Preparing a defended hearing in the Local Court

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1. Introduction

This paper is designed for junior practitioners or those who are new to Local Court criminal advocacy. There are several ways to approach a defended hearing, and each advocate will have a different approach and style. The purpose of this paper is to set out a number of matters to consider when preparing and appearing in a Local Court defended criminal hearing on behalf of an accused person.

The purpose of this paper is not to discuss, other than briefly, the substantive criminal law or practical aspects of advocacy. These are beyond the scope of this paper.

The Acts that are referred to throughout this paper are:

- Crimes Act 1900 (NSW) (the Crimes Act).
- Criminal Procedure Act 1986 (NSW) (the Criminal Procedure Act).
- Evidence Act 1995 (NSW) (the Evidence Act).
- Legal Professional Uniform Australian Solicitors' Conduct Rules 2015 (the Solicitors' Rules)

You should also consider the Legal Aid NSW policies and guidelines that may be applicable to your particular matter (e.g. the defended hearing policy; the jurisdiction test).

2. The charges

The Court Attendance Notice (CAN) – particulars

The particulars in the CAN set the parameters of the charge against your client. Like an indictment, the CAN should state 'the act, matter or thing alleged as the foundation of the charge'[2]. For example, in a charge of larceny, the CAN must state the date and location of the alleged offence, the property must be identified with precision, and the owner of the subject property must be identified.

Other particulars to look out for in a CAN include:

- The correct subsection of the offence (e.g. s 527C *Crimes Act*: Goods In Custody has 4 subsections giving rise to 4 distinct offences; as does s 322 *Crimes Act*: threatening or intimidating witnesses, jurors, etc)
- The type and amount of drug (s 25 *Drug Misuse and Trafficking Act* 1985)
- the value of the property stolen (s 112 *Crimes Act*: Break, enter & commit serious indictable offence)

If the CAN does not include the particulars with sufficient specificity, your client will have difficulty understanding the exact case to answer. In such a situation, you can write to the OIC to request 'further and better particulars'. Often this can be done informally via email and is best done as early as possible in your preparation.

Also check the commencement date of the proceedings. There is a time limit of 6 months for commencing summary prosecutions (s 179 *Criminal Procedure Act*).

[1] This is a revision of a paper published by Lester Fernandez in 2005 when Lester was a solicitor in the Criminal Law Division of Legal Aid NSW. I have also incorporated advice and tips contained in the Legal Aid NSW Solicitor's Manual.
[2] *Johnson V Miller* (1937) 59 CLR 476 at 489-490

Once you know the exact conduct that your client is charged with, you can then research the offence; analyse the evidence; and take detailed, targeted instructions from your client.

3. The prosecution case

a. The Brief of Evidence

The prosecution is required to serve the brief of evidence on the defence before a matter is set down for hearing: Part 2 Division 2 *Criminal Procedure Act* and Local Court Practice Note Crim 1 govern this procedure.

Certain summary offences are exceptions to this rule:

Criminal Procedure Regulation 2017

24 Offences for which briefs of evidence not required

For the purposes of section 187 (5) of the Act, the following proceedings are prescribed as proceedings of a kind in which a prosecutor is not required to serve a brief of evidence —

a) proceedings for an offence for which a penalty notice may be issued (other than an offence that is set out in Schedule 4 and that is not referred to below),
b) proceedings for an offence under section 4 of the *Summary Offences Act 1988*,
c) proceedings for an offence under any of the following provisions of the *Road Transport Act 2013* (or a former corresponding provision within the meaning of that Act)—
    i. section 53 (3) or 54 (1) (a), (3) (a), (4) (a), (5) (a) (i) or (b) (i),
    ii. section 110 or 112
d) proceedings for a summary offence for which there is a monetary penalty only,
e) proceedings for an offence under section 10 of the *Drug Misuse and Trafficking Act 1985*,
f) proceedings for an offence under section 16 (1) of the *Poisons and Therapeutic Goods Act 1966*.

Domestic violence offences require the prosecution to provide the defence with a mini-brief on the first mention date, and the matter is adjourned for a defended hearing as soon as a plea of not guilty is entered. Local Court Practice Note Crim 1, Chapter 10.
Section 183 *Criminal Procedure Act* states that a brief of evidence is to include:

- Written statements taken from the persons the prosecutor intends to call to give evidence in proceedings for the offence, and
- Copies of any document or any other thing, identified in such a written statement as a proposed exhibit.

