercheru* [2001] NSWCCA 102 and *Toro-Martinez* (2000) 114 A Crim R 533.)

- Where, in offering a plea, an accused did not appreciate the nature of the charges or did not intend to admit his or her guilt, or where the applicant, on the admitted facts, would not in law have been convicted of the offences charged. Lawson v The Queen [2011] NSWCCA 44 (22 March 2011) at [32])
- A court may also go behind a plea of guilty where the plea is entered after a trial judge has erroneously decided to admit evidence that would be fatal to the defence, (Lawson)
- Where an accused person is induced by threats from a fellow accused or police officer to plead guilty where otherwise he or she would have pleaded not guilty: R v Murphy (1965) VR 187 at 190.

Procedure in the Local Court

In summary proceedings relevant law is in sections 193 and s 207 of the *Criminal Procedure Act 1986*.

i. The original solicitor who entered the plea will be conflicted.
ii. After indicating the plea is to be withdrawn, the court will issue a time-table for filing of evidence and list the matter for hearing
iii. The onus is on the applicant seeking to withdraw the plea to demonstrate circumstances that would entitle them to withdraw the plea (**the miscarriage of justice test)**
iv. Best practice is evidence by affidavit with the deponents available for cross-examination
v. The previous solicitor should require a waiver of confidentiality from the client to discuss their instructions, release their file or write an affidavit
vi. If the client **will not** waive privilege but is being critical of the conduct of their former lawyer then privilege is waived and the instructions/file are discoverable by the Crown / prosecution (see *Mann v Carnell [1999] HCA 66; 201 CLR 1; 74 ALJR 378; 168 ALR 86;)*
vii. It is usually on the applicant to ensure both the evidence (by affidavit) and attendance of the previous solicitor if the application is to succeed
viii. The Court is unlikely to accept any evidence from the applicant that could be contradicted or confirmed by the previous solicitor if there is no attendance or evidence from that person

Hikala v Constable Elliott; Treloar v Constable Elliott [2016] NSWSC 81, dealt with an application to withdraw a plea of guilty that was improperly dealt with by the Learned Magistrate in the Local Court and is a useful authority to have when attending Court with instructions to make this sort of application as Justice Button made helpful comments about the procedure to be adopted in these applications

After conviction in the Local Court

Section 12 of the Crimes (Appeal and Review) Act 2001 allows a person who pleaded guilty in the local court and has been sentenced by the Local Court to appeal against the conviction to the District Court 'with leave' of that Court.

If leave is granted, the District Court may set aside the conviction, dismiss the appeal or, set aside the conviction and remit the matter to the original Local Court for redetermination in accordance with any directions of the District Court (s20(1)).

The procedure to be followed would be similar to that outlined above under i-viii; however the application in the District Court should be commenced by Notice of Motion and supporting affidavit.

Annexure B: Instructions to plead (LC)

INSTRUCTIONS TO PLEAD GUILTY

I, , instruct my solicitor, , that I plead guilty to:

- Offence, section, maximum penalty
- Offence, section, maximum penalty

My solicitor has gone through the police facts/brief of evidence with me.

- Acknowledgment of matters in brief
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-
-
- Acknowledgment of matters in facts
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My solicitor has told me that the evidence in the police facts/brief of evidence is evidence upon which I can be found guilty of the above offence(s).

I understand that:

- I have a right to plead not guilty;
- if I plead not guilty I would have a hearing and the Court would decide whether I am guilty or not after hearing all the evidence;
- if I plead guilty I cannot later tell a court that I am not guilty;
- by pleading guilty I agree that the Police facts sheet that will be read by the Court when determining my sentence is an accurate description of what happened, and

that my solicitor cannot say anything in Court that contradicts anything in the facts sheet; and

- the law says that I should receive a discount (less of a sentence) for pleading guilty at this stage of the proceedings, compared to the sentence I would get after being found guilty at the end of a hearing.

I accept the elements of the offence(s).

My solicitor has told me that the maximum penalty for the offence is years. 2 years is the maximum penalty that can be imposed in the Local Court.

I have been advised that I am likely/ unlikely to receive a gaol sentence in relation to these matters.

I instruct my solicitor to obtain a sentence assessment report. I acknowledge that a Community Corrections report will be received directly by the Court.

I have freely chosen to plead guilty. There has been no pressure from any person to enter this plea of guilty.

I acknowledge disqualification period of applies

I acknowledge LEPRA identification orders will be made

I acknowledge the offence to which I am pleading guilty attracts reporting obligations under the Child Protection (Offender Registration) Act

....

Signed

Annexure C: Acknowledgment of Child Protection (Offender Registration) Act

Acknowledgment of Child Protection (Offender Registration) Act

I, Joe Blogs, acknowledge that I have been advised by my solicitor in relation to the following:

I acknowledge that the offences that I am being sentenced for are registrable offences under the *Child Protection (Offender Registration) Act*.

