

# A GUIDE TO CRIMINAL PROCEDURE IN THE NSW LOCAL AND DISTRICT COURTS

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## LEGISLATION & REGULATIONS

### NSW

Bail Act 2013	BA
Children (Criminal Proceeding) Act 1987	CCPA
Coroners Act 2009	COA
Costs in Criminal Cases Act 1967	CCCA
Crime Commission Act 2012	CCA
Crimes Act 1900	CA
Crimes (Appeal and Review) Act 2001	CARA
Crimes (Forensic Procedures) Act 2000	CFPA
Crimes (Sentencing Procedure) Act 1999	CSPA
Criminal Procedure Act 1986	CPA
Criminal Procedure Regulations 1986	CPA Reg
Director of Public Prosecutions Act 1986	DPPA
Evidence Act 1995	EA
Evidence (Audio and Audio-Visual Links) Act 1998	EA AVLA
Fines Act 1996	FA
Independent Commission Against Corruption Act 1988	ICACA
Law Enforcement (Controlled Operations) Act 1997	ECOA
Law Enforcement (Powers & Responsibilities) Act 2002	LEPA
Law Enforcement (Powers & Responsibilities) Regulation 2002	EPRA Reg
Legal Profession Uniform Conduct (Barristers) Rules 2015	Bar Rules
Mental Health and Cognitive Impairment Forensic Provisions Act 2020	MHCIFPA
Road Transport Act 2013	RTA
Surveillance Devices Act 2007	SDA
Young Offenders Act 1997	YOA

### Commonwealth

Crimes Act 1914	CA (Com)
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## COURT PRACTICE NOTES

### Supreme Court

Bail	PN SC CL 11
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\* By way of disclaimer this paper can only serve as a starting point to the daily considerations of criminal practice, which is a highly regulated area of legal practice. Practitioners with existing criminal law experience might find little if anything new in this paper, but those in the Bar Practice Course who have not had much to do with the criminal law might hopefully find some of the references to be of use.

**District Court**  
Criminal Trials  
Sentence Matters

PN DC CRIM 18  
PN DC CRIM 20

**Local Court**  
EAPG Committal Matters  
Criminal Proceedings Case Management

PN LC COMM 2  
PN LC CRIM 1

## **BEFORE THE CHARGE PROCESS**

### **Police investigation – what can happen pre-charge (remember a police investigation is often on-going)**

#### **Statutory powers to obtain evidence**

**LEPRA:** Powers of entry, search and seizure powers with and without warrants, establishing crime scenes, powers of arrest, drug detection powers, powers to give directions, powers relating to the detention of intoxicated persons.

**LECOA** Applications for authorities to conduct controlled operations (defined in s.3) and conduct of controlled operations and also includes cross-border applications.

**SDA** Use of surveillance devices, surveillance device warrants (listening, optical and data devices). Statutory power for police officers to use body-worn video (BWV).

**CA (Com) Part IC** Powers of investigation, powers of detention: non-terrorism and terrorism offences.

#### **Statutory powers to force suspects to co-operate**

**CFPA** Forensic procedures by consent, non-intimate forensic procedures by order of senior police officer, forensic procedures by order of Magistrate and carrying out of forensic procedures.

**CC (Com) Part ID** Forensic procedures.

**RTA** Requirement for responsible person to disclose driver identity (s.177).

**LEPRA** Power to require identity to be disclosed (Part 3), powers relating to persons in custody (taking of identification particulars, examination by a medical practitioner), testing of certain offenders for intoxication.

#### **Interviewing suspects**

**LEPRA** Use of ICV equipment to record conversations between police officers and drivers and occupants of any vehicle detained (Part 8A), safeguards (Part 9, Div 3).