The brief of evidence will usually include:

- Police statements.
- The statement of the victim.
- Statements of civilian witnesses, if any
- Statements of expert witnesses, if any.
- Results of forensic tests, such as blood alcohol tests.
- Photographs, plans, sketches and other similar documents, if any.

See also *DPP v West* [2000] NSWSC 103 in relation to the statements that are to be included in a

brief of evidence.
Always check the following:

- That statements have been signed and dated.
- That any expert certificates included in the brief comply with s 177 *Evidence Act*.

b. Elements of the offence – analysing the brief

It is essential at the outset to identify the elements of each offence with which your client is charged. The elements are the individual components (ingredients) of an offence, and the prosecution must prove each element beyond reasonable doubt.

LexisNexis Criminal Practice and Procedure NSW (Vol 4, Tab 27: informations and indictments) is an excellent resource for identifying the elements of the offence.

One way to analyse whether the elements of an offence are established is to do the following:

- Divide a page into two columns.
- Write down each element of the offence in the left column, and in the right column, note the evidence in the brief that relates to each particular element.

This will allow you to ascertain:

- What, if any, evidence exists for each element (whether there is a prima facie case)
- The nature of that evidence – direct, circumstantial etc
- The quality/reliability of that evidence.

c. Is there a prima facie case?

This requires there to be admissible evidence in relation to each element of the offence. The quality of the evidence is not important at this stage, but rather that there is simply some evidence in relation to each element. If evidence is absent in relation to one or more element of the charge, then the offence cannot be proved.

d. Strengths and weaknesses of the prosecution case

if you determine that there is evidence in relation to each element, the next step is to analyse the quality of that evidence. Working off the same table described above, closer analysis should be applied to each particular piece of evidence, paying attention to the admissibility and reliability of the evidence.

e. Are there any legal defences?

Some offences have defences particular to them, such as s 527C *Crimes Act* - Goods in Custody; for some offences there are statutory defences such as self-defence for assaults and affray. Other defences derive from the common law, such as claim of right for offences involving theft, and mistake of fact.
Other defences may operate in different ways depending on the type of offence. For example, intoxication at the time of the relevant conduct may be considered in the following way:

1. In relation to offences of specific intent, intoxication may be taken into account in determining whether a person had the intention to cause the specific result necessary for an offence of specific intent, as long as the intoxication was not deliberate.
2. In relation to offences other than offences of specific intent, intoxication can be taken into

account if the intoxication was not self-induced.[3]

LexisNexis' Criminal Practice and Procedure NSW and Annotated Criminal Legislation NSW both provide excellent commentary on most NSW criminal offences. Also check the Local Court and Criminal Trials Bench Books for commentary, directions, and the most recent authorities.

f. Prosecution disclosure

The prosecution is under a continuing obligation to make full disclosure to the accused in a timely manner of all material known to the prosecutor, which may be relevant to a fact in issue (see the Office of Director of Public Prosecutions Prosecution Guidelines and particularly Guideline 18). It is generally (but not strictly) accepted that the Prosecution Guidelines apply to police prosecutors.

See also *Bradley v Chilby* [2020] NSWSC 145.

g. Requisitions

Once you have read the brief of evidence consider whether you need further information. Often there will be additional documents or details that are referred to in witness statements, but which are not contained in the brief of evidence (for e.g. photos, diagrams, sketches).

You can request this information by writing to the Officer in Charge of the matter and sending a copy of that letter to the senior police prosecutor at the relevant court or police station.

Examples of matters that you can requisition, if relevant, are:

- The criminal records of the victim or other relevant witnesses.
- Applications for search warrants and listening device warrants.
- Custody management records.
- Other documents that are referred to in the brief but are not contained in the brief.

The provisions relating to requests are contained in ss 166 - 169 *Evidence Act.* Those sections outline the matters about which requests can be made, the time limits for making requests and the consequences of failure or refusal to comply with such requests.

4. Ethical considerations before you take detailed instructions on the brief

If your analysis of the brief leads you to conclude that the Prosecution case is deficient or too weak to prove the offence beyond reasonable doubt, you may decide to consent to the Prosecution tendering their brief without requiring any of their witnesses to be called for cross-examination. Upon reading the brief, the Magistrate hears submissions from each party, and yours would focus on why there is either no prima facie case, or why the charge cannot be proven beyond reasonable doubt.