By law I am obliged to make an initial report to police within 7 days of my release from custody of all the matters contained within section 9 of that Act:

(a) the person's name, together with any other name by which the person is or has previously been known,

(b) in respect of each name other than the person's current name, the period during which the person was known by that other name,

(c) the person's date of birth,

(d) the address of each of the premises at which the person generally resides or, if the person does not generally reside at any particular premises, the name of each of the localities in which the person can generally be found,

(e) the name and date of birth of each child who generally resides in the same household as that in which the person generally resides,

(f) if the person is a worker--

(i) the nature of the person's work, and

(ii) the name of the person's employer (if any), and

(iii) the address of each of the premises at which the person generally works or, if the person does not generally work at any particular premises, the name of each of the localities in which the person generally works,

(g) details of the person's affiliation with any club or organisation that has child membership or child participation in its activities,

(h) the make, model, colour and registration number of any motor vehicle owned or hired by, or generally driven by, the person,

(i) details of any tattoos or permanent distinguishing marks that the person has (including details of any tattoo or mark that has been removed),

(j) whether the person has ever been found guilty in any foreign jurisdiction of a registrable offence or of an offence that required the person to report to a corresponding registrar or been subject to a corresponding child protection registration order and, if so, where that finding occurred or that order was made,

(k) if the person has been in government custody since the person was sentenced or released from government custody (as the case may be) in respect of a registrable offence or corresponding registrable offence, details of when or where that government custody occurred,

(l) if, at the time of making a report under this Division, the person leaves, or intends to leave, New South Wales to travel elsewhere in Australia on an average of at least once a month (irrespective of the length of any such absence)--

(i) in general terms, the reason for travelling, and

(ii) in general terms, the frequency and destinations of the travel,

(m) details of any carriage service (within the meaning of the Telecommunications Act 1997 of the Commonwealth) used, or intended to be used, by the person including any phone numbers used, or intended to be used, by the person,

(n) details of any internet service provider or provider of a carriage service (within the meaning of the Telecommunications Act 1997 of the Commonwealth) used, or intended to be used, by the person,

(o) details of the type of any internet connection used, or intended to be used, by the person, including whether the connection is a wireless, broadband, ADSL or dial-up connection,

(p) details of any email addresses, internet user names, instant messaging user names, chat room user names or any other user name or identity used, or intended to be used, by the person through the internet or other electronic communication service,

(q) any other information prescribed by the regulations.

I will be obliged to notify the police of any changes to the above information, moving forward, within 7 days of any change. Failure to notify the police of a change can result in a prosecution of failing to comply with reporting obligations, which is a summary offence carrying up to 2 years imprisonment.

I will also be obliged to review these conditions with the police every 12 months. Failing to do so is also an offence as outlined above.

I acknowledge the period of these reporting requirements in my case is _____ years

I acknowledge that reporting periods are suspended whilst a person is in government custody, travelling overseas for more than 1 month and in some circumstances which they are travelling outside NSW as well as whilst a person is on an interim or final HRO order.

I acknowledge that I will not be able to get a Working with Children Check.

I note that I may attract an application for a Child Offender Prohibition Order which might prohibit the following conduct:

(a) associating with or other contact with specified persons or kinds of persons,

(b) being in specified locations or kinds of locations,

(c) engaging in specified behaviour,

(d) being a worker (within the meaning of the *Child Protection (Working with Children) Act 2012*) of a specified kind.

(2) Subsection (1) does not limit the kinds of conduct that may be prohibited by a prohibition order.

An application for this order is at the discretion of NSW Police. I have the right to defend this application if made.

Client :

Date:

Witnessed by:

