

# ***Unpeeling Appeals***

**by Janet Witmer and Stephen Eccleshall**

**Indictable Appeals Solicitors**

**Legal Aid NSW**

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This is our short guide to how the Indictable Appeals section of Legal Aid NSW works on applications for legal aid for an appeal to the NSW Court of Criminal Appeal (CCA). In it we hope to give you a picture of how appeals happen.

## **In the Beginning...**

First the client or their solicitor lodges a Notice of Intention to Appeal (NIA)<sup>1</sup> with the Court of Criminal Appeal (CCA). The CCA then notifies the proper officer of the appropriate Court. Usually this is the District Court, except for charges like murder, which are heard in the Supreme Court.

The client may be complaining about being convicted or be philosophical about the conviction (or may have pleaded guilty) and is only complaining about the severity of the sentence. If they are appealing both conviction and sentence (*i.e. I am not guilty, and even if I was, the sentence is too long*), that is an all-grounds appeal.

There are also Crown sentence appeals – where the Director of Public Prosecutions (DPP) is appealing against the leniency of the sentence. These start as actual appeals, not as NIAs and they go immediately into a call-over and are usually allocated a hearing date as soon as possible, sometimes before we even get the paperwork.

In NIA matters the CCA sends the client a notice telling them that their legal representative should notify the Court that they are acting. The client hopefully sends a legal aid form to us at the same time they lodge their NIA.

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<sup>1</sup> In an appeal against severity it is a “Notice of Intention to Seek Leave to Appeal”, while in an appeal against conviction, or on all grounds, it is a “Notice of Intention to Appeal”. This is because in a conviction appeal, the appellant appeals as of right if it is a question of law, while in a severity appeal, or a conviction appeal which involves a question of fact, leave to appeal has to be granted. The question of leave is decided at the time of the appeal hearing.

If they do not do so but have told the CCA they want Legal Aid, the CCA lets us know and we get a legal aid application from them<sup>2</sup>.

Once the legal aid application and the email copy of the NIA lands on the Office Manager's desk they open a file. At this time checks are done for obvious conflicts and to see if a Legal Aid (in-house) solicitor acted at the sentence/trial. An obvious conflict may be if we already act on appeal for a co-accused and there may be an issue of parity or if their interests are not the same, or if they are alleging incompetence by a Legal Aid solicitor<sup>3</sup>. If there is a conflict, we would assign the file to a private practitioner. If the client has nominated a private solicitor they want to act for them, we may assign their matter to that solicitor if the solicitor's firm is on the Indictable Crime Panel<sup>4</sup>. If they have not nominated and we wish to assign the matter, we send the matter to Grants with a request that they assign it. Usually it then goes to the next cab on the rank (an electronic offer to the panel).

We keep as many indictable appeals files in Indictable Appeals as we can. If a client has asked for a private solicitor and we intend to keep them in-house, we send a pro-forma letter saying the Legal Aid policy is to keep criminal appeal matters in-house unless there are exceptional circumstances<sup>5</sup>. Sometimes we have to assign files simply because we are too busy and don't have the capacity to do them in-house. If you think a file should be assigned due to a conflict situation, discuss it with your supervising solicitor who will make the final decision and arrange the assignment.

If the client was represented by a Legal Aid solicitor for the trial and/or sentence proceedings, the Office Manager will also send a request for an Appeal report to the solicitor/barrister who acted in the proceedings asking for their brief opinion which can be helpful.

Files are allocated or assigned by the Solicitor in Charge (SIC) or one of the Grade IV solicitors. Less experienced solicitors will normally have more sentence matters and fewer complicated matters while the experienced solicitors have more of the complex conviction appeals although everyone usually has a mixture.

The support staff draft the initial pro-forma letters before the file lands on your desk: letters to the Court of trial/sentencing ordering the "paperwork", and to the CCA and the DPP's office (ODPP) advising that we act, as well as to the

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<sup>2</sup> Support staff in Indictable Appeals either send a legal aid form with a return paid envelope or speak with the client by video link and complete the form with them.

<sup>3</sup> There is not always a conflict, but it is something to keep a careful eye on.

<sup>4</sup> The Indictable Crime Panel is a list of private firms of solicitors who are approved to accept higher court and CCA matters and in most cases a matter being assigned would have to go to one of these. It is possible to assign the matter to a solicitor who is not on the panel if there is a good reason, such as that solicitor acted in the trial/sentence and is familiar with the matter and it is unusually complex or they speak the client's language and/or the client has mental health or intellectual difficulties.

<sup>5</sup> See Legal Aid Policy 12 Representation. There is no appeal to the Legal Aid Review Committee in respect of a decision by Legal Aid to allocate a criminal appeal matter to an in-house solicitor.

client saying they have been given a limited grant to investigate whether there is a reasonable prospect of success in the appeal<sup>6</sup>.

