Legal Aid NSW Conference 2017

"GOING THE DOG": SENTENCING AND ASSISTANCE TO LAW ENFORCEMENT AUTHORITIES

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INTRODUCTION

Section 23 of the *Crimes (Sentencing Procedure) 1999* (the CSPA)

1. The common law has long recognised the public interest in encouraging offenders to supply information to authorities which will assist the latter to bring third parties to justice (*R v Cartwright* (1989) 17 NSWLR 243 at 252) or reveal an offender's otherwise unknown criminality (*R v Ellis* (1986) 6 NSWLR 603).

2. In 1991, however, in direct response to the decision of the NSW Court of Criminal Appeal in *R v Many* (1990) 51 A Crim R 54, the NSW Parliament enacted legislation to "regulate" discounts for assistance: *R v XX* [2017] NSWCCA 90 at [42] per Beech-Jones J. The history of the legislative developments in the area of assistance to law authorities is comprehensively reviewed by Beech-Jones J in *R v XX* at [37]-[55] and R A Hulme J in *RJT v R* [2012] NSWCCA 280 at [57]-[61].

3. Assistance to law enforcement authorities is now set out in s 23 of the CSPA. Although the common law and extrinsic material may be relevant to the process of statutory construction, the focus must always be upon the text: *R v XX* at [26]-[27]. Relevantly, section 23 provides:

   (1) A court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence.

   (2) In deciding whether to impose a lesser penalty for an offence and the nature and extent of the penalty it imposes, the court must consider the following matters:

   > *(b) the significance and usefulness of the offender's assistance to the authority or authorities concerned, taking into consideration any evaluation by the authority or authorities of the assistance rendered or undertaken to be rendered,*
   >
   > *(c) the truthfulness, completeness and reliability of any information or evidence provided by the offender,*
   >
   > *(d) the nature and extent of the offender's assistance or promised assistance,*
   >
   > *(e) the timeliness of the assistance or undertaking to assist,*
   >
   > *(f) any benefits that the offender has gained or may gain by reason of the assistance or undertaking to assist,*
   >
   > *(g) whether the offender will suffer harsher custodial conditions as a consequence of the assistance or undertaking to assist,*

(h) any injury suffered by the offender or the offender's family, or any danger or risk of injury to the offender or the offender's family, resulting from the assistance or undertaking to assist,

(i) whether the assistance or promised assistance concerns the offence for which the offender is being sentenced or an unrelated offence,

(3) A lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence.

(4) A court that imposes a lesser penalty under this section on an offender because the offender has assisted, or undertaken to assist, law enforcement authorities must:

(a) indicate to the offender, and make a record of the fact, that the lesser penalty is being imposed for either or both of those reasons, and

(b) state the penalty that it would otherwise have imposed, and

(c) where the lesser penalty is being imposed for both reasons-state the amount by which the penalty has been reduced for each reason.

(5) Subsection (4) does not limit any requirement that a court has, apart from that subsection, to record the reasons for its decisions.

(6) The failure of a court to comply with the requirements of subsection (4) with respect to any sentence does not invalidate the sentence.

PART ONE

Identifying the availability of "assistance to authorities"

4. Identifying the possibility of assisting authorities is a vital threshold issue. It is important to note that s 23 of the CSPA is drafted broadly and has been interpreted as such: *R v XX* [2017] NSWCCA 90 at [32]. Forms of assistance that may not have attracted discounts under the common law may nonetheless fall within the scope of s 23(1): *R v XX* at [51] and [56].

5. The following discussion is designed to highlight:

   - The breadth of the statutory language suggests that the categories of assistance which may attract a discount are not closed. Importantly, the restraints of the common law do not preclude the application of s 23(1). It is therefore important to discard any assumptions about discounts for assistance.

   - However, simply because assistance may fall within s 23(1) does not mean a lesser sentence is warranted. The judicial determination to discount a sentence and the extent of any discount is discretionary not obligatory; it will turn upon the application of the s 23(2) factors.

   - It is therefore important, at an early stage, to identify firstly whether the assistance may fall within s 23(1) and secondly how you can strengthen the argument that the court should exercise its discretion to impose a lesser sentence. The latter involves a thorough and careful application of the s 23(2) criteria to the facts in your matter.

The classic case: assistance against co-accused

6. Assistance to authorities most commonly and most obviously arises as a relevant consideration for defence practitioners in criminal matters involving co-accused.

7. The typical scenario is where police identify and charge one or more co-accused with the joint commission of a crime. For example, "A", "B" and "C" are alleged to have jointly participated in a robbery in company contrary to s 97(1) of the *Crimes Act 1900*. Each co-accused may have an interest in providing assistance to the authorities incriminating the other co-accused. It is trite to observe that the relevance of assistance to authorities will depend upon your client's instructions and the circumstances of the case. For example, if the Crown case is overwhelming and each co-accused intends to plead guilty then the authorities will generally have little interest in an offer of assistance from one co-accused that may incriminate another.

8. Another opportunity to explore assistance to authorities is where the police are unable to identify all offenders in a joint criminal enterprise. In the example above, assume that only "A" has been identified and therefore charged with Robbery in Company. "A" may possess information that could lead to the identification and charging of "B" and "C".

9. Conversely, an offender may have identified the co-offenders to authorities yet the latter have declined to charge the co-offenders. For example, "A" participates in an ERISP. In the ERISP he makes admissions to the commission of the offence and identifies his co-offenders as "B" and "C". The police do not charge "B" and "C" because there is an absence of evidence to corroborate "A"s potential testimony. The limited utility of "A"s assistance does not negate the application of s 23 of the CSPA but it may bear upon the extent of any discount: *Hughes v R* [2013] NSWCCA 129 at [47] per Davies J (Hoeben CJ at CL and Hall J agreeing); *Regina v. Tooth* [2001] NSWCCA 407 per Howie J at [20] (Grove, J. agreeing) citing *Regina v. Yenice* (1994) 72 A. Crim. R. 234 at 239 and *R v Ward* (NSWCCA, unreported, 29 May 1995). It is important, however, to know why police declined to charge "B" and "C". For example, it may damage "A"s case on sentence should he attempt to rely upon s 23 of the CSPA if the police investigation powerfully demonstrates that "A"s account was unreliable or even false.

Assistance against a criminal group, network or syndicate

10. The factual matrix and court attendance notice may indicate that the offender was the sole offender. However, on closer inspection it may appear that the offender was a participant in a broader criminal enterprise. Clients will not ordinarily volunteer, unprompted, their involvement in a criminal group, network or syndicate. However, there are factors that should alert your attention to this possible involvement:

    - The very nature of the charge: offenders participating in commercial drug supply or fraud offences are often participants in a wider criminal network. As a general proposition, the more serious the offence (for example, large commercial quantity supply of a prohibited drug under s 25(2) of the *Drug Misuse and Trafficking Act 1986*) the more likely that the offending is not isolated to your client.

    - The factual matrix: the commercial nature of the criminal offence and the degree of planning, organisation, repetition, sophistication may all constitute indicators of participation in a criminal group, network or syndicate.

    - Examples might include an offender charged with the ongoing supply of prohibited drugs; on closer analysis, it appears that she operates as a "runner" for the principal in a drug supply enterprise. Similarly, the offender may be charged with multiple thefts of mail from residential letter boxes; the purpose of the theft might be to provide the mail to an unknown offender who operates an identity fraud syndicate.

11. If it appears to you that the client might be a participant in a group, network or syndicate, then the subject of their involvement should be broached, carefully and gently, with the client. You may need to obtain instructions regarding their willingness to provide assistance; their role in the criminal enterprise, and; the value of the information that they can provide. Advising clients in these circumstances is important and challenging; it is considered in Part 2.

Assistance arising from the criminal milieu

12. It is unsurprising that many clients are immersed in the criminal milieu. A client may possess relevant information which does not originate from their direct involvement but emerges from their criminal associations and connections. This sort of assistance will fall within s 23(1): *R v Many* (1990) 51 A Crim R 54 at 66-67 cited with approval in *RJT v R* [2012] NSWCCA 280.

Police Informers or Registered Sources

13. An offender's engagement in the criminal milieu or involvement in organised criminality may create an opportunity for the offender to provide ongoing assistance to police as a police informer or registered source. This may take the form of the offender participating in a controlled operation under the *Law Enforcement (Controlled Operations) Act 1997.* That is, the offender, pursuant to the supervision of police and subject to strict legislative restraints, either participates in the commission of a criminal offence or attempts to extract admissions from suspects to a crime.

14. The offender's assistance to police may pre-date the subject offence or it may constitute current and ongoing assistance. It is common for the client or, particularly in the latter circumstance the police, to advise you of this past or current assistance. It is undoubtedly assistance that may warrant reductions in the sentence under s 23.

15. Alternatively, an offender may wish to provide ongoing assistance to police; the promise of future assistance or the realisation of the promise may consequently trigger consideration of s 23. The steps to facilitating ongoing assistance as a police informer are considered in Part 3.

