

The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION



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Criminal Law

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PART 1 – CRIME

[14.10] The words *crime* and *criminal* are easily applied to violence and theft. But crime also includes victimless crimes such as possession of marijuana, parking violations and minor traffic offences.

In its widest sense, the term criminal law includes any law which declares that certain conduct is an offence and lays down a penalty for it.

In practice, however, parking violations and minor traffic offences are not generally regarded as crimes. They are separately recorded by

Roads and Maritime Services and, unlike serious offences, generally do not need to be disclosed in job applications.

Drug offences are discussed in Chapter 21, Drug Offences. Sexual offences are discussed in Chapter 35, Sexual Offences. Domestic violence crimes are dealt with in Chapter 19, Domestic Violence. Traffic offences are dealt with in Chapter 20, Driving and Traffic Law.

The difference between crimes and civil wrongs

It can be quite difficult to define the difference between crimes and civil wrongs.

Who is wronged?

One way of looking at it is to say that a crime is a wrong against the community, which attracts community condemnation and punishment, while a civil wrong is a wrong against an individual, which requires compensation or repayment to the person wronged. For example, if a person takes money from someone's bag without their permission, they are committing a criminal offence for which they can be punished by the state. If they carelessly damage someone's bag, the owner may take them to a civil court and they may be ordered to pay compensation, this is quite separate from the punishment process.

On the other hand, a person who fails to pay back a loan is not committing a crime. Although a civil case can be taken against them to get the money back, the person cannot be prosecuted for a criminal offence.

Of course, a crime is often (not always) also a wrong against an individual.

Who takes action?

Crimes are normally prosecuted by the state or Commonwealth, whereas it is generally up to an individual to take court action against a person who has committed a civil wrong.

It is possible for someone to commence criminal proceedings against a person who has committed a crime against them, such as assault, but it is rarely done.

Actions that are both crimes and civil wrongs

Many acts, such as assault, can constitute a crime and a civil wrong at the same time. The police may be reluctant to commence criminal charges for minor assaults unless there are witnesses or noticeable injuries, and they will leave it up to the person assaulted to take action. In this case, the person may have to choose between starting criminal proceedings and starting civil proceedings.

If the police bring criminal proceedings, the person can still bring a civil action.

Types of crime

[14.20] Crimes may be tried by a magistrate, or by a judge and jury. Usually this depends on the seriousness of the crime.

[14.30] Crimes tried by a magistrate

Crimes tried by a magistrate in a Local Court are called *summary offences*. They are less serious than those tried by a judge and jury (*indictable offences*), and the penalties are less.

Examples of summary offences are driving with the prescribed concentration of alcohol, smoking marijuana and offensive behaviour.

Can the person have a jury?

A person charged with a summary offence cannot insist on having a jury to decide their innocence or guilt. Because of the expense and delay involved in a trial by jury, most new offences created by parliament are tried by a magistrate.

Time limits

Proceedings for a summary offence must be started within six months of the date of the alleged offence (*Criminal Procedure Act 1986* (NSW), s 179(1)).

Children and summary offences

When a person under 18 is charged with a criminal offence, the case is heard, at least initially, in the Children's Court, and special provisions apply (see Chapter 7, Children and Young People).

[14.40] Crimes tried by a judge and jury

Crimes tried by a judge and jury are generally more serious (*indictable offences*). In jury trials, the judge rules on questions of law, and the jury rules on questions of fact.

In the Supreme Court

Only extremely serious charges – generally murder, terrorism and major corporate frauds – are heard in the Supreme Court.

In the District Court

Cases arising from other indictable offences such as robbery, malicious wounding and dangerous driving causing death are heard in the District Court.

Time limits

There is no time limit for a charge to be laid for an indictable offence.

The pre-trial hearing

Before people charged with indictable offences are sent to a higher court there is a preliminary hearing in a Local Court, called a committal hearing.

At the pre-trial hearing, directions are made to ensure all evidence is available. Lawyers representing an accused and the prosecution are given an opportunity to discuss and negotiate charges, to determine what charges are to proceed to a higher court and discuss whether guilty pleas can be entered. There is a limited opportunity for witnesses to be called and tested. After the committal process is complete. A Magistrate must commit a person for trial unless the Magistrate has accepted a guilty plea in which case the matter

is sent to the higher court for sentence (*Criminal Procedure Act*, ss 96, 97).

The court hierarchy is discussed in Chapter 1, About the Legal System. Court proceedings are discussed later in the chapter at [14.530].

[14.50] Crimes tried by either a magistrate or a judge and jury

Many less serious types of indictable offences, such as stealing and breaking and entering, may (or must) be dealt with by a magistrate in the Local Court under some circumstances. There are special procedures for dealing with these cases.

Time limits

There is no time limit for the prosecution to lay a charge for indictable offences that can be dealt with summarily, even though they are heard in the Local Court.

Indictable offences dealt with summarily

Legislation divides indictable offences into those which may:

- not be tried summarily;
- be tried summarily unless the prosecuting authority or the accused elects to have the offences dealt with on indictment (Table 1); and
- be dealt with summarily unless the prosecuting authority elects to have them dealt with on indictment.

This means that a large number of indictable offences are likely to be tried summarily. The tables, which are found at the end of the *Criminal Procedure Act*, should be checked, as they are changed regularly.

Choosing a District Court trial

An accused can choose between a Local Court hearing and a District Court jury trial if property involved is valued at more than \$5,000 or, in the case of an assault, the assault is serious.

Is a jury trial desirable?

Because a magistrate in a Local Court may view the facts very differently from a jury of 12 citizens hearing the case in the District Court, deciding whether a jury trial is desirable is an important decision.

What about penalties?

Once a matter goes to the District Court, that in itself, may result in the matter being viewed more seriously.

Maximum penalties available to judges are significantly greater than those available to

magistrates, who are restricted to a maximum of 100 penalty units, two years' imprisonment for one offence and five years for multiple offences (*Criminal Procedure Act*, ss 267, 268; *Crimes (Sentencing Procedure) Act 1999* (NSW), s 58). (see penalties at [14.670]).

Basic principles of criminal law

[14.60] Historically four basic principles of our criminal law were that:

- a person is innocent until proven guilty;
- guilt must be proved by the prosecution beyond reasonable doubt;
- silence cannot be used to infer guilt;
- a person who has been acquitted cannot be tried again for the same offence.

This section shows the recent watering down of the latter two of these fundamental principles.

[14.70] Innocent until proven guilty

The basis of our system of criminal justice is that a person charged with an offence is innocent until proven guilty.

[14.80] Proof beyond reasonable doubt

What the prosecution must prove

The principle that a person is innocent until proven guilty requires that the prosecution must prove the guilt of the accused.

It is not up to the person charged to establish their innocence, although sometimes the accused has to show that there is sufficient evidence to raise an issue as a defence.

The prosecution must satisfy the magistrate, judge or jury that the accused person is guilty beyond reasonable doubt. If there is any reasonable doubt about their guilt, they should be acquitted (ie, found to be not guilty of the offence). The prosecution must not only prove that the accused did the prohibited act with the necessary criminal intent, but also disprove any defences raised by the accused.

What the defendant may have to prove

In some cases, the defendant merely has to raise a defence, that is, suggest it is a reasonable possibility, and the prosecution will then have to disprove it beyond a reasonable doubt. In other cases, the burden of proving a particular defence, such as insanity, may be on the accused person. However, unlike the prosecution, the defence only has to be proved to the lesser standard of on the *balance of probabilities*.

[14.90] The right to remain silent

There is no general right in the Australian Constitution, or anywhere else in Australia, that says a person is entitled to remain silent when questioned by police.

However, a person is not required to answer questions put by a police officer, except in certain limited situations (see Part 2 of this chapter at [14.230]).

Is silence evidence of guilt?

Until 2013, the fact that a person chose to remain silent could not be used as evidence of their supposed guilt. However, in 2013 the NSW Parliament introduced new rules with regards to the right to silence following reforms in England (*Evidence Act 1995* (NSW), s 89A). Now a suspect will be cautioned that although they have the right to remain silent, "it may harm their defence if they fail to mention something now that they later rely on at trial". The special caution only applies if the suspect has received legal advice at the time.

[14.100] Double jeopardy

The principle of double jeopardy requires that no-one should be punished more than once for the

same offence, and that no-one should be twice placed in jeopardy of being convicted for the one offence. This means generally that if a person has been tried and acquitted of an offence, they cannot be tried again on the same charge. This principle emphasises the finality of verdicts in the resolution of disputes and ensures that prosecutions are not used as an instrument of tyranny or harassment.

In 2006, the NSW Parliament passed legislation abolishing the rule against double jeopardy in cases where:

- an acquittal of a “life sentence offence” (murder, manslaughter, gang rape, large commercial supply or production of illegal drugs) is debunked by “fresh and compelling evidence of guilt”; or
- an acquittal of a “15 years or more sentence offence” was tainted by perjury, bribery or

perversion of the course of justice (*Crimes (Appeal and Review) Act 2001* (NSW), ss 99–103).

Where to find the criminal law

Most crimes in NSW are covered by statutes passed by parliament. The main Act is the *Crimes Act 1900* (NSW), but specific areas are covered by other Acts such as the *Drug Misuse and Trafficking Act 1985* (NSW) and the *Summary Offences Act 1988* (NSW). Crimes affecting federal powers or property are generally regulated by Commonwealth Acts such as the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth).

Some crimes only exist at common law as a result of the rulings of courts over the years (eg, attempts to commit some crimes and conspiracies).

References to the *Crimes Act* in the following sections are to the NSW Act, unless otherwise specified.

Examples of crimes

[14.110] Assault

What is assault?

There are two types of assault covered by s 61 of the *Crimes Act*.

1. Battery assault

Battery assault is intentional or reckless application of unlawful force, for example, hitting someone.

What if the person consented?

The application of force is unlawful unless the victim has consented (eg, boxing). A person cannot consent to actual bodily harm or more, unless the defendant’s actions were within lawfully recognised exceptions such as surgery, boxing, contact sports, lawful corrections and manly pastimes (*R v Brown* [1994] 1 AC 212).

In England, it was held that victims could not consent to sado-masochistic activities, and thus the accused was guilty of assault. However, in Australia, the defendants would not be charged due to the *Human Rights (Sexual Conduct) Act 1994* (Cth).

Assaults, except where bodily harm is caused or excessive force is used (*R v Raabe* (1985) 14 A Crim R 381), require evidence that the victim did not consent.

Mere touching can amount to an assault

Touching and spitting can amount to an assault, provided it is intentional or reckless unlawful contact.

2. Psychic assault

Psychic assault is intentionally or recklessly creating the fear of imminent unlawful contact in the victim. For example, “give me your money or I’ll shoot” is an assault (and robbery).

What about threats?

A threat of immediate physical violence is enough, so long as it is a real rather than a fanciful or impossible threat. The accused does not need to have the ability or the intention to carry out the threat (eg, threatening with a plastic gun). The essence of psychic assault is that the victim felt fear.

Types of assault

The *Crimes Act* distinguishes between different types of assault, and each offence carries its own penalty. Common assaults have a maximum penalty of two years’ imprisonment (s 61). Assaults can also be aggravated by additional elements:

- assault occasioning actual bodily harm (maximum penalty five years (s 59));
- intentionally wounding or inflicting grievous bodily harm (“really serious bodily injury”) (maximum penalty 25 years (s 33));
- recklessly wounding or inflicting grievous bodily harm (maximum penalty 14 years (s 35));
- assaults on victims with special status. For example, assaults on police carry higher penalties, regardless of whether the accused knew the victim was a police officer (s 58; Div 8A);
- assault during public disorder (maximum penalty five years (s 59A)).