In this situation, you'll want to be absolutely confident in your assessment of the Prosecution case, and that your client understands the consequences of proceeding without challenging any of the Prosecution case or calling any defence evidence.

However, in the vast majority of matters, you will find that there is at least a prima facie Prosecution case to answer. Before you proceed with obtaining your client's version, advise them on Solicitors Rule 20.

[3] see Part 11A *Crimes Act 1900 NSW*

Rule 20 – Delinquent or Guilty Clients

20.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:

20.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;

20.2.2 in cases where the solicitor continues to act for the client:

i. must not falsely suggest that some other person committed the offence charged;
ii. must not set up an affirmative case inconsistent with the confession;
iii. may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
iv. may argue that for some reason of law the client is not guilty of the offence charged; and
v. may argue that for any other reason not prohibited by (i) and (ii) the client should not be convicted of the offence charged;

20.2.3 must not continue to act if the client insists on giving evidence denying guilt or requires the making of a statement asserting the client's innocence.[4]

5. Your instructions

a. What is your client's version of the events?

After you have read the brief of evidence and determined that there is a case for your client to answer, you can take detailed instructions. Your client's instructions should include:

1. Their version of the event: what they say did or did not happen.
2. Their comments on the victim and witness statements.
3. Their comments on their arrest, charging, detention and interviewing.
4. If there are any witnesses that would assist the defence case.

Always get your client to read, sign and date these instructions for your file.

b. Does your client have a defence?

Your client may deny the allegation altogether; dispute certain alleged facts in relation to one or more of the elements of the offence; raise a defence at law; or simply seek to 'put the prosecution to proof'.

As mentioned, it is important to be aware of what defences may be available in a particular case. You must thoroughly research the law in relation to your client's particular charges, using resources such as Criminal Practice and Procedure NSW.

c. Defence witnesses

Defence witnesses can be categorised as:

- Material witnesses – they were there, or they can give evidence of what they saw, heard, etc.
- Character witnesses – see below

In the same way that you take a statement from your own client, you should take a detailed version from other defence witnesses if you have any. Ensure they sign and date their statement.

[4] Australian Solicitors Conduct Rules

d. Evidence of good character – absence of relevant convictions

Evidence of good character can be led for two reasons:

a. An accused is, by virtue of his/her good character, considered unlikely to be guilty of the offence charged. Your client either has no convictions at all, or no relevant convictions (i.e. no convictions for dishonesty when charges with a stealing-type offence).
b. Good character can be used in assessing the credibility of the accused in the denial of the charge, and therefore the unlikelihood of guilt.

See *R v Murphy* (1985) 4 NSWLR 42 at 54.

The provisions relating to evidence of good character are contained in ss 109 – 112 of the *Evidence Act*.

Evidence of good character, if available, can be led in a general sense or in a specific sense. You will need to consider carefully whether good character should be raised.

Evidence of good character can be led from:

- Cross examination of the Officer in Charge of the matter.
- The accused.
- Any defence witnesses called to give evidence in relation to the accused's character.

e. Subpoenaing documents

Your client may instruct you to obtain material that might not have been provided by the prosecution. For example, CCTV footage, or criminal histories of prosecution witnesses.

Both Part 3 (ss 220 – 232) of the *Criminal Procedure Act* and Part 6 of the Local Court Rules 2009 govern the procedures relating to issuing and setting aside subpoenas in the Local Court. A detailed discussion of the considerations involved in subpoenaing documents can be found in Chapter 7 of the NSW Young Lawyers Criminal Law Committee's *A Practitioner's Guide to Criminal Law*[5].

6. Preparing the hearing – working in reverse

a. Case theory and closing address

Upon analysing the brief and obtaining detailed instructions from your client, you should now be able to formulate a case theory that is consistent with your client's plea of not guilty. If you cannot arrive at this, your client probably should be reconsidering their plea.

Your case theory is the nub of your closing address, which is the first thing to prepare. The reason for drafting your closing address first is that it highlights the real issues in your case, such as:

- Weaknesses in the prosecution case
- Statutory or legal defences
- What evidence you will have to lead from particular witnesses
- Your areas for cross-examination, objections, and your examination-in-chief of defence witnesses

[5] https://www.lawsociety.com.au/sites/default/files/2018-05/Practitioner%27s%20Guide%20to%20Criminal%20Law.pdf

- Case law that is relevant and which supports your case.

