

Indictable Criminal Law Solicitor Practice Standards

This document sets out practice standards for lawyers representing clients and instructing Counsel in indictable criminal law matters, excluding complex matters, in the Local and District Court under a grant of legal aid.

These practice standards apply to in-house Legal Aid NSW solicitors and private lawyers acting in legally aided criminal matters.

Lawyers who are appointed to the Indictable Criminal Law Solicitor Panel (the panel) are eligible to receive grants of aid and assigned work from the Grants Division, including committals, trials and sentences.

Legal Aid NSW may audit panel lawyers for compliance with practice standards. Continued inclusion on the panel is conditional on compliance with these practice standards.

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General Principles

The majority of people appearing in the Criminal Justice System are people who are disadvantaged in the legal system. Many are from disadvantaged backgrounds. It is important that lawyers representing people in criminal courts are able to communicate effectively. Lawyers must also have an understanding of cross-cultural issues and issues facing socially and economically disadvantaged people, people with mental illness, people with a disability and Aboriginal and Torres Strait Islander people.

1. Responsibilities to Clients

A lawyer representing an accused person in a legally aided criminal matter will:

- 1.1 Provide representation in accordance with the Legal Profession Uniform Law (NSW) and the relevant Legal Profession Uniform Conduct Rules.
- 1.2 Obtain from the client adequate instructions as to the current status of the matter in order to apply for a grant or for an extension of legal aid.
- 1.3 Assist the client in obtaining a grant of legal aid by providing Legal Aid NSW with all information relevant to the application or extension.
- 1.4 Observe the principles governing the lawyer/client relationship and the privacy of instructions provided by the client.
- 1.5 Use a qualified interpreter where necessary after obtaining approval from the Grants Division.
- 1.6 Meet with the client as early in the process as possible and communicate with the client in a way that the client understands using language appropriate to the age, maturity, education and cultural background of the client.
- 1.7 Promptly comply with reasonable requests by a client for information regarding their matter.
- 1.8 Provide a meaningful reply to all correspondence, reply promptly to all urgent matters and advise clients that a detailed response for advice may require more time.
- 1.9 Respond to all telephone inquiries promptly.
- 1.10 Keep their clients informed of the progress of their matter in a timely manner and ensure that the client is aware of the stages through which a matter progresses in the court system.
- 1.11 In all communications with clients, lawyers are to use language that is clearly understandable, free of jargon and calculated to assist the resolution of the matter, not to inflame emotions or antagonize.
- 1.12 Give advice and explain all available options to the client together with the consequences of any decision made by the client. Lawyers must ensure that their clients make the decisions, not the lawyer making the decision for the client.

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- 1.13 Explain to the client a matter to the extent reasonably necessary to permit them to make informed decisions regarding the matter and to advise their clients of what they are expected to do to assist their case.
- 1.14 Obtain prior instructions from the client before presenting their case in court. If there is insufficient time, the lawyer should adjourn the matter for such time as is necessary for the client to give proper instructions.
- 1.15 Advise the client at the first reasonable opportunity, if a possible delay in the progress of the matter becomes apparent.
- 1.16 Attend all court events in a timely manner; allowing adequate time to prepare.
- 1.17 Ensure the client is represented at all court events and that any agents engaged are members of the panel.
- 1.18 Ensure that where the lawyer is unable to meet with the client on a particular occasion that every effort is made beforehand to inform the client and Counsel, if briefed; and that any agents engaged are members of the panel.
- 1.19 Advise the client on the law, procedure and practice that apply to their case, including the charges and potential penalties, and the likely time their matter will take to be heard and completed. Before entering a plea the lawyer should have all relevant prosecution evidence including the charge sheet/court attendance notice/summons, the police facts sheet, the brief of evidence where appropriate and the client's criminal record. The client should be fully apprised of the case against him or her.
- 1.20 Speak with the client immediately following a court appearance, including clients who have been remanded in custody, and confirm that the client understands the result and any orders made by the court. The client should also be asked if they wish to make a release application. If it is not possible due to the lack of time because of list demands then a letter should be sent to the client informing them of the results and their effect.
- 1.21 Consider the appropriateness of a release application bearing in mind the restrictions on multiple release applications as set out in s.74 of the *Bail Act 2013* along with general considerations regarding show cause (s.16A and s.16B) and unacceptable risk (ss 17-20).