Past Assistance

16. What if your client has provided assistance to the police that pre-dates the commission of the subject offence? The effect of *R v XX* [2017] NSWCCA 90 at [35] and [56] per Beech-Jones J (Bathurst CJ and R A Hulme J agreeing) is that past assistance, even if unrelated to the subject offence, may fall within the ambit of s 23. But whether it warrants a lesser sentence will depend upon the application of the s 23(2) criteria: at [56]. Importantly, the weakened policy rationale that attaches to past assistance and the absence of a temporal or substantive connection with the subject offence are significant hurdles that must be overcome in persuading the court to reduce the sentence.

17. In *R v XX*, the appellant was sentenced for sexual assault offences against his daughter. Many years before the commission of the offence the offender assisted police in the investigation and prosecution of a charge of conspiracy to murder. He received a payment of $17,000.00 for his assistance. There was no evidence of ongoing risk of reprisal. The primary judge took into account his past assistance and imposed a lesser sentence.

18. In allowing the Crown Appeal, Beech-Jones J deliberated upon the application of "past assistance" within the parameters of s 23 of the CSPA. The following principles emerge from His Honour's analysis:

    - Section 23 confers a discretion and not an obligation upon a sentencing judge to proffer a discount when assistance has been provided: at [31].

    - Section 23 is to be construed broadly; it includes, for example, the voluntary disclosure of otherwise unknown guilt to authorities and assistance to authorities where the offender is a victim of a crime: at [32]-[33].

    - Past assistance, that is assistance provided to authorities before the offender's arrest for the subject offence is capable of falling within s 23: at [35]. Section 23(1) will even encompass past assistance that is unrelated to the subject offence: at [56].

    - However, the policy rationale for awarding discounts is considerably weaker where the assistance was provided before the arrest for, or commission of, the subject offence: at [54].

    - Additionally, the presence and strength of any connection between the past assistance and the subject offence is a crucial consideration in determining whether the court should reduce the sentence and, if a reduction is warranted, the extent of any reduction: at [35] and [62]; see also s 23(2)(i) of the CSPA.

    - Therefore, although past assistance may fall within the ambit of s 23 this does not mean it will automatically attract a discount for assistance. Whether past assistance warrants a lesser sentence and the extent of any reduction of the sentence will depend upon the application of the s 23(2) criteria: at [56].

    - The primary judge erred in imposing a lesser sentence because, upon a comprehensive assessment of the s 23(2) criteria, a discount was not warranted. A relevant factor of "great importance" was the unrelated nature of the assistance which was provided many years before the commission of the subject offence [s 23(2)(i)]: at [62]. A consideration of the remaining s 23(2) factors was at best neutral. Although some factors were to the offender's benefit these factors were neutralised because XX had been rewarded for his past assistance [s 23(2)(f)], and there was no evidence he suffered ongoing risk of reprisals [s 23(2)(h)]: at [62].

19. *R v XX* highlights the challenges in obtaining reductions for past assistance particularly where the past assistance is unrelated to the offending. But it does not preclude reductions for this form of assistance. Defence practitioners should always properly consider past assistance; investigate it thoroughly, and; consider if the adverse factual aspects in *R v XX* can be distinguished.

20. There are four practical challenges that will commonly confront defence practitioners when identifying the availability of past assistance as a mitigating factor on sentence.

21. First, uncovering past assistance to authorities. It will not arise on the face of the court attendance notice, facts, record or brief of evidence. It can generally only be identified in conference with the client or the client's family or friends. However, past assistance is somewhat unusual; hence an offender may not think to volunteer it nor will it ordinarily occur to the defence practitioner to explore its existence. Many clients, particularly clients with a criminal history or criminal associations, will be reluctant to admit to having assisted the police even if directly asked. Therefore, it is important to garner the confidence of your client; it is trite to observe that clients who trust their lawyers will provide more fulsome instructions.

22. Second, determining if it was previously taken into account by a sentencing court or if the offender received a reward for proffering the assistance. The former, in particular, would almost inevitably cause the sentencing court to decline to exercise its discretion under s 23 and impose a lesser penalty. Possible solutions to the dilemma include:

    - Asking the client. However, it is respectfully suggested that lawyers would be very reluctant to rely solely upon a client's instructions.

    - Identifying *when* the assistance was provided and contrasting the date of the assistance with the criminal record. The defence practitioner can then obtain the sentencing remarks from any court appearances that post-date the assistance to determine if it was taken into account.

    - Your client or his/her family may be able to provide the name of the officer-in-charge. The officer-in-charge should be able to advise if an affidavit of assistance was prepared. If it was not, it can be inferred that it is unlikely that the assistance was ever taken into account by a sentencing court. Similarly, the officer-in-charge should be able to advise if your client received any material reward or benefit for the assistance.

23. Third, determining if the past assistance has contributed to ongoing adverse consequences for the offender. For example, the offender's past assistance may mean he or she must serve their sentence in more onerous prison conditions such as restrictive forms of protective custody: cf *R v XX* at [58] and [62]. It may therefore be necessary to obtain the offender's NSW Corrective Services file to determine when and why the offender was first placed in protective custody; why the offender continues to be placed in protective custody, and; the conditions of protective custody.

24. Fourth, identifying the existence of a connection between the past assistance and the commission of the subject offence. For instance, the consequences of past assistance may have triggered an illicit substance addiction or the development of a mental illness which contributed to the commission of the subject offence: see, for example, *R v Kelly* (1993) 30 NSWLR 64 at 70 cited in *R v XX* at [49].

Assistance where the offender was a victim of a crime

25. In *RJT v R* [2012] NSWCCA 280, the appellant was sentenced for sexual assault offences committed against his seven year old daughter. The appellant was interviewed by police. During the course of the interview he told police, inter alia, that he had been sexually assaulted by his grandfather. The appellant assisted police in the investigation and prosecution of his grandfather. It appears that his grandfather was subsequently charged and pleaded guilty to charges arising from the appellant's complaint. The primary judge declined to reduce the sentence because she concluded that such assistance did not fall within the ambit of s 23(1).

26. Basten JA (Adams J agreeing) concluded that the primary judge had erred; the appellants' assistance to police not only fell within s 23(1) but it also warranted the imposition of a lesser sentence. Basten JA noted that:

    - The language in the section is wide enough to include any form of assistance but a purposive approach could limit its operation: at [5].

    - It was not necessary to consider if s 23 applied to offenders who were also independent witnesses to a crime or to past assistance (i.e. assistance provided before the commission of the offences): at [6].

    - There is a public interest in encouraging victims of sexual abuse to report offences to police: at [9].

    - The offender's role as a victim and the factual matrix justified a limited discount of 10%: at [10].

27. R A Hulme J dissented. His Honour acknowledged the breadth of the statutory language but did not accept the proposition that the mere reporting of a crime amounted to assistance under s 23. His Honour noted that such a broad construction may result in absurd results. For example, an offender who had been the victim of a home invasion and provided assistance to police many years before the subject offence may be entitled to ask a court to reduce their sentence for that assistance: at [40].

28. It is suggested that *R v XX* resolves the purported absurdity of R A Hulme J's example. That is, the breadth of s 23(1) may encompass such assistance but whether such assistance will warrant a reduction in the sentence will depend upon the principled application of the s 23(2) criteria. In R A Hulme J's example the provision of the assistance before the commission of the subject offence and the absence of any temporal or substantive connection may powerfully indicate that no lesser sentence is warranted: see *R v XX* at [62].

29. Defence practitioners should be cognisant of the following circumstances which may trigger s 23 of the CSPA:

    - If your client participates in an interview for the subject offence, discloses to police that she or he was the victim of a sexual assault and assists police in the investigation and prosecution of the perpetrator, this will fall within s 23(1)

and may warrant a reduction in the sentence for the subject offence pursuant to s 23.

- On a proper application of *R v XX,* it could be argued that an offender who discloses in a police interview that he/she is the victim of a non-sexual offence, or even that he/she is an independent witness to an offence (sexual or non-sexual) and subsequently provides assistance should also fall within s 23(1). But whether this assistance warrants the imposition of a lesser sentence will depend upon the application of the s 23(2) criteria to the particular circumstances of that case.

Disclosure of otherwise unknown guilt

30. The discussion to date has focussed upon assistance that reveals the criminality of third parties. However, s 23 of the CSPA is not limited to that form of assistance. It extends to what is often described as an "*Ellis discount*"; that is, where the offender discloses otherwise unknown guilt to the authorities: see *CMB v Attorney General for New South Wales* [2015] HCA 9 at [41] and [71]; *Panetta v R* [2016] NSWCCA 85 at [33]-[34].

31. In *R v Ellis* (1986) 6 NSWLR 603 at 604, Street CJ (Allen and Hunt JJ agreeing) said:

    Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.

    The leniency that follows a confession of guilt in the form of a plea of guilty is a well-recognised part of the body of principles that cover sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.

32. The principles in *Ellis* may find their expression in a wide array of circumstances. Sentence reductions pursuant to s 23 of the CSPA have occurred where the offender voluntarily confesses to:

    - The commission of an offence that was unknown to police: see *Panetta v R* [2016] NSWCCA 85.