**LEPR Reg** Vulnerable persons (Part 3, Div 3) including the presence of a support person and

mandatory notification of the ALS (NSW/ACT) on behalf Aboriginal persons and Torres Strait Islanders prior to questioning. Applies to detained and protected persons: clause 37 **LEPR Reg.**

- CCPA** Admissibility of statements made by children (s.13).
- CPA** Admission of statements by suspects where there is no tape recording of the admission (s. 281)
- EA** Special cautions and the drawing of unfavourable inferences (s.89A and see also s.122 **LEPRA.**
- CA (Com) Part IC** Obligations of investigating officials relating to administering of cautions, certain rights (interpreters, lawyers), legal practitioners and Aboriginal or Torres Strait Islander persons, tape recordings.

## **Inquiries**

### **Coronial inquests**

- COA** Investigation of certain deaths and suspected deaths in order to determine times, dates, manner and cause of deaths. Investigation of fires and explosions that destroy property in order to determine causes and origins.
- Privilege against self-incrimination (s.61). Evidence given where a certificate has been granted cannot be used against a person (except in respect of the falsity of the evidence: s 61(7)).

## **Independent Commission Against Corruption**

- ICACA** Privileges (ss.24 & 37).

## **NSW Crime Commission**

- CCA** Privileges (ss.39 & 39A).

## **COMMENCEMENT OF LEGAL PROCEEDINGS - THE CHARGE**

### **Alternatives to the charging process**

- CPA** Penalty notice offences (ss. 332 - 344A)
- CP Reg** Penalty notices may be issued under the *Crimes Act 1900* NSW – larceny where the property doesn't exceed \$300 and goods in custody. Penalty notices may be issued under the *Drug Misuse and Trafficking Act 1985* NSW – possession of small amounts. Penalty notices may also be issued under the *Summary Offences Act 1988* NSW for a small number of offences.

- FA** Penalty notice procedure (Part 3).
- YOA** Alternatives available to children in certain circumstances: Warnings (Part 3); Cautions (Part 4); Youth Justice Conferences (Part 5).

### **Laying of charges and commencement of proceedings**

- CPA** Proceedings commence with the issue and filing of a court attendance notice (ss. 47 & 172).

All proceedings are taken to have commenced on the date on which a court attendance notice is filed in the registry (s.178).

Proceedings can be commenced by any person subject to limitations conferred by an Act (s.14). Police officers and public officers commence proceedings by issuing a court attendance notice (s.173). Private prosecutions may be commenced by issuing a court attendance notice signed by a registrar (s.174).

Time limits on the commencement of proceedings (s.179).

### **Bail**

- BA** A bail authority (police officer or Local Court) can release a person without bail, dispense with bail, grant bail with or without conditions or refuse bail (s.8; Part 5, Div 1; s.64).

A few minor offences (such as fine only matters, or some offences under the Summary Offences Act or the YOA) carry a right to be released on bail (s.21(2)).

Bail applications are heard every weekend on Saturdays and Sundays, also on public holidays. In the city applications are heard by Magistrates and in regional and rural areas they are heard by Registrars.

## **THE LOCAL COURT**

### **Bail**

- BA** Making a release application: issues include consideration of whether the offence involves a show cause requirement (ss.16A & 16B) and the unacceptable risk test (s.19) **Attachment 1: Flow Charts**

Rules of evidence do not apply (s.31).

Carefully consider what you say in Court and what you tender on the application. Be mindful that the investigation is ongoing, you are being recorded and an officer involved in the investigation is likely sitting behind you.

Bail can be granted subject to conduct conditions (s.25); security conditions (s.26); accommodation conditions (s.28) and enforcement conditions (s.30).

If bail is applied for and refused, consider applying for bail in the Supreme Court of NSW (s.66) and *Practice Note No. SC CL 11 – Bail* – practice and procedure to be adopted for preparing and filing a bail application for hearing in the Supreme Court. **Attachment 2: PN SC CL 11.**

If refused in the Supreme Court appeal lies to the Court of Criminal appeal (s.67)

### **Prosecution disclosure**

**CPA** Brief service orders in relation to committal proceedings (ss. 61-64); charge certificates (ss.65-68); brief service orders in relation to summary proceedings in the Local Court (ss.183-188).