2. Responsibilities to Legal Aid NSW

A lawyer representing an accused person in a criminal matter subject to a grant of legal aid will:

- 2.1 Comply with these practice standards.
- 2.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 2.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 2.4 Comply with the terms and conditions of the grant of legal aid.

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- 2.5 Ensure that any Applications for legal aid, extensions of the grant of aid and requests for reconsideration and review are lodged promptly with all relevant information and supporting material to enable a decision to be made without delay.
- 2.6 Be responsible for the matter and accountable to Legal Aid NSW for any breach of these practice standards including for any work undertaken in the matter by another lawyer or employee of the (your) firm.
- 2.7 Seek approval of the Grants Division for any disbursements prior to expenditure on the file by obtaining the appropriate grant or extension via Grants Online.
- 2.8 Review all files on completion of the matter to ensure all necessary steps have been taken before notifying the Grants Division that the matter is finalised. When submitting the final claim to the Grants Division the lawyer must complete the file outcome form setting out the steps involved in completion of the matter and the result in the matter.
- 2.9 Ensure prompt payment to experts, witnesses and other third parties who have undertaken work pursuant to a grant of aid for that work.
- 2.10 Reassign all pro forma invoices for Counsel's fees to the barrister who has been briefed so that the barrister can claim directly from Legal Aid NSW.
- 2.11 Provide the file in a matter to Legal Aid NSW where a written authority is received from a client to hand over the file.
- 2.12 Seek orders for costs where appropriate.
- 2.13 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.

3. Responsibilities to Others

When dealing with other lawyers, Counsel, experts, witnesses and the staff of the Tribunals or Courts or other agencies or institutions, the lawyer will:

- 3.1 Conduct all communication in a courteous, prompt and professional manner.
- 3.2 Comply with time limitations, procedural steps, the practice directions of the Court or Tribunal and any undertakings given to the Court or Tribunal.
- 3.3 Avoid unnecessary expense or waste of time by ensuring that:
 - (i) documents are served or filed on time;
 - (ii) documents served, filed or given to the client are legible;
 - (iii) the client is aware of medical appointments, conferences and hearing dates and understands the importance of attending promptly and on time;
 - (iv) witnesses are aware of conferences and hearing dates and understand the importance of attending promptly and on time;
 - (v) court commitments are accurately diarised.

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4. Indictable Matters

4.1. Committals (for matters committed to the District Court)

A lawyer appearing at a committal will:

- 4.1.1 Open and retain a file for the client with copies of the police facts, bail conditions, criminal history and the brief.
- 4.1.2 Obtain instructions from the client and give advice about the law, the defences and partial defences that may be available, the benefits of an early plea of guilty, maximum penalties, whether there is a Standard Non-Parole Period and the legal process and procedure.
- 4.1.3 Advise the client of the strengths and weaknesses of the Crown case.
- 4.1.4 Advise on the right to make an election and the consequences of making an election in respect of Indictable Offences listed in Table 1 of the *Criminal Procedure Act 1986*.
- 4.1.5 Keep the client well informed of the progress of the matter, and give realistic advice about brief service orders, depending on the nature of the evidence the brief is expected to contain.
- 4.1.6 Obtain instructions from the client, including a personal history, medical history, psychiatric diagnoses, admissions to psychiatric hospitals, psychological assessments, drug and alcohol history, attempts at rehabilitation, family background and immigration status.
- 4.1.7 Determine if there is an issue of Fitness to Stand Trial, a defence of “Not Guilty Mental Illness,” a partial defence of Substantial Impairment or an intellectual disability requiring assessment by a psychiatrist or psychologist and seek approval from Legal Aid NSW to arrange such assessments. The report of the psychiatrist or psychologist may need to be served on the DPP; however counsel briefed in the matter should be consulted before service.
- 4.1.8 Obtain signed authorities to release copies of reports from e.g. Justice Health, and community health centres.
- 4.1.9 Obtain signed instructions from the client if he or she intends to plead guilty.
- 4.1.10 Comply with any relevant Practice Note issued by the NSW Chief Magistrate.
- 4.1.11 Determine whether to brief counsel subject to the approval of Legal Aid NSW. If approval is given to brief counsel, the lawyer will comply with the briefing requirements as set out in 4.2.1 to 4.2.4 below.