The “paperwork” is the transcript and exhibits from the proceedings. In a conviction appeal this is the trial transcript, including counsels’ opening and closing addresses, any interlocutory judgments and the summing up. In a sentence appeal it is the transcript of the proceedings, (including counsels’ oral submissions) and the remarks on sentence. In both cases the exhibits are also ordered. The letter is sent to the “proper officer” of the court. The exhibits are provided by the District Court and Supreme Court. The transcripts are provided through the Reporting Services Branch of the Department of Justice.

When you receive the file you should have a good look through it so you know what the matter is likely to be about and then check and sign the letters prepared for you. If there were co-accused, and it is a sentence appeal, you order the transcript of the remarks on sentence for the co-accused if they were sentenced at different times since there is often an issue of parity.<sup>7</sup>

Your paralegal follows up Reporting Services and the court to provide transcript and exhibits and will give all of the documents to you when the matter is ready to brief. If you need anything more than the usual paperwork, such as the co-accused transcripts, ask your paralegal to obtain them.

In the case of a Crown appeal, the ODPP provides the documents and it is up to you (acting for the client as respondent) to chase them, if they do not arrive promptly.

Sometimes your client is not in gaol pending the determination of the Crown appeal because they received a non-custodial sentence, and in that case you would ask them to come in to see you for a conference.

Sometimes the client wants to appeal their conviction, although they pleaded guilty. This may require a letter, a video link conference or a visit to the client to clarify the situation. It is possible but extremely difficult to appeal a conviction when there was a plea of guilty. You have to convince the Court that the client did not understand what they were doing when they pleaded, and that the evidence in the Crown Brief simply does not prove to the criminal standard the offence for which they pleaded guilty. These are usually messy matters – and often once you talk to the client about the tests which must be satisfied, they decide they are really only wanting to appeal their sentence.

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<sup>6</sup> The limited grant is an authorisation to expend funds under s33 of the Legal Aid Commission Act 1979

<sup>7</sup> That is should they have gotten the same sentence, or some sentence proportional to their different situations and involvement – and you don’t really know the answer to that without looking at their transcript.

## The life of the NIA is 12 months

The NIA expires after 12 months<sup>8</sup>. One needs to order the papers, get them, brief counsel and get a response to the question “Is there a reasonable prospect of success?” as well as prepare the actual appeal papers (if merit is found), within that time<sup>9</sup>. We often don’t get the paperwork by the end of 6 months even in straightforward matters. It is therefore important, especially after the first 6 months has elapsed, to regularly follow up your paralegal’s progress in compiling the brief if it has not come to you or, if it has, to ensure that it is briefed and counsel is well aware of the NIA expiry date.

Often the exhibits arrive fairly promptly but the transcript trails behind.

The remarks on sentence, summing up and interlocutory judgments take the longest to get, since these transcripts are typed and then sent to the Judge to revise before they are sent to us. Of course no one tells us when they are sent to the Judge until we specifically ask. When this happens we usually contact the Registry by email and explain our difficulties with obtaining transcript and they are often able to facilitate a prompt production of the transcript<sup>10</sup>.

There is a system in place where those matters with an early release date will have their requests for transcripts sent with a notification that it is a particularly urgent matter, and the paralegals will chase these up more than normal matters. One would also seek the assistance of the Registry earlier in these matters.

Although the paralegals normally chase the paperwork, it is necessary to keep an eye on progress, so you can avoid as far as possible creating the extra hurdle (and work!) of having to appeal out of time<sup>11</sup>. If it gets towards the end of the NIA and you are not in a position to either lodge an appeal or refuse legal aid – that is, you have not received counsel’s advice – and you may not have even briefed yet – you will need to keep in mind that you will need to file additional documentation, an application to file out of time and supporting affidavits, explaining the reasons for the delay if (after the NIA expires) an appeal is brought<sup>12</sup>.

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<sup>8</sup> See Supreme Court (Criminal Appeal) Rules 2021 [NSW], Part 3: Commencement of proceedings. Under these rules it is no longer possible to request an extension of an NIA as was the case under the previous rules.

<sup>9</sup> Unless a matter is very urgent because it has a short non-parole period or for some other reason, the solicitor generally leaves chasing of paperwork to the paralegals.

<sup>10</sup> Clause 7 of the Practice Note directs parties to contact the Registrar if there are particular difficulties in obtaining transcripts and/or exhibits

<sup>11</sup> Or a situation in which the client is released before an appeal can be heard if there is a very short non-parole period (NPP). If the NPP is very short, and you find merit, you may need to talk to the Registrar to see if it can be listed for an earlier hearing than it would ordinarily get.