    - The commission of an offence that was known to police but where the police did not know, and were unlikely to discover, the identity of the perpetrator: see *R v Raad* [2011] NSWCCA 138.

- The commission of an offence where the police did not know, but were likely to discover, the identity of the perpetrator: *R v Tezay Hassan* [2005] NSWCCA 21 at [23].

- The commission of an offence which the police may not have been able to prove but for the admissions of the offender. In *S v R* [2008] NSWCCA 186, the offender was the subject of a controlled operation which revealed sufficient evidence to charge the offender with ongoing supply. The offender was arrested and participated in an ERISP; his admissions provided the evidentiary basis for police to charge the offender with the more serious offence of supply prohibited drug not less than the commercial quantity. The court agreed that this warranted a reduction in the sentence under s 23 of the CSPA although there was a divergence of opinion regarding the extent of the reduction: Bell J (Latham J agreeing) at [11] and Adams J (dissenting) at [28]-[33].

- Additional criminality otherwise unknown to police, however, the extent of the leniency will not be as great as cases where the police are unaware of the offender having committed any offence: *Lewins v The Queen* [2007] NSWCCA 189 at [18] per Howie J (Basten JA and Grove J agreeing).

- An aggravating element of an offence which was not previously known to police or could not otherwise be proven beyond reasonable doubt: *MPB v R* [2013] NSWCCA 213 at [124] per Garling J (R A Hulme J and Basten JA agreeing).

33. However, mere cooperation with the authorities may either not fall within the ambit of s 23(1) or it may not warrant a reduction in the sentence having regard to the matters prescribed in s 23(2). For example:

    - It appears that unwitting assistance to police will not fall within s 23(1): *R v Calderoni* [2000] NSWCCA 511 at [13]; *R v Fernando* [2004] NSWCCA 147 at [41]. Therefore, an offender who provides an inculpatory DNA sample to police unaware of its evidentiary significance cannot rely upon s 23: *R v Fernando* at [41].

    - In *JL v R* [2014] NSWCCA 130, the provision of a password to an encrypted file which led to further child sexual assault-type charges did not warrant a reduction in the sentence pursuant to s 23 because it was of limited significance and usefulness in the context of the whole Crown case. McCallum J (with Hoeben CJ at CL and McCallum J agreeing) noted at [26] that: *"The applicant's guilt came to the attention of the police as a result of the victim's complaint to her mother. Police found the encrypted file without the applicant's assistance. They did not need his assistance to anticipate that it probably contained further evidence against him. There is no evidence one way or the other as to whether they could have obtained access to the file without his assistance. It is therefore unsurprising that his alleged assistance was not relied upon by senior counsel at the proceedings on sentence."*

    - The making of admissions to police in an ERISP where the allegations were already under investigation; the admissions were incomplete, and; had limited

significance, would not warrant the imposition of a lesser sentence: *R v AA* [2017] NSWCCA 84 at [49]-[50].

34. Two important observations should be made. First, *R v Calderoni* and *R v Fernando* are rare examples of the Court of Criminal Appeal narrowly interpreting s 23(1) contrary, it could be argued, to the clear terms of the statute. The weight of more recent authority (such as *JL v R, R v XX and R v AA)* appears to suggest that mere cooperation with authorities may fall within the wide ambit of s 23(1) but will not warrant a reduction in the sentence upon consideration of the s 23(2) factors. Second, although such assistance may not warrant a reduction in the sentence under s 23(2) it may constitute remorse for the purpose of s 21A(3)(i) of the CSPA: see, for example, *R v Fernando* at [41].

35. Therefore, if your client has made admissions to police it is important to consider if an *Ellis*-type argument is technically available; how you can persuade the court to exercise its discretion to reduce the sentence under s 23, and; the extent to which it may reduce the sentence. This involves carefully assessing the strength of the Crown case with and without the client's admissions. For example, practitioners might benefit from thinking about the following questions:

    - Without the admissions, would the authorities have discovered the commission of the specific offence charged or any other offence?

    - Without the admissions, would the authorities have been able to identify the offender as the perpetrator of the specific offence charged or any other offence?

    - Without the admissions, would the authorities have been able to prove beyond reasonable doubt the offender's guilt in relation to the specific offence charged or any other offence?

A word of caution

36. Upon identifying the availability of the assistance to authorities as an issue which should be explored, defence practitioners will confront a more nuanced question: should the offender attempt to rely upon assistance as a matter of mitigation? The advantages and disadvantages of providing assistance to authorities should be fully explored with your client. It is to this issue which we now turn.

PART TWO

Advising clients about providing assistance

37. As can be seen from the discussion so far, providing assistance to authorities gives rise to a number of overlapping issues which may impact upon your client's safety and wellbeing, as well as their sentencing outcome. It is suggested that before looking to advance a case on sentence invoking s 23, you provide your client with detailed advice which addresses the advantages and disadvantages of assisting authorities. Relevant considerations include:

Advantages

- The prospect that your client may receive a discount on sentence if he or she provides assistance to the authorities. Your advice should aver to the possibility that the Court may decline to discount the sentence and, if the court deems it appropriate to reduce the sentence, the possible range of discount that the client may receive in the circumstances of the matter.

- Assisting authorities may also constitute evidence of remorse and prospects of rehabilitation for the purpose of s 21A(3) of the CSPA.

- Assisting authorities may strengthen the client's bargaining position during important stages of the negotiation phase such as the settling of charges or the drafting of Agreed Facts.

Disadvantages

- The potential ramifications for your client in the event that they provide false information or renege on an undertaking to provide assistance. The ramifications may be severe; they are discussed at Part 5 of this paper.

- Your client's safety may be in issue should the offender assist authorities particularly where the assistance reveals the criminality of a third party. The risk to the offender's safety may arise from the third party or the third party's associates. More generally, the mere act of assisting police may attract acts of retribution or punishment from persons immersed in the criminal milieu although those persons may be entirely unaffected by your client's assistance; this is most obvious in a custodial setting. While steps can be taken to keep the details of the assistance provided confidential, others may become aware that your client has provided assistance. For example, the client who makes a statement to police incriminating a co-accused should expect the statement to be served upon the co-accused. The client is usually best placed to weigh up those risks.

- If your client is in custody, they should be advised about their right to request that they be placed in protective custody, if they hold fears for their safety arising from the provision of assistance. Any such request should be made in

writing to the Commissioner of Corrective Services.[1] Corrective Services should comply with cl 14.6.1 of the *Offender Classification and Case Management Policy and Procedures Manual,* which states:

> *An inmate who is under threat because:*
>
> - *they have informed on another inmate/s*
> - *have given or are about to give evidence against another inmate*
> - *are considered under threat from another inmate/s must be separated from possible contact with other inmate/s.*
>
> *Note: This process also applies when an external agency such as The Australian Crime Commission, NSW Police, or The Independent Commission Against Corruption report an inmate to be under threat*.
>
> Of course while we can point our clients to the existence of this policy, we can make no guarantees as to its implementation or effectiveness.

- Disclosing information to police may reveal your client's otherwise unknown criminality to police and hence trigger further charges or the inclusion of adverse sentencing facts. Therefore, the importance of induced statements (which are discussed at Part Three) should not be understated.

- Notwithstanding the protection of an induced statement, clients should be warned that there is a possibility, although it is ordinarily remote, that police may utilise the content of the statement for investigative rather than evidentiary purposes; that is, police may investigate what your client has disclosed and subsequently obtain independent admissible evidence that is adverse to your client's interests.

- It is also important to advise clients that the officer-in-charge is likely to prepare a document often described as a "letter of comfort" or "affidavit of assistance" which may be tendered at the sentence hearing. The letter of comfort may, for example, summarise the information provided; comment on its significance, reliability and value, and; opine on the potential that the client may be harmed. It is perhaps an understatement to observe that a negatively expressed letter of comfort is unhelpful to your client's case on sentence. The damage of an adverse letter of comfort may be capable of some amelioration: see *R v Bourchas* [2002] NSWCCA 373 which is discussed below.

[1] See s 11(2) of the *Crimes (Administration of Sentences) Act 1999*, and Clause 14.2, Corrective Services NSW *Offender Classification and Case Management Policy and Procedures Manual.*

PART THREE

Practical steps to providing assistance

38. This section of the paper will focus on practical strategies for defence lawyers in engaging with the police and DPP to facilitate your client providing assistance to authorities. The principal concern is the detection and prosecution of third party criminality.

39. There are a number of different situations that will arise in practice in relation to what type of assistance your client is willing to give and how they are willing to give it.

40. They can range from:

    a) Providing an induced statement against co-accused or others who are uncharged in relation to a matter

    b) Adopting a record of interview in statement form to demonstrate willingness to assist the prosecution

    c) Signing of undertakings to give evidence at hearings/trials of others

    d) Providing assistance to the police by becoming a registered informant (this would involve the client obtaining evidence for the police in a variety of ways), and

    e) Providing information to police to assist in their investigation without the client's details being made public.

