

## Indictable and Complex Criminal Law Barrister Practice Standards

This document sets out practice standards for barristers representing legal aid clients in indictable and complex criminal law matters in the Local, District and Supreme Court.

These practice standards apply to barristers briefed by in-house Legal Aid NSW solicitors or by private solicitors in legal aid matters.

Barristers who are appointed to the Indictable Criminal Law Barrister Panel and/or Complex Criminal Law Barrister Panel will be eligible to be briefed in legally aided matters covered by the relevant panel.

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

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## General Principles

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

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

Practitioners must provide a responsive service and demonstrate a commitment to continuity of representation.

### 1. Responsibilities to Clients

A barrister appearing in an indictable or complex criminal law matter will:

- 1.1 Represent the client in an efficient and effective manner to ensure a fair trial and to achieve the best possible outcome.
- 1.2 Act ethically and with competence and diligence in the service of the client.
- 1.3 Meet with the client and the instructing solicitor as early in the process as possible and communicate with the client in a way that the client understands using language appropriate to the age, maturity, education and cultural background of the client.
- 1.4 Use a qualified interpreter whenever necessary.
- 1.5 Provide the client with the practitioner's details.
- 1.6 Observe the principles governing the lawyer/client relationship and the privacy of instructions provided by the client.
- 1.7 Give advice and explain all available options to the client together with the consequences of any decision made by the client. Barristers must ensure that their clients make the decisions, not the barrister making the decision for the client.
- 1.8 Ensure that the client is informed of the process generally, the outcome of all Court appearances and of particular developments in their case as appropriate.
- 1.9 Advise the client on a plea(s) of guilty and, in the event of a plea(s), settle the terms of any document that records the client's instructions as to that plea(s) of guilty.
- 1.10 Attend all Court events in a timely manner; allowing adequate time to prepare.

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- 1.11 Together with the instructing solicitor, speak with the client immediately following a Court appearance, including clients who have been remanded in custody, and confirm that the client understands the result and any orders made by the Court. If it is not possible due to the lack of time because of list demands then ensure, so far as is practicable, a letter is sent by their instructing solicitor to the client informing the client of the results and their effect.
- 1.12 If briefed in committal proceedings, support the principle of continuity by retaining carriage of the matter if it proceeds to trial and/or sentence.
- 1.13 Keep proper records of all conferences and attendances and maintain briefs in an orderly and proper manner.
- 1.14 Advise the client on the law, procedure and practice that apply to their case, including the charges and potential penalties, and the likely time their matter will take to be heard and completed. Before entering a plea, the instructing solicitor and barrister should have all relevant prosecution evidence including the charge sheet/court attendance notice/summons, the police facts sheet, the brief of evidence where appropriate and the client's criminal record. The client should be fully apprised of the case against him or her.

## 2. Responsibilities to Instructing Solicitors

A barrister appearing in an indictable or complex criminal law matter will:

- 2.1 Advise on evidence required or that which should be excluded in a timely manner.
- 2.2 Ensure that instructions from their client have been received before presenting their case in court.
- 2.3 Ensure that there are signed instructions from the client if he or she intends to plead guilty, before the client is arraigned.
- 2.4 Respond promptly to any request for advice on evidence, expert reports or conferences.
- 2.5 Comply with, and advise on, matters in relation to all Practice Notes of the Court (including where appropriate appearing at or advising in relation to call-overs).
- 2.6 Attend, or advise in relation to, any pre-trial conference ordered pursuant to Part 3 Division 3 *Criminal Procedure Act 1986*.
- 2.7 In the event that an instructing solicitor fails to be present in Court or otherwise as required (e.g. at conferences) remind that person of their responsibilities to Legal Aid NSW and the client.

### 3. Responsibilities to the Court

A barrister appearing in an indictable or complex criminal law matter will:

- 3.1 Provide representation in accordance with the Rules of the New South Wales Bar Association.
- 3.2 Comply with all Practice Notes timetables and time standards fixed by the court.
- 3.3 Comply with any directions made pursuant to Chapter 3 Part 3 Division 3 *Criminal Procedure Act 1986*.
- 3.4 Manage the case efficiently and effectively, including thoroughly preparing for court hearings and other requirements of the case.
- 3.5 Have the case ready to be heard as soon as is practicable.
- 3.6 Present the identified issues in dispute clearly and succinctly.
- 3.7 Confine the case to identified issues, which are genuinely in dispute.
- 3.8 Consider, and where appropriate make, admissions, consents or agreements pursuant to sections 184, 190 and 192 *Evidence Act 1995*.
- 3.9 Limit the evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests, which are at stake in the case (in the context of running the case on the issues genuinely in dispute).
- 3.10 Occupy as short a time as is necessary to advance and protect the client's interests, which are at stake in the case.

### 4. Responsibilities to Others

When dealing with other solicitors, barristers, experts, witnesses and the staff of the Tribunals or Courts or other agencies or institutions, the barrister will:

- 4.1 Conduct all communication in a courteous, prompt and professional manner.
- 4.2 Comply with time limitations, procedural steps, the practice directions of the Court or Tribunal and any undertakings given to the Court or Tribunal.
- 4.3 Avoid unnecessary expense or waste of time by ensuring that:
  - (i) documents are served or filed on time;
  - (ii) documents served, filed or given to the client are legible;
  - (iii) the client is aware of medical appointments, conferences and hearing dates and understands the importance of attending promptly and on time;
  - (iv) witnesses are aware of conferences and hearing dates and understand the importance of attending promptly and on time;
  - (v) court commitments are accurately diarised
- 4.4 Avoid unnecessary adjournments because you have not advised, or not advised early enough, on relevant parts of the case.