Maintain a degree of flexibility when drafting your closing, to allow you to address additional evidence and issues that may arise in the course of the hearing.

b. Create a witness table

Having thoroughly read the brief, prepare a table of witnesses. For each prosecution witness have a column that summarises their statement, a column of objections to their evidence; and a column for cross-examination points. Each cross-examination question should have a purpose, informed by your case theory and in support of your closing address: to either discredit damaging evidence, or to highlight favourable evidence.

c. Prepare your client for examination-in-chief & cross-examination & re-examination

This does not mean coaching your client, but it does mean explaining to them how to listen and think before they then answer questions. Your client should understand the constraints of examination-in-chief (non-leading questions), the risks of cross-examination (no control over the questions and likely to be grilled by the Prosecutor), and the purpose and limitations of re-examination (only to address issues raised in cross-examination).

d. Prepare your areas of questioning

Some advocates write every cross-examination question out in full and spend considerable time arranging the order of questioning. Others simply list the particular areas and issues that they need to cover in support of their case theory/closing. Either way, it is essential that you are able to listen and respond to the witness' answers. Your thorough preparation and detailed understanding of the evidence will underpin your success. So develop a technique that works for you.

e. Create a detailed chronology of the matter

This will include events leading up to the incident, and events afterwards. It can be useful to incorporate relevant parts of witness statements in the chronological order.

f. A view

A visual inspection of the location where the allegation is said to have occurred can be invaluable. This will help you understand the area in a way that photographs (if included in the brief of evidence) will not be able to show. You will gain an appreciation of the lighting, any visual obstructions, and distances between crucial points in the surrounding area. Take photographs, if appropriate.

g. Exhibits

Exhibits enhance the persuasive impact of oral evidence and for this reason they are very important. The use of exhibits should be considered, provided the evidence is relevant and can be used effectively.

Exhibits can take the form of diagrams, models, maps, photographs, actual objects, audio and video recordings. Exhibits can also take the form of summary charts of evidence or of other information involved in the case. Section 29 *Evidence Act* states that evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

h. Watch ERISPs (Electronic Recording of Interview with Suspected Person)

In order to be admissible, information given by an accused to police during the course of official questioning usually has to be recorded (s 281 *Criminal Procedure Act*).

The recording (which is defined in s 281(4) *Criminal Procedure Act*) is an exhibit when it is tendered in court. The transcript of the recording is the *aide memoire*. It assists the court but is not the actual exhibit.

It is important to watch the ERISP. It will not only help you work out whether the transcript is accurate, but it may also indicate important aspects of the questioning and your client's manner and condition at the time of questioning which may be relevant in your case (for example, being intoxicated or not in a fit mental state).

i. Subpoena witnesses for the defence

As a matter of caution, it is always preferable to subpoena your own witnesses, even if they tell you that they will be coming to court to give evidence. If a defence witness subsequently is unable to attend court on the date of the hearing and you are seeking an adjournment, it will usually assist you that you have made formal arrangements to have that witness attend court through having subpoenaed them to give evidence.

j. Speaking to the prosecutor

There are several reasons why it may be useful to speak to the prosecutor before a hearing, including:

- To clarify any parts of the prosecution case you are unsure of.
- To identify the issues in dispute and not in dispute
- To check which witnesses the prosecution has available to call in the hearing.
- To discuss the proposed course of the evidence.
- To make sure that prejudicial or clearly inadmissible evidence is not led.
- Have the prosecutor particularise the charge at the outset of the hearing.

If the DPP is prosecuting the case, a DPP solicitor will have been allocated to the case well in advance of the hearing.

If the Police are prosecuting, the prosecutor is likely to be reading the brief of evidence on the date of the hearing. You can still ring the police prosecutors in advance of the hearing though and ask to speak to either the senior police prosecutor or another police prosecutor to discuss the case.

k. Speaking to prosecution witnesses

'There is no property in a witness'. This means that you are entitled to speak to prosecution witnesses if you choose to, but you should exercise caution in doing so. See Rule 23 of the Australian Solicitors' Rules.