Induced statements

41. Guideline 15 of the ODPP Guidelines and page 88 of the NSW Police Code of Practice for CRIME set out the definition of an induced statement. Guideline 15 states:

    An induced statement is one taken from a person on the basis that the information in the statement will not be used against the person making the statement. It is a statement from a person who is prepared to supply information relevant to the investigation of criminal activity which may tend to incriminate him or her in criminal activity and who is not otherwise prepared to supply the information.

42. The rule of thumb is that the Director of Public Prosecutions needs to approve the taking of an induced statement if your client is charged with a strictly indictable matter. The police do NOT have the authority to grant an induced statement if your client has been charged and the ODPP have carriage of the prosecution against your client.

43. If your client is charged with a summary matter that is not being prosecuted by the ODPP, then according to the Code of Practice for CRIME, the police require

the approval of their Local Area Commander or a police officer of equivalent or superior rank (superintendent and above) to approve the application.

Why does my client want an induced statement?

44. If your client is going to give assistance to police you want an induced statement simply because you want them to be protected against the prospect of further charges that arise from their admissions to police.

45. Like the provisions that arise in Crime Commission hearings and other inquisitorial hearings, an induced statement does not cover your client against *falsity of statements or for the purpose of establishing the falsity of evidence given by the witness.*

46. It is important to give them that advice before they engage in this process.

Factors the DPP and Police take into account in deciding whether to recommend that an induced statement be taken

47. The police and DPP solicitors need to write a report to their superiors before approval can be given to take an induced statement.

48. In the Code of Practice for CRIME, pages 89 and 90 set out a list of factors that police should take into account when deciding whether to apply to their superior for an induced statement to be taken. They are:

    - *the seriousness of the offence(s) being investigated and in particular the potential for further serious offences being committed if an investigation result is not achieved*

    - *the extent of the likely involvement by the witness in the criminal activity under investigation*

    - *the likely culpability of the witness in the criminal activity under investigation compared to others who are involved in this activity*

    - *the significance of the information that is likely to be provided by the witness to the investigation*

    - *the likelihood of evidence being obtained to achieve the same or a similar investigative result through other means*

    - *the attitude of the witness and the likelihood of the witness being persuaded to provide the information in a conventional manner*

    - *the perceived reliability of the witness and the evidence that the witness is likely to provide if an inducement is given.*

49. If the DPP agree to provide your client with an induced statement and he/she is then an informer it is likely the client will make their way on to the index of informers that is retained by the DPP. This index records informers who have

given evidence or been proposed to give evidence and any known public evaluation of their evidence by the courts.

50. Pursuant to Guideline 17, once your client is registered on the index an accused person against whom the informer is to give evidence should be informed in advance of trial of:

    a) the informer's criminal record;

    b) whether or not the Police or Corrective Services Department has any information which might assist in evaluating the informer's credibility, particularly as to:

        i. motivation,

        ii. previous animosity against accused persons,

        iii. favourable/different treatment by Corrective Services,

        iv. mental health/reliability,

        v. the extent to which public officers have given evidence or written reports on behalf of the informer (eg to courts, Parole Board);

    c) whether any monetary or other benefit of any kind has been claimed, offered or provided;

    d) whether the informer was in custody at the time of giving assistance;

    e) whether an immunity has been granted or requested;

    f) whether any discount on sentence has been given for assistance in the matter; and/or

    g) other current or former criminal proceedings in which the informer has given evidence or was proposed to give evidence.

Communicating your client's intention (discreetly) to provide an induced statement

51. There are no rules or regulations on how to communicate with the Police/DPP about your client's intention/desire to provide an induced statement.

52. It is important that before you approach the Police/DPP you obtain instructions from your client about the type of information they are able to provide in combination with considering the factors listed above.

53. It may be useful to obtain from your client a list of topics that they are able to provide police that may be of assistance to the prosecution as well as formulating in your letter to the DPP/Police those factors listed above.

54. It is advisable to act discreetly and keep a paper trail.

55. The following practice has proved useful when a client communicates their desire to provide a statement to police against their interests:

    a) During conference with the client discuss very clearly the pros and cons of pursuing this option. Factors to include in your advice to your client are discussed elsewhere in this paper.

    b) During conference it is important you extract from the client the various topics that they can touch on in their induced statement so you can communicate this to the DPP/Police.

    c) Engage in a conversation with the OIC about their interest in your client in giving assistance.

    d) If this is met with a positive response then arrange an 'informal meeting' with police at your office or another location, to discuss the type of information your client is capable of giving. Sell the proposal to them, as they are going to be the main driving force behind whether an induced statement should or shouldn't be taken.

    e) Keep a file note of your conversation with police.

    f) If the matter is prosecuted by the DPP write a letter marked 'strictly confidential' to the solicitor with carriage at the DPP seeking that the Director approve the taking of an induced statement from your client (sample attached A). In your correspondence you should identify the topics (without giving too much away) that your client is prepared to discuss. The DPP need something to get this over the line.

    g) If the matter is prosecuted by the Police, write to the Police as suggested above.

    h) If and when approval is given, it is important that you communicate to your client that arrangements will be put in place by the Police to take the induced statement. However you must stress to the client to NOT talk to Police until you have received the approval in writing from the DPP/Police.

How can the police help your client?

56. Not surprisingly the police have a 'witness protection branch.' They are responsible for the management of witnesses/informers during the course of the legal proceedings and beyond.

57. They and investigating police liaise with a number of different stakeholders in the criminal justice system and beyond to assist witnesses/ informers with their needs, which differ on a case by case basis.

58. Below are some (not all) examples of the type of assistance police can offer your client:

- Police can assist your client in obtaining accommodation.

- Police can provide financial rewards to your client for providing 'information' to police.

- Police can provide induced statements.

- Police can facilitate escorts to and from Court (including liaising with sheriff officers to have witnesses in 'safe' rooms).

- Police can offer general protection to your client against others. Protection can be provided in a range of different ways but also includes participation in the witness protection program:

    - Inclusion in the program is a decision only made by the Commissioner of Police: *Section 6, Witness Protection Act 1995.*

    - If included in the program, the *Witness Protection Act 1995* provides the witness with certain rights and entitlements. For example, a witness can change their identity and have it registered with the Office of Births, Deaths and Marriages (see section 15).

Indemnities/Immunity from prosecution

59. The decision to grant an indemnity is a matter for the Attorney General.

60. Indemnities are a last resort and it is desirable that the criminal justice system operate without the need to grant concessions to persons who have participated in the commission of offences.[2]

61. Section 19 of the *Director of Public Prosecutions Act 1986* enables the Director to request the Attorney General to grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence. The Director may not grant such an indemnity or give such an undertaking. The Attorney General may do so pursuant to Chapter 2 of the *Criminal Procedure Act 1986* and may also give an undertaking that binds him or her in honour.

    - Section 32 *Criminal Procedure Act* is where one finds the power that allows the Attorney General to grant a witness an indemnity from prosecution.

    32 Indemnities

    (1) The Attorney General may, if of the opinion that it is appropriate to do so, grant a person an indemnity from prosecution (whether on indictment or summarily):

    (a) for a specified offence, or

[2] Code Of Practice for CRIME pg 92.

(b) in respect of specified acts or omissions.

(2) If the Attorney General grants such an indemnity, no proceedings may thereafter be instituted or continued against the person in respect of the offence or the acts or omissions.

(3) Such an indemnity may be granted conditionally or unconditionally.

62. Guideline 17 and Annexure C of the ODPP Guidelines set out the 'Interagency Protocol for Indemnities & Undertakings'.

63. Pages 92 and 93 of the Police Code of Practice for CRIME deal with the guidelines applicable to police in seeking an indemnity against prosecution for a witness.

Registered sources

64. There may arise an occasion where your client communicates his/her desire to become a registered source for the police.

65. Police have the power under sections 6, 8 and 27 *Law Enforcement (Controlled Operations) Act 1997* to engage civilians as registered sources, in the course of an investigation into criminal activity.

66. The common example of the use of registered sources in recent times is during a controlled drug operation, where the police engage a registered source and provide them with 'buy money' to purchase prohibited drugs from a suspect. The registered source is usually equipped with recording equipment.

67. This type of assistance by your client can be quite significant (and dangerous) in the context of their own criminal proceedings, often attracting a letter of comfort of significant value.

68. In addition clients can also be financially rewarded by Police for engaging in this work (although note that any reward the client has already received may be taken into account by the Court in determining whether to apply a discount on sentence for assistance, pursuant to s 23(2)(f)).

69. When advising clients who want to engage in this conduct it is important to make them aware there are regulations in place which limit the extent of work they will be required to undertake and safeguards police must comply with under the *Law Enforcement (Controlled Operations) Act 1997* and *Law Enforcement (Controlled Operations) Regulation 2012*.

70. Schedule 2 of the *Law Enforcement (Controlled Operations) Regulation 2012* sets out a Code of Conduct that police must comply with.