The law about weapons

Guns

In 1996, there was a concerted effort by parliaments across the country to reassess laws relating to firearms. The *Firearms Act 1996* (NSW) was a result of this national approach. Firearm possession is confirmed by the Act as being a privilege, not a right, conditional on the overriding need to ensure public safety.

The key provisions of the Act are:

- the prohibition in most circumstances of the possession and use of automatic and self-loading rifles and shotguns;
- a national licensing and registration scheme;
- strict requirements for the licensing, sale and acquisition of firearms;
- requirements for the safe keeping of firearms.

Other weapons

The *Weapons Prohibition Act 1998* (NSW) regulates the possession, sale, manufacturing, safe-keeping and licensing of such weapons as extendable batons, machine guns, taser guns, knuckle dusters, studded gloves, explosives, crossbows, flick knives and star knives, missile launchers and flame throwers. This Act similarly confirms that firearm possession is a privilege, not a right, and requires that each person who possesses or uses a prohibited weapon under the authority of a permit has a genuine reason for possessing or using the weapon.

See also Offences involving knives at [14.150].

[14.120] Homicide

What is homicide?

Homicide is the killing of a human being. To be charged with a homicide offence, a person must have caused the death of a human being.

Murder

For the charge of murder, the prosecution must prove that at the time of causing death, the accused had the mens rea or mental state of either an intention to kill or to cause grievous bodily harm (ie, really serious bodily harm), or the recognition of the probability of death (reckless indifference to human life). Alternatively, a person can be found guilty of murder if they caused the death of the victim during or immediately after a 25-year offence. An example of this is where a person has broken into a house and inflicted grievous bodily harm (*Crimes Act*, s 18).

Voluntary manslaughter

If a person is charged with murder, they can argue complete defences such as self-defence which, if successful, will lead to acquittal. An accused can also argue a partial defence which, if successful, will reduce the charge of murder to (voluntary) manslaughter. An accused might argue that the killing was in response to extreme provocation by the deceased (s 23), or they suffered a substantial impairment of the mind (s 23A), and/or they had acted in self-defence but had used excessive force (s 421). The defence of extreme provocation has replaced the earlier defence of provocation and can only be argued in very limited circumstances, particularly with the new requirement that the accused’s response was due to the victim committing an indictable offence.

Involuntary manslaughter

If an accused caused the death of the victim, but lacked the necessary mens rea for murder, they may still be charged with (involuntary) manslaughter. An accused may be charged with unlawful and dangerous act manslaughter, which requires the prosecution to prove that the accused caused the death of the victim during an unlawful

and dangerous act (*Wilson v The Queen* (1992) 174 CLR 313). An example of this may be during a bar brawl where an accused hit the victim (assault), causing the victim to fall back and hit their head, resulting in death.

Alternatively, an accused may be charged with manslaughter by criminal negligence. This arises where the accused's gross negligence has caused the death of a victim. This may be charged where the accused has failed to act, where they had a legal duty to act. For example, legal duties have been found in parent/child relationships and voluntary assumption of care for helpless persons (*Taktak v The Queen* (1988) 14 NSWLR 226).

Assault causing death

Where a person assaults another by intentionally hitting them which causes their death, the person can be charged with assault causing death (reported in the news as one punch homicides). This particular offence has a maximum penalty of 20 years. If the person carrying out the assault is over 18 and intoxicated, the maximum penalty is 25 years. Importantly the minimum sentence and non-parole period the court can impose is eight years, regardless of any matters raised in mitigation of penalty (ss 25A, 25B).

[14.130] Stealing

What is stealing?

If a person takes and carries away another person's personal property with the intention of permanently depriving, the owner of the property without their consent, that person can be guilty of larceny – that is, stealing (*Crimes Act*, s 117).

Intention to permanently deprive

The intention to permanently deprive can include not just keeping another person's property, but acting in a way that the owner would not see the property again. This would include discarding it, selling it, giving it away or altering it.

Claim of right made in good faith

If a person honestly believes that they are legally entitled to property, then they cannot be guilty of larceny if they take the property or the value of the property (*R v Fuge* (2001) 123 A Crim R 310; *R v Lopatta* (1983) 35 SASR 101).

If a person finds something and keeps it

Someone who finds property and keeps it for themselves can be guilty of stealing, unless they honestly and reasonably believe that there was no likelihood the owner could be found.

For example, if you find a \$20 note on the road, it would be reasonable to believe that the owner would not be found, so you could not be charged with theft if you decided to keep the money. However, if you found a wallet with identification, then you would be expected to make some effort in finding the owner (eg, calling them, giving the wallet to the police).

"Borrowing" money without consent

A person who took money intending to use it, for example, to bet on the races, and later return it, could also be guilty of stealing (s 118).

Fraud

There is a basic offence of fraud where a person dishonestly obtains property or financial advantage by deception (s 192E). Deception can include words or conduct and covers situations where a person causes a computer to make a response the person is not authorised to cause it to make.

Eating a meal at a restaurant and then running out without paying would be fraud, as by sitting down at the restaurant you are dishonestly indicating that you will pay for the meal.

Other stealing offences

The *Crimes Act* also prohibits receiving stolen property.

Shoplifting

Summary stealing offences include shoplifting, perhaps the most common form of stealing or larceny.

Because shoplifting is such a prevalent offence, innocent shoppers can be wrongly accused. The simple explanation "I forgot to pay" is very often met with disbelief. Medical evidence, character evidence and the like, can be called to show that there was no

intention to steal; that is, to take property without paying for it.

Can the person be searched or detained?

If a police officer suspects on reasonable grounds that a person has under his or her control anything stolen, the police officer may stop, search and detain the

person (*Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 21 (LEPRA)).

A person suspected of theft in a store can be detained by store staff until the police arrive, provided that there are reasonable grounds for the suspicion.

Penalties

Most shoplifting offences lead to a fine, but for repeat offences jail is likely.

Counselling services

Some counselling is available for people who have been charged and are pleading guilty to shoplifting offences. Court parole officers may do the counselling, or refer people who plead guilty to an approved program.

Summary or indictable?

Stealing offences can be indictable or summary offences.

Summary offences are dealt with in the Local Court by a magistrate.

The maximum penalty for a stealing offence dealt with by a magistrate is two years' jail and/or a fine of \$11,000.

Offences where the property is valued at over \$5,000 can be dealt with by a judge and jury with the consent of the prosecution or the accused.

Car stealing

Car stealing is a form of larceny (see [14.130]).

Anyone who steals a car is liable to a maximum penalty, often years' jail (*Crimes Act*, ss 154C, 154F).

Anyone who assaults another person with intent to take a car and steals that car and drives it, or intends to drive it, is liable to a maximum penalty of 10 years' jail (s 154C(1)(a)). Where there are circumstances of aggravation, the maximum penalty increases to 14 years' gaol.

Driving or being a passenger in a stolen car

Joyriding is the unauthorised borrowing of a car with the intention of returning or abandoning it. The prosecution only needs to prove taking without consent.

Section 154A(1) makes it a criminal offence to drive or allow yourself to be a passenger in a car, knowing that the car has been taken without the owner's consent.

The maximum penalty before a judge is five years' jail.

[14.140] Burglary

The *Crimes Act* seeks to cover all aspects of the range of activities involved in burglary.

Entering

Section 109 specifies that "entering with intent to commit a serious indictable offence" (such as stealing), or entering and actually committing a serious crime, are both offences where the person then breaks out, carrying a maximum penalty of 14 years' imprisonment. Where a person enters a dwelling house with intent to commit a serious indictable offence, but does not break out, they will be liable for up to 10 years' imprisonment.

Aggravated entry

If the offence is aggravated by violence, the use of a weapon (offensive weapon under s 109(2); dangerous weapon under s 109(3)), company or deprivation of liberty, heavier penalties, up to a maximum of 25 years, apply (s 109). Standard mandatory minimum sentences also apply (see Sentencing at [14.670]).

Breaking out

Section 109 also covers situations where entry was not by force (such as through an open door), but exit was obtained by breaking out.

Breaking

In the context of burglary, breaking need not involve smashing anything; it can be as little as opening a screen or internal door or an unlocked window.

Breaking in

Breaking into a dwelling, school, shop, warehouse, garage, factory or some such place and committing a crime, or intending to commit a crime, such as assault or property damage is also an offence (ss 112–113).

Proving the intention to steal

A theft does not have to be completed for an offence to be committed (if theft is intended).

For example ...

A person who is disturbed inside a house before grabbing the loot and who runs into the arms of a waiting off-duty police officer has committed the offence of breaking and entering with intent to commit a serious indictable offence (s 113).

The prosecution must prove from the circumstances (and/or any admission by the accused) that there was

an intention to commit a particular crime. It might, for example, prove that the accused was dressed in dark clothes, broke a lock, entered the house and then fled. There might be evidence that drawers were disturbed.

This evidence, together with any admissions made by the accused, would probably be enough to prove that the accused intended to steal while in the house.

Offences involving intent

Section 114 specifies a number of offences involving intent, which means that a burglar can be apprehended before actually breaking, entering or stealing. This section covers anyone who:

- is armed with a weapon or instrument with intent to commit an indictable offence;
- has with them implements for housebreaking or safebreaking, or implements that could be used to enter and/or drive a vehicle;
- has their face blackened or disguised (or who has the materials to disguise themselves) with the intention of committing an offence.

The maximum penalty is seven years' jail.

Where a person previously found guilty of any indictable offence is found guilty under s 114, that person is liable for up to 10 years' jail (s 115).

What are housebreaking and safebreaking implements?

Housebreaking and safebreaking implements need not be marked "Acme Burglary Tools". Ordinary household items like screwdrivers, pliers, knives and chisels can be used as evidence. The prosecution must prove that the items were in the possession of the accused for an illegal rather than an innocent purpose.

If the police arrest a disguised man in someone's backyard at 3 am with a chisel and screwdriver in hand, he will have some explaining to do. If he was,

in fact, on his way home from a fancy dress party and he got lost, he might have a lawful excuse.

It is quite clear from decisions by the Court of Criminal Appeal (eg, *R v Harris* (2007) 171 A Crim R 267; *R v Ponfield* (1999) 48 NSWLR 327) that the courts take a hard line when sentencing offenders of this sort. Jail is frequently seen as the appropriate punishment. Those with records of such offences, or committing multiple offences, can expect long jail terms.

[14.150] Offences in public places

Thousands of people are charged each year with so-called public order offences under the *Summary Offences Act*. Most are fined or given bonds, but some are directed to perform community service work or imprisoned. Police powers with regard

to public order offences are specified under the LEPRA.

Public order legislation is extensively used against young people, vandals and demonstrators. Many of the offences involved are fairly trivial, victimless crimes, but the impact on the lives of the people convicted may not be trivial. These matters are noted in police records and count

as convictions, which are often required to be disclosed on employment applications.

As summary offences, these offences are dealt with by a magistrate in the Local Court.

Questions of law are rarely raised in relation to street offences. Most cases depend on the facts and circumstances.

Offensive conduct or language

Under ss 4(1) and 4A of the *Summary Offences Act*, a person must not conduct themselves in an offensive manner near or within view or hearing of a public place or school, or use offensive language in or near or within hearing of such a place.

What must be proved?

The prosecution must prove, beyond reasonable doubt (the standard of proof required in all criminal cases), that:

- the conduct occurred near or within view of a public place or school; and
- the conduct was offensive.