<u>Civilian witnesses</u>

It is preferable before speaking to a civilian witness to speak to the Officer in Charge of the case as well as the prosecuting officer or solicitor. If that witness is legally represented, you must approach their lawyer first: Rule 33 Australian Solicitors' Rules.
Always have an independent witness (not your client) with you when you speak to them. Better still, consider speaking with them only in the presence of the prosecutor or OIC.

Complainants

It would be a rare case where you would want to speak to a victim in a matter, even where the victim asks to speak to you. Only do so in the presence of the prosecutor or OIC, and never over the telephone. You should also note that the Law Society has issued Guidelines in relation to contact with complainants in apprehended violence orders and family violence matters. The Guidelines are available from the Law Society.[6]

Expert witnesses

Conversely, you should always consider speaking to an expert witness to be called by the prosecution. Most experts pride themselves on their impartiality. You will benefit from speaking to the prosecution's expert by talking to them about their evidence and how they arrived at their opinions. This information will help you in preparing your case, and particularly your cross examination. Excellent papers and resources, such as Her Honour Judge Yehia's paper on Expert Evidence can be found on the Public Defenders website, and the Criminal CPD website.

l. Late service of statements

Police and prosecutors often serve additional brief items within 14 days of the hearing date, and even on the date of the hearing. You can object to this evidence being admitted in the hearing, given that it has not been served in accordance with the '14-day rule' found in s 183(3) *Criminal Procedure Act*).

It would then be up to the prosecution to persuade the Court of good reasons why this rule should not be observed. The Court has the power to either allow the evidence in, despite your objection, or adjourn the proceedings to allow the Prosecution time to comply with the rule. (See Division 2 of the *Criminal Procedure Act* generally).

7. The hearing

Both the *Criminal Procedure Act* (particularly Chapter 4 Part 2) and the *Evidence Act* contain a number of important sections relating to the taking of evidence from witnesses. Chapter 4 of the Criminal Procedure Act concerns Local Court hearing procedures. Part 2.1 of the *Evidence Act* governs the questioning of witnesses.

You should be fully across this legislation.

a. The order of proceedings

Courts often list far more defended matters than there is time to resolve on any given day, on the expectation that many hearings will resolve or not proceed for various reasons. Notwithstanding, the list is usually very busy and the Court expects parties to be ready to proceed at a moment's notice.

The Magistrate may invite the parties to make short opening addresses, or may simply ask 'so what is this matter all about?' This is an opportunity to outline the issues that are in dispute, and those that are not in dispute (which you would have confirmed with the Prosecutor before the hearing). This is also the time when you can request the Prosecutor to particularise their case so as to pin them down.

Often, the Magistrate will not be interested in hearing opening remarks and will simply say, 'call your first witness, Sergeant'.

The prosecution will present their case first, and generally calls witnesses in this order:

[6] https://www.lawsociety.com.au/sites/default/files/2018-03/1254699_0.pdf

- The Officer in Charge and then other police witnesses,
- The complainant,
- Civilian witnesses,
- Expert witnesses, if any.

At the close of the Prosecution case, you have an opportunity to address the Court, which is discussed below.

Then you proceed with the defence case: calling your client and other witnesses. When you've called through all your witnesses and any other evidence, the Prosecutor then makes their closing address, arguing why your client should be convicted. You follow with your closing address, arguing why the offence can't be proved beyond reasonable doubt, and which you will have already drafted long before the hearing began.

b. Challenging the Prosecution Case

Admissibility of evidence

You should diligently consider all relevant aspects of the *Evidence Act* with a view to ascertaining the admissibility and inadmissibility of the evidence in the brief. A thorough understanding of the relevant provisions in the Evidence Act is an essential (albeit arduous) requirement to being an effective advocate.

For example, identification evidence (which is defined in the Dictionary to the *Evidence Act*) is only admissible in certain circumstances (ss 114 - 115 *Evidence Act*) and may be subject to a warning in relation to its reliability (ss 116(1), 165(1)(d) *Evidence Act*).

Unlawfully or improperly obtained evidence[7]

These matters include:

- The lawfulness of arrest. See, for example, *Christie v Leachinsky* [1947] AC 573.
- The appropriateness of arrest. See *DPP v Lance Carr* (2002) 127 A Crim R 151.
- Compliance with the detention after arrest provisions contained in Part 10A *Crimes Act* and the Crimes (Detention After Arrest) Regulation 2000, especially in relation to vulnerable persons.
- Powers of search and seizure.
- Exclusion of admissions (s 281 *Criminal Procedure Act,* ss 84, 85, 86, 90 *Evidence Act*).