**DPPA** (s.15A).

**DPP Guidelines** (Chapter 13).

**Common law** *Grey v The Queen* [2001] HCA 65 where crown failed to disclose prosecution witness had received favourable treatment by the crown.

**Bar Rules** Rules 83-95). In particular, see Rules 87-88. (Crown Prosecutors are involved in criminal proceedings in the Local Court because of the EAGP scheme which is addressed below).

### **Defence enquiries and investigations**

Consider the potential urgency of some matters - For example, obtaining material from social media: Facebook, Instagram, Snapchat and so forth (prior to it being deleted); issuing subpoenas: CCTV, charge room footage, obtaining an expert report: for example, from a psychiatrist (issue of mental illness); recording a contemporaneous statement from the accused (rebut later allegation of recent invention).

Experts generally - Psychiatric/psychological report in respect of an issue of fitness to be tried, psychological report relevant to an issue of cognitive impairment to challenge the admissibility of alleged admissions. Consider whether a DNA scientist, forensic pharmacologist, traffic engineer and so forth may be necessary. Many expert witnesses are prepared to field preliminary questions before they are engaged, Public Defenders can assist with a list of potential expert witnesses.

Issuing subpoenas – Carefully consider, pros and cons.

NSW Police Force – COPS entries, criminal records of witnesses (see *R v Jenkins (No 2)* [2018] NSWSC 697).

### **Elections**

**CPA** Procedure if no election made, procedure for dealing with offences if election is made, time for making elections and withdrawing elections (ss.258-264).

Maximum applicable penalties for Table 1 and Table 2 offences (ss.267-268 and Schedule 1).

Become familiar with CPA Schedule 1, Table 1 offences (indictable offences that are to be dealt with summarily unless prosecutor or person charged elects otherwise) amendments to the list of offences occur. The most recent addition to the table (from 30.04.21) is the offence of ongoing supply of prohibited drugs (s25A(1) *Drug (Misuse and Trafficking) Act*). Serious breaking and entering in company offences where the serious indictable offence is stealing or damaging property where the theft or damage does not exceed \$60,000 is also a relatively recent addition to the Table.

## **EAGP (Early Appropriate Guilty Pleas) Scheme (from 30.04.18)**

**CPA** Procedures dictated by Local Court Practice Note. **Attachment 3: PN LC COMM 2.**

Charge certification (ss.65-68). **Attachment 4: Public Defenders Common Charge Options**

Compulsory case conferences (ss.69-81). (Make all appropriate plea offers at case conference - these are required to be recorded and in the event of a conviction at trial, the discount will apply if the plea was forthcoming at case conference). **Attachment 5: Criminal Case Conferencing Best Practice Guide.**

Plea offers can be made after the filing of the case conference certificate but any time before committal (s.77).

Plea discounts vary depending on time of the plea.

Question of fitness can be raised at committal and the accused committed for trial (ss.93 & 94). Where an accused is committed for trial under these sections no case conference is required (s.69(c)). If the person is subsequently found fit, there is a provision for the matter to be returned for a case conference (s.52 MHCIFPA).

**CSPA** Pleas entered in the Local Court attract a discount of 25% (s.25D(2)(a)).

Pleas entered at least 14 days before trial or first available opportunity after committal for trial, attract a discount of 10% (s.25D(2)(b)).

Otherwise a discount of 5% applies (s.25D(2)(c)).

See also ss.25D(3) & s.25D(4).

Discounts applicable where clients found fit after committal for trial (s.25D(5)).

## **Committal proceedings**

**CPA** Witnesses may be called to give evidence (ss.82-92).

A hearing may be held to determine the application (s.82(2)).

Application for witnesses to attend to give evidence must be made after the charge certificate has been filed (s.82(3)).

If both parties consent direction must be made otherwise “*substantial reasons why in the interests of justice*” must be satisfied (ss.82(4) & (5)).

Certain witnesses cannot be directed to attend (s.83) or generally not to be directed to attend (special reasons required) (s.84).

A Magistrate can no longer discharge an accused at committal (s.96).