To establish the offence, it is not necessary that a member of the public has actually been offended by the language. Further, it is not necessary that a member of the public be present when the language is used (*Jolly v The Queen* (2009) 9 DCLR (NSW) 225).

Offences in private places

Some conduct that is an offence in a public place will be an offence even if it occurs in a private place; for example, certain prostitution offences (see [14.190]), and the offence of public disorder.

The defence of reasonable excuse

Even if the formal elements of an offence are proved beyond reasonable doubt, the accused can still be acquitted if they can show, on the balance of probabilities, that they had a reasonable excuse for the conduct.

What constitutes a reasonable excuse is not entirely clear, but it may extend to a mistake of fact or law based on reasonable grounds (see, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523).

Penalty

The penalty for offensive conduct is a fine of up to six penalty units or three months' imprisonment. The penalty for offensive language is a fine of up

to six penalty units. The value of six penalty units is currently \$660.

What it means

What is a public place?

Public place means a place (land, water or building) to which the public (even a limited section) has access (*Summary Offences Act*, s 3). It does not matter whether entry is free or not, or whether the place is usually open to the public or not.

Schools are not included in this definition. They are defined separately.

What is offensive?

The NSW Court of Appeal, using the Oxford Dictionary, noted in *R v Smith* [1974] 2 NSWLR 586 that offensive means displeasing, annoying or insulting, though none of those words is a precise alternative to "offensive", which has its own meaning drawn from the context. The word "fucking" has been held by some Supreme Court judges to be of itself offensive, although some magistrates have taken a more realistic view.

What is conduct?

Conduct has not been specifically defined, but is usually taken to mean behaviour.

Other summary offences

Other summary offences include obscene exposure and being in possession of a knife (see Offences involving knives at [14.150]) and annoying or harassing behaviour.

Police can move people on and give them directions if they see them in public engaging in such behaviour (LEPRA, s 198). Under s 9 of the *Summary Offences Act*, it is an offence where a move on order is given for being drunk or disorderly and within six hours the same person is drunk and disorderly in another place.

Some summary offences (such as possession of an offensive implement) carry penalties of up to 50 penalty units or two years' imprisonment (s 11B). Defacing property using a spray can could put serious and persistent culprits in jail for up to 12 months (*Graffiti Control Act 2008* (NSW), s 4).

Lesser summary offences

Lesser offences under the *Summary Offences Act* include:

- obstructing traffic (maximum penalty – four penalty units);

- damaging fountains, shrines, monuments and statues (maximum penalty for wilfully damaging or defacing any protected place – 40 penalty units; maximum penalty for committing nuisance or offensive/indecent act in or on any war memorial – 20 penalty units).

Offences involving knives

It is an offence to be in possession of a knife in public without reasonable excuse (*Summary Offences Act*, s 11C). Police have the power to search for knives if they suspect on reasonable grounds that the person has a dangerous implement on them (LEPRA, s 26). A police officer may request a person who is in a public place or a school to submit to a frisk search if the police officer suspects on reasonable grounds that the person has a dangerous implement in their custody. The fact that a person is in a location with a high incidence of violence may be taken into account in determining whether there are reasonable grounds to suspect the person has a dangerous implement.

The *Summary Offences Act* gives police the power to search anyone they reasonably suspect of having a knife in a public place or school (s 11C).

Maximum penalties for knife-related offences are:

- in the case of possession of an offensive implement in a public place or school, 50 penalty units or two years' imprisonment;
 - in the case of custody of a knife in a public place or school, 20 penalty units or two years' imprisonment, or both;
 - in the case of a parent who knowingly authorised or permitted their child to commit an offence under s 11C, five penalty units;
 - in the case of sales of knives to children under 16 years of age, 50 penalty units.
-

Public assemblies

The *Summary Offences Act* requires that the Police Commissioner be notified of an intention to hold a public assembly. There is a form for the purpose in Sch 1 of the *Summary Offences Regulation 2010* (NSW).

Information required

The form asks for details such as:

- the date, time, place and purpose of the assembly (or route for a procession);
- the number of people expected to attend;
- the name and address of a person willing to take responsibility for organising the assembly (*Summary Offences Act*, s 23).

What the Police Commissioner may do

Where the commissioner is notified (at least seven days in advance), they may either:

- authorise the assembly; or
- apply to the District Court or Supreme Court for an order prohibiting it (s 25).

Before the commissioner applies to the court

Before applying to the court, the commissioner must invite the organisers to:

- confer with a specified police representative, at a specified time and place; or
- make written representations within a fixed time (s 25(2)).

Application for court orders by the organiser

If notification prohibiting the assembly is received less than seven days before it is to be held, the organiser can apply to the District Court or Supreme Court for an order to authorise it (s 26).

The court's decision is final and not subject to appeal.

Participation

Taking part in an authorised public assembly is not an offence, and the offence of obstructing traffic does not apply (s 24).

Unauthorised assemblies

An unauthorised public assembly may take place, but participants do not have any immunity from prosecution for obstructing traffic or unlawful assembly (*Crimes Act*, s 545C).

Additional powers for demonstrations that obstruct traffic

In 2015, police powers to give directions in relation to demonstrations, protests, processions and organised assemblies were increased. Police officers can give directions if they believe on reasonable grounds that it is necessary to deal with a serious risk to the safety of people. The powers can be exercised even if:

1. that activity is not an authorised public assembly or is not being held substantially in accordance with any such authorisation; and
 2. the police officer in charge at the scene has authorised the giving of directions; and
 3. the direction is limited to the persons who are obstructing traffic (see LEPRA, s 200).
-

Violent disorder

Section 11A of the *Summary Offences Act* deals with *violent disorder*. This offence occurs when:

- there are three or more people “present together”; and
- any of them intentionally uses or threatens violence, or carries on so that a hypothetical “person of reasonable firmness” (there need not be any person present at the scene) would be afraid for their personal safety.

All members of the group will be guilty of the offence, which carries a maximum penalty of 10 penalty units or six months’ imprisonment.

This offence can be committed in private as well as in public.

What is violence?

Violence is defined to include threats to property as well as people, and can include acts which are intended to be harmful but do not in fact result in any harm.

[14.160] Criminal trespass**Entering or remaining on “enclosed lands”**

It is an offence, without lawful excuse, to:

- enter enclosed lands without the consent of the owner, occupier or person apparently in charge;
- remain on enclosed lands after being requested to leave by that person (*Inclosed Lands Protection Act 1901* (NSW), s 4).

What are enclosed lands?

Enclosed lands means any land, either public or private, surrounded by a fence or wall, or by a fence or wall and a canal or some natural feature such as a river or cliff that provides recognisable boundaries. It includes any part of a building or structure and any land occupied or used in connection with a building or structure (s 3).

Prescribed premises

Some premises including schools, childcare centres, hospitals and nursing homes are specially prescribed, and unlawful entry to them carries a double penalty.

The defence of lawful excuse

The accused is required to establish that they had a lawful excuse for being on the land.

It is not necessary to show a legal right to be there, and an accused can rely on a mistaken and genuine belief that, if true, would justify their being there; for example, they were invited to visit a friend and mistakenly entered the wrong house (*Darcy v Preterm Foundation* [1983] 2 NSWLR 49; *Minkley v Munro* (unreported, Supreme Court of NSW, August 1986, per Grove J)).

The maximum penalty is 10 penalty units in the case of prescribed premises and five penalty units in any other case.

Failing to leave and behaving offensively

A person is guilty of a further offence if they:

- commit an offence by failing to leave when asked by an appropriate person (the owner, occupier or person apparently in charge); and
- behave in an offensive manner (s 4A).

The maximum penalty is 10 penalty units, or 20 penalty units for prescribed premises.

Powers of the owner, occupier or person apparently in charge

Section 6 of the *Inclosed Lands Protection Act 1901* gives powers of arrest to the owner, occupier or person in charge, and it is an offence for the trespasser to give them a false name or address.

Aggravated offences

If an offence of entry or remain on enclosed lands is committed and the person also:

- interferes with, or attempts or intends to interfere with, the conduct of the business or undertaking; or
- does anything that gives rise to a serious risk to the safety of the person or any other person on those lands.

The maximum penalty is 50 penalty units (s 4B).

Prosecution under both Acts

Section 4 of the *Summary Offences Act* applies to offensive conduct in a private place or school. For example, a squatter or demonstrator involved in a sit-in who uses offensive language may well be convicted of both trespass and offensive behaviour.

The likelihood of conviction for offensive language is, of course, subject to the court's attitude to the words used.

[14.170] Drunkenness

An intoxicated person may be guilty of offensive conduct, but public drunkenness is not an offence.

Power to detain an intoxicated person

There are significant powers of detention under the LEPRA. A person who is intoxicated in a public place may be detained by a police officer if they are found to be:

- behaving in a disorderly manner;
- behaving in a manner likely to cause injury to themselves or someone else, or damage to property;
- in need of physical protection because of their intoxication (s 206(1)).

The power extends to juveniles.

The person must be released if they cease to be intoxicated (s 207(2)(f)).

Who is an intoxicated person?

A person is considered to be intoxicated if they are seriously affected by alcohol and/or another drug. This leaves a wide area for police discretion.

Police protection from liability

Police and other people authorised to detain intoxicated persons are protected from liability for legal action (such as an action for false imprisonment), provided they act in good faith (s 210).

Release into the care of a responsible person

The person must be released if:

- a responsible person is willing to undertake their immediate care; and
- there is no sufficient reason for not releasing them into that person's care (s 206).

A person who is detained has the right to be informed about this, and given a reasonable opportunity to contact a friend or relative who can look after them.

Police search powers

Police and authorised people have the power to search intoxicated people in detention (s 208), but anything taken under this power must be returned when the person is released.

Offences committed while intoxicated

Where an intoxicated person commits a criminal offence, the provisions of the LEPRA do not apply (s 206(2)), and the person is dealt with in the same way as any other arrested person.

Is the intoxicated person a prisoner?

A person detained under this LEPRA is not a prisoner. Only someone arrested for a criminal offence, whether intoxicated or not, is a prisoner.

Prohibition of alcohol consumption

Some local councils have ordinances prohibiting the consumption of alcohol in certain areas, with fines for transgressors.

[14.180] Summary offences in the Crimes Act

A number of summary offences can be found in the *Crimes Act*, in the part which deals with offences to be tried summarily.

Resisting police

Resisting or hindering police in the execution of their duty or inciting someone else to resist, hinder or assault police is a summary offence under the *Crimes Act* (s 546C). The maximum penalty is 10 penalty units and/or 12 months' imprisonment.

Police powers in relation to vessels and vehicle searches

There are a number of sections relating to the powers of police officers to board vessels, stop and detain vessels, and stop and search people and vehicles (LEPRA, ss 36, 36A, 42).

Other offences

Other summary offences under the *Crimes Act* include:

- being habitually with someone known to have been convicted of an indictable offence (s 546A);
- being found in or near a public place with intent to commit an indictable offence, having

already been convicted of an indictable offence (s 546B);

- “peeping or prying” on another person without reasonable cause (s 547C).

Maximum penalties for these offences range from two to four penalty units or three to six months’ imprisonment.

Sex work

[14.190] Sex work in NSW is predominantly decriminalised.

It is not illegal to work as a sex worker in NSW if you are over 18 (*Crimes Act*, s 91C).

It is not an offence to operate or live off the earnings of a brothel in NSW (*Restricted Premises Act 1943* (NSW)), and brothels are regulated by local councils (*Environmental Planning and Assessment Act 1979* (NSW)).

What is a sexual service?