4.2. Briefing Counsel for Committal

A lawyer briefing Counsel in committal proceedings will:

- 4.2.1 Contact the Clerk of Chambers immediately following receipt of the grant letter to ascertain the availability of a Public Defender.

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- 4.2.2 If a Public Defender is not available, retain a copy of the Non-acceptance of Brief Form on the file.
- 4.2.3 If the matter does not fall within the definition of a complex matter under 6.1 and a Public Defender is not available, brief private Junior Counsel.
- 4.2.4 If the matter does fall within the definition of a complex matter under 6.1 and a Public Defender is not available, the lawyer will brief Junior Counsel who is appointed to the Complex Criminal Law Barrister Panel in accordance with the Grants Allocation Guidelines.
- 4.2.5 Promptly provide briefs and instructions to Counsel in writing, including where practicable, the following legible documents:
- (i) A back sheet;
 - (ii) an index of documents contained in the brief;
 - (iii) observations on the facts to Counsel sufficient to assist Counsel in appreciating the issues, and the background of the matter;
 - (iv) such other observations as the lawyer may regard as being useful to Counsel;
 - (v) a copy of the charge certificate;
 - (vi) client's instructions;
 - (vii) criminal history of the client;
 - (viii) medical and expert reports (both Crown and defence reports);
 - (ix) statements of Crown witnesses;
 - (x) statements of defence witnesses;
 - (xi) transcript of Local Court proceedings; and
 - (xii) copies of any subpoenas issued.
- 4.2.6 Ensure that the original brief along with any additional material served throughout the proceedings are sent to Counsel as soon as they are received.
- 4.2.7 Promptly reassign the Grants Online invoice for Counsel's fees to Counsel, to enable Counsel to claim his or her fees directly from Legal Aid NSW.

4.3. Case Conferencing

A lawyer participating in the case conference scheme will:

- 4.3.1 Comply with the principles set out in the current version of the [Best Practice Guide to Case Conferencing](#) co-authored by Legal Aid NSW, the NSW Office of the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions.

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- 4.3.2 Advise the client on the objectives of case conferencing contained in s70 of the Criminal Procedure Act 1986
- 4.3.3 Advise the client on the procedure for the initial case conference and any subsequent case conference.
- 4.3.4 Obtain instructions from the client concerning matters to be dealt with in the case conference prior to participating in the case conference.
- 4.3.5 Advise the client that any offers made by the defence or the prosecution during the case conference will be recorded on a case conference certificate.
- 4.3.6 Advise the client that matters specified in a case conference certificate are to be treated as confidential.
- 4.3.7 Prior to the completion and filing of the case conferencing certificate advise the client, or ensure that Counsel advises the client where Counsel is briefed, of:
 - (i) The effect of the case conferencing scheme to the sentencing discount applied under Part 3 of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence.
 - (ii) The penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made on behalf of the client or by the prosecutor in the committal proceedings.
 - (iii) The effect on the applicable penalty if any such off is accepted or rejected, including the effect of acceptance at different stages of the proceedings for the offence.
- 4.3.8 When submitting the claim to the Grants Division for attendance at the case conference the lawyer must complete the case conference outcome form.

4.4. Attendance at Case Conference

It is expected that the assigned panel lawyer and counsel (when briefed) will attend the case conference. If it becomes necessary, in exceptional circumstances, for the assigned lawyer to arrange for another lawyer or agent to attend, that lawyer or agent should be appointed to the panel.