<sup>12</sup> Previously the Registrar would consider applications to extend the life of a NIA. This procedure was abolished when the 2021 Rules and Practice Note came into effect.

## When the Paperwork arrives

Usually but not always Crown exhibits are given letters (A, B etc.) and defence exhibits have numbers (1, 2 etc.). Often the whole Crown brief for sentence (facts, prior record, statements etc.) goes in as one exhibit. In that case hopefully it has an index since it is difficult otherwise to work out if it is all there. Some Judges' Associates carefully mark each exhibit with an exhibit slip. Some don't mark them at all. Some judges very clearly identify for the transcript what each exhibit is. Sometimes all one has is the Crown saying "Here is the Crown brief" and you assume that it is exhibit A if it is marked at all.

Have a quick look at the transcript to see if it is all there – looking at the end of each day's transcript to see whether and when it was adjourned to, and whether the remarks on sentence and summing up (if it is a trial) are there.

## Briefing Counsel

Once it looks like we have a complete set of the transcripts and exhibits the solicitor reads the proceedings and does some research on potential appeal issues they have the time for<sup>13</sup>. The solicitor then prepares a Memorandum on the brief to Counsel. The brief usually sets out a précis of what occurred, what the offence was, what kind of appeal the client is seeking, what the client was convicted or acquitted of, and what sentence was imposed. If the client has voiced any particular concerns, these are noted. If the solicitor has any views on whether there has been an error that is included too.

It is important to clearly set out in the Memorandum the questions which you are asking counsel to answer and to try to provide in the brief, in a well-organised manner, all of the material counsel will need to provide the advice. The overarching question will be whether the proposed appeal has reasonable prospects of success<sup>14</sup>. When asking counsel to advise about a proposed conviction appeal you would normally ask: Was there error or unfairness to the applicant (a) in the Crown's opening or closing addresses; (b) in relation to applications concerning the admission or exclusion of evidence and (c) in the trial judge's summing up or directions to the jury. You would also ask if any of the verdicts are unreasonable based on the evidence or if counsel can see any other matter that may justify an appeal.

In relation to a proposed sentence appeal you would ask counsel whether there is appellable error including manifest excess or a parity ground.

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<sup>13</sup> Sadly, the pressure of a very large file load sometimes means you are only able to give Counsel an overview of the case, and any concerns you may have without having time to do in-depth research with reference to case law. Your client is not normally disadvantaged since Counsel will do their own research, and in most cases already have a detailed knowledge of the relevant legislation and case law.

<sup>14</sup> See Policies 13.3.1 Appeals to the CCA and the High Court and 8.1 Merit Test A. Other policies apply however the matter will not be being briefed to counsel if the application does not satisfy policies such as the Means Test or appropriate expenditure.

It is also necessary to ask Counsel, if they identify appellable error, to address the provisos under which the CCA may nevertheless dismiss an appeal<sup>15</sup>.

Counsel should be asked to provide appeal submissions in lieu of an advice if they find merit in a proposed appeal.

Finally, if briefing private counsel you will need to inform Counsel of the standard fees for providing advice (or submissions in lieu) and of any additional preparation approved<sup>16</sup><sup>17</sup>. You will need to discuss the appropriate level of any additional preparation with the Senior Solicitors or SIC and record their approval on the file.

### **Who do I brief?**

If you are not briefing a Public Defender (PD)<sup>18</sup>, you need to brief counsel from the Appellate Crime Barrister Panel. This panel is only for junior counsel. Senior counsel is briefed with the approval of the SIC. In exceptional cases you can get permission to brief an “off panel” barrister. You have to do a short submission to the SIC, and if that is approved, it then goes to the Director Crime for approval. This would mostly be done when dual counsel is being proposed, and senior counsel particularly wants a specific non-panel barrister to work with them. Senior counsel would then give you good reasons to put in your submissions. For instance it might be the matter revolves around a constitutional issue and senior counsel wants junior counsel, not on the panel who has this expertise.

### **Counsel’s Advice**

The barrister then considers the proposed appeal. If counsel thinks there is no reasonable prospect of success, they provide an advice to that effect. You carefully review the advice to check if it addresses all of the relevant issues and tests, that it contains no mistakes and is clear in its reasoning and otherwise suitable to provide to the client. If or when the advice is acceptable you refuse legal aid to the client<sup>19</sup>. A copy of the advice is given to the client with our letter refusing aid unless they have instructed, normally for reasons relating to their safety in custody, that they do not want a copy. I normally wait a few weeks before closing the file as the client may wish to talk to you about it. In most cases you should consider telling the client in person or by video link rather than just coldly sending a refusal letter. If the client does not speak English, you should arrange (or ask your support staff to arrange) an interpreter for the conference.

