

## Appellate Criminal Law Barrister Practice Standards

This document sets out practice standards for barristers representing legal aid clients and providing advice to Legal Aid NSW in appeals to the Supreme Court, Court of Criminal Appeal (CCA) and the High Court of Australia.

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

The Grants Division manages grants of aid in the District and Supreme Court, the NSW Court of Criminal Appeal and the High Court of Australia. Barristers who are appointed to the Appellate Criminal Law Barrister Panel (the panel) are eligible to be briefed in legally aided matters covered by the panel. Continued inclusion on the panel is conditional on compliance with these practice standards.

This panel is established under section 50(1) of the *Legal Aid Commission Act 1979* (NSW).

### Index

General Principles.....	2
1. Responsibilities to Clients.....	2
2. Responsibilities to Instructing Solicitors .....	2
3. Responsibilities to the Court .....	3
4. Responsibilities to Legal Aid NSW.....	3
5. Obligations in Assessing Merit.....	4

## General Principles

The majority of people appearing in criminal matters and in receipt of legal aid are disadvantaged in their dealings with the legal system. They come from a variety of different and often disadvantaged backgrounds. They differ widely in their physical, mental and intellectual abilities and their capacity to understand legal matters. They often have difficulty communicating effectively with the court, government authorities and their legal representatives.

Practitioners representing people in receipt of legal aid in criminal courts must be able to communicate effectively with their clients and also have an understanding of cross-cultural issues and issues facing socially and economically disadvantaged people.

### 1. Responsibilities to Clients

A barrister has the following responsibilities to their client:

- 1.1 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.
- 1.2 Use a qualified interpreter whenever necessary.
- 1.3 Provide the client with the barrister's details.
- 1.4 Ensure that the client is informed of the process generally, the outcome of all Court appearances and of particular developments in their case as appropriate.
- 1.5 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. If it is not possible due to the lack of time because of list demands then ensure, so far as is practicable, a letter is sent by their instructing solicitor sent to the client informing them of the results and their effect.
- 1.6 Keep proper records of all conferences and attendances and maintain briefs in an orderly and proper manner.
- 1.7 Not charge or recover any money from the client except with the approval of Legal Aid NSW: see: s.41 *Legal Aid Commission Act 1979*.

### 2. Responsibilities to Instructing Solicitors

A barrister has the following responsibilities to their instructing solicitor:

- 2.1 Provide advices (if there is no merit) or grounds and settled submissions and the short note confirming merit (if there is merit) promptly and within court timetables.
- 2.2 Respond promptly to any request for advice on evidence, expert reports or conferences.

Appellate Criminal Law Barrister Practice Standards	Version: 3.0
June 2018	Page 2 of 5

- 2.3 Comply and advise in relation to all Practice Notes and Orders of the Court.
- 2.4 Review the brief to ensure it includes all necessary documentation and transcript to prepare an advice (if there is no merit) or grounds of appeal and submissions and appear (if there is merit).
- 2.5 Advise the solicitor promptly if an application to the Registrar for an extension of time is required for the Notice of Intention to Appeal.
- 2.6 Return briefs promptly if the barrister does not believe they are of sufficient seniority to be able to advise or appear before Court in the particular matter.

### 3. Responsibilities to the Court

A barrister has the following responsibilities to the Court:

- 3.1 Provide representation in accordance with the [Legal Profession Uniform Law \(NSW\)](#) and the relevant Legal Profession Uniform Conduct Rules.
- 3.2 Comply with all Practice Notes, timetables and time standards fixed by the court.
- 3.3 Have the case ready to be heard as soon as is practicable.
- 3.4 Present the identified issues in dispute clearly and succinctly.
- 3.5 Confine the case to identified issues, which are genuinely in dispute.
- 3.6 Occupy as short a time as is necessary to advance and protect the client's interests, which are at stake in the case.

### 4. Responsibilities to Legal Aid NSW

A barrister has the following responsibilities to Legal Aid NSW:

- 4.1 Comply with the Service Agreement for the Provision of Services to Legally Assisted Persons.
- 4.2 Comply with these practice standards.
- 4.3 Comply with the provisions of the *Legal Aid Commission Act 1979* and policies and guidelines of Legal Aid NSW (as amended).
- 4.4 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 4.5 Be cognisant of the terms and conditions of the grant of legal aid to the legally assisted person.
- 4.6 Notify Legal Aid NSW of any matter, which may cause Legal Aid NSW to review, alter or terminate the client's grant of aid (see s.38A *Legal Aid Commission Act 1979*).

Appellate Criminal Law Barrister Practice Standards	Version: 3.0
June 2018	Page 3 of 5

- 4.7 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.
- 4.8 Ensure all correspondence, memoranda, notes of conferences or instructions, telephone notes, are kept within the brief in an orderly manner which will allow another barrister, if necessary, to quickly take over the brief.
- 4.9 Take steps to avoid a potential conflict of interest, not act where a conflict exists and notify Legal Aid NSW as soon as possible that a conflict exists.
- 4.10 Maintain files in an orderly manner so that Legal Aid NSW may effectively audit the file if required; allowing it to quickly and easily understand the factual basis of the matter, the client's instructions, attendances at court, conferences, views, prison visits (including a record of the date, start and finish times), and work undertaken in the matter, the stage the matter has reached and any further action that is required.
- 4.11 Make a note on the brief of any advice given to a client that is not confirmed in writing.
- 4.12 Return the brief to the instructing solicitor promptly on completion of the matter or on the barrister ceasing to act and retain or return with the brief all correspondence, memoranda, notes of conferences or instructions, telephone notes, client's instructions, attendances and notations of work undertaken.
- 4.13 Keep timely and accurate records of work to enable proper costing of the brief in accordance with Legal Aid NSW fee scales by the Audit Officer.
- 4.14 Seek orders for costs where appropriate.
- 4.15 Notify Legal Aid NSW of any actual or potential change in the estimated length of the matter.

## 5. Obligations in Assessing Merit

In assessing merit a barrister will do the following:

5.1 If the barrister forms the view that the Legal Aid NSW Merit Test A is satisfied, i.e. "reasonable in all the circumstances". The barrister will:

- (i) Discuss the relative merit of the available grounds of appeal with the instructing solicitor.
- (ii) Proceed to write the grounds and submissions of the appeal by reference to:

### a. Conviction Appeals

Whether the proceedings have involved:

- an unreasonable verdict
- a wrong decision on a question of law, or
- a miscarriage of justice.

Appellate Criminal Law Barrister Practice Standards	Version: 3.0
June 2018	Page 4 of 5

b. Sentence Appeals

- Identification of error(s) made in the exercise of the sentencing court's discretion.

c. High Court Appeals

- Section 35A of the *Judiciary Act 1903* (Cth)

(iii) Attach to those grounds and submissions a short note that the barrister has found the appeal has merit.

- 5.2 When considering whether an applicant for legal aid has reasonable prospects of success in an appeal before the Court of Criminal Appeal, the barrister should take into consideration that the Court may dismiss the appeal on the basis of the proviso in section 6 of the *Criminal Appeal Act 1912*; that is, if the Court "considers that no substantial miscarriage of justice has actually occurred", despite the grounds of appeal being established.
- 5.3 If the barrister forms the view that the Merit Test A is not satisfied, the barrister will provide a comprehensive advice to the instructing solicitor for it to be provided to Legal Aid NSW.
- 5.4 In an all grounds appeal if the merit test is satisfied for only one limb, i.e. conviction or sentence then a merit advice is required for the other limb which does not satisfy the merit test.