A sexual service is sexual intercourse – the introduction into the vagina, anus or mouth of a person any part of another person’s body or an object controlled by them – or masturbation for payment (defined in the *Crimes Act*, s 61H). The courts have extended the definition to include any act of offering the body that involves physical contact with another person for sexual gratification in exchange for money, regardless of whether or not sexual intercourse is provided (*Summary Offences Act*, s 3).

- stop sex work due to force or threat to themselves or others; or
- leave premises where sexual services are provided.

Recruiting a sex worker by deception

It is an offence to recruit a sex worker by the deception that sexual services will not be expected of them.

Advertising for sex workers

Under ss 18 and 18A of the *Summary Offences Act*, it is an offence to advertise a sex industry business or to advertise for sex workers.

Living off the earnings of a sex worker

Living off the earnings of a sex worker is not a crime unless the worker is a street sex worker (s 15).

[14.200] Offences

Inducement to an act of prostitution

Section 15A of the *Summary Offences Act* and the federal *Criminal Code Act 1995* make it an offence to induce someone to commit an act of prostitution. A person can be charged with an offence if they put pressure on someone or offer money or any other inducement to influence them to commit an act of prostitution with someone else.

Keeping a person in sexual servitude

Under the NSW *Crimes Act* (s 80D) and the federal *Criminal Code Act 1995*, it is an offence to keep someone in sexual servitude, where the person is not free to:

Children and sex work

It is illegal to involve children (people under 18) in prostitution (*Crimes Act*), and children can be seen to be at risk if they are on premises that are used for prostitution (*Children and Young Persons (Care and Protection) Act 1998* (NSW)).

Premises used for live adult entertainment, where there is no legal prohibition on minors entering the premises, may be deemed by the minister (upon application by a senior police officer) to be sex clubs in which minors are prohibited (*Summary Offences Act*, ss 21B, 21C).

[14.210] Sex industry workplaces

There are a number of workplaces in the sex industry:

- sex services premises, including brothels and home occupation sex service premises;
- street-based sex work.

What is a brothel?

The s 2 of the *Restricted Premises Act 1943* defines brothels as places used habitually for the purposes of prostitution and premises that have been and are likely to be used for prostitution, or that have been advertised or represented as being used for prostitution and that are likely to be used for the purposes of prostitution. Premises may constitute a brothel even though they are used by only one sex worker for the purposes of prostitution.

The definition of brothel in s 1.4 of the *Environmental Planning and Assessment Act 1979*, differs in that it excludes premises used by only one sex worker from the definition.

Brothels

In NSW, brothels are able to operate as legitimate businesses. Brothels are regulated by councils as legal land uses requiring development consent, with provisions regulating their location, design and operation.

If a brothel operates without, or contrary to, their development consent or with adverse impact on the community, the council may fine the operators (*Environmental Planning and Assessment Act 1979*). Brothel closure orders against the operator or staff of unlawful brothels and related sex service premises can be made (Sch 5, Pt 3). If a brothel closure order is not complied with, the court can make a Utilities Order directing a provider of water, electricity or gas to cease providing those services (Sch 5, Pt 11, s 35). A Utilities Order cannot be made for premises used for residential purposes.

Councils can seek an order to stop the owner or occupier of premises from using or allowing the use of premises as a brothel (*Restricted Premises Act 1943*, s 17(2A)) due to a complaint(s) against premises with “two or more prostitutes” because of the adverse impacts caused by the location and operation of the premises on people who live or work, or who use, or whose children use, facilities in the vicinity of the brothel.

It is an offence for businesses to provide sexual services in premises that pretend to be for massage, sauna/steam baths, photo/health studios or services of a like nature (*Summary Offences Act*, s 16). Workers, clients (s 16) and management (s 17) all commit offences in such circumstances.

Private workers

Home occupation sex service premises, where a person provides sexual services from their residence, are defined as brothels by some local councils and by NSW legislation (*Restricted Premises Act 1943*). Council planning policies may restrict or prohibit home occupation sex service premises from operating in specific zones or building types, constrain the maximum number of sex workers in a complying use, or require the operator to seek consent as a brothel.

Home occupation sex service premises operating in strata title apartment buildings may require the consent of the owners’ corporation and those in public or community housing may require the consent of the letting agency. Premises with a residential tenancy agreement must comply with the requirements of the agreement.

Street-based sex workers

Soliciting in the public domain is legal in NSW. It is, however, an offence for street workers to solicit near or within view from a dwelling, school, church, hospital or public place, or in a school, church or hospital.

A worker who harasses someone while soliciting near or within view from a dwelling, school, church, hospital or public place is committing an offence (*Summary Offences Act*, s 19).

A client (*kerb crawler*) on or near a road which is near or within view from a dwelling, school, church or hospital who solicits someone for prostitution is committing an offence (s 19A).

Anyone involved in an act of prostitution in or within view from a church, hospital, school or public place or in a car or within view from a dwelling is committing an offence (s 20).

[14.220] Health and safety

The operators of premises providing sexual services must ensure the health and safety of employees, clients and visitors to the workplace (*Work Health and Safety Act 2011* (NSW); *Workplace Injury Management and Workers Compensation Act 1998* (NSW); *Workers Compensation Act 1987* (NSW)).

Anyone with a transmissible infection must obtain the other person’s informed consent before having sex with them in any circumstances (*Public Health Act 2010* (NSW), s 79). It is a defence if the court is satisfied that the defendant took reasonable precautions to prevent the transmission of the sexually transmitted infection.

For further information and assistance in relation to sex work and the law, contact the Sex Workers

Outreach Project (SWOP) or your local community legal centre.

PART 2 – ARREST, INTERROGATION AND BAIL

[14.230] This section discusses police powers, police dealings with people who are suspected of an offence, and what happens up until the case comes to court, including matters concerned with bail.

The Australian court system is discussed in Chapter 1, About the Legal System. Court procedure is discussed at [14.530].

Police powers

[14.240] At the heart of our common law is a person's right to refuse to answer questions put by people in authority and to refuse to accompany those in authority to any particular place unless they have been formally arrested.

Those rights, however, can be, and have been, eroded by laws made in parliament. In Australia, unlike the USA, there is no Bill of Rights protecting our rights.

Police powers have been extended by legislation, and a complex set of rules has evolved in an effort to strike a balance between protecting people's rights and liberties and ensuring effective law enforcement.

This section discusses what powers police have under the law.

[14.250] Power to demand information

Police questioning

Who may police question?

While investigating a crime, police may question anyone.

Must a person answer?

With certain exceptions, mostly involving situations where a person must give their name and address, there is no legal requirement to answer.

This does not mean that a person should not normally give their name and address. It is

advisable to cooperate with police when there is nothing to be lost by doing so.

Where information must be given

In some situations name and address, and sometimes other information, must be given.

In motor traffic cases

A driver or person in the driver's seat, or instructor of a learner driver, must produce their licence when asked to do so by police (*Road Transport Act 2013* (NSW), ss 171, 172). It is an offence not to do so. If a vehicle was involved in a traffic offence, but the owner or person with custody of it was not driving at the time, they must, if asked, give police the details of the person who was driving the vehicle when it was involved in the offence (s 173).

Vehicles suspected of being used in an offence

If police reasonably suspect that a vehicle was used in committing an offence, the driver must not only provide identification but also disclose the identity of anyone else in the vehicle at the relevant time.

Failure to cooperate could lead to a penalty of up to 12 months' jail (LEPRA, ss 14–18).

Breath and drug tests

A driver must undergo a breath analysis or a random oral fluid test for illicit drugs when asked to do so by a police officer (*Road Transport Act 2013*, Sch 3). The officer should have reason to believe that the person was:

- driving a motor vehicle on a public street; or
- sitting in the driving seat of a stationary car on a public street and attempting to start it.

Children under 16

In some proclaimed areas of the state, mainly country towns, if police suspect that a person is under 16 they can, under the *Children (Protection and Parental Responsibility) Act 1997* (NSW):

- demand the person's name and address;
- search them; and
- detain them at a foster home or detention centre or "escort" them home.

Police do not have to charge the person.

People near a crime scene

Anyone around a crime scene who could reasonably be regarded as able to assist the police must, on demand, give police their name and address and proof of identity if required (LEPRA, ss 11, 12).

Knowledge about serious offences

A person who has information about the commission of a serious crime, which might materially assist the police, has a duty to report it to police. They can be charged and jailed if they do not do so, unless they have a reasonable excuse (such as fear of the offender or fear they may implicate themselves) or a claim for privilege (*Crimes Act 1900*, s 316).

Where police suspect underage drinking

Under the *Summary Offences Act*, a person suspected of being under 18 and possessing or consuming alcohol in a public place must give their name and address to the police (s 11(5A)). An on-the-spot fine of \$20 can be issued (s 29).

[14.260] Customs officers and ASIO

Questions asked by customs officers

Under the *Customs Act 1901* (Cth), customs officers have the power to require certain information in some circumstances. Their powers are discussed in more detail in Chapter 21, Drug Offences.

Questions about terrorism

ASIO has special powers to question people suspected of knowing about terrorist activity. A special hearing is convened so that the suspect can be interrogated under the *Australian Security Intelligence Organisation Act 1979* (Cth). The person must answer questions, and can be prosecuted if they don't answer or they give false evidence.

Anything said during an interrogation cannot be used in criminal proceedings against the person (Div 3).

ASIO and NSW police also have special powers to detain terrorist suspects (*Australian Security Intelligence Organisation Act; Terrorism (Police Powers) Act 2002* (NSW)).

Questions about organised crime

Both the Australian and New South Wales Crime Commissions can compel a person, referred to them by the government, to answer questions and produce documents about organised crime. The person must answer the questions or produce the documents but what they say or produce cannot be used against them in a criminal prosecution other than a charge of lying to the Commission (see the *Crime Commission Act 2012* (NSW); *Australian Crime Commission Act 2002* (Cth)).

The Law Enforcement (Powers and Responsibilities) Act

The LEPRA commenced operation on 1 December 2005.

The Act consolidates most of the police powers previously found in many other Acts, including the *Crimes Act 1900* and the *Summary Offences Act*.

It also gives police a number of additional powers, and powers that have been presumed but never written down.

Powers at crime scenes

The LEPRA gives police specific powers to set up crime scenes, and control access to and from areas so

designated. A crime scene can be established by any police officer; however, a warrant from a magistrate is required before any extensive powers under the Act can be exercised. Those powers include allowing police to inspect, examine, photograph, dig-up or dismantle property, and use any electricity or water on a property (ss 88–98).

Search powers

Specific powers to search suspects are also included in the Act. Frisk searches and strip searches are allowed. Under s 23A, a person may be required to open their

mouth and shake their head so police can look for concealed drugs. The Act contains strict rules for strip searches (ss 31–33).

Powers of entry without a warrant

The Act also extends police powers to enter premises without a warrant (see Entry and search without a

warrant at [14.280]). Police may enter premises if they believe on reasonable grounds it is necessary to prevent a breach of the peace or imminent danger of significant injury, or if a person has suffered significant injury (s 9).

[14.270] Power to give directions

Police can direct a person to “move on” if they reasonably believe that the person is obstructing traffic or harassing others (LEPRA, ss 197–200).

At police road blocks

Police can set up road blocks and stop and search vehicles, seize property and give directions to drivers and passengers:

- while looking for vehicles believed to have been involved in a crime; or
- if the vehicles are in the vicinity of a place where there is a serious risk to public safety (LEPRA, ss 35–41).

[14.280] Powers of search and seizure

Police can search a person or premises for the purposes of investigating a crime when the person or occupier consents to the search.

Motor vehicles may also be searched.