Making the decision about whether or not to apply for witnesses. Benefits may include: exploring certain issues relating to the admissibility of evidence such as the admissibility of an ERISP; getting a better understanding of the potential strength of the prosecution case where statements are brief and vague; tactically preparing for the trial; and assisting in the preparation of a no-bill application. Cons against calling witnesses may include: witnesses sometimes become unavailable (dead, can't be found...) by the time

a matter is listed for trial (query the potential admissibility of their evidence given at committal). Is there an element of surprise that will be lost before a jury if the witness is rehearsed, having given evidence at a committal hearing?

## Summary Hearings

**CPA** Once a plea of not guilty is entered, the court will set a timetable for the progress of the matter, including setting a hearing date. Except in some cases, an order will usually be made that the brief of evidence is served at least 14 days before the hearing (s.183) but see CPA Reg 24 for matters not requiring service of brief, including matters where a penalty notice might be served; some offences under the *Summary Offences Act 1988*; a number of offences under the *Road Transport Act 2013*; and proceedings for which there is only a monetary penalty.

Domestic violence complainants may give evidence by way of pre-recorded statement (DVEC) (s.185A).

The court must refuse to admit evidence sought to be adduced by a prosecutor if the provisions of Part 2, Division 2 CPA have not been complied with (s.188).

**PN LC CRIM 1** The Practice Note regulates the procedures to be followed in respect of pre-trial and in hearings, including:

- Notices of Appearance are to be filed to assist in the prompt and effective service of the brief (clause 5.7(b));
- Once the plea of not guilty, the legal representative for the accused must provide the court and the prosecutor with a copy of Court Listing Advice (clause 5.7) which indicates which of the witnesses contained within the brief are required for cross examination (cl. 5.7(c)(2));
- Adjournments of hearings will not be granted unless there are cogent and compelling reasons (cl. 6.1(a));
- In respect of domestic violence proceedings, in which there are special provisions for the early service of evidence, including a mini-brief, to encourage any early guilty pleas (cl. 10.2).
- The pre-trial diversion for defendants with drug problems to the MERIT programme (cl. 12).

**Attachment 6: PN LC CRIM 1**

## THE DISTRICT COURT

### Sentencing hearings

**CSPA** Range of penalties available, s 21A factors, guilty pleas and discounts, victim impact statements, taking further offences into account (Forms one). Orders attaching to various penalties.

Complying with NSW *District Court Practice Note 20* – commenced 31 August 2020. Applies to all sentence

proceedings committed to the District Court for sentence on or after the commencement date. **Attachment 7: PN DC CRIM 20.**

Is a Sentence Assessment Report necessary? (Consider whether it is likely to say anything positive, if not don't ask for one).

Standard directions include:

- Prosecution to file and serve bundle no later than 2 weeks prior to sentence date;
- Defence to file and serve documentary material no later than 7 days prior to sentence date;
- Prosecution and defence to file and serve any further documents AND an outline of submissions no later than 3 days prior to the sentence date.
- Non-compliance will have consequences: (clause 17 and 18).

## Pre-trial procedure

### Indictments and arraignments

**CPA** An indictment is to be presented in the District Court within 4 weeks after the committal for trial unless the rules of the Court or an order of the Court extends this time (s.129).

The Court has jurisdiction once the indictment is presented, and the accused is arraigned. Any proceeding held thereafter forms part of the trial (s.130).

A plea of not guilty and a refusal to plead is taken to be a plea of not guilty (ss.154-155). A plea of guilty can be entered to an offence not charged in the indictment if the accused can lawfully be convicted of that offence (s.153).

### Trial by jury / election for trial by judge alone

**CPA** Trials in NSW are by jury unless an order for a trial by judge alone is made (s.131).

COVID-19 emergency legislation introduced (s.365). There is now a single test governing the power to grant a trial by judge alone: "*in the interests of justice*". See *R v BD (No. 1)* [2020] NSWDC 150.

**CCA** Jury only trials in Commonwealth trials.

### Orders about the trial and case management (reducing delays)

**CPA** Indictment may not be amended after it is presented except with the leave of the court or by consent (s.20 but see s.21).