In addition, the assigned panel lawyer must ensure that:

- 4.4.1 The client is not disadvantaged by the delegation to another panel lawyer.
- 4.4.2 The work is completed in accordance with these standards.
- 4.4.3 Any lawyer is sufficiently familiar with the matter and the case conferencing processes and procedures to be able to properly advocate for the client at the case conference.
- 4.4.4 They maintain a record on file of the name of any person who attends the case conference on their behalf.

- 4.4.5 At the conclusion of the committal proceedings, ensure wherever possible that counsel briefed at committal, whether a Public Defender or private counsel, will continue to be briefed for the trial and or sentence proceedings.

4.5. District Court Trials

A lawyer appearing for a defendant in a criminal trial in the District Court will:

- 4.5.1 Obtain all relevant prosecution evidence including the Indictment, the full brief of evidence including results of forensic investigations, other expert reports and the client's criminal record.
- 4.5.2 Ensure the client is fully apprised of the case against him or her prior to any instructions being taken regarding the plea to be entered.
- 4.5.3 Advise the client of any reasonably open defences to the matter, the penalties applicable and the benefits of a guilty plea.
- 4.5.4 Obtain signed instructions from the client if he or she intends to plead guilty, these should be obtained prior to arraignment.
- 4.5.5 After obtaining approval from the Grants Division obtain any necessary expert report on behalf of the client.

4.6. Briefing Counsel for Trial

A lawyer briefing Counsel in a criminal trial in the District Court will:

- 4.6.1 Ensure that Counsel is briefed prior to the arraignment.
- 4.6.2 If the lawyer was not assigned the matter for the committal proceedings or if Counsel was not briefed at the committal, the lawyer will:
- (i) Contact the Clerk of Chambers immediately following receipt of the grant letter to ascertain the availability of a Public Defender.
 - (ii) If a Public Defender is not available, retain a copy of the Non-acceptance of Brief Form on the file.
 - (iii) If the matter does not fall within the definition of a complex matter under 6.1 and a Public Defender is not available, brief private Junior Counsel.
 - (iv) If the matter does fall within the definition of a complex matter under 6.1 and a Public Defender is not available, the lawyer will brief Junior Counsel who is appointed to the Complex Criminal Law Barrister Panel in accordance with the Grants Allocation Guidelines.
- 4.6.3 Promptly provide briefs and instructions to Counsel in writing, including where practicable, the following legible documents:
- (i) A back sheet;
 - (ii) an index of documents contained in the brief;

- (iii) observations on the facts to Counsel sufficient to assist Counsel in appreciating the issues, and the background of the matter;
- (iv) such other observations as the lawyer may regard as being useful to Counsel;
- (v) an indictment;
- (vi) client's instructions
- (vii) criminal history of the client;
- (viii) medical and expert reports (both Crown and defence reports);
- (ix) statements of Crown witnesses;
- (x) statements of defence witnesses;
- (xi) transcript of Local Court proceedings; and
- (xii) copies of any subpoenas issued.

4.6.4 Ensure that the original brief along with any additional material served throughout the proceedings are sent to Counsel as soon as they are received.

4.6.5 Ensure Counsel advises the client as to the benefits of an early plea pursuant to s.22 of *Crimes Sentencing Procedure Act 1999*.

4.6.6 Promptly reassign the Grants Online invoice for Counsel's fees to Counsel, to enable Counsel to claim his or her fees directly from Legal Aid NSW.

4.7. Court Appearances

It is expected that the assigned panel lawyer will attend all court listings and instruct Counsel on each day of a trial. If it becomes necessary, in exceptional circumstances, for the assigned lawyer to arrange for another lawyer or agent to attend, that lawyer or agent should be appointed to the panel. In addition, if exceptional circumstances require the use of a clerk to instruct Counsel, the clerk must be experienced and properly briefed.

The assigned panel lawyer must ensure that:

4.7.1 They retain personal control over the conduct of the case, including responsibility for making forensic decisions such as the number and nature of witnesses to be called or cross examined.

4.7.2 The client and the court are not disadvantaged by the delegation to another panel lawyer, agent or an instructing clerk.