Powers to enter or remain on premises

Except in situations where it is permitted by statute (see Entry and search without a warrant at [14.280]), police cannot lawfully enter or remain on premises just to question a person unless the owner or occupier agrees to it.

Search warrants

Unless a crime scene is established, the power to search premises may be enforced only if the police have a search warrant, which the occupier of the premises is entitled to see. If they have no warrant, the police can normally be refused entry (however, see Entry and search without a warrant at [14.280]).

Search warrants are dealt with under Pt 5 of the LEPRA.

How police obtain a warrant

Under the Act, warrants are issued by an authorised justice (a magistrate or authorised justice of the peace at the Local Court).

Police must apply for the warrant in writing, setting out the grounds on which the warrant is sought and the offence to which it relates.

Police must make a report to the authorised justice within 10 days of the warrant being issued.

Notice to occupier

Police must produce and serve on the occupier an occupier’s notice setting out details of the warrant.

They must also show the warrant to an occupier on request.

Hindering police

It is an offence to hinder or delay the execution (carrying out) of a warrant (LEPRA, s 52). It is an offence generally to resist a police officer in the execution of their duty.

Night searches

Unless it says so, a warrant cannot be executed at night (s 72).

Can police use force?

If police with a search warrant demand entry and are refused they may use force, whether by breaking open doors or otherwise, to enter the premises (s 70).

If police take anything

A receipt must be issued for anything seized, which must then be disposed of according to the direction of a court (ss 215–220).

Improperly obtained evidence

Anything that has been improperly or illegally obtained by police cannot be used as evidence unless the court uses its discretion to allow it in the public interest (*Evidence Act*, s 138).

Entry and search without a warrant

If police suspect a crime has been committed

Police can enter premises to arrest a person reasonably suspected of having committed a crime (LEPRA, s 9; see also *Kennedy v Pagura* [1977] 2 NSWLR 870).

If police suspect an offence is likely to occur

Police can also enter premises if they reasonably suspect that a breach of the peace or other offence is likely to take place.

If a domestic violence offence has occurred

If police believe on reasonable grounds that a domestic violence offence has occurred, they can enter to investigate on the invitation of any person on the premises (s 82).

If someone is arrested on the premises

If someone is arrested on the premises, police can search them and their possessions without a warrant. They cannot make a general search of the entire premises.

Searches carried out under federal law

Police may search a named place and seize things under a warrant issued by a magistrate or authorised justice of the peace (*Crimes Act 1914* (Cth), Pt 1AA) in relation to an offence against a law of the Commonwealth or a territory.

Federal searches are also allowed in emergencies and in relation to terrorist acts.

Searching a person

The police can stop, search and detain anyone reasonably suspected of having anything in their possession that is:

- stolen;
- unlawfully obtained; or
- intended for use in committing a serious offence (LEPRA, s 21).

Searching for dangerous implements

Police can on “reasonable grounds” search anyone they suspect may have a “dangerous implement” such as a knife or firearm.

Being in an area that police say is a location of “high incidence of violent crime” is enough to justify the search (s 26).

Search after having been arrested

A person may be searched immediately upon arrest and property may be seized from that person if police suspect not to do so would present a danger or things relevant to an offence may be found (s 23).

Search after having been charged

The person may also be searched once they are in lawful custody and after having been charged with an offence by a police officer. Anything found may be seized (s 24).

Search powers of customs officers

Under the *Customs Act 1901*, customs officers (including narcotics agents) may search any ship, boat or aircraft without a warrant if it comes from overseas or may have customs-related goods associated with it (s 187).

Personal searches

A person can be detained and searched if a customs officer has reasonable cause to suspect they are unlawfully in possession of any prohibited imports or

exports (ss 219L–219R). The search must be carried out as soon as practicable, in a private area and by someone of the same sex as the person searched (s 219M).

Internal searches

A person suspected of carrying certain substances internally may also be detained. The detention must be authorised as soon as practicable by a judge or magistrate (ss 219A–219V).

Arrest

[14.290] All citizens have certain powers to arrest people who have committed or are

committing crimes. In practice, it is usually the police who exercise these powers.

[14.300] Citizen's arrest

When can a citizen make an arrest?

The right of arrest by a private citizen is rarely exercised today, and is limited to cases where:

- a crime has been committed or attempted;
- there is immediate danger that a crime will be committed;
- a breach of the peace has been committed; or
- it is thought on reasonable grounds that a breach of the peace is about to be committed.

An arrest for *breach of the peace* may be justified where there has been an assault, or public alarm and incitement to violence.

Mere annoyance, disturbance, or insulting or abusive language are not sufficient reasons for one citizen to arrest another.

Arrests by security guards

A security guard at a retail store who makes an arrest does so as a citizen.

After the arrest

Anyone exercising a power of arrest must be careful, as the person arrested may sue for false imprisonment.

The arrested person should be handed over to the police without delay and with a full recorded explanation of the reasons for the arrest.

[14.310] Police arrest

The police powers of arrest can be found in the s 99 of the LEPRA and the s 77 of the *Bail Act 2013* (NSW). If other options, such as a Court Attendance Notice, can ensure a person comes to court, these are encouraged.

Arrest under a warrant

A warrant is a written authority from an authorised justice of the peace, magistrate or judge for the arrest of a named person.

A warrant can be issued for:

- an offence;
- failure to pay a fine;
- failure to appear in court; or
- police believe on reasonable grounds there has been breach of a bail condition.

Effect of the warrant

The warrant authorises all police officers to arrest the person named in it wherever and whenever they may be found.

Arrest without a warrant

Most arrests are made without a warrant.

Arrest under the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

A police officer can arrest a person without a warrant or detain them for further investigation when they regard arrest as reasonably necessary. What is reasonable can include:

- stopping the person committing this or another offence;
- stopping the person fleeing;
- enabling inquiries to be made about the person's identity;
- ensuring the person appears before a court;
- obtaining property in the possession of the person that is connected with the offence;
- preserving evidence of the offence or preventing the fabrication of evidence;
- preventing the harassment of, or interference with, witnesses;
- protecting any person's safety or welfare, due to the nature and seriousness of the offence.

After an arrest without a warrant the arrested person must be taken before an authorised officer or a senior police officer, as soon as possible (s 99(3)).

Arresting police must identify themselves and give the reason for the arrest (s 201).

Arrest under the federal Crimes Act

Under the *Crimes Act*, police can arrest someone without a warrant when:

- a breach of the peace has been committed (the breach must involve an offence under the *Crimes Act*);
- police believe on reasonable grounds that a breach of the peace is about to be committed;
- police believe on reasonable grounds that the person has committed an offence against a federal law, and a charge against the person could not effectively be dealt with otherwise.

Arrest to take forensic samples

Police can detain a person to obtain a forensic sample under some circumstances (see [14.380]).

Arrest for customs offences

Police and customs officers may arrest a person without a warrant if they believe, on reasonable grounds, that the person is involved in offences such as smuggling or the import or export of prohibited goods.

[14.320] Making an arrest

There are three elements of a valid arrest:

- a statement indicating that the person is being arrested (eg, “you are under arrest”);
- a statement indicating a reason for the arrest;
- the person voluntarily going with police, being physically removed by police, or remaining in a place indicated by police.

Giving reasons for the arrest

It is not necessary to specify the charge precisely. The point is that the person should know why they are being arrested. If it is obvious, the police do not have to formally explain it.

A reason does not have to be given if the person makes it difficult; for example, by trying to escape.

Use of force

A police officer may use as much force as is reasonably necessary to arrest a person.

Unreasonable force is assault. It is up to the judge or magistrate to decide whether the force used was reasonable in the circumstances.

Use of handcuffs

Police may handcuff a person after arrest if:

- the person tries to escape; or
- it is considered necessary to prevent escape.

[14.330] Resisting arrest

It is an offence to resist or hinder, or incite anyone to assault, resist or hinder a police officer in the execution of their duty, which includes making lawful arrests (*Crimes Act 1900*, s 546C).

An arrest may be valid if the police reasonably suspect that someone has committed an offence, even if they are completely innocent.

If the innocent person resists arrest, an offence is committed. This can lead to the person being charged with resisting arrest even if the police do not proceed with any other charge.

Passive resistance and running away

Resistance must be active. Merely lying down and refusing to cooperate or running away from a police officer before a valid arrest has been made, is not resisting arrest. Neither is running away before a valid arrest has been completed.

However, running away can be seen as evidence of “consciousness of guilt”, and may be used against a person in court.

What to do if you are arrested**Cooperate**

You should not try to resist arrest.

It is up to the police officer to decide whether a person is to be arrested or brought to court by the issue of a court attendance notice.

A person’s conduct will often influence which course the police adopt. For minor offences, being polite to the police may prevent a charge being laid. Cooperation with police is always advisable where there is nothing to be lost by it.

Contact a lawyer

You should contact a lawyer as soon as possible and ask for the lawyer to be present during questioning.

Objecting to unlawful arrest

If you believe you have been arrested unlawfully, you should object as frequently as possible in the presence of independent witnesses. If you can, you should also tell an independent person of the arrest and place of detention.

Your rights if you are arrested

After arrest you must be brought before a custody officer and your rights must be explained to you. If this is not done, demand it.

If you are questioned about a crime or arrested and accused of breaking the law in NSW, you have three fundamental rights:

- the right to be treated as innocent until proven guilty beyond reasonable doubt by a court;
- the right to remain silent (except in the case of traffic offences, and some other offences). The police must behave lawfully when investigating a

crime and must respect your right not to answer questions or make statements;

- the right to lodge a complaint if you are mistreated by police or denied any of the rights discussed in this chapter.

Talk to a lawyer before you talk to the police. Remember: no matter how friendly – or intimidating – a police officer may appear, anything said to a police officer, even in casual conversation, can be used as evidence in court.

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Detention at the police station

[14.340] It is usually a good idea for people questioned by the police to cooperate as far as possible without incriminating themselves.

[14.350] Who can be detained?

The police have no power to detain a person who has not been lawfully arrested. To detain someone who has not been arrested is false imprisonment, which is a civil wrong. Neither can the police arrest a person merely for questioning – they must have a reasonable suspicion that a crime has been committed (see *Williams v The Queen* (1986) 60 ALJR 636).

If a person has not been arrested

Police can ask people who have not been arrested to accompany them to the police station for questioning, provided it is made clear that they need go only if they want to. Once at the station, a person can be arrested or detained for questioning if there is a reasonable suspicion of their involvement in a crime.

Police can only force a person to go to a police station if that person is under arrest for an offence.

[14.360] At the police station

A person who has been arrested will be taken to a police station.

The custody manager

A *custody manager* (a senior officer) gives the person a form explaining their rights and advising

(*cautioning*) them that they are not obliged to answer questions.

What the police must do

The police must:

- tell the person why they are being detained;
- give the person the opportunity to get legal advice (either at their own expense or, if appropriate, from the Legal Aid Commission or the Aboriginal Legal Service);
- give the person the opportunity to communicate privately with a friend or relative.

If someone asks, the police are obliged to tell them where the detained person is being held.

Exceptions

The only time police may not permit communication is where there is a reasonable fear that it might lead to an accomplice escaping or evidence being destroyed.

Vulnerable persons

The police are obliged to assess whether a detained person is a vulnerable person – for instance, a child or a person suffering an intellectual disability – and arrange support for them.

[14.370] The detention period

Police can detain a person arrested on suspicion of committing a crime for a “reasonable period” (up to four hours) to investigate the crime and question the person (LEPRA, Pt 9).

Extending the detention period

The time spent in detention can be extended by up to eight hours on application to an authorised justice (a magistrate or an authorised justice of the peace employed by the Local Court) (LEPRA, s 118).