Severing count(s) on the indictment (s.21) but see *Bauer (a pseudonym) v The Queen* [2019] HCA 40 and s.97A EA.

Separating trials from other accused: (s.21).

Court to hear and determine together proceedings for two or more offences where notice has been given that the prosecution intends to rely upon tendency or coincidence evidence (s.29A (subject to s 21(2))).



Applying for a change of venue (s.30).

Prosecution and defence disclosure obligations, including alibi evidence (ss.134-151).

Pre-trial hearings / readiness hearings / telephone call-overs (s.139) See also District Court Practice Notes Crim 18 and 19. **Attachment 8: PN DC Crim 18**. These hearings can include case management orders such as ordering a pre-trial conference between crown prosecutor and defence counsel (s.140) and rulings in respect of questions of law.

There are sanctions for non-compliance of pre-trial disclosure: including refusing to admit the evidence, excluding expert evidence or granting an adjournment (s.146).

Disclosure requirements are ongoing – they do not cease until such time as the accused is convicted or acquitted or the prosecution is terminated (s.147).

Designed to encourage co-operation between defence and prosecution: reducing witness list, agreed facts (s.191 EA) (co-operation that could reflect in a utilitarian discount if convicted after trial: s 22A CSPA).

Consider other orders that might be necessary: issuing subpoenas (for example: FASS file to provide to defence DNA expert, NSW Police Force ballistic case notes to provide to defence firearms' expert and so forth).

In respect of trials involving 'prescribed sexual offences' (defined s.3):

- Consider whether leave might be required to issue a subpoena.
- Important to become familiar with the provisions relating to sexual assault communication privilege (SACP): (ss.295-306). The process is staged and can be lengthy, so get in early and don't leave it until the trial date.

Is there evidence of prior-sexual history that you want admitted? You will need to make an application under s 293. See *Jackmain (A pseudonym) v R* (2020) 102 NSWLR 847; [2020] NSWCCA 150. See more recently *Decision Restricted* [2021] NSWCCA 51 (can access through the NSW Bar Association library).

Orders about pre-trial applications: binding unless exception applies ("not be in the interests of justice"): (s 130A) as well as advance rulings (s.192A EA).

Interlocutory appeals by crown and defence (s.5F *Criminal Appeal Act* 1912).

Prosecution application to vacate trial date – Consider making an application for costs: *R v Mosely* (1992) 28 NSWLR 735 (costs thrown away by the defence in wasted preparation) – see also paper by Luke Brasch.

## **Pre-recorded hearings**

### **Child Sexual Offence Evidence Pilot Scheme**

Child sexual offence evidence pilot scheme (Schedule 2, Clauses 81-90) and also CPA Reg Part 10.

Applies to proceedings at a prescribed place: Clause 83. Currently Downing Centre and Newcastle District Court.

Children's champions, also called witness intermediaries: preparation of reports and present during the child's evidence.

Ground rules hearing.

Evidence in chief and cross-examination is recorded and then played at the trial.

Further evidence may be given at the trial but only with leave (CPA Reg, Clause 87)

### **Expansion of pre-recorded hearings – response to COVID-19 pandemic**

A court may order the evidence of a witness be given at a pre-recorded evidence hearing in the absence of a jury (ss.354-364).

These provisions do not arise until such time as all pre-trial and case management requirements have been complied with (s.356).

The test is whether it is in the interests of justice to do so (s.356(2)(d)).

Forensic decisions to consider: possible lengthy delay between pre-recorded evidence and trial, what further prosecution investigations are likely? What fresh evidence may be sought to be led by the crown? What prejudice may arise for an accused when putting the accused's case to the complainant in compliance with the rule in *Browne v Dunn*?

Application for leave required for witness to give further evidence (ss.358 & 364).

Anecdotally, these provisions have either not been used or not used in any significant way.

### **Trials**

Jury delivers verdicts on indictment.

Judge deals with related and back-up offences by either determining them or remitting them back to the Local Court to be dealt with by a Magistrate (ss.165-169) - think tactically.