4.7.3 The work is completed in accordance with these standards.

4.7.4 Any lawyer (or clerk in exceptional circumstances) is sufficiently familiar with the case and the duties of an instructing lawyer and be competent to carry out the functions of an instructing lawyer.

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- 4.7.5 They maintain a record on file of the name of any person who attends court on their behalf or as their agent, including dates and times they instructed Counsel.
- 4.7.6 Claims submitted for court attendances by clerks are in accordance with the legal aid fee rates applicable to clerks.

4.8. Instructing at Trial

When instructing Counsel in a criminal trial in the District Court the lawyer will:

- 4.8.1 Order a transcript of trial proceedings on the prescribed application. Legal Aid NSW will not fund the cost of obtaining the transcript. Lawyers can make an application to the Court Reporting Service for the transcript by way of a brief letter setting out the fact that the accused is indigent, legally aided and that a transcript is necessary to prevent procedural unfairness.
- 4.8.2 Take proper notes, and record exhibits; so that those exhibits can be easily identified, when required.
- 4.8.3 Provide Counsel with copies of witnesses' statements, when Counsel is cross-examining. Arrange defence witnesses and otherwise assist counsel as required.
- 4.8.4 Respond to the advice of Counsel in a timely manner including advice as to the preparation of the case.

4.9. Appearing at Sentence

A lawyer appearing in a sentence matter in the District Court following a conviction at trial or a plea of guilty (at committal, arraignment or trial) will:

- 4.9.1 Obtain prior instructions from the client. It is recommended that the client sign their instructions. Read to the client, or have them read, the agreed facts. A signed copy of the agreed facts should never be provided to the prosecution.
- 4.9.2 Advise the client on the law, procedure and practice that applies to their case, including; the charges and the potential penalties.
- 4.9.3 Consider whether to negotiate with the DPP on a different or a lesser charge, in full satisfaction of any indictment.
- 4.9.4 Consider whether it is relevant or necessary to have any matters placed on a Form 1 and taken into consideration on sentence.
- 4.9.5 Consider whether a Pre-Sentence Report will be to be beneficial or useful. In deciding this issue, consider the client's criminal record, any previous breaches of parole, bond, and community service orders. Consider the current offence and whether a non-custodial sentence is likely or possible.
- 4.9.6 Determine what material needs to be tendered on sentence for the client, and obtain those assessments and reports to enable you to put forth subjective material on sentence.

- 4.9.7 Obtain a personal history from the client, including medical history, psychiatric diagnoses, psychological assessments, drug and alcohol history, attempts at rehabilitation, family background, and immigration status.
- 4.9.8 If possible, obtain past psychological or psychiatric assessment, and/or past Probation and Parole reports to determine whether this person has issues which need to be addressed.
- 4.9.9 Determine if the person has mental health issues or an intellectual disability requiring a psychological or a psychiatrist assessment, with the approval of Legal Aid NSW, which will be addressed on sentence.
- 4.9.10 Advise the client about the appeal process, appeal prospects and time limits for appeal. Explain the Legal Aid NSW policy and the merit advice process in respect to obtaining legal aid for an appeal against conviction and/or severity or a Crown Appeal.

4.10. Responding to a s. 5F Appeal Filed by the Crown

4.10.1 Merit Test A applies to applications for legal aid to respond to an interlocutory appeal under s.5F or to respond to a Crown sentence appeal under s.5D, s.5DA, s.5DB, and s.5DC of the *Criminal Appeal Act 1912* (NSW) ([Criminal Law Policies 4.13.1 and 4.13.2](#)). [Criminal Law Guideline 1.14.2](#) provides guidance on considering whether the applicant satisfies Merit Test A when responding to an appeal. Guideline 1.14.2 says there is a presumption of merit on the basis that there is a judgment or order that is favourable to the applicant and is the subject of the appeal brought by another party to the proceedings. In applying Merit Test A, lawyers should take into consideration the following:

- (i) Would a grant benefit the applicant by assisting them to retain the favourable decision or at least minimising any harm that might arise from altering the favourable decision;
- (ii) Would a grant avoid the harm and delays that might arise from the applicant being unrepresented on appeal;
- (iii) That a favourable decision would indicate reasonable prospects of success; and
- (iv) That the CCA has a strong preference for parties to be appropriately represented as:
 - (a). the Court may want to raise its own arguments or ask the parties questions;
 - (b). the respondent may be able to argue in some circumstances that even where the trial judge has made a mistake the Court should exercise its discretion and allow the decision to stand; and
 - (c). it would avoid delays.