71. Also of use is Schedule 1 of the *Law Enforcement (Controlled Operations) Regulation 2012* which provides a sample of the form that must be completed by the appropriate delegate when seeking authority. It is worth advising your clients of what is set out at paragraph 5 below:

(a) no participant will induce or encourage another person to engage in criminal activity or corrupt conduct of a kind that the other person could not reasonably be expected to engage in unless so induced or encouraged,

(b) no participant will engage in conduct that is likely to seriously endanger the health or safety of that or any other participant, or any other person, or to result in serious loss or damage to property,

(c) no participant will engage in conduct that involves the commission of a sexual offence against any person,

(d) each participant authorised to participate in the controlled operation has the appropriate skills to participate in the controlled operation,

**(e) it is wholly impracticable for a law enforcement participant to participate in that aspect of the controlled operation in relation to which a civilian participant identified below is authorised to participate,*

**(f) it is wholly impracticable for a civilian participant to participate in the aspect of the controlled operation in relation to which a civilian participant identified below is authorised to participate without the civilian participant engaging in the particular controlled activities authorised.*

PART FOUR

Addressing s 23 at the sentence hearing

72. It is important to be mindful at the outset of the risk to your client's safety that arises from discussing assistance to authorities in open Court. You will often hear practitioners referring in a circumspect way to "a s 23 issue" or directing the Court's attention to a paragraph of their written submissions, as a way of bringing this issue to the court's attention without discussing it openly. These approaches may suffice if the issue does not have a big role to play in the sentence proceedings. If the issue is significant, you may need to consider:

    a. ***Separate sentence proceedings:*** If your client is listed for sentence together with a co-accused, consider applying to separate the sentence proceedings. It may be appropriate for the proceedings to be conducted one after the other, before the same Judge. Such application should be made at early stage (preferably at the time the sentence hearing is listed) and in the absence of the co-accused.

    b. ***Suppression and non-publication orders***: The Court has the power to make a suppression order or non-publication order pertaining to:

        i. Information tending to reveal the identity of your client, and/or

        ii. Information that comprises evidence, or information about evidence, given in proceedings before the Court.[3]

        Grounds for making an order include where the order is "necessary to protect the safety of any person".[4] The Court will need to be persuaded that protecting your client's safety outweighs "the public interest in open justice" in the circumstances of your case.[5]

    c. ***Closing the Court:*** There is no specific statutory power authorising a Judge to close the Court to protect the safety of an offender. The power to do so is derived from the common law. Compelling evidence of a threat to your client's safety will need to be presented to override the principle of open justice.

<u>A three step approach</u>

Submissions invoking s 23 will generally need to address 3 issues:

1. *Establish that assistance has, or will be provided.* This is usually obvious and may occupy very little time in your submissions, particularly in light of the broad interpretation of s 23(1) favoured in *R v XX.* However it is helpful to identify with precision what you rely on as comprising assistance. Further, the scope and nature of any undertaking or agreement to provide future assistance should be

[3] s 7, *Court Suppression and Non-publication Orders Act 2010* (NSW).
[4] s 8(1)(c), *Court Suppression and Non-publication Orders Act 2010* (NSW).
[5] s 6, *Court Suppression and Non-publication Orders Act 2010* (NSW).

clearly articulated. For reasons discussed further below, this may become important at the appeal stage if your client fails to provide the anticipated assistance.

2. *Address why a lesser sentence should be imposed, with reference to the factors in s 23(2).* Some cases of interest concerning the s 23(2) factors are noted below.

3. *Consider whether the discount proposed or contemplated may lead to a sentence unreasonably disproportionate to the nature and circumstances of the offence.* In one sense, addressing s 23(3) is really a matter for the Court to consider in the process of instinctive synthesis. However, you should be prepared to address the Court on this issue, particularly if multiple discounts are to be applied, or if you are asking the Court to impose an alternative to full time custody in light of the assistance provided.

<u>Section 23(2)(b), (d) and (e): Significance and usefulness, nature and extent and timeliness of the assistance</u>

73. These factors are all relevant to a consideration of the value of the assistance provided. This value may be illustrated by successful prosecutions, charges laid, a decision by a co-accused to plead, or by the gathering of intelligence by investigators which is useful in more enigmatic ways. The following cases provide examples as to how Judges have assessed the value of assistance provided in particular circumstances.

74. In *R v Sinclair* [2017] NSWSC 686, R A Hulme J determined that a discount of 10% was appropriate for an offender who had given an undertaking to provide evidence against a co-accused, 'Evans'. The following passage from the decision demonstrates a willingness on His Honour's part to engage in a reasonably detailed consideration of how the offender's evidence would likely relate to other evidence in the Crown case:

> *[162] The primary issue in the trial of Evans will be whether he (Evans) was present at Medway or Badgerys Creek during the commission of the offences. He denies it. The Crown already had a quite reasonable case against Mr Evans in respect of this issue. For example, there is DNA evidence of his presence at Medway. There are a host of circumstantial items as well as admissions to various people as to his presence and involvement at Badgerys Creek. The substantial similarity between the two events is the basis for my allowing the Crown to rely upon coincidence evidence. Accordingly, the assistance proffered by the offender is significant and useful, but the Crown is not dependent upon it to prove its case against Mr Evans.*
>
> *[163] Another way in which the offender's assistance is significant and useful is in proving what Mr Evans actually did within both sets of premises. If the proceedings concerning Mr Evans move to a sentence phase, that will be reasonably important.*

75. Where the Crown contends that assistance is of limited value because of other evidence available to the Prosecution, the Crown should provide evidence to support this contention. In *Regina v AB* [2017] NSWCCA 88 the offender had

provided a statement identifying his co-accused. On appeal, the Crown contended that the discount afforded for the offender's assistance was excessive, in circumstances where the offender provided the statement after his co-offender had already been charged. In rejecting this ground of appeal, Bathurst CJ stated at [66]:

> *The extent to which the statement provided assistance could only be properly measured by reference to other evidence in the possession of the Crown implicating the co-accused. However, apart from declining to concede that it had no other evidence implicating the co-offender, the Crown did not indicate what evidence was in fact available. In the circumstances it does not seem to me that the sentencing judge erred in allowing a discount of 25%.*

76. Where multiple co-accused are negotiating with the Crown at the same time and ultimately all enter pleas of guilty, it may be very difficult to discern what role, if any, assistance provided by one co-accused played in another co-accused's decision to plead. This was the situation considered by Harrison J in *R v Haines; R v Lee* [2016] NSWSC 1333. In that case, shortly after pleading guilty to murder and armed robbery with wounding, the co-accused Haines provided the Crown with a statement which inculpated a third co-accused, Ms Wran, who had not yet pleaded guilty. The Crown served the statement on Ms Wran's representatives, however apparently did not propose to rely upon it in their case, as it contradicted other evidence. Harrison J took a narrow view of the value of such assistance, affording just 2.5% discount in acknowledgment of the "fact" of assistance, rather than its usefulness. His Honour observed at [43]:

> *Unfortunately, the evidence does not permit me to decide whether or not Mr Haines' offer of assistance was of any utility to the Crown, given its timing and content. The Crown was by then in negotiations with Ms Wran's lawyers and the offer of assistance was in part, at least, in conflict with other evidence upon which the Crown proposed to rely. There is in the circumstances also no suggestion that Mr Haines' custodial conditions will reflect his willingness to assist.*

An obvious difficulty arises for practitioners from His Honour's approach, as defence counsel will rarely be apprised of the role a client's offer of assistance has played in confidential negotiations between the Crown and a co-accused, or in that co-accused's deliberations with their own representatives.

77. Where a client has not given evidence or provided an undertaking to do so, the value of their assistance may depend somewhat on what use Police were able to make of the information provided. For example, did the information enable Police to obtain a warrant and commence an investigation which ultimately led to convictions based on other evidence obtained during the course of the investigation? This may be difficult to untangle, particularly if investigations are ongoing or you are dealing with uncooperative Police officers. It is suggested that any enquiries of Police in this regard be made in writing. If Police are unwilling to provide you with any information, you may wish to provide evidence of your efforts to the Court.

78. In *R v Bourchas* [2002] NSWCCA 373; 133 A Crim R 413, error was held to have occurred where the Crown tendered the applicant's statement of assistance over objection, and the sentencing Judge relied upon certain factual matters contained therein in a manner adverse to the offender. Giles JA at [99] identified the following principles which apply to the way in which such evidence should be used:

    1. *The offender carries the burden of proving assistance to the authorities, as a matter going to mitigation.*

    2. *The Crown should assist the offender in the discharge of that burden.*

    3. *The assistance may extend to the Crown tendering the evidence of assistance to the authorities, but the Crown should not do so over the objection of the offender.*

    4. *A statement made by way of assistance to the authorities on an undertaking that the information in it will not be used against the offender may properly be admitted on the basis that the information in it will not be used against the offender, and with its use restricted accordingly.*

    5. *When the offender tenders a statement made by way of assistance to the authorities, or accepts the Crown's assistance in tendering such a statement, it is prudent that the basis of the tender be agreed and stated showing any restriction on the use of the information in the statement; if there is disagreement, a ruling can be made in the normal way.*

    6. *In the absence of an agreed basis of tender or a ruling at the time of admission, whether use of a statement made by way of assistance to the authorities is restricted will depend on the circumstances, but normally the information in the statement cannot be used against the offender.*

<u>Section 23(2)(c): The truthfulness, completeness and reliability of any information or evidence provided by the offender</u>

79. In addition to considering how an offender's evidence may advance the factual matrix of the Prosecution case against a co-offender, the probative value of the evidence can also be assessed in terms of its reliability, completeness and accuracy. For example, an ERISP that inculpates a co-accused but is also replete with self-serving assertions designed to minimise the culpability of the offender, will be of less value and attract a lesser discount: *Hitchcock v R* [2016] NSWCCA 226 per Hoeben CJ at LC at [42].