Defence of mental health impairment or cognitive impairment (Part 3, s.28 (old NGMI)) now codified in the MHCIFPA. New verdict of "*act proven but not criminally responsible*": see MHCIFPA (commenced 27.3.2021). Procedural elements remain largely unchanged: Test decided on the balance of probabilities (s.28(2)), explanation to jury has the additional direction that they are not be influenced by the consequences of the verdict (s.29) and a special verdict may be entered at any time if all agree the evidence establishes the defence (s.31).

### **Potential proceedings after not guilty verdicts**

Consider whether you have grounds to make a costs application under CCCA (s.3).

Consider whether your client may have a civil action against the State for example for malicious prosecution, and perhaps false imprisonment.

The prosecution can appeal a directed acquittal by a jury or in a judge alone trial to the Court of Criminal Appeal (s 107 CARA).

Consider the power of the Court of Criminal Appeal to order a retrial where there is "*fresh and compelling evidence*" or "*tainted acquittals*" (ss 99 – 106) noting that there has never been an application to review a verdict of acquittal under the tainted acquittals provisions)

## Proceedings after guilty verdicts

Sentence hearing – CSPA (as discussed above); for Commonwealth Crimes see *Crimes Act Cth Pt 1B*, general sentencing principles (s.16A), sentences of imprisonment, conditional release orders and so forth.

Consider whether a sentencing discount might still apply: s 22A CPSA. A discount of 5% was granted for the utilitarian benefit of an election for trial by judge alone, following a finding of guilt during the COVID-19 pandemic: *R v Ross (No. 5)* [2020] NSWDC 306.

Consequential orders upon convictions (whether pleas of guilty or conviction after hearing/trial) include:

- The making of an APVO or an ADVO;
- Orders for the payment of compensation (see s.99 VRSA in respect of factors to be taken into account when determining whether an order should be made and the amount;
- Orders directing that offenders attend a police station within a timeframe to commence process of becoming a registered sex offender;
- Orders relating to the proceeds of crimes – forfeiture and confiscation (*Confiscation of Proceeds of Crimes Act 1989*);
- Deportation;
- Firearms prohibition orders;
- Working with children prohibitions;
- Driver licence disqualifications;
- For State offences - automatic release to parole for sentences of imprisonment of less than or equal to 3 years) otherwise must appear before the NSW parole board.
- For Commonwealth offences – parole decisions involve the Attorney-General if the federal offender has been sentenced to more than 3 years. The AG can either make/refuse to release an offender to parole (s.19AL CA Com). Decision is made on written material, there is no opportunity to appear in person at a parole hearing (this is in contrast to State Parole Authority).
- High Risk Offender applications: see *Crimes (High Risk Offenders) Act 2006* – extended supervision orders, continuing detention orders – applications are made in the NSW Supreme Court.

## 'Diversionary' procedures

### Local Court

#### MHCIFPA

Applications to be diverted away from the criminal justice system (s.12) (commenced 27.3.2021) "*Mental health impairment or cognitive impairment*" (s.14(1)) - power to dismiss and discharge (s.18) "*Mentally ill or mentally disordered*".

A diversionary order is now available to people with a "*cognitive impairment*" (s.5) or a "*mental health impairment*" (s.4). There is now a discretionary list of criteria that a magistrate "*may*" take into account when deciding whether it is more appropriate to deal with the accused at law or by way of diversion.

Another significant change is that the conditions of a discharge now last for up to 12 months, increased from the previous 6 months (s.16).

What reports will you need? Background material? Is there a clinical nurse consultant attached to the Court

House that can assist?

Issue of lack of fitness for trial in the Local Court, consider a stay application, see *Mantel v Molyneux* (2006) A Crim R 83.

Prosecution may make an election that proceedings be dealt with on indictment. Proceedings below may then apply.

Intervention programs: the traffic offender intervention program, circle sentencing intervention program, see CPA Reg 2017.