“Time out”

There are provisions for “time out” which do not count towards the detention period. This includes travel time, and time spent with a lawyer or any doctor called to attend (LEPRA, ss 109–113).

This may make the total time spent in police custody much longer than the official detention period.

When the detention period is over

As soon as the detention period is over the person must be:

- released; or
- taken before a magistrate to be formally charged; or
- given a court attendance notice and police bail (see [14.450]).

Drunk and disorderly

The LEPRA allows police to detain a person found intoxicated in a public place who is behaving in a disorderly manner, or is likely to cause injury or damage property, or is in need of physical protection.

Period of detention

People may be detained for up to eight hours in a police station, but must be released earlier if:

- they cease to be intoxicated; or
- a responsible person is prepared to care for them.

There is no court appearance – drunkenness is no longer a criminal offence.

Detention in relation to federal offences

People arrested by the Federal Police under federal legislation can also be detained for up to four hours, or longer if a magistrate allows.

Aboriginal people and people under 18 can be held for two hours only (*Crimes Act*, s 23C).

Under the Customs Act

The federal *Customs Act 1901* makes provision for detention and search if a police or customs officer has reasonable cause to suspect that a person is carrying contraband or prohibited imports or exports.

[14.380] Detention for forensic tests

A person can be detained for up to two hours for the purpose of taking samples.

This time is in addition to that allowed for other investigations, and can be extended.

Legislation

The rules and procedures for taking forensic samples and for matching a person’s DNA with samples on police databases are in the *Crimes (Forensic Procedures) Act 2000* (NSW).

The corresponding federal provisions are in the Pt 1D of the *Crimes Act*.

Obtaining consent to take samples

Police can ask a person reasonably suspected of committing a serious offence to provide a forensic sample such as blood or a sample for DNA testing, in an attempt to prove or disprove the offence.

If the person does not consent

If the person does not consent to having the sample taken:

- police can apply to a magistrate who can order that the sample be taken by force if necessary;
- a senior police officer can order that a sample of hair – which can provide DNA – be taken by force.

People who cannot consent

The testing of children or those incapable of giving consent (eg, because of mental illness) can only be ordered by a magistrate.

Taking non-intimate samples

Intimate samples such as blood and DNA cannot be taken for less serious offences. Non-intimate samples such as nail clippings or scrapings from under fingernails can be taken by order of a police officer.

The DNA database

Each state and territory has its own DNA database. A national DNA database called CRIMTRAC has also been set up which will allow any sample of DNA taken to be matched against samples taken from crime scenes across the country. Prisoners serving sentences for serious offences can be tested so that their DNA can be put on both the state and the national databases.

[14.390] Police questioning

Police are experts at getting information from people, and a suspect at the police station needs to be very careful not to fall for manipulative questioning techniques.

“Your friend told us everything”

For example, police may say something like “your friend Joe has told us everything”. This may not be true. Even if it is true, and the police can show a written statement signed by Joe, agreeing with Joe’s statement after reading it is regarded by the law as having adopted the statement, and this may later be tendered as evidence against the person.

It is not necessary to respond in any way to other people’s statements.

Undercover agents and controlled operations

Sometimes police deceive a suspect about their identity to obtain evidence or information of criminal activity. They may lead the person to believe they are, for example, well known in drug circles; induce the person to engage with them in drug dealing; and then arrest the person for it.

Deceiving a suspect about police identity is permissible. Even possession and sale of drugs by police is allowed, if they have received express authority to engage in what is now known as a controlled operation.

Police engaged in such an operation do so without risk of being themselves accused of criminal activity (*Law Enforcement (Controlled Operations) Act 1997* (NSW)).

Obtaining false documents

Police and other agencies using undercover agents can lawfully obtain false documents such as birth certificates and licences to lend support to their assumed identity (*Law Enforcement and National Security (Assumed Identities) Act 2010* (NSW)).

Using records of conversations

It is not true that police only use written statements as evidence in court. They can and do use records of verbal conversations. They do this especially in summary (relatively minor) matters, because in serious matters they must comply with strict rules

about the recording of statements to make them admissible (*Criminal Procedure Act*, s 281).

There is no such thing as an “off the record” conversation with a police officer.

The police caution

Before questioning a suspected person, the police should caution the person that:

- no questions need be answered; and
- any answers given may be used in evidence (*Evidence Act*, s 139).

Special caution for serious offences

When a person has been arrested for serious offences carrying a maximum penalty of five years jail or more, the police can give a special caution advising the person that their silence or failure to mention certain facts may be used against them in court. Before any negative inference can be drawn in court the special caution must be given when their lawyer was present (*Evidence Act*, s 89A). Special cautions cannot be given to young people under 18.

How the caution may be used in evidence

A written statement or recorded interview taken in the police station will end with questions about:

- whether or not a caution was given and understood;
- whether the statement or interview answers were made voluntarily.

If the case goes to court, the police may use evidence that they gave the caution to show that what an accused said, was said freely and voluntarily.

The right to silence

In 2012, a significant change was made to the right to silence. The right to silence no longer applies where an adult has been charged with a serious offence, has been given the special caution when their lawyer was present. For all other matters and as a general rule, someone who has been arrested does not have to answer questions (for exceptions, see Where information must be given at [14.250]). It is important to remember that:

- legally, no adverse inference can be drawn from refusing to answer questions (*Evidence Act*, s 89);

- any response given to questions could determine whether or not police will proceed with the matter;
- suggestions from police that making a statement will make things easier should be ignored. It is for the court alone to determine what will happen.

As a rule, it is important not to say or write anything about any offence before speaking to a lawyer. Admissions are used regularly to convict people.

If a person wants to remain silent

If a person who has been arrested doesn't want to say anything to police, this attitude should be made clear and never changed. Name and address should be stated, and every other question answered with words such as "I do not want to say anything at this stage".

There should be no change to this reply, even if the police ask about the reason for this attitude.

If a person wants to make a statement

It may be in the interests of a person who has been arrested to make a statement or participate in a recorded interview, if there is a valid explanation for the behaviour in question (eg, in the case of a charge of theft, if the owner's consent had been given).

Whatever the circumstances, it is important to seek legal advice before making a statement.

Explaining to police when pleading guilty

A person who, after legal advice, wants to plead guilty may wish to talk to police to put on record the precise extent of their involvement or explain the circumstances of the offence.

Surrendering to police

Where someone wants to surrender to police, a lawyer can assist in preparing a statement.

After a person has been charged

Police can ask questions before they charge someone, and may detain the person for up to 12 hours for the purpose (see [14.370]). After the person has been charged, however, police should only question them if:

- it is necessary to prevent loss to some other person or body; or
- it is necessary to recover property; or
- additional charges are to be laid.

[14.400] Lawyers and support people

Right to legal assistance during questioning

Unless the accused is a child (ie, under 18), there is no absolute legal right to have an independent witness or a lawyer present during questioning.

However, the courts have decided that a lawyer should be allowed to be present if requested, and interrogation should be delayed for a reasonable time to permit an accused person to try to get legal assistance (*R v Dugan* (1970) 92 WN (NSW) 767; *Driscoll v The Queen* (1977) 137 CLR 517).

Right to a support person during questioning

The police code of practice allows for children and vulnerable people to have a support person to sit in on the interview.

Support people are not lawyers; they can only assist by interpreting what the police are saying.

Right of communication after detention

The police code of practice provides that after a person has been detained, facilities should be made available to allow them to telephone a friend, relative, solicitor or doctor.

The police code of conduct and ethics

The police code of ethics and standards of professional conduct (available on the NSW police website) sets out the ethical and other obligations and responsibilities of NSW police. They are not legal rules and do not confer rights. If they are not followed, however, a complaint should be made (see Chapter 9, Complaints). The conduct of police could cast doubt on whether any admission or confession was voluntary.

If the person has not been arrested

If someone has gone to a police station voluntarily and is not under arrest, they can refuse to give information or even remain at the police station until a lawyer or independent witness is present.

If access to a lawyer is prevented

If a lawyer requests access to a person in custody and is refused, the fact that the request was made, and the names of police officers spoken to, should be recorded. This can be used as evidence casting doubt on the truth and voluntariness of any record of interview.

If access to a lawyer is denied, a written or verbal complaint should be made to the Ombudsman or police commissioner, referring to the police code of practice.

Right of communication after a bail decision

After the police have made a bail determination, a person in custody has the right to contact a lawyer, or any other person, in connection with the bail. Under the *Bail Act*, police must inform the person of this right, and reasonable access to telephone facilities must be made available (s 45).

A telephone conversation overheard by a police officer can be used as evidence. A person detained by police should speak only about what the police have alleged, not what actually happened.

Children

Children are in a special position. A statement, confession or admission made by someone under 16 will not be admitted as evidence in court unless a parent, guardian or other adult – not a police officer – is present throughout the police interview.

For people between 16 and 18, there must be a solicitor or other adult of the young person's choice present when statements are taken.

[14.410] Records of interview**Electronic records**

In serious matters, police must offer an accused the opportunity to have an interview conducted in front of a camera, or recorded by audio recording.

Most police stations have facilities for doing this.

At the end of the interview, a police officer who was not involved in the interview will ask a series of questions designed to reveal whether any threats or inducements were made to the person.

Complain on record!

The equipment is designed to make tampering with a recording extremely difficult. Any complaints about the interview should be made while the tape is running.

Access to recordings

Recordings are kept at the police station and made available for viewing by the accused person or their legal advisers on request. A CD is generally made available.

Access to audio recordings

The person must be given a copy of an audio recording:

- at the end of the interview; or
- on their release from custody.

Written records

A written record of the interview is made, either in a police notebook or on a computer:

- for less serious offences; or
- if taping is impossible; or
- the accused person refuses to have it recorded (*Criminal Procedure Act*, s 281).

After the record of interview has been made, the person is asked to sign it.

What signing a record of interview means

When a person reads and signs a document, or agrees that it is correct, they are adopting *everything* in it.

There is no problem where:

- the person knows and understands what the document contains; and
- agrees that the words recorded in the document are theirs.

There is also no problem when a person reads and signs a record of interview that contains no answers except refusals to answer (unless what the police are really after is a specimen of handwriting to be used in court).

When not to sign a record of interview

A person should not sign a record of interview if:

- they have not read it;
- they do not understand all or any part of it;
- they disagree with all or any part of it.

Unsigned records of interview cannot be used as evidence in court (*Evidence Act*, s 86), though the police can give evidence of admissions if they can establish a reasonable cause why the admission was not recorded (*Criminal Procedure Act*, s 281(2)(b)).

Access to a written record of interview

Where a person's words are recorded by police, a copy should be given to that person so they can see the extent of any admissions before going to court.

Where a person is asked to sign for the copy

When a person asks for a copy of the record of interview, police may request a signature as a receipt.

This request should not be made, but if it is and the person does not want to sign the statement, it is better for that person to do without the copy.

Disputing a statement in court

A jury should be warned to carefully consider the dangers of relying on evidence of a confession, even if it is recorded or signed, where:

- it is disputed by an accused person; and
- it is not supported by other evidence (*Evidence Act*, s 165; *R v McKinney* (1991) 171 CLR 468).

[14.420] Identification of suspects

Police investigations often involve a victim or witness describing an offender. Strict rules apply to ensure that identification is conducted properly.

Line-ups

The preferred method of attempting to identify suspects is to conduct a line-up or identification parade (*Evidence Act*, s 114; *Alexander v The Queen* (1981) 145 CLR 395).

A suspect should be given the opportunity to:

- choose any position; and
 - complain about any aspect of the procedure.
- The sergeant in charge of the line-up should be independent of the officers investigating the case.