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<sup>15</sup> See s 6 of the Criminal Appeal Act 1912 (NSW) and rule 4.15 of the Criminal Appeal Rules

<sup>16</sup> Legal Aid’s Fee Scales are published on its website. Fees are sometimes increased by small increments so it is a good idea to check the current fee scale rates and provide these with your brief.

<sup>17</sup> On briefing private counsel you will need to submit an extension for funding using Legal Aid’s electronic grants administration system.

<sup>18</sup> Solicitors from the Indictable Appeals section do not need to demonstrate that there isn’t a Public Defender available as a precondition to approaching private counsel.

<sup>19</sup> At the same time you should lodge an extension on Legal Aid’s electronic grants administration system refusing aid.

The client may appeal to the Legal Aid Review Committee (LARC) against the refusal of legal aid. In that case you do a report (there is a format) and this is sent to Grants who finalise the report and send it to the Committee which considers the refusal, and usually confirms it, given that it is based on the advice of experienced counsel. On two occasions however, I have known the Committee to overturn refusals and on at least one of these occasions, the appeal was allowed in the CCA. Usually if a refusal is overturned, LARC asks you to get a second opinion, but occasionally, they just say to run it.

If you feel strongly that Counsel may be wrong you would discuss this with the SIC and consider whether a second opinion is warranted. As a beginning solicitor in the CCA section, you are unlikely to do this, but after you have been in the section for a while, you will start to have your own opinions, and you should pay attention to them. Usually if private counsel has been briefed for the initial advice we brief the PDs for the second opinion and vice versa although this is not essential. This is not a frequent situation, but it happens often enough that it is useful to mention it.<sup>20</sup>

### **Counsel's Submissions**

If Counsel decides there is merit in an appeal, that is, a reasonable prospect of success, they will provide Submissions for filing in the CCA. The Grounds are incorporated in these Submissions. You carefully review the submissions to check that they address the relevant issues and tests and the prescribed requirements in the Practice Note, that they contain no mistakes and are clear and otherwise suitable to be filed. You consult with counsel if you think amendments are needed.

The solicitor then prepares the Notice of Appeal (or Application for Leave to Appeal in the case of a sentence appeal), the Grounds and the Certification that all of the relevant transcripts and exhibits are available. The submissions and the accompanying appeal forms that you have completed are then able to be electronically filed with the CCA by way of email<sup>2122</sup>.

The appeal documents that you electronically file are normally returned to you directly by email within 3 working days bearing an image of the Court's seal (stating the document has been e-Filed) and a date stamp for the date you filed them. At this time you are informed of the date upon which the matter has been listed in a CCA Registrar's call-over to be given a hearing date. It is

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<sup>20</sup> We have probably sought second opinions on average once or twice per year.

<sup>21</sup> It is still possible to file hard copy documents in the Supreme Court Registry, Level 5 of the Law Courts Building in Queens Square. However, since around April 2020 the Registry has allowed e-filing by way of emailing PDF versions of documents or documents created and signed as PDFs. Similarly a custom of Legal Aid and Crown accepting service by email has developed. These processes have now been formally authorised in the 2021 Rules and Practice Note. Email addresses for filing are provided at clause 6 of the Practice Note.

<sup>22</sup> The Practice Note at clause 6 requires that 3 hard copies and the original of the e-Filed document must be provided within 24 hours. There is a question as to whether the CCA Registry will actually require provision of hard copies. Registry has not been requiring Indictable Appeals staff not to send copies. It is best to wait until your appeal documents have been stamped e-Filed before sending any hard copies or original documents. If necessary, your support staff can assist to produce and send hard copy documents to the Registry.

put into the next call-over if it is filed more than a week in advance of the call-over.

Legal Aid is then formally granted for the appeal and the client is advised of this by letter<sup>23</sup>.

### **Call-over**

You need to check that the matter is in the call over list as expected<sup>24</sup>. Once available dates are received from the Registrar<sup>25</sup> you obtain instructions from counsel about (a) on which dates they can appear and any order of preference and (b) the estimated total duration of the hearing.

You should attend the call over yourself<sup>26</sup> or provide instructions in writing for a colleague who is attending so they can mention your matter for you<sup>27</sup>.

Be sure to email counsel immediately after the call over to inform them of the hearing date and other orders made at call over (ie: chiefly the timetable for filing of the Crown submissions in response).

Around this time it is also a good idea to email a word version of counsel's final submissions to the CCA Registry (Registry only, not to the Crown) to comply with the requirement in the Practice Note<sup>28</sup>.