Discretionary exclusion of evidence

There might be discretionary reasons for a Magistrate to exclude or limit evidence. The discretions to exclude evidence are contained in the *Evidence Act* and include:

- The discretion to exclude admissions (s 90).
- The general discretion to exclude evidence (s 135).
- The general discretion to limit use of evidence (s 136).
- The exclusion of prejudicial evidence in criminal proceedings (s 137).
- The discretion to exclude improperly or illegally obtained evidence (s 138).
- Admissions made by suspects in custody who have not been properly cautioned (s 139).

[7] Jane Sanders, Principal Solicitor of The Shopfront Youth Legal Centre has published some excellent papers on Police Powers and LEPRA. You can find them at the Criminal CPD website

c. Challenging the evidence

Challenging the credibility of the police or their witnesses

Examples of ways that you may challenge the credibility of police or their witnesses are:

- You may cast doubt on the witness's ability to observe the events they have stated in evidence.
- You may be aware of a prior statement made by the witness that is inconsistent with their examination-in-chief. You can cross-examine the witness in relation to those inconsistencies.

Inconsistency between prosecution witnesses

Another way to cast doubt on the evidence of a prosecution witness is by eliciting and using the evidence of other witnesses that is inconsistent.

Corroboration of the defence case from prosecution witnesses

Not all prosecution witnesses necessarily hurt the defence case. In some situations, prosecution witnesses (whether they are independent witnesses or police) may support evidence given by the accused or the defence witnesses.

In these circumstances, the goal of cross-examination will be to elicit the favourable evidence that substantiates your client's version.

The rule in *Browne v Dunne*

The rule in *Browne v Dunn* (1894) 6 R 67 is a rule of procedural fairness. It provides that a witness subject to cross-examination should have the opportunity to agree or contradict evidence that touches upon the testimony of that witness.

If the rule is breached there are a number of potential consequences, including under s 46 Evidence Act that a court may give leave to a party to recall a witness to give evidence about a matter raised by evidence adduced by another party, being a matter on which the witness was not cross-examined.

See *R v Birks* (1990) 19 NSWLR 677 at 688 – 689. See also *R v Liristis* [2004] NSWCCA 287 for a detailed discussion of the rule, its principles and cases in which it has been applied.

One advantage of having your client's written instructions is that you can use them as a checklist to make sure that you comply with the rule in *Browne v Dunn*.

Unreliability of evidence

Section 165 *Evidence Act* sets out a list of the matters that can comprise unreliable evidence. The list is non-exhaustive and includes:

- Hearsay evidence.
- Evidence of admissions.
- Identification evidence.
- Evidence, the reliability of which may be impaired by age, ill health (whether physical or mental), injury, disability or the like.
- Evidence given by a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding.
- Evidence given by is a prison informer or 'give up'.

- A written record of official questioning of an accused that has not been signed, or otherwise acknowledged in writing by the Accused (such as a notebook statement that has not been signed by the Acccused).

In a hearing in the Local Court, you can ask a Magistrate to direct him/herself as to the matters contained in s 165. If you ask the Magistrate to do this, in accordance with s 165(2), you will have to address the Magistrate on:

- The fact that the evidence may be unreliable.
- The matters that cause the evidence to be unreliable.
- The need for caution in determining whether to accept the evidence.
- The weight to be given to the evidence.

For a history of common law warnings and their relationship to the warnings contained in s 165, see *R v Stewart* (2001) 52 NSWLR 301.

d. Assessing the evidence at the end of the prosecution case

At the end of the prosecution case, if you determine that the Prosecution has not led any evidence in relation to one or more elements of the offence, you can make a submission that your client has "no case to answer". The court is required to decide whether a prima facie case exists. The question at this stage is: on the evidence as it stands, could the accused lawfully be convicted? This is a question of law (*May v O'Sullivan* (1955) 92 CLR 654).

If you do not make a 'no case to answer' submission, or if you are unsuccessful with making the submission, you should consider whether you can make a submission that, on the whole of the evidence before it, the court cannot be satisfied beyond reasonable doubt that the accused is guilty. This is a question of fact. Such a submission is commonly referred to as the 'second limb of *May v O'Sullivan*'.