When to complain

A complaint should be made to the sergeant where other people on the line-up are not of similar age, height or general appearance to the suspected person.

Keeping a record

Participants in line-ups should make written notes of all aspects of the process as soon as possible afterwards, including details of any complaint.

Challenging the line-up

Even if a suspect is identified, the conduct of the line-up can be challenged if everything was not in order. This is easier if a complaint was made and recorded at the time.

The importance of the line-up

The failure of a witness to identify a suspect in a line-up can be relied on to assert innocence to a court.

Photographs

If the suspect has refused a line-up or a line-up cannot be held for other reasons, police may show photographs of suspects to witnesses.

Once again, strict rules apply (*Evidence Act*, s 115). The photographs must be presented in a way that does not indicate they are of people in police custody – there should be no suggestion in the photographs that anyone they show is or has been in trouble with the police.

[14.430] Medical examinations

As part of their investigation, the police can request, and if necessary compel, a medical examination of a suspect. Strict procedures must be complied with (*Crimes (Forensic Procedures) Act 2000* (NSW)).

Searches under the Customs Act

Where a customs officer has reason to suspect that a person is carrying or has hidden on their person contraband or prohibited imports or exports, the person may be detained and searched (see Chapter 21, Drug Offences).

The person should be told of their right to object before a justice of the peace or collector of customs (*Customs Act 1901*, s 196).

This right to object might not apply to chemical tests to see if the person has recently been in possession of drugs.

[14.440] After the detention period

After the period of detention at the police station, police must either:

- release the person; or
- charge the person with an offence.

Commencing criminal proceedings

Criminal proceedings are started by a formal allegation (*charge*), set out in a court attendance

notice (usually by a police officer), that a person did something forbidden by law.

A person must be given a court attendance notice before they can be brought to court.

Police bail

When a person has been charged, police decide whether or not to grant bail.

See [14.450] for a detailed discussion of what bail is, what is involved in granting or refusing bail, and what to do if bail is refused.

Illegal actions by police during the investigation

Was the confession voluntary?

Under the ss 84 and 85 of the *Evidence Act*, admissions or confessions obtained by violence, undue influence or threats cannot be used as evidence in court. If this happens, the confession can be challenged in court (see [14.540]).

Taking civil action against police

Civil court action can be taken in cases of police misconduct such as:

- trespass to property or a person's body (eg, illegal search);
- assault;
- wrongful arrest;
- false imprisonment;
- malicious prosecution.

However, the cost and difficulty in proving a case and the doubtful outcome mean civil action is often not worth taking.

What to do about police mistreatment

A person who has suffered mistreatment at the hands of police or denied his or her legal rights when being questioned or arrested, should:

- complain immediately to the officer concerned and the custody manager at the police station and then complain to the Police Commissioner or the relevant Ombudsman. Delay makes it easier for police to deny the complaint in any later inquiry. Verbal complaints should be confirmed in writing, if possible, by a solicitor;

- if relevant, arrange an immediate medical examination. This should occur at the earliest opportunity (if possible, by two doctors). Any external injuries should be photographed;
- if relevant, ask someone who saw the person not long before the arrest to look at any injuries and state (in writing) whether they saw them before;
- as soon as practicable, make a full statement of what occurred. The sooner the statement is made, the more credible it will be;
- seek legal advice as soon as possible (not the day before court). You should contact your nearest community legal centre for advice about this (see Contact points of Chapter 4, Assistance With Legal Problems for a list of community legal centres);
- where appropriate, take legal action for assault and/or false imprisonment (see above);
- complaints about NSW police officers are referred to the NSW Ombudsman and complaints about Australian Federal Police are referred to the Commonwealth Ombudsman (see Chapter 9, Complaints). If the matter is serious, legal action may also be appropriate.

Remember, complaining about the police may require persistence, and may not seem worth the effort at times. However, it is important that people who have been mistreated or denied their rights by police take the opportunity to use the complaint mechanisms available.

Extradition

Extradition occurs when a person is sent from one state (or country) to another to be tried for a criminal offence.

A justice in the state where the offence was committed issues a warrant for the person's arrest

(*Service and Execution of Process Act 1992* (Cth), s 18), which is taken to the state where the person lives. The person is arrested (or taken from jail) and brought before a justice (usually a magistrate) in that state, who:

- orders that the person be sent to the state where the interstate warrant was issued, in the custody of the police officer bringing the warrant; or
- allows the person bail on the condition that they appear in a particular court in the other state; or
- allows the person bail until the end of a period when the person should be sent to the other state; or
- releases the person; or
- makes any other order they think fit.

Avoiding extradition

It is rare for a person to avoid extradition.

In contrast with the situation for overseas extradition, the fact that there is no offence in NSW comparable

with the offence charged in the other state does not enable the person to avoid extradition.

The person apprehended should seek full details of the charge before trying to persuade the magistrate not to extradite. Legal representation is strongly advised. Cross-examination of the interstate police may provide useful information as to the strength of the police case, thus enabling better defence preparation.

Appeals

The *Service and Execution of Process Act 1992* (Cth) allows an appeal to the Supreme Court (s 19). The judge can only take into account things the magistrate can consider.

Bail

[14.450] What is bail?

Bail is the authority to be at liberty for an offence until the proceedings for the offence finish. Bail can be granted to any person accused of an offence or where a person is required to appear in court as a witness but has been arrested to secure their attendance. Bail, if granted, may be conditional or unconditional.

Soon after the person has been charged a decision whether or not bail is required at all, whether it will be granted, and any conditions that are to apply will be made. The decision is made, first by a police officer and later by a court. Subject to certain conditions that decision can be revisited or appealed.

Once granted, bail continues until revoked or varied until the proceedings are finalised. If bail is granted to a person in custody, they are released once any pre-release conditions are met.

The entitlement to bail is dealt with in the *Bail Act*. The *Bail Act* sets out all matters dealing with a person's detention or liberty after arrest.

The bail decision

The following decisions can be made after a person is arrested:

- the person can be released without bail by a police officer with bail powers;
- bail can be dispensed with by a court or authorised justice;
- bail can be granted with or without conditions;

- bail can be refused.

Underlying any decision whether to dispense with bail, grant bail, grant bail with conditions or refuse bail is the question: Is there an unacceptable risk the person will fail to appear in court, commit a serious offence, endanger the safety of victims or the community or interfere with witnesses? If there is such a risk and it cannot be sufficiently mitigated by conditions bail can be refused.

[14.460] When can bail be granted?

Bail may be granted at any stage of criminal proceedings, notably:

- after the person has been charged and before their first appearance in court;
- during any adjournments before or after the start of the hearing of the case;
- between committal for trial or sentence and appearance in the Supreme or District Court;
- between the date of conviction and the date of sentence;
- during any period of the stay of execution of a judgment or a sentence;
- while the person is waiting an appeal an appeal to be heard.

What the accused person agrees to do

A person granted bail or who has had bail dispensed with must appear in court when required by

notice to do so. A person who is granted bail must sign a copy of the acknowledgment of the decision to grant bail and comply with any pre-release conditions (s 33). The bail acknowledgment form specifies the person's obligations to appear in court, to notify the court of any change of address and to comply with any formal requirements or conditions. Whoever grants bail is obliged to take reasonably practicable steps to ensure the person understands what is in the bail acknowledgment. A person is not entitled to their liberty until they sign the acknowledgment and agree to, and meet any conditions of, bail (s 11).

Bail does not entitle a person to be at liberty while the person is in custody for some other offence.

[14.470] At the police station

A person charged and in custody at a station must be considered for bail as soon as practicable after the person is formally charged. One common reason for deferring making a decision is that the person is too intoxicated. The decision to grant, refuse or release without bail can be made by the officer in charge of the police station or an officer over the rank of sergeant. Unless bail is not required the person must be given a bail eligibility information form that contains written information about eligibility for bail and their entitlement to request review of a bail decision made by a police officer.

If bail is refused

If a person is refused bail by a police officer or for some other reason is not released on bail, they must be brought before a court or an authorised justice as soon as practicable.

If bail is dispensed with

The police or a court may order that bail be dispensed with. The accused is then free to go until the next court appearance, unless they are being held in police custody for another reason (eg, for some other offence where bail has been refused).

Right to contact a lawyer or other person for help with bail

The person in custody must usually be given reasonable assistance to contact a lawyer or someone else who can help with bail.

Note that the right to get in touch with someone only applies to getting assistance for bail.

When the police may not allow contact

The police may not allow the person to contact someone if they have reason to believe that this might help an accomplice escape or lead to the loss, destruction or fabrication of evidence.

It is very rare for a police officer to have such a reason and not to tell a person of their bail rights or help them contact a lawyer.

Right to have the decision reviewed

The decision to refuse police bail must be reviewed by a senior officer, on request, unless the time taken to conduct the review would delay in bringing the person before a court.

A review is not required if the bail decision has previously been reviewed by a senior police officer.

If bail is granted or dispensed with

If bail is granted or dispensed with, the police will give the arrested person a notice indicating where and when they are to appear in court.

[14.480] A right to release

Upon arrest, a person has a right to release without bail or to have bail dispensed with or to conditional bail for:

- those offences where a fine is the only penalty;
- most crimes in the *Summary Offences Act* except those relating to obscene exposure, possession or use of a laser pointer in public, loitering as a convicted child sexual offender or where the person has previous convictions for violent disorder or possession of knives;
- any offence involving a child accused where the child is being dealt with by conferencing under the *Young Offenders Act 1997* (NSW), s 21 of the *Bail Act*.

[14.490] Court bail applications

Types of bail applications

There are three types of bail application:

- a release application, which can be made by the accused person; or
- a detention application which can be made by the prosecutor; or
- a variation application which can be made by any interested person, including the accused,

the prosecutor, the complainant for a domestic violence offence, a person for whose protection an order is or would be made under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (see *Bail Act*, s 51) or the Attorney General.

How to apply

A person may apply for bail orally if they are before the court. The person, or a solicitor, spouse, parent or guardian, can also make a written application using a form available from any Local Court.

Notice is required for variation applications

There is no need for a fresh decision on bail to be made each time a person comes to court. Bail or the refusal of bail will continue until the proceedings are over unless varied. A court cannot hear a variation application made by a person, other

than the accused person, unless satisfied that the accused person has been given reasonable notice of the application, subject to the regulations.

A court is not to hear a variation application made by a person other than the prosecutor in the proceedings unless satisfied that the prosecutor has been given reasonable notice of the application.

If the person is in jail

If the person is in jail and bail is refused or granted with conditions that cannot be met and need to be varied, the prison governor must, on request, send the bail application, without delay, to the clerk of the court.

When bail applications are heard

Unless they are vexatious or frivolous, bail applications must be heard without delay.

What courts can grant bail

In general, a court has power to hear a bail application or bail variation if:

- proceedings for the offence are pending in the court; or
- proceedings on an appeal against a conviction or sentence of the court are pending in another court and the accused person has not made a first appearance before the other court; or
- the bail decision to be varied was made by the court.

A court can also hear an application to vary bail conditions if the court has granted bail but the conditions are unable to be met.

An authorised justice

An authorised justice can grant bail in the Local Court if no magistrate is available. An authorised justice is:

- a registrar of the Local Court or the Children's Court; or
- an officer of the Department of Attorney General and Justice who is declared, by order of the Minister, whether by reference to his or her name or office, to be an authorised justice for the purposes of this Act.