### **Preparing further evidence**

If possible the solicitor then sees the client or talks to them by phone or video link to obtain any further material necessary and/or to explain the process. Often it is not essential to see the client in person, since the whole appeal process is usually about what was said and tendered before the original Court. So usually things which have happened after the conviction or sentence are not relevant and nor is material which was not used but which existed at the time of sentence. Events that have happened post sentence may become relevant and helpful if the Court finds a sentencing error and its discretion to re-sentence is triggered.

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<sup>23</sup> An extension granting legal aid should be submitted on Legal Aid's electronic grants administration system.

<sup>24</sup> The list will be circulated by email a few days prior to the call-over

<sup>25</sup> These dates are normally emailed to Justice agencies by the CCA Registry on a Tuesday. The dates are also posted on the Supreme Court's website (currently under the Court lists and sittings tab).

<sup>26</sup> Since around April 2020 the current CCA Registrar has running a virtual court for all call-overs. Solicitors receive an email providing dial-in details for the call over and they may appear by phone or audio-visual link.

<sup>27</sup> Be careful to request non-publication order/suppression if required and attach a copy of documents including, Grounds, Certification and emails containing counsel instructions. Be available to be contacted during call over to answer questions if a colleague is appearing for you..

<sup>28</sup> See clause 17. The submissions document needs to be emailed no later than 3 working days prior to the hearing.

In a sentence appeal matter, it is often helpful to have some additional material in the form of an affidavit by the client as to what courses they have done, or the conditions of their custody/protection status, whether they get visits etc.

One would usually send a request to the Department of Justice to obtain a copy of your client's Corrective Services case management file under the Government Information (Public Access) Act 2009 (the GIPA Act). There is a standard letter to do this. Once the case management file arrives, you go through it and isolate the documents which may be of help to your client. You should discuss this material with your client. If your client accepts the material as accurate or can give evidence clarifying what occurred in relation to minor infringements of the prison disciplinary rules you should draft an affidavit for them<sup>29</sup>. You might annex the relevant case file documents to a corresponding solicitor affidavit. You need to check with counsel to see that you are both in agreement as to what should be filed. Usually you would not attach a huge bulk of material<sup>30</sup>. You would only put in items which are clear and positive, and which are dated after the sentence date. Occasionally you will also obtain their Justice Health file if the client has significant health issues. The Justice Health file contains progress/clinic notes by nursing staff and medical officers, including psychiatric reviews, reports about referrals to hospital, tests and treatment. If there are more than a few pages, you should describe or explain the documents, noting how they are relevant to the question of re-sentence in your affidavit.

Over the past few years the State DPP has developed the practice of obtaining the client's custodial management file themselves or a report from the General Manager of the gaol about them and filing anything which is adverse.

If your client's case management file contains many adverse reports, you should take instructions from the client and possibly also prepare a defensive affidavit which may be filed if required. You should consult with counsel about the strategy to adopt.

It is a good thing to visit your clients if at all possible. You will establish a better connection more easily by a personal visit than by talking to them by video link. Obviously if the client is at Grafton or Junee this is not usually going to be practical. Occasionally it is still essential, and then you make appropriate travel plans and trek off. If you do have to go to a far-flung gaol, you should consider asking if anyone else in the section wants you to see a client of theirs as well.

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<sup>29</sup> It is now common practice amongst solicitors in the Indictable Appeals section to settle and execute affidavits over video link. Section 14G of the Electronic Transactions Act 2000 has provided a procedure for affidavits to be witnessed remotely. If an affidavit is to contain very sensitive material it can be transmitted by express post and still be executed by video link. Affidavits, like a Notice of Appeal, are able to be filed and served electronically.

<sup>30</sup> In *Bushara v R* [2006] NSWCCA 8 the CCA criticised legal representatives who placed a large volume of Corrective Services case file documents which were of limited relevance to resentencing.

When you visit country gaols, and some metropolitan gaols you need to contact gaol management and advise of your intention to visit and seek confirmation approval is given<sup>31</sup>.

When you get to the gaol, leave your mobile phone in the car. Most people starting in this section will have visited a gaol before. If not, talk to someone in the section or in Legal Aid's Prisoners Legal Service about helpful hints for visiting gaols<sup>32</sup>.

If your client really wants to see you and is at a geographically impossible gaol, like Ivanhoe or Broken Hill, you can write to inmate movements and ask for them to be transferred to a metropolitan gaol. You will need a good reason for the transfer; something like being for the purpose of an assessment for a psychological report or a conference with legal representatives and that those things cannot reasonably be done over video link. Ask your client before doing this as many clients absolutely do not want to be moved for a variety of good reasons. Conversely some clients are very enthusiastic about being transported to a metropolitan jail as their family are all in Sydney. Of course Corrective Services may reject or ignore your request.