Section 23(2)(f): Any benefits the offender has gained or may gain by reason of the assistance or undertaking to assist

80. In *R v XX* [2017] NSWCCA 90 the offender's past assistance had attracted a reward of $17,000. The benefit already gained was relevant to the Court's determination that no discount was warranted under s 23: at [62].

Section 23 (2)(g) and (h): Harsher custodial conditions and risks to safety

81. It is observed that Judges vary in their willingness to take judicial notice of safety risks and onerous custodial conditions which may flow from the provision of assistance. It is of course preferable to place evidence before the Court specifically addressing these factors. In *R v Sukkar* (2006) 172 A Crim R 151, Howie J held following *R v Mostyn* (2004) 145 A Crim R 304 at [5]:

> *… It should now be accepted that an offender who has provided assistance will not necessarily be disadvantaged in the prison system and, if the offender wishes to assert otherwise, he or she should lead evidence of that fact.*

82. Where a client has given evidence regarding a particularly dangerous individual, this may warrant a discount even in the absence of evidence of specific threats or safety concerns. In *AGF v R* [2016] NSWCCA 236, R A Hulme J stated at [37]:

> *The applicant's assistance involved the provision of information whereas significant reductions of sentence are usually reserved for offenders who also give evidence against others, or undertake to do so. Nevertheless, the assistance which concerned a rather dangerous criminal was of some substance. It was not such as to warrant a reduction of sentence by a large proportion but the extent of the reduction it should have attracted is not trivial either when one has regard to the very lengthy term that was imposed. The level of reduction should reflect the serious nature of the criminal activity about which the applicant volunteered information to police; the validity of his information; and the potential risk to which he exposed himself. The level of reduction should also serve the public interest discussed in R v Cartwright.*
>
> (Emphasis added)

83. Where a discount is given for assistance it will typically reflect the requirement for the accused to serve time in protective custody. It is therefore an error for the Court to find special circumstances on the basis that the offender will spend time in protection, as this factor has already been taken into account: *R v Alcazar* [2017] NSWCCA 51 per Schmidt J at [135].[6]

[6] For an example of a Judge taking the opposite view, see R v AC (No 7) [2016] NSWSC 404 per Hamill J at [17], a decision that predates *Alcazar*. His Honour stated therein "*I do not consider this to constitute what is sometimes, inelegantly, described as "double counting". It is a matter that is relevant both to the total sentence, but also whether there should be some reduction in the non-parole period*." It is noted that while the sentence imposed was upheld on appeal, the appeal judgment is

Refusal of Police to provide a letter of comfort

84. Circumstances may arise where you are instructed that assistance has been given, however Police refuse to provide a letter of comfort. Consideration should then be given to introducing evidence of assistance by other means, for example by calling evidence from your client on the issue. In *OGC v R* [2016] NSWCCA 254, the applicant sought to adduce new evidence of assistance that was not before the sentencing Judge. In refusing leave to rely upon the evidence, Harrison J observed at [33]:

> *The applicant's contention that he was "unable" to adduce evidence of assistance to police is premised on the fact that Detective Noy did not provide a "letter of comfort". This was not the only means available to the applicant for adducing such evidence. He chose to give evidence on sentence in relation to other matters in mitigation, but did not give evidence about any assistance he allegedly provided. It is otherwise clear that the applicant was still in possession of the mobile telephone he used to communicate with Detective Noy at the time of the sentencing proceedings and that he was in a position to lead the same evidence before the sentencing court as he now seeks to have admitted in this Court*. …

Arriving at a figure and the requirement of proportionality

85. Section 23(4)(b) requires that where the Court imposes a lesser penalty in light of past and/ or future assistance, it must state the penalty that it would otherwise have imposed. Where both past and future assistance are recognised, the court is required to state the amount by which the penalty has been reduced for each reason (s 23(4)(c)). Failure to do so does not invalidate the sentence imposed (s 23(6)).

86. It has been held that the combined discount for a guilty plea and assistance should not normally exceed 50%: *SZ v R* at [3]; *R v Holland* (2011) 205 A Crim R 429 at [42]; *R v AZ* (2011) 205 A Crim R 222 at [94]; *Z v R* [2014] NSWCCA 323 at [34]. A combined discount exceeding 50% should be reserved for exceptional cases: *SZ v R* at [53]; *AAT v R* [2011] NSWCCA 17 at [31].

87. Where an offender has pleaded *not guilty*, the effect of *SZ v R* is not to confine the sentencing Judge to a maximum discount for assistance of 25%. The Court is constrained only by the application of s 23(3), which provides that *"a lesser penalty that is imposed under this section in relation to an offence must not be unreasonably disproportionate to the nature and circumstances of the offence*": *Z v R* [2014] NSWCCA 323 at [33]. In *Z v R,* McCallum J observed at [34]:

> *…On the authority of SZ, it may appear at first glance that an offender who pleads not guilty but provides assistance of the highest order is eligible to have his penalty reduced by the same amount as an offender*

restricted and the author is unaware as to whether any comment was made about this aspect of Hamill J's judgment.

who provides assistance of the same high order but also pleads guilty at the earliest opportunity. That of course is an entirely hypothetical comparison. To the extent that there is at least a theoretical possibility of unequal justice being occasioned on that account, it is resolved by s 23(3)*. As explained by Howie J in SZ, that provision reflects the common law principle that there is "a bottom line beneath which a sentence cannot legitimately be set". It is recognised that the bottom line ordinarily sits at 50 per cent of the sentence that would have been imposed but for the discounts allowed by the statute. But it does not follow that the Act must be construed with an implied algorithm (flowing from the premise established by Thompson and Houlton) that a discount for assistance cannot exceed 25 per cent. To construe the Act with that level of mathematical rigidity would come close to punishing some offenders who offer assistance for not pleading guilty.*

88. It is plain to see why the operation of s 23(3) has been described as creating a "diminishing return" for offenders who provide extensive assistance, particularly where they are also entitled to a discount for their guilty plea: see *R v AC* (No 7) [2016] NSWSC 404 per Hamill J at [16]. As Simpson J put it in *R v Lenati* [2008] NSWCCA 67 at [35] "*Where accumulation of discounts that would ordinarily be applicable produces a sentence that is disproportionately low in relation to the objective criminality, it is the discounts, and not the sentence, that must give away.*"

89. While the authorities are clear that the availability of multiple types of discounts may justify reduction in the overall discount to achieve proportionality, it may also be open to the Court to refuse to apply a discount because of the presence of other mitigating factors which have had a bearing on the sentence to be imposed. In *R v AB* [2017] NSWDC 179, a Young Offender with mental health problems was sentenced in the District Court for an offence of violence committed against an employee of the out of home care facility where she lived. About a fortnight prior to committing that offence, AB had been the victim of a sexual assault. She had reported the sexual assault to Police and cooperated with their investigation before committing the index offence. At the time she came to be sentenced in the District Court, she was shortly due to give evidence by way of a pre-recording in the sexual assault proceedings. There was no evidence that her cooperation with the sexual assault proceedings had placed her at risk of harm. As to the availability of a discount pursuant to s 23, Sides QC DCJ concluded:

> [69] *In the context of the Young Offender's mental health issues, of particular concern to the Court in this case is that to extend a discount under s 23 could provide the cross-examiner with ammunition upon which to cross-examine her and contribute to or add to the trauma that she is likely to experience in the process of giving evidence, even though that will be given in a pre-recorded session. When I say "pre-recorded" I mean in advance of the trial. In this context the Court is conscious of her mental health issues which make her more vulnerable than other child complainants giving evidence by that or any other process.*
>
> [70] *Further, the Court's finding of substantially reduced moral culpability has been given considerable weight and, as already noted, the Court has extended a discount in the order of about 25% to reflect the utility of a guilty*

plea and it has extended a discount because of remorse. In the Court's view any further reduction in sentence would result in an unreasonably disproportionate sentence contrary to subs 23(3). In the circumstances the Court does not extend a discount under s 23.

This decision was handed down on 5 June 2017 and, to the authors' knowledge, has not yet been the subject of appellate consideration.

90. Where a Judge is sentencing an offender for multiple offences, the discount should be applied to each of the sentences, and due regard should be had to proportionality in arriving at the overall term: *CM v R* [2013] NSWCCA 341 per RA Hulme J at [48].