Class 1 offence	**Class 2 offence**
(a) the offence of murder, where the person murdered is a child,	(a) the offence of manslaughter (other than manslaughter as a result of a motor vehicle accident), where the victim of the manslaughter is a child, or
(b) an offence that involves sexual intercourse with a child (other than an offence that is a Class 2 offence), or	(a1) an offence that involves sexual touching or a sexual act against or in respect of a child, being an offence that is punishable by imprisonment for 12 months or more, or
(c) an offence against section 66EA of the *Crimes Act 1900* , or	(a2) an offence under section 33 (1) of the *Crimes Act 1900* , where the person against whom the offence is committed is a child under 10 years of age and the person committing the offence is not a child, or
(d) an offence against section 272.8, 272.10 (if it relates to an underlying offence against section 272.8) or 272.11 of the *Criminal Code* of the Commonwealth, or an offence against section 272.18, 272.19 or 272.20 of the *Criminal Code* of the Commonwealth if it relates to another Class 1 offence as elsewhere defined in this section, or	(a3) an offence under section 66EB or 66EC of the *Crimes Act 1900* , or
(d1) an offence against section 80A of the *Crimes Act 1900* , where the person against whom the offence is committed is a child, or	(b) an offence under section 86 of the *Crimes Act 1900* , where the person against whom the offence is committed is a child, except where the person found guilty of the offence was, when the offence was committed or at some earlier time, a parent or carer of the child, or
(e) any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed in this definition, or	(c) an offence under section 80D or 80E of the *Crimes Act 1900* , where the person against whom the offence is committed is a child, or
(f) an offence under a law of a foreign jurisdiction that the regulations state is a Class 1 offence, or	(c1) an offence under section 87 of the *Crimes Act 1900* , where the person committing the offence has never had parental responsibility (within the meaning of that section) for the child who is taken or detained, or
(g) an offence an element of which is an intention to commit an offence of a kind listed in this definition, or	(d) an offence under section 91D, 91E, 91F, 91G or 91H of the *Crimes Act 1900* (other than an offence committed by a child prostitute), or
(h) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition, or	(f) an offence under section 91J, 91K or 91L of the *Crimes Act 1900* where the person who was being observed or filmed as referred to in those sections was then a child, or
(i) an offence that, at the time it was committed-- (i) was a Class 1 offence for the purposes of this Act, or (ii) in the case of an offence occurring before the commencement of this definition, was an offence of a kind listed in this definition.	(g) an offence against section 271.4, 271.7, 272.9, 272.10 (if it relates to an underlying offence against section 272.9), 272.11, 272.12, 272.13, 272.14, 272.15, 273.5, 273.6, 273.7, 471.16, 471.17, 471.19, 471.20, 471.22, 471.24, 471.25, 471.26, 474.19, 474.20, 474.22, 474.23, 474.24A, 474.25A, 474.25B, 474.26, 474.27 or 474.27A of the *Criminal Code* of the Commonwealth, or an offence against section 272.18, 272.19 or 272.20 of the *Criminal Code* of the Commonwealth if it relates to another Class 2 offence as elsewhere defined in this section, or
	(h) an offence against section 270.6 or 270.7 of the *Criminal Code* of the Commonwealth where the person against whom the offence is committed is a child, or

	(i) an offence against section 233BAB of the *Customs Act 1901* of the Commonwealth involving items of child pornography or of child abuse material, or
	(j) any offence under a law of a foreign jurisdiction that, if it had been committed in New South Wales, would have constituted an offence of a kind listed in this definition, or
	(k) an offence under a law of a foreign jurisdiction that the regulations state is a Class 2 offence, or
	(l) an offence an element of which is an intention to commit an offence of a kind listed in this definition, or
	(m) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind listed in this definition, or
	(n) an offence that, at the time it was committed-- (i) was a Class 2 offence for the purposes of this Act, or (ii) in the case of an offence occurring before the commencement of this definition, was an offence of a kind listed in this definition.

Reporting period : Class 1 offence	**Reporting period: Class 2 offence***	**Reporting period Multiple Class 2 offences**
15 years (one offence) (7.5 if child and no discretion exercised per s3C)	8 years (4 if child and no discretion exercised per s3C)	Life, if previously found guilty of three or more Class 2 offences
Life, if registrable for Class 1 or 2 and commits a further registrable offence These reporting periods are halved for registrable persons who were children at the time of the registrable offence (Act, s 14B).	These reporting periods are halved for registrable persons who were children at the time of the registrable offence (Act, s 14B).	These reporting periods are halved for registrable persons who were children at the time of the registrable offence (Act, s 14B).
(4) For the purposes of this section-- (a) 2 or more offences arising from the same incident are to be treated as a single offence, and	(b) 2 or more offences arising from the same incident are to be treated as a single Class 1 offence if at least one of those offences is a Class 1 offence.	19 Section 3A(5) provides that "[a] reference to a single offence in this section includes a reference to more than one offence of the same kind arising from the same incident." 20 Subsection (3) of s 3 of the Act provides that "offences arise from the same incident only if they are committed within a single period of 24 hours and are committed against the same person." 21 Section 3B provides that a person ceases to be a "registrable person" if an appeal against conviction succeeds, if an appeal against sentence results in a sentence which places the person outside the reach of the Act, or a child protection registration order is quashed. *KE (by his next friend and tutor NE) v Commissioner of Police & Ors.* [2018] NSWSC 941

** if client is child, no priors and single *sexual* offence there is an exception under S 3C of *Child Protection Offender Registration Act* where no sentence of full time detention or control order and 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

ONUS on accused to establish not a risk; on balance of probabilities (consider s3AA + expert evidence)

Where they are a child the reporting obligation period is halved

1. Can you reduce the charge from Class 1 to Class 2? 2. Can you reduce multiple class 1 charges to a 'single incident' that is against the same victim within a 24 hour period (this applies to Form 1 NSW and s16BA Cth). By reducing the offending to a single incident, the reporting period will be 8 years instead of 15 years.