You need to be careful when considering making a 'second limb' submission, because some Magistrates take the view that if you do, but they rule against you, you are precluded from calling any evidence in the defence case. You should first ask the Magistrate if they will allow you to proceed with the defence case if you make a 'second limb' submission.

8. The defence case

a. To call your client or not to call your client?

Every accused has a right to silence. The decision to call your client to give evidence is therefore a critical one, which requires careful consideration of a number of factors. Always give your client clear advice regarding the pros and cons of getting in the witness box, and obtain their signed instructions on this issue. It may only be after all the Prosecution evidence has been heard that you make a final determination on whether to call your client or not.

The advantage to calling your client is that the Magistrate will hear your client's version as sworn evidence (adding to its veracity). There are a number of disadvantages, largely concerning cross-examination. Your client might not cope well under cross-examination, and as a consequence may change their version, concede issues in dispute, or become aggressive and argumentative. Your client may also not be able to tell their version without prompting and so will not do well in examination-in-chief. You will be able to assess these weaknesses through your conferences with your client.

Calling your client to give evidence is not a necessity, and in some cases, it may be better that they exercise their right to silence. At the close of the Prosecution case, ask yourself: to what extent, if at all, will I improve my client's chance of an acquittal if I call him/her to give evidence? Then ask yourself: how big is the risk of damaging his/her chances by calling them to give evidence (and being subjected to cross examination)?

b. Calling witnesses in the defence case

If you have witnesses that you will be calling in the defence case, you have to determine:

- What relevant evidence they will give.
- What the credibility of their evidence will be.
- In what order you will call them.

Be aware that if you do not call evidence in the Local Court, you are precluded from calling fresh evidence at an appeal against conviction to the District Court unless you have the leave of the District Court, and only if it is in the interests of justice (ss 18 and 19 *Crimes (Local Courts Appeal and Review*) *Act 2001* (NSW)).

c. Matters to raise with your client and witnesses that will be giving evidence in the defence case

Make sure that you speak to them about the following:[8]

- Taking an oath.
- Procedure in court.
- Listen to each question. Understand all of the words and the question as a whole, and if you don't then say so.
- Tell the truth, including if you do not remember a matter.
- Give short and direct answers – not like a conversation.
- The roles of examination-in-chief, cross-examination, and re-examination.
- Objections to evidence may be made. Credit: the Magistrate will be assessing your answers, the way you give them, and your demeanour generally.
- Face up to difficulties in your evidence; do not avoid them.
- Matters particular to this hearing.

d. Closing addresses

The closing address is the last opportunity where you will have to present your version of the events and your position in relation to the facts and the issues to the Magistrate. The closing is a presentation of an argument as to why your client should be acquitted. Ideally, you will already have sketched this out and only need to include the salient pieces of evidence that really drive your case theory home.

The closing address will highlight:

- The deficiencies in the prosecution case, and why the prosecution has not established the elements of the offence beyond reasonable doubt.
- Any defences raised.
- Relevant case law.

Some of the ways to make a closing address persuasive are to:

[8] This handy list can be found in the Criminal Law Solicitor's Manual, published by Legal Aid NSW

- Address how the facts assist your case.
- Weave your instructions into the argument.
- Address the weaknesses in your own case.
- Address the issues upon which the Magistrate should give less weight or more weight.
- Refer to exhibits or visual aids.

9. Final tips on appearing in a defended hearing

a. Take thorough notes of the evidence

To be able to take useful notes of the evidence at the hearing, you must be extremely organised. Don't be that practitioner who constantly shuffles papers across the bar table, trying to find a document.

One useful strategy is to have your list of areas of questioning on a separate document to the notes you take and keep it on the lectern. Another strategy when taking notes of Prosecution evidence is to divide a page into two columns. On one side of the page, you can write the actual evidence. On the other, make notes of cross-examination points and points to address in your closing.

During your client's examination-in-chief it's helpful to work through their typed instructions, so that you can mark off the issues as you go and ensure you don't miss anything.

During your client's or witness' cross-examination, you can write their evidence on one side of a page, and any re-examination points on the other side.