## **District Court**

### **Question of fitness to be tried**

**CA (Com)** Commonwealth offences see ss 20B-20BI *Crimes Act Cth*.

**MHCIFPA** (ss.35-53).

The fitness test has been codified (s.36). Procedural aspects remain mainly unchanged. Two changes to remember: (1) prior to an inquiry into fitness the court may now order reports (ss. 43(3) & (2) in considering unfitness the court is to consider whether the trial process can be modified or assistance provided to facilitate the defendant understanding and participation (s.44(5)).

The procedure after an inquiry has changed. Instead of referring the defendant to the Mental Health Review Tribunal the court decides if the defendant will become fit or not in the next 12 months: s 47. If the court finds the person will not become fit the matter proceeds to a special hearing (unless the ODPP decide not to proceed): s 48. If the Court decides the defendant may become fit he/she is referred to the Tribunal: s 49. The Tribunal reviews the person: s 78. Where the Tribunal finds a defendant has become fit the matter moves immediately into to criminal proceedings. Where the Tribunal finds the defendant will not become fit within 12 months, the matter moves immediately to a special hearing: s 51. **Attachment 9 MHCIFPA Flow Charts.**

### **Referrals to the Drug Court**

*Drug Court Act 1986*.

## **Physical or AVL Appearances**

### **The accused**

Accused detainees (defined in s.3 EAAVLA) to appear physically in “*physical appearance proceedings*” (defined s.3 EAALA) unless the court otherwise directs (s.5BA(1) EAAVLA, in all other matters the accused detainee is to appear via audio visual link. Note s.5BA(1) does not apply if the parties consent to the accused detainee appearing before the court by AVL: (s.5BA(3)). For example, see *R v Warwick (No. 26)* where Garling J directed with the consent of the parties that the accused appear via AVL for the remainder of his trial.

Pandemic provisions have extended the court’s powers to conduct proceedings with accused appearing remotely (s.22C EAAVLA (provision has been extended to operate, at this stage, until September 2021), for example, in *R v Douglas*; *R v Read*; *R v Linke*; *R v Casamento*; *R v Counihan* [2020] NSWSC 1731 Adamson J permitted a number of accused, that were not in custody, to appear by AVL from places outside of NSW

including Melbourne and London at their arraignment.

### **Witnesses**

A NSW court may on its own motion or on application by a party, direct that a person give evidence or make submissions to the court by audio link or AVL from any place outside NSW that is a participating State: see **EAALA** generally.

### **Appearances of counsel - YOU**

Our professional lives have changed and remain that way.

Personal opinion – whenever possible don't have your appearance reduced to a head-shot on a screen. Appear in the physical space of the court room so that you can actively and physically engage and persuade through more than just the sound and content of your voice. When you have the physical space of the court room you have a presence that involves persuading with your whole being (movements, mannerisms, gestures, intonations, tones and so forth) and importantly you can read the feeling in the court room and adjust your advocacy accordingly.

There is also FODO – an acronym understood to have been coined by Zahra SC DCJ – “*fear of dropping out*”.

## RESOURCES

### Investigation

*Crimes Act 1914 Cth – Part 1C*  
*Law Enforcement (Powers and Responsibilities) Act 2002 NSW*  
*Law Enforcement (Powers and Responsibilities) Regulation 2016*  
*Law Enforcement (Controlled Operations) Act 1997 NSW*  
*Surveillance Devices Act 2007 NSW*  
*Road Transport Act 2013 NSW – s 177*  
*Crimes (Forensic Procedures) Act 2000 NSW*

### Common offences

*Criminal Code Act 1995 Cth*  
*Crimes Act 1900 NSW*  
*Crimes (Domestic and Personal Violence) Act 2007 NSW*  
*Summary Offences Act 1988 NSW*  
*Road Transport Act 2013 NSW*  
*Drug Misuse and Trafficking Act 1985 NSW*  
*Firearms Act 1996 NSW*

### Enquiries

*Coroners Act 2009 NSW*  
*Independent Commission Against Corruption Act 1988 NSW*  
*New South Wales Crime Commission Act 1985*