An authorised justice can review certain bail conditions such as reporting, residence and conditions about not associating with certain others with the consent of the prosecutor but only before the matter has been sent to a higher court. They cannot review bail after the matter has been to the Supreme Court. An authorised justice can hear an application to vary bail conditions if bail has been granted but the conditions are unable to be met. An authorised justice cannot vary enforcement conditions or impose new ones.

An authorised justice cannot hear a release application or a prosecutor's application that a person at liberty be detained, if a decision to release or detain has been made by another court.

The Local Court

The Local Court includes the Children's Court and the Drug Court. A Local Court magistrate has no power to grant bail to someone where proceedings for the offence are before a higher court. A Local Court can vary bail given by the other courts by consent of the parties unless the Supreme Court has directed that a condition not be varied.

The District Court

The District Court's power to grant bail is similar to that of the Local Court. Once the matter has gone to a higher court, the District Court has no power to hear a bail application.

Land and Environment Court

The Land and Environment Court's power to grant bail is similar to that of the Local Court. Once the matter has gone to another court, the Land and Environment Court has no power to hear a bail application.

Industrial Court

The Industrial Court's power to grant bail is similar to that of the Local Court. Once the matter has gone to another court, the Industrial Court has no power to hear a bail application.

The Supreme Court

The Supreme Court can hear a release application if it has been refused by another court. The Supreme Court can hear a detention application or a variation application if the District Court or Local Court or an

authorised justice or police officer made the original bail decision. It is critical that the applications be on the correct forms, which are available from the Supreme Court and its web site.

The Court of Criminal Appeal

The Court of Criminal Appeal can grant bail if:

- it has ordered a new trial and the new trial has not commenced; or
- it has made an order that committal proceedings be recommended and the person is before the Court (s 67); or

- it has directed a stay of execution of a conviction and the stay is in force; or
- an appeal from the Court is pending in the High Court; or
- a bail decision has been made by the Land and Environment Court, the Industrial Court or the Supreme Court.

If an appeal is pending in the Court of Criminal Appeal, bail cannot be granted unless there are special or exceptional circumstances.

Exceptions

The Local Court, District Court, Land and Environment Court and Industrial Court may only hear a bail application after the bail decision is made by the Supreme Court or Court of Criminal Appeal if:

- proceedings for the offence are pending in the relevant court; and
- the person appears before the relevant court in those proceedings; and
- the relevant court is satisfied that special facts or special circumstances justify the hearing of the bail application.

Where a police officer has arrested a person for a suspected breach or applies for a warrant, the person will be brought before an authorised justice or the Local Court who may then release the person on their original bail, vary the bail decision, or revoke or refuse bail.

The *Bail Act* gives a District Court power to hear bail applications, which are not strictly before them, where that court is sending the matter to another court (s 65).

Number of applications that can be made if bail is refused

There is a limit to the number of times a person can apply for bail. After their initial application to a court, a person cannot then apply again to that court, unless there are grounds for another application. Similarly if a detention application is made by a prosecutor and refused, the prosecutor cannot then apply to that court for another order requesting the person be detained, unless grounds are shown. Grounds include:

- new information is available; or
- relevant circumstances have changed; or

- the person was unrepresented at the first application.

If bail was refused on their first appearance in court, a child is allowed a second application (s 74).

What happens if the case is adjourned?

If a case is adjourned, bail will continue whether or not the person has appeared. If the person does not appear, the failure to appear can be excused but this should not be presumed. The accused should ask the clerk of the Local Court about the magistrate's attitude to non-attendance. In serious charges, the court is likely to insist that the accused appear.

If a person cannot appear, they should advise the court immediately they cannot attend and why. If possible, a lawyer should be asked to appear for them and evidence such as a medical certificate be provided to the court. The court will give or send the person a notice of listing, setting out the date to which the case is adjourned.

An accused who is unable to attend for a reason such as illness should let the police and the court know and provide supporting evidence, such as a medical certificate.

The court may – and sometimes does – ignore the information, but if the explanation seems reasonable and is supported by evidence, the court is more likely to adjourn the case and continue bail.

If an adjournment has been agreed to

Where police and the accused have consented to an adjournment, the court (in relatively minor cases at least) will usually have no objection to non-attendance on the understanding that there will be an appearance on the adjourned date, to save time and lost wages in appearing merely for the adjournment.

Long adjournments

Before a person may be asked to consent to a longer adjournment, the court must announce whether or not bail has been granted and whether or not any conditions have been imposed.

An accused should not consent to bail conditions or a long adjournment unless they are certain of release,

and that the person who has agreed to lodge or has lodged security is willing and able to provide bail.

In many cases, the court, if it knew the accused was in difficult circumstances, would set less stringent bail conditions.

Show cause

A person arrested for very serious offences, such as murder, sexual intercourse with a child, offences involving the use of a firearm or where the new offence is said to have been committed by a person with previous convictions for a personal violence offences or while on bail or parole bail will automatically be refused unless the person shows cause why his or her detention is not justified (*Bail Act*, s 16B). Showing cause involves a separate first step in the process of obtaining bail beyond simply addressing bail concerns (see [14.500]). Showing cause requires the person to establish that there is some particular reason why their detention is not justified.

[14.500] Bail decisions

The decision to grant or dispense with bail involves a consideration of any bail concerns, that is, whether there is an unacceptable risk the person will, if released:

- fail to appear at any proceedings for the offence; or
- commit a serious offence; or
- endanger the safety of victims, individuals or the community; or
- interfere with witnesses or evidence.

Refusal of bail

Bail can be refused if a show cause offence is charged and the person cannot show cause why their detention is not justified.

Bail can be refused only if the bail authority is satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions. Bail cannot be refused for an offence for which there is a right to be released (see [14.450]).

On refusal or revocation of bail, a written notice must be given to the person setting out the terms

of the decision and noting any right of appeal or review.

If bail is refused by an authorised justice or the Local Court, the person will be returned to court within eight days (s 41) unless they consent to a longer adjournment or are in custody for other matters or it is not reasonable to bring the person to court for a longer period. A person should seek legal advice before consenting to a longer adjournment.

Assessing unacceptable risk

When deciding whether an accused is an unacceptable risk only the following matters are considered:

- the accused person's background, including criminal history, circumstances and community ties;
- the nature and seriousness of the offence;
- the strength of the prosecution case;
- whether the accused person has a history of violence;
- whether the accused person has previously committed a serious offence while on bail;
- whether the accused person has a pattern of non-compliance with bail acknowledgments, bail conditions, apprehended violence orders, parole orders or good behaviour bonds;
- the length of time the accused person is likely to spend in custody if bail is refused;
- the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;
- if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, and whether the appeal has a reasonably arguable prospect of success;
- any special vulnerability or needs the accused person has including because of youth, being an

- Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment;
- the need for the accused person to be free to prepare for their appearance in court or to obtain legal advice;
- the need for the accused person to be free for any other lawful reason;
- the severity of the likely penalty if the person is found guilty.

The seriousness of the offence

In ascertaining the seriousness of an offence, consideration will be given to:

- whether the offence is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument;
- the likely effect of the offence on any victim and on the community generally;
- the number of offences likely to be committed or for which the person has been granted bail or released on parole.

Release without conditions

If there are no unacceptable risks, the person can be released without bail, bail can be dispensed with or bail can be granted without conditions.

Conditional release

If conditions can sufficiently mitigate risk, then conditional bail must be granted. A condition can only be imposed to mitigate an unacceptable risk. Any conditions must be reasonable, proportionate to the offence for which bail is granted, and appropriate to the unacceptable risk. Bail conditions can include requirements:

- that the person comply, while at liberty, with police directions designed to monitor or enforce compliance with the underlying bail conditions;
- that the accused person do or refrain from doing something, such as surrender a passport or not associate with or contact certain persons;
- that someone provides security for compliance with the condition the accused will appear in court. This means an acceptable person enters into an agreement under which that person agrees to forfeit a specified amount of money or deposit a sum of money or some other security to help guarantee the accused will appear in court (see, eg, *R v Lago* [2014] NSWSC 660);
- that there be an acknowledgment by an acceptable person to the effect that they are

acquainted with the accused person and they regard the accused person as a responsible person who is likely to comply with their bail acknowledgment;

- for children, that suitable arrangement is made for the accommodation of the accused person before they are released on bail.

The police and courts can only impose specific conditions as pre-release requirements. These are a requirement that a passport be surrendered, that security be promised or lodged, that character acknowledgements be made, and, for children, that the accommodation requirement be met.

If a surety wants to be released

If a person has given or promised security and wishes to be discharged from their obligations, they may apply to the court that granted bail to be released. If the person is not in court, an apprehension warrant or summons can be issued to bring them to court. When the accused appears in court, the court must – unless to do so would be unjust – discharge the surety, and make another bail decision.

It is an offence for a person who has offered security to dispose of that security while the agreement is current. If they do so, bail can be revoked.

A court that finds a person guilty or not guilty must ensure consideration is given to the return of any money or other bail security deposited.

Detailed regulations relating to forfeiture of security can be found in Sch 2 of the *Bail Act*.

Drug rehabilitation

A condition that an accused do something can include requiring a person to attend a drug rehabilitation program. These conditions can be imposed at any time, even after a guilty plea (*Crimes (Sentencing Procedure) Act*, s 11). Successful attendance at such programs can be important when a court assesses what sentence to impose.

Putting a case for bail

Often, for minor matters, the police will simply issue a court attendance notice and dispense with bail. On arrest, unless there is a right to bail, it may be necessary to convince a police officer, or their superior, that bail should be granted. If the police refuse bail, a person must be prepared to argue a case for bail in court. As there are limitations on the number of attempts that

can be made for bail, an accused must be prepared to argue strongly for bail. The accused should place before the court as much relevant material as possible, and be ready to respond to whatever the police say or show to the court. Sometimes it may be necessary to wait until all that material is available.

The rules of evidence (see *Bail Act*, s 31) do not apply to bail applications. Any issues relating to the grant of or refusal of bail are decided on the balance of probabilities. Only proceedings for an offence need to satisfy the beyond reasonable doubt standard.

Appeal bail

After a person has been sentenced in the Local Court the proceedings end and so too does the bail order. If a jail sentence is imposed and an appeal is lodged, the person must seek a fresh grant of bail. The same considerations relating to unacceptable risk apply to that application as any other bail decision.

After a person has been sentenced to a term of imprisonment by the District or Supreme Courts they may appeal to the Court of Criminal Appeal. At this stage, fresh bail may only be granted if special or exceptional circumstances are established.

[14.510] Breach of bail

A prosecutor can apply to a court requesting bail be refused or revoked but the court cannot do so unless satisfied the accused person has received reasonable notice of the application. There are limits on the number of times a prosecutor can make such applications to the same court (*Bail Act*, s 76; see [14.450]).

A person on bail can be arrested if:

- an arrest warrant is issued by a court;
- police are aware the person has breached a bail condition or agreement; or
- a police officer believes on reasonable grounds that they are about to fail to comply with the bail conditions or agreement.

Before police make such an arrest they must consider the relative seriousness or triviality of the breach, the circumstances of the person and whether alternatives to arrest are appropriate. Once arrested, they must be brought before the court to have their bail position reassessed.

Failure to appear in court

Failing to appear in court after a bail undertaking without reasonable excuse is a summary offence carrying the same penalties as the offence for which

bail was granted, with a maximum penalty of three years' jail and/or a \$3,300 fine (s 79).

The penalty for absconding is intended to be effective in influencing an accused to appear.

Once the offence of failing to appear is on record, getting bail in the future may be very difficult.

It is up to the accused to prove reasonable excuse.

[14.520] Appeals from bail decisions

Stay of bail for serious offences

If the first time a person appears in court for a serious offence, a court grants or