### **A note about acting for Sex Offenders**

There are a couple of specific issues applicable to sex offenders. Do not ever write to them in gaol referring to their sexual offences explicitly. That sort of letter may well result in your client being killed or at least damaged. For the same reason you would not send them copies of the Submissions, and if you refuse them legal aid, you will not send the Advice. If they are in a gaol visited by Prisoners Legal Service, you could ask them to take a copy of the Advice/Submissions and wait while the client reads it. If it is a metropolitan gaol, give some thought to visiting yourself with a copy of the Advice. Alternatively, if they are at a distant gaol, you could arrange a video link conference and go through the points in the Advice or Submissions<sup>33</sup>. The client may ask you to send the document to a relative or friend.

The exception to this is that if the client is in a gaol or section of a gaol specifically for sex offenders<sup>34</sup>, they may request that you send them documents. In this case, provided you get very specific instructions and note them in your file, it is all right to send the documents.

If the offence relates to an adult victim, the danger to your client is less acute. However, it is better for your client to be safe than sorry, and other inmates

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<sup>31</sup> Support staff can prepare and send and follow up on the request for you. Some in-person visits can now be booked using the JustConnect platform.

<sup>32</sup> The Law Handbook by Redfern Legal Centre Publishing contains a helpful chapter on Prisoners

<sup>33</sup> Provided the share screen function has not been blocked by Corrective Services AVL staff, you may be able to show the client the advice and have them read it on screen.

<sup>34</sup> Some parts of the MSPC at Long Bay for instance almost exclusively hold sex offenders.

are not always as accurate as they could be in their interpretation of letters which cross their line of sight.

The above applies also to those who give assistance – also known in gaol as “dogs”. Those inmates who have assisted the authorities and who are most at risk are often kept in the Special Purpose section of the Long Bay Correctional Complex and are designated by P numbers rather than their name and MIN<sup>35</sup>.

### **To be or not to be at the Appeal hearing**

If there is a CCA hearing coming up you need to ascertain if your client wants to appear at the hearing. It used to be that clients could physically attend or not. The system changed about 10 years ago and they are now no longer allowed to attend in person. If they want to appear they can only do so by video link unless there is a very good reason for them to attend in person. If they require an interpreter, that was for a while considered to be a good reason to attend in person however it is not uncommon now to see an interpreter in court speaking softly by telephone to the inmate in the gaol suite to interpret the proceedings.

If your client has a mental condition or intellectual disability and would struggle to comprehend the proceedings over a video link this could constitute a good reason for requesting their attendance in person. You and Counsel may also (privately) think if the Judges saw this client in person it may excite some sympathy for them and their appeal.

Many clients do not wish to attend in person or by video link, particularly if they are in some country gaols and they would need to travel to appear<sup>36</sup>, as they lose their jobs and cells. Travelling is uncomfortable and there is no guarantee that they will be returned to their gaol.

If your client is attending by video link, you can telephone the staff administering the video link at the gaol and have a telephone conference with the client before or after the proceedings. You may use the practitioner rooms on Level 13 of the Supreme Court Building for the call.

If your client will be attending the hearing in person, a couple days before the hearing, you should contact the gaol and ask to speak to Records to ensure they have the order for their attendance. If they do not, email the CCA Registry and ask them to issue another.

### **The Appeal Book<sup>37</sup>**

Appeal books (also known as Application books) are an agreed collection of the lower court transcript and exhibits relevant to the appeal. They are like a

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<sup>35</sup> A six-digit prisoner identification number. MIN stands for Master Index Number.

<sup>36</sup> Some gaols, mainly the minimum-security forest camps still do not have video link facilities.

<sup>37</sup> See clause 14 of the Practice Note for the requirements for Appeal Books and Appeal Book Indexes

formal paginated version of your initial brief. In Commonwealth matters the Commonwealth DPP prepares the whole appeal book. If you see any potential for the Crown to omit relevant material you should contact the Crown and remind them that you wish to be consulted about the proposed index. In State law matters you are expected to prepare the draft index (only) on behalf of the applicant/appellant and once the content is agreed with the Crown to send it to the CCA Registry by email as a word document<sup>38</sup>.

If you are providing an index the CCA will prepare the final appeal book. You should be able to obtain a copy of the book about a week before the hearing. You then can send it to your counsel by email and in hard copy so that they can include references in their notes for their oral submissions at the appeal hearing.

### **Extensions of timetable**

The Crown may ask for an extension of the time to file its submissions. It is a requirement under the solicitor's rules that the Crown seeks our attitude to such a request before it contacts the CCA Registrar<sup>39</sup>. Seek counsel's advice about any Crown request before responding to the Crown.

### **Crown submissions**

You will normally receive a copy of the Crown submissions on time, most likely by email. If you have not received the submissions by the day after they fall due, contact the solicitor with carriage of the matter for the Crown and ask for a copy to be emailed as soon as possible<sup>40</sup>.