NOTE: these considerations can also be taken into account when applying the “appropriate expenditure of limited legal aid funds” test.

4.10.2 Where the client is responding to a s. 5F appeal, the trial barrister may be retained to appear in the CCA, even if they are not on the Appellate Criminal Law Barrister Panel. The instructing lawyer must consult with Grants to determine the most appropriate barrister in the circumstances, and it may be determined that a barrister from the Appellate Criminal Law Barrister Panel is required (e.g. due to the complexity of the matter, a lack of relevant experience by the trial barrister, issues of availability and timing of the hearing etc.).

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4.10.3 Where the client is seeking to commence a s. 5F appeal, a new grant is required and only counsel on the Appellate Criminal Law Barrister Panel can be briefed to appear. Guideline 1.14.2 does not apply in these circumstances (i.e. there is no presumption of merit).

5. File Management

A lawyer representing an accused person in a criminal matter subject to a grant of legal aid must ensure that:

5.1 Files must be maintained in an orderly manner so that Legal Aid NSW may effectively audit the file if required, and to ensure that another lawyer assuming conduct of the matter may quickly and easily understand its factual basis, the client's instructions, the stage the matter has reached and all further action required to run the matter in line with the practice standards.

5.2 All documents including:

- (i) correspondence from the Grants Division in relation to the grant of legal aid; and
- (ii) correspondence received and sent in relation to the matter

are kept on the file in date order.

5.3 Court documents filed, served or issued in the proceedings are kept in a separate bundle on the file in date order.

5.4 Clear and legible file notes are kept of all telephone conversations, conferences, interviews, meetings with clients or witnesses and experts and include:

- (i) date;
- (ii) name of person spoken to; and
- (iii) relevant details of the conversation.

5.5 Clear and legible file notes are kept of information and advice given to a client that is not confirmed in writing.

5.6 All court attendances are noted on the file in date order with:

- (i) Coram;
- (ii) date and venue of court appearance;
- (iii) the name of the lawyer attending on behalf of the legally assisted person;
- (iv) details of other parties' representative/s;
- (v) summary of any negotiations and orders or directions made;
- (vi) start and finish time/s of the court attendance; and
- (vii) the date proceedings have been adjourned to or the outcome of the matter.

5.7 All Conferences, Views, Prison Visits and any other specific attendances must be noted on file including at a minimum, details of the length and type of attendance and the date on each occasion.

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- 5.8 Receipts or other verifying evidence for all disbursements claimed for payment from Legal Aid NSW are retained in a separate section of the file.

6. Training

A lawyer who is a member of the panel will:

- 6.1 Undertake training as required by Legal Aid NSW.
- 6.2 Complete at least five CPD units each year specifically relevant to the practice of Criminal law.

7. Definitions

7.1. Complex Matters

A complex criminal matter under a grant of legal aid includes:

- All Supreme Court trials and pleas;
- Matters where the maximum penalty is life imprisonment;
- Manslaughter trials and pleas;
- All terrorism matters;
- Sexual Assault matters where there are multiple complainants and/or multiple defendants;
- Matters where the trial is complex because of the nature of the charge or the defence or where significant case management is required (e.g. sex slavery, fraud or money laundering charges where there are more than 30 counts and/or the total value is more than \$500,000.00);
- Matters involving a number of expert witnesses and identified by the trial judge as requiring significant case management pursuant to s.141 *Criminal Procedure Act 1986*;
- Where the trial length is estimated at 20 days or more; and
- Where the brief of evidence is more than 5,000 pages.