You will also need to maintain a list of the exhibits as they are tendered at hearing. For the sake of the transcript, you should call exhibits by their number when referring to them in your questions and submissions.

b. Make effective objections

If evidence sounds or seems objectionable to you, it probably is. In these circumstances, it is generally preferable to make an objection and then formulate the grounds for objection. If the evidence is not in fact objectionable, you can withdraw your objection.

There is no substitute for a thorough understanding of the *Evidence Act* and the grounds for objection contained in it. You may be assisted by having a list of headings of the most common grounds for objection to determine the basis of your objection. Some of these grounds are:

- Relevance (Part 3.1 *Evidence Act*).
- Hearsay (Part 3.2 Evidence Act).
- Opinion evidence (Part 3.3 *Evidence Act*).

You will also have prepared a table of prosecution witness' evidence, in which you will have already identified the potential objections to their evidence.
You object to evidence by standing and stating, "I object".

It is useful to begin your objection with a direction explanation of the objection, such as "this is hearsay evidence, because …" or "this is not relevant evidence, because …".

Similarly, you can answer an objection to evidence with a direct explanation of the answer to the objection, such as "this is relevant evidence because….".

10. Steps following a finding of guilty

a. Sentencing

If your client is convicted, the Magistrate will expect to be able to proceed to sentence as soon as possible, and so you should be ready to do so. Exceptions would be when a Sentencing Assessment Report (SAR) is required, or when you require references or other subjective material. Ensure that you have the necessary instructions at the outset of the hearing to either proceed to sentence or to make an adjournment application.

b. Appealing to the District Court

You can lodge an appeal against the conviction. This appeal is lodged after sentencing.

Appeals to the District Court are dealt with in the *Crimes (Local Courts Appeal and Review) Act 2001.* Appeals to the District Court are generally argued on the transcript of the hearing in the Local Court. Fresh evidence is not permitted except with leave of the Court (ss 18 & 19).

c. Bail pending an appeal to the District Court

If your client is looking at a sentence of imprisonment if convicted and sentenced, you would need to inform your client of this possibility before the hearing. Discussing possible sentence options upon conviction and obtaining instructions on this issue will allow you to be prepared for an appeals bail application if your client is in fact convicted and sentenced to full time imprisonment.

References and Resources

Local Court Practice Notes

There are currently two Practice Notes relevant to hearings in the Local Court. These can be found here.

They are:

- Local Court Practice Note Crim 1: Case management of criminal proceedings in the Local Court. This consolidates a number of earlier Practice Notes and includes as attachments a number of relevant forms.
- Local Court Practice Note no 2 of 2012: Domestic and Personal Violence Proceedings. This also attaches information on timetabling for statements.

The Advocacy Rules

The Australian Solicitors' Conduct Rules can be found here.

Rules 17 – 29 govern advocacy and litigation. Make sure you are well acquainted with them!

Learning about advocacy

Advocacy is a skill that is worth the investment in time and effort that it takes for improvement. You can learn through texts and training courses, by watching others on their feet, and by asking others to evaluate your performances in court. Reviewing your and others' mistakes and successes, coupled with your continued practice, will enhance your advocacy.

There are a multitude of resources and texts on the topic (see below). There are also excellent training courses such as that run by the Australian Advocacy Institute.

Resources

The following list of resources is where you will find information related to the various issues raised in this paper. They are only a start. There are many, many more out there.

Online resources

- Criminal CPD
- Criminal Law Survival Kit
- The NSW Public Defenders
- JIRS (Judicial Information Research System – requires a sign-in)
- Bench Books (Judicial Commission of NSW)
- LexisNexis Criminal Practice and Procedure NSW (requires subscription)

Books

- Advocacy manual: the complete guide to persuasive advocacy / Geroge Hampel, Ann Ainslie-Wallace, Elizabeth Brimer, Randall Kune. (2016) Sydney: Australian Advocacy Institute (2), 2016
- An Introduction to advocacy / Bodor, Peter , Berman, Peter , Ainslie-Wallace, Ann , Taylor, Christopher , Wong, Matthew , Prince, Shane , Ierace, Mark , Bell, Richard , Paton, Elaine & The Law Society of New South Wales Young Lawyers (2007)
- Advocacy in practice / Glissan, James (2015)
- George Hampel Hampel on Ethics and Etiquette for Advocates: A Guide to Basics
- (Melbourne: Leo Cussen Institute, 2001).
- Advocacy: an introduction / Curthoys, Jeremy & Kendall, Christopher (2006)