Immediately on receipt of the Crown submissions check all pages are enclosed and email the submissions to your counsel. (Counsel will be eagerly waiting to receive them.) In the covering email try to flag anything remarkable about the submissions (e.g. error conceded) and make comments or offer to make comments in a follow up email.

If there is a particularly contentious issue raised in the submissions discuss with counsel whether they wish to prepare and have filed a set of submissions in reply. Reply submissions are not normally provided for in an appeal timetable at call-over. You should however be able to file them at any time including at the hearing although they are of more assistance if filed in time for the bench to consider them before the hearing.

It is good practice to speak with your client after receiving the Crown submissions and before the hearing to explain to them the likely shape of the argument. Reassure the client in case they become discouraged on seeing

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<sup>38</sup> In appeals in which the applicant is preparing the Appeal Book index, the CCA Registrar may list the matter for a call over shortly after the index is due to ensure that it has been filed. The Registrar will usually remove the matter from the call over list if asked to do so once the index is filed.

<sup>39</sup> See Solicitors' Rule 22.5

<sup>40</sup> If you receive an out of office message by email you should email the solicitor's managing lawyer.

the Crown submissions. Inform them that the Crown almost always opposes an appeal, and indeed sees it as their role, even if we have a strong argument, so they should not feel too discouraged by the content of the submissions. If grounds are being abandoned inform them of this and the reasons why.

### **List of authorities<sup>41</sup>**

A 'list of authorities' is a list of the cases and legislative provisions that the bench need read to because counsel is going to specifically address upon them in their oral submissions. It does not normally contain cases that the CCA should be fully familiar with (unless counsel wants them on the list for ample caution!).

The Crown will often incorporate their list into their submissions. The applicant will normally file their list the day before the hearing.

You should counsel two to three days before the hearing and ask them to send you the names of the cases they wish to be included on the applicant's list of authorities. Tell counsel that you require this information by 9am the day before the hearing. The deadline for emailing the list to the Registry, a word document with hyperlinks to MNC cases cited<sup>42</sup> is 10 am the day before the hearing<sup>4344</sup>

Forward a copy of the email to counsel immediately after sending. Sometimes counsel may ask you to provide them with a hard copy of authorities on our list and the Crown's list.

If counsel does not wish to file any list of authorities, I find the best approach is to simply email the CCA Registry and Crown to tell them this.

### **Other tasks to do on the day before hearing**

Make sure that files are in order to take to court. That is make sure that you will be able to quickly find any document that counsel may ask for. Take a small supply of stationary for note taking and note passing and, highlighting and tabbing etc.

Counsel may request that a copy be made of certain documents, usually 6 or 7 copies (bench, counsel, solicitors), to hand up. Get these ready.

The Court list for the hearing day will normally be circulated by email by 3pm on the day before the hearing. If this is not received, the list can be found on

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<sup>41</sup> See clauses 27-29 of Practice Note

<sup>42</sup> I normally put the cases in a numbered list in alphabetical order

<sup>43</sup> Email the list to the general CCA Registry address copying in the solicitor with carriage of the matter for the Crown. It is normally helpful to identify the matter clearly in the subject field: "XY v R – 2017/6666 – CCA Sentence Appeal for hearing tomorrow – Applicant's list of authorities (enclosed)".

<sup>44</sup> If you are running late you may receive an anxious email from one of the appeal judge's associates.

the Court's website. On receipt, forward the list by email to counsel. Tell them whether or not family will be in attendance if there seems any prospect of this occurring. Arrange meeting time and place with counsel. Inform any family attending of the venue, process including likelihood judgment will be reserved, whether or not counsel is happy to speak with them (normally after the hearing).

Pack the suitcase/s for court. Take your copy of the brief and filed material and the correspondence file. Take your work laptop computer<sup>45</sup>.

If your client is appearing via video link, enter into your contacts on your mobile phone the number for the video link officers at the gaol that your client will be appearing from.

### **Instructing in Court**

This is the fun part. If your client is appearing, you arrange to meet Counsel either for a phone conference, or if your client is not appearing, outside the court room just before 10 am.

Appeal hearings are usually on level 13 of the Supreme Court Building in Queens Square, either in Court 13A or the ceremonial Banco Court. Shortly before the proceedings start you should enter counsel's name and Legal Aid as instructor on the appearance sheet on the lectern. The usual procedure once the presiding Judges enter and the proceedings commence is that Judgments, if any, of previously reserved cases, are handed down and then the Appeal list is called over. The barristers give estimates of how long they think their case will take, and the Court then gives the later cases "markings".