### Bail

*Bail Act 2013 NSW*

### Procedure

*Criminal Procedure Act 1986 NSW*  
*Criminal Procedure Regulation 2017 NSW – Part 7, Part 9, Part 10*  
*Children’s (Criminal Proceedings) Act 1987 NSW*  
*Local / District Court Act / Rules*  
*Local / District Court Practice Notes*  
*Court Suppression and Non-Publication Orders Act 2010 NSW*

### Appearances (accused and witnesses)

*Evidence (Audio and Audio-Visual Links) Act 1998*

### Committal hearing

*Crimes (Sentencing Procedure) Act 1999 NSW*  
*Local Court Practice Note Comm 2*  
*Children’s Court Practice Note 12*  
Brief Protocol between ODP and NSW Police  
Legal Aid – Guide for Defence Practitioners

### Orders following conviction

AVOs: *Crimes (Domestic and Personal Violence) Act 2007 NSW*  
Compensation orders: *Victims Rights and Support Act 2013 NSW [VRSA]*  
Sex offenders: *Child Protection (Offenders Registration) Act 2000 NSW, Child Protection (Offenders Prohibition Orders) Act 2004, Child Protection (Working with Children) Act 2012 NSW*  
Confiscation: *Confiscation of Proceeds of Crime Act 1898 NSW*. [See also *Criminal Assets Recovery Act 1990 NSW* which does not require a conviction].

### Sentencing and Post-sentencing

*Crimes Act 1914 Cth – Part 1B*  
*Crimes (Sentencing Procedure) Act 1999 NSW*  
Parole: *Crimes (Administration of Sentences) Act 1999 NSW*  
Post sentence: *Crimes (High Risk Offenders) Act 2006 NSW*

### Costs

*Criminal Procedure Act 1986 NSW*  
*Costs in Criminal Cases Act 1967 NSW*

Legal Aid Commission Act 1979 NSW s 42, 43A

### **Appeals**

*Criminal Appeal Act 1912 NSW*

*Crimes (Appeal and Review) Act 2001 NSW*

### **Mental Health / Drug Court**

*Mental Health and Cognitive Impairment Forensic Provisions Act 2020 NSW*

*Mental Health Act 2007 NSW*

*Drug Court Act 1998 NSW*

### **Books & Loose-Leaf Services (on-line subscriptions available)**

RN Howie QC & PA Johnson SC, *Criminal Practice and Procedure NSW*  
(LexisNexis Butterworths, 4 Volume loose-leaf service).

RN Howie QC & PA Johnson SC, *Annotated Criminal Legislation New South Wales*  
(Butterworths, 2018-2019 edition, 2019, single textbook).

T Anderson, *Commonwealth Criminal Law* (The Federation Press, 2<sup>nd</sup> ed, 2018).

P Zahra SC & C Young *Zahra and Arden's Drug Laws in NSW* (The Federation Press, 3<sup>rd</sup> ed., 2014).

S Odgers SC *Sentence* (Longueville Media, 4<sup>th</sup> ed, 2018). Note: 5<sup>th</sup> print edition expected to be published September 2020.

M Bagaric *Ross on Crime* (Thomson Reuters, 8<sup>th</sup> ed, 2018).

### **Guides and Papers**

Legal Aid NSW & ODPP *Criminal Case Conferencing Best Practice Guide*, 2019

NSW Public Defenders *Table of Common Charge Options for State Offences*, March 2020

NSW Public Defenders *Defence of Mental Health Impairment or Cognitive Impairment* March 2021

### **Websites**

Bench books: <https://www.judcom.nsw.gov.au/category/publications/bench-books/>

Judicial Information Research System (subscription required – includes sentencing statistics, restricted judgments):

<https://jirs.judcom.nsw.gov.au/public/auth/signin/>

Public Defenders Website (includes papers & sentencing tables):

<https://www.publicdefenders.nsw.gov.au/>

Criminal CPD (Papers): <https://criminalcpd.net.au/>

Criminal Law Survival Kit: <http://www.criminallawssurvivalkit.com.au/>