Conclusion of the proceedings

91. It is common for exhibits relating to the provision of assistance to be sealed and placed on the Court file. Some Judges prefer to return the sealed exhibits to the parties for safekeeping. In *R v RK* [2017] NSWDC 80, an offender was called before the Court for breaching a s 12 bond. When NSW Police were asked to produce the affidavit of assistance that had been tendered in the original sentence proceedings, the Court was advised it had been destroyed in accordance with an unspecified procedure or protocol approved by the NSW Police Commissioner. The lesson here appears to be that if you suspect that future proceedings are likely in a case, for example an appeal or breach proceedings, it is worth ensuring that an appropriate direction has been made for the safekeeping of the relevant exhibits.

PART FIVE

Post-sentencing: What if your client does not stick the script?

92. As previously discussed, an offender who has assisted authorities to detect and prosecute a third party may have provided a statement to, or interview with, police (induced or otherwise) indicating a willingness to provide ongoing assistance to police and/or setting out the evidence he or she may be prepared to give in court against the third party. In such a case:

    - The prosecution should insist upon the offender undertaking, in writing, to provide evidence in accordance with that statement or interview;

    - The court may impose a lesser sentence because of the offender's undertaking to assist the authorities under s 23(1); that is, the sentencing court may reduce the sentence in anticipation of the fulfilment of the offender's promise that he or she will provide future assistance. If the court imposes a lesser sentence for future assistance it must specifically quantify the discount for that reason under s 23(4), and;

    - Unless the third party pleads guilty, the prosecution will ordinarily require the offender to give evidence at the hearing or trial of the third party to satisfy the terms of the undertaking. If the offender is competent to give evidence, then he or she is compellable to give that evidence: s 12 of the *Evidence Act 1995 (NSW)*.

93. An offender who fails to comply with his or her undertaking to assist authorities may face significant ramifications. In *Regina v O'Brien* (Court of Criminal Appeal, 10 June 1983), Gleeson CJ said:

> *In some circumstances where the offer of future assistance has been an offer to give evidence, and an offender has actually or constructively refused to give evidence when the occasion arose, the offender might expose himself to charges of contempt of court, or of perjury. More commonly, however, the problem has arisen in the context of attempts by the prosecuting authorities to have this Court intervene to correct or adjust the original sentence so that it reflects the sentence that would have been imposed if the offer of assistance had not been made. In such cases difficult questions have arisen as to the conditions which must be satisfied before the Court may intervene. It was in an endeavour to meet those difficulties that s 5DA was enacted.*

94. Therefore, there are ordinarily three possible consequences should an offender fail to adhere to an undertaking to give evidence against a third party: the Crown may appeal against the sentence pursuant to s 5DA of the *Criminal Appeal Act 1912* and/or the offender may be charged with contempt or perjury. We will focus predominantly on the first and most common consequence: a Crown Appeal against the sentence under s 5DA.

Crown Appeal

The Legislation

95. Section 5DA of the *Criminal Appeal Act 1912* provides:

> *5DA Appeal by Crown against reduced sentence for assistance to authorities*
>
> *(1) The Attorney General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence imposed on a person that was reduced because the person undertook to assist law enforcement authorities if the person fails wholly or partly to fulfil the undertaking.*
>
> *(2) On an appeal the Court of Criminal Appeal may, if it is satisfied that the person has failed wholly or partly to fulfil the undertaking, vary the sentence and impose such sentence as it thinks fit.*
>
> *(3) A reference in subsection (1) to a sentence imposed on a person includes a reference to a sentence that was varied or imposed by the Court of Criminal Appeal.*

The Relevant Principles

96. The section has been the subject of significant judicial attention. The principles which guide its application include the following:

- The purpose of s 5DA is not punitive; it is designed to enable the Court of Criminal Appeal to intervene or correct a sentence where the sentencing process has miscarried; *R v O'Brien* (Court of Criminal Appeal (NSW), 10 June 1993, unreported per Gleeson CJ at p 2); *Regina v Stavropoulos* [2007] NSWCCA 333 at [49] per Hall J (with McClellan CJ and Price J agreeing); *R v MG* [2016] NSWCCA 304 per Meagher JA (Johnson and Rothman JJ agreeing) at [13].

- If the promised future assistance is not forthcoming then the discount has been obtained on an expectation which has not been fulfilled. It is in these circumstances that s 5DA allows a sentence to be varied to that which would have been imposed: *Regina v Waqa* (2004) 149 A Crim R 143 at 147; *Regina v Stavropoulos* at [49].

- Generally, the court can only adjust the sentence to reflect the failure to provide future assistance: *Regina v Waqa* at 147 but see *R v Shahrouk* [2014] NSWCCA 87 which is discussed below. Therefore, it is very important that the first instance sentencing court separately quantify the discount for future assistance: *R v Skuthorpe* [2015] NSWCCA 140 at [39].

- Section 5DA is not concerned with reviewing the sentence generally. It only provides a mechanism that allows the discount for future assistance to be excised or reversed: *R v Chaaban* [2006] NSWCCA 352 at [52]; *R v MG* at [13].

- However, there may be some circumstances where the offender's failure to provide future assistance warrants interference with the discount for past assistance. In *R v Shahrouk* [2014] NSWCCA 87, the offender's refusal to provide future assistance led to the collapse of the prosecution case against the co-accused. The Court found that the *whole* of the offender's assistance was worthless. The offender was re-sentenced under s 5DA on the basis of no discount at all for assistance: *R v Shahrouk* per Davies J (R A Hulme and Hall JJ agreeing) at [42]-[64].

- Even if the offender has failed to comply with their undertaking, the court may exercise its discretion under s 5DA(2) and decline to intervene: see *R v Skuthorpe* at [36]. Generally, however, offenders who obtain discounts for future assistance only to renege on their undertaking to give evidence should expect to have their sentences increased unless there are exceptional circumstances: *R v KS* [2005] NSWCCA 87 at [19].

- Where the discount extended to an offender for past and future assistance was reduced to avoid an unreasonably disproportionate result (s 23(3)), and the offender fails to fulfil an undertaking to provide future assistance, the Court may decline to intervene on the basis that the offender is entitled to have the full benefit of their discount for *past* assistance restored: *R v Lenati* [2008] NSWCCA 67 per Simpson J at [47]-[49].

- The reasons why the offender failed to fulfil his or her undertaking is of little materiality to the exercise of the discretion: *R v El-Sayed* (2003) NSWCCA 232 at [32]-[35]. Therefore, if the reasons for the offender's failure to fulfil their undertaking is "understandable fear resulting from threats" this will not usually justify an exercise of the s 5DA(2) discretion: *R v El-Sayed* at [32]-[35]. However, if the State has failed to provide the offender with the expected level of support and protection from threats then this may amount to exceptional circumstances: *R v Bagnall and Russell* (Court of Criminal Appeal (NSW), 10 June 1994, unrep).

Common Questions of Fact

97. Typically, there are four questions of fact which arise when the Crown asserts that an offender has failed to adhere to their undertaking to provide future assistance: *R v Stavropoulos* [2007] NSWCCA 333 at [34]; *R v James; James v R* [2014] NSWCCA 311 at [11].

98. The ***first question*** is whether an undertaking has been given by the offender. It is important to note that an undertaking does not need to be in written form: *R v James; James v R* [2014] NSWCCA 311 at [12] per Basten JA; see also, for example, *R v X* [2016] NSWCCA 265; *R v Skuthorpe* [2015] NSWCCA 140.

99. In *Regina v Stavropoulos* [2007] NSWCCA 333, Hall J (McClellan CJ at CL and Price J agreeing) found at [62]-[64] that an essential pre-condition for the exercise of power under s 5DA was absent; the offender had not undertaken to provide future assistance. Hall J drew a distinction between an "undertaking" and an "expectation" that the offender would give evidence. The latter does not fall

within s 23 of the Act: at [61]. The conclusion that the offender had not provided an undertaking turned upon its facts; for example:

- There was no evidence that the offender had made an induced statement: at [59].

- There was no evidence that the offender had signed a written undertaking: at [58];

- There was no evidence from any Crown witness that the offender had given an undertaking: at [60(b)].

- There was some uncertainty as to whether the Crown would call the offender to give evidence at the trial of the co-accused: at [60(c)].

- The Sentencing Judge spoke in terms of a willingness or preparedness to give evidence rather than there being a reference to an obligation or undertaking to give evidence: at [38] and [60(e)].

100. The ***second question*** is: what is the content of the undertaking? The first and second questions commonly arise together: *R v James; James v R* at [12]. It is important that the undertaking is "framed with a degree of specificity" to identify the nature and extent of any obligations pursuant to the undertaking and to provide a proper basis for proceedings under s 5DA: *Regina v Stavropoulos* per Hall J at [56]. Hall J in *Regina v Stavropoulos* at [57] set out a common form of undertaking in the following terms:

"I, (NAME OF OFFENDER) hereby undertake to give evidence at any proceedings (including any appeal and re-trial) against (NAMED OFFENDERS) and for the offence of (SPECIFIED OFFENCE OR OFFENCES).

AND I further undertake to give active co-operation, including the giving of evidence truthfully and frankly in accordance with the statement made by me on (SPECIFIED DATE), a copy of which is attached.