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## 5. Responsibilities to Legal Aid NSW

A barrister appearing in an indictable or complex criminal law matter will:

- 5.1 Comply with these practice standards.
- 5.2 Comply with the provisions of the [Legal Aid Commission Act 1979 \(NSW\)](#) and the [policies and guidelines](#) of Legal Aid NSW (as amended).
- 5.3 Comply with the [Terms and Conditions of use of Grants Online](#) (as amended).
- 5.4 Be cognisant of the terms and conditions of the grant of legal aid to the legally assisted person.
- 5.5 Notify Legal Aid NSW of any matter, which may cause Legal Aid NSW to review, alter or terminate the client's grant of aid. (see: s.38A *Legal Aid Commission Act 1979*)
- 5.6 Notify Legal Aid NSW immediately of any circumstances that could give rise to a claim for professional negligence and provide a detailed statement in relation to the matter.
- 5.7 Comply with the principles set out in the current version of the [Best Practice Guide to Case Conferencing](#) co-authored by Legal Aid NSW, the NSW Office of the Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions.
- 5.8 Ensure all correspondence, memoranda, notes of conferences or instructions, telephone notes, are kept in the brief in an orderly manner which will allow another practitioner, if necessary, to quickly take over the brief.
- 5.9 Take steps to avoid a potential conflict of interest, not act where a conflict exists and notify Legal Aid NSW as soon as possible that a conflict exists.
- 5.10 Maintain files in an order that will allow the Manager Professional Practices, or such other officer nominated by the Director Grants to quickly and easily understand the factual basis of the matter, the client's instructions, attendances at court, conferences, views, prison visits (including a record of the date, start and finish times), and work undertaken in the matter, the stage the matter has reached and any further action that is required.
- 5.11 Make a note on the brief of any advice given to a client that is not confirmed in writing.
- 5.12 Return the brief to the instructing solicitor promptly on completion of the matter or on the barrister ceasing to act and retain or return with the brief all correspondence, memoranda, notes of conferences or instructions, telephone notes, client's instructions, attendances and notations of work undertaken.
- 5.13 Keep timely and accurate records of work to enable proper costing of the brief in accordance with Legal Aid NSW fee scales by the Audit Officer.

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- 5.14 Make timely applications (at or within 7 days from the trial aborting) for costs under the *Suitors Fund Act* or the *Costs in Criminal Cases Act*, where appropriate.
- 5.15 Notify Legal Aid NSW of any actual or potential change in the estimated length of the matter.

## 6. Responsibilities for the Case Conference

### 6.1. Preparation for and participation in the Case Conference

A barrister participating in the case conference scheme will:

- 6.1.1 Support the objectives of case conferencing by:
  - (i) Determining whether there are any offences to which the accused person is willing to plead guilty.
  - (ii) Facilitating the provision of additional material or other information which may be reasonably necessary to enable the accused person to determine whether or not to plead guilty to one or more offences
  - (iii) Facilitating the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.
- 6.1.2 Advise the client on the objectives of case conferencing contained in s. 70 of the *Criminal Procedure Act 1986*.
- 6.1.3 Advise the client on the procedure for the initial case conference and any subsequent case conference.
- 6.1.4 Obtain instructions from the client concerning matters to be dealt with in the case conference prior to participating in the case conference.
- 6.1.5 Advise the client that any offers made by the defence or the prosecution during the case conference will be recorded on a case conference certificate.
- 6.1.6 Advise the client that matters specified in a case conference certificate are to be treated as confidential.
- 6.1.7 Together with the instructing solicitor, speak with the client immediately after the case conference, including clients who have been remanded in custody, and confirm that the client understands the outcome of the case conference.
- 6.1.8 Prior to the completion and filing of the case conference certificate advise the client of:
  - (i) The effect of the scheme for the sentencing discount applied under Part 3 Division 1A of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence.
  - (ii) The penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made on behalf of the client or by the prosecutor in the committal proceedings. The effect on the

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applicable penalty if any such offer is accepted or rejected, including the effect of acceptance at different stages of the proceedings for the offence.

6.1.9 Retain carriage of the matter for the trial and/or sentence proceedings.

## 6.2. Attendance at Case Conference

It is expected that both the instructing solicitor and barrister will attend the case conference.

In addition, a barrister participating in a case conference must ensure that:

6.2.1 The work is completed in accordance with these standards.

6.2.2 They are sufficiently familiar with the matter and the case conference processes and procedures set out in Chapter 3 Part 2 Division 5 of the *Criminal Procedure Act 1986* to properly advocate for the client at the case conference.

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

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

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

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

7.2 Where the client is responding to a s. 5F appeal, the trial barrister may be retained to appear in the CCA, even if they are not on the Appellate Criminal Law Barrister Panel. The instructing solicitor will consult with Grants to

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determine the most appropriate barrister in the circumstances, and it may be determined that a barrister from the Appellate Criminal Law Barrister Panel is required for the response to the s. 5F appeal (e.g. due to the complexity of the matter, a lack of relevant experience by the trial barrister, issues of availability and timing of the hearing etc.).

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

## 8. Definitions

### 8.1. Complex Matters

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

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

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