If you are in one of the later cases, counsel may suggest that the two of you go for coffee or may hint that they would like to be alone with their paperwork to continue their preparation for the appeal. Sometimes Counsel just waits in the Court, or sometimes they go back to Chambers. Take your lead from them. Depending on the marking you may wish to go back to the office (remember that is about a 40-minute round trip) or stay in Court and listen to the preceding case. Alternatively, you might go to a nearby cafe to work on another file which you have prudently brought with you, or if feeling very frivolous, you could read a novel or go do some quick shopping. Make sure you are back just before the marking, even though counsel nearly always underestimate how long an appeal hearing will take.

You sit next to Counsel at the bar table unless you have two counsel in which case you may end up behind them as there is no room.

As Counsel and the bench talk, they will refer to parts of the transcripts or documents. As far as possible you should flip (quietly) through your file and copy of the brief or Appeal Book so as to have the document being discussed

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<sup>45</sup> It can be useful if you need to work whilst waiting for your matter to be heard. During the hearing it may be useful for finding further authorities. You will need to use the cellular network for an internet connection.

in front of you. Sometimes the bench does not have the document and you have to sacrifice your copy to the bench or run off and make a photocopy.<sup>46</sup> Sometimes the Bench or counsel are trying to find something in the paperwork, and you can be helpful in locating the section of transcript.

If Affidavits have been filed, at some point counsel will formally “read” them onto the record. If Counsel forgets, remind them before they sit down.

After the appeal has been heard, you and counsel should speak with the client and help ensure that they understood what has happened in the appeal proceedings. Otherwise, you will have previously arranged for your client to call you the next day, or you will have arranged a conference by video link to talk to them a day or so after the hearing.

### **The Aftermath**

If the appeal is reserved (which it usually is), when judgment is to be finally delivered<sup>47</sup>, the Registry will email our office a day or two before and tell you where and when the judgment is being delivered. The client will not be told or transported.

When you receive the email, you should reply by email to the Registry to advise if you or someone from the office will be attending to collect the judgment. It is most important to attend for judgment if the matter is a Crown sentence appeal and your client is in the community or if the matter is a conviction appeal and there is a need to make a bail application<sup>48</sup>.

When you collect the judgment your next step depends on if it was a win or a loss. If a sentence appeal wins there is usually not much to do except report the happy news back to your client<sup>49</sup>. You should formally write to your client and set out the result and let counsel know too.

If the sentence appeal result means that your client should be out today you might want to ensure that the CCA Registry sends the warrant to the gaol as soon as possible and that the gaol has received and acted upon it. If your client’s non-parole period has just been significantly shortened and they are due for parole imminently, but the sentence exceeds 3 years, you should email the State Parole Authority to advise them of the successful appeal and ask that they consider your client’s parole as soon as possible. This is because it takes about 6 weeks for the Authority to receive the reports it

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<sup>46</sup> Registry staff on Level 4 may assist, or often a Judge’s associate will make a copy.

<sup>47</sup> Which is somewhere between 2 weeks and 6 months in the future.

<sup>48</sup> The CCA has over the past year been discouraging solicitors from attending for the delivery of judgment unless it is really necessary. If you are not attending for judgment you will normally receive a PDF of a certified copy of the judgment by email within 2 hours of the judgment being delivered. Judgments also routinely appear on Caselaw within a couple of hours of delivery (unless the judgment is restricted).

<sup>49</sup> On receiving the notification from the Court that judgment is being handed down you should try to book a video link appointment with them for the afternoon of the day of the delivery judgment. At all costs try to avoid a situation where your client first learns about their appeal result from the media.

needs to consider parole, and if they are not aware of the suddenly shortened non-parole period, there may be a delay.

If the sentence appeal is dismissed, you should of course also advise your client as soon as possible including with a letter and let counsel know too.

If you have won a conviction appeal, and an acquittal was ordered, there should be nothing to do but cheer. Your client should be released within hours. You should ensure the CCA Registry sends out the warrant urgently and again contact the Records section of the gaol to ensure they are released.

If a retrial has been ordered you need to think about bail. Was the client on bail before? If so, you should have already obtained information as to whether they will be seeking bail and obtain instructions. Even if they were not on bail before, it may be appropriate to make a bail application pending the rehearing of the charges.

You might also consider writing a "no bill" application to the DPP if appropriate. The new retrial file then makes its way back down to the Indictable Criminal Law practice of Legal Aid or to the private solicitor who acted in the original trial. Usually it is better if we do the "no bill" as it will take time before the matter is securely in the practice of a retrial solicitor and the idea of a "no bill" may get lost. You would discuss this with your supervisor and usually counsel would help by either drafting the application or at least by assisting you.

We hope this has given you an overview of Appeals work. Of course there are all sorts of small and large variations on the above, but it is a start.

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