AND everything that I have said in this statement is true and I have not withheld any information.

I give this undertaking with the knowledge, consent and advice of my legal representative.

...

...

(Witness)"

101. The ***third question*** is whether the sentencing court at first instance gave a discount to reflect the offender's undertaking. As Basten JA explained in *R v*

James; James v R at [13], the amount of any discount for past and future assistance must be specifically quantified under s 23(4)(c) of the CSPA. A failure to comply with this statutory obligation significantly hampers the ability of the Court of Criminal Appeal to determine the extent to which it should interfere with the sentence under s 5DA: *R v James; James v R* at [13]; *R v Skuthorpe* [2015] NSWCCA 140 at [39]; *R v GD* [2013] NSWCCA 212 at [39].

102. The ***fourth question*** is whether the offender has failed to comply with the terms of the undertaking. In the ordinary case, the failure to fulfil the undertaking will manifest itself in the offender's actual or constructive failure to give evidence in accordance with his or her statement: *Regina v O'Brien* (Court of Criminal Appeal, 10 June 1983) per Gleeson CJ. It is important to note that s 5DA(1) applies if the offender fails "wholly or partly" to comply with the undertaking to give assistance.

103. It is an obvious failure to fulfil the terms of the undertaking if the offender withdraws the offer of future assistance after his or her sentence hearing: see *R v Shahrouk* [2014] NSWCCA 87.

104. Determining if an offender has failed wholly or partly to comply with their undertaking is a question of fact and degree. For example, in *R v James; James v R,* the offender had expressed to the Crown trial advocate his reluctance to give evidence and concerns regarding his own reliability: see, for example, at [37]. The trial advocate declined to call the offender to give evidence at the trial of the co-accused. However, at no point did the offender refuse to give evidence: at [45]. The offender's affidavit tendered in the Court of Criminal Appeal revealed a real possibility that the Crown had misheard, misunderstood or wrongly transcribed their conversations with the offender: at [41]. The Court was not persuaded that the offender had failed to fulfil his undertaking: at [46].

105. In *R v X* [2016] NSWCCA 265 and *R v MG* [2016] NSWCCA 304, each offender had received sentencing discounts for future assistance in a murder investigation involving the accused Mohammed Hamzy. Both offenders gave evidence for the Crown which, in part, accorded with their earlier police statements but were also, in part, materially inconsistent with their statements. These inconsistencies buttressed the defence case theory that Hamzy had shot the deceased in self-defence.

106. In both *R v X* and *R v MG* the Court compared each offender's statement with the transcript of the offender's oral evidence. The Court in each matter concluded that the offenders had failed to fulfil the whole of their undertakings to give evidence at Hamzy's trial because they had not given evidence in accordance with their statements: *R v X* at [46]-[47]; *R v MG* at [42]. In both cases, the Court declined to exercise its residual discretion not to intervene, even though the offenders had served their non-parole periods and resentencing would require them to return to custody and serve fixed sentences of just six weeks. The public interest in ensuring undertakings are met prevailed over considerations of practicality and safety.

107. Unanswered and fraught questions may confront the Court of Criminal Appeal where the parties are in disagreement regarding one or more of these four factual issues. For example:

- To what standard must the Court of Criminal Appeal be "satisfied" under s 5DA(2)? In *R v James; James v R* at [46], McCallum J suggested the standard should be "beyond reasonable doubt" but her Honour's remarks were obiter and have not been the subject of comprehensive consideration: *R v MG* at [22].

- Can the Court of Criminal Appeal take into account the remarks and findings of the trial Judge presiding over the trial of the co-accused in determining if the offender has failed to comply with the undertaking? Analogously, does the *Evidence Act 1995 (NSW)* apply to an application under s 5DA? In *R v MG,* Meagher JA, Rothman J and Johnson J agreed with the orders of the Court but each expressed different opinions regarding these discrete questions of principle.

- More fundamentally, is the Court of Criminal Appeal even the appropriate vehicle for resolving factual disputes? See *R v James; James v R* at [14]-[15] per Basten JA.

108. Putting to one side the complex and unresolved aspects of s 5DA and assuming that the Crown has satisfied the Court of the four factual issues, the Court must determine if it should nonetheless exercise its discretion and decline to intervene in the sentence: *R v X* at [39]: see above at [5]. In *R v KS* [2005] NSWCCA 87 at [19], Wood CJ at CL said that a failure to fulfil the terms of an undertaking would warrant appellate intervention unless there are exceptional circumstances. There is no exhaustive list of exceptional circumstances; each case will depend upon its own facts: see the additional observations of Hidden AJ in *R v X* at [62]. For example, in *R v Skuthorpe* [2015] NSWCCA 140, the significant delay in bringing the application under s 5DA combined with the relatively short proposed increase in the sentence and the failure of the parties in the court below to assist the sentencing Judge to quantify the discount for future assistance, warranted the exercise of the discretion to dismiss the Crown Appeal.

Charges post-sentencing

109. If the offender is called to give evidence at the trial of a third party and either refuses to take the oath/affirmation or, after taking the oath/affirmation, refuses to answer admissible questions, then he or she may be charged with contempt: see, for example, *Prothonotary of the Supreme Court of NSW v A* [2017] NSWSC 495; *R v Bilal Razzak* [2006] NSWSC 1366. Obviously an offender is entitled to refuse to answer questions where he or she fears self-incrimination and a s 128 certificate under the *Evidence Act 1995 (NSW)* is not forthcoming: see, for example, *R v Collisson* [2003] NSWCCA 212 at [13].

110. Refusing to take the oath/affirmation or answering questions without lawful excuse is a serious example of contempt: *R v Bilal Razzak* at [39]. It strikes at the heart of the administration of justice: *Registrar of the Court of Appeal v Raad* (NSWCA, unreported 9 June 1992), Kirby P at 14. The crime of contempt is beyond the scope of this paper; however, the relevant principles are comprehensively elucidated in *Prothonotary of the Supreme Court of NSW v A* [2017] NSWSC 495 and *R v Bilal Razzak* [2006] NSWSC 1366.

111. Less commonly, the prosecution may establish that the offender's statement to police was false which could trigger charges under Part 7 of the *Crimes Act 1900*. Alternatively, the offender may give knowingly untrue evidence at the trial of the co-accused which may satisfy the elements of perjury or charges associated with perjury under Division 4 of Part 7 of the *Crimes Act 1900.*

CONCLUSION

112. The authors hope that this paper proves practically and theoretically instructive. We welcome any feedback or questions; novel issues often emerge when practitioners consider the application of s 23 of the CSPA and we are all happy to assist as best we can.

Riyad El-Choufani, Daniel Pace, and Sophie Williams

Advocates – Legal Aid NSW

ATTACHMENT A

SAMPLE LETTER

Our Ref: [redacted]

Your Ref:

[redacted]

Office of the Director of Public Prosecutions

DX: 11525, Sydney Downtown

STRICTLY WITHOUT PREJUDICE & HIGHLY SENSITIVE

Dear Mr [redacted],

RE: R V [redacted]

We act on behalf of [redacted] who has been charged with a number of drug related offences.

The matter is presently listed at Central Local Court on [redacted].

We confirm that earlier this morning we had a meeting with Detective Senior Constable [redacted] and Detective Senior [redacted] in relation to this matter.

As a result of that conversation we have been invited to write to your office seeking the Director's approval for the taking of an induced statement from [redacted]

Guideline 15 of your Office's Guidelines states:

- *However, if a matter is already with the ODPP for the conduct of a prosecution already begun (not simply to provide advice as to the sufficiency of evidence to support charges) and:*
    - *it is intended by police to take an induced statement from the defendant, accused or appellant or a witness or potential witness in the proceedings; and*
    - *the statement relates to the matter*

  Then the police are to obtain written approval from the Director before the induced statement is taken. Such authorisation will only be given after consideration of a written request supported by copies of all available relevant documents.
  Requests for authorisation must be referred to the Director's Chambers.

To assist you in your task, we provide a list of topics which [redacted] may address in [redacted] induced statement:

1. The names of people involved in the drug supply syndicate

2. The source of the drugs that [redacted] specifically obtained and type of drugs

3. Frequency at which [redacted] obtained drugs from that source

4. Location at which [redacted] obtained drugs from that source, including hidden locations not known to police.

5. Payments or percentages [redacted] would receive from the sale of drugs by the source

6. The way in which customers would contact the syndicate.

As you may appreciate of paramount concern to our client is [redacted] safety in custody and in the community. We trust this correspondence will remain confidential and your office will ensure that *'prior to charges being laid against any person/s inculpated in the induced statement, all correspondence is to be treated by the ODPP as sensitive and securely stored and treated accordingly.*[7]*'*

In addition the saving of cost and time weighed against the likely outcome of the matter is substantial (Guideline 20) in circumstances where this information may result in convictions of the co-accused in this case and potentially avoid the need for a District Court jury trial.

Thank you for your consideration of this request.

Yours sincerely,

SOLICITOR

[7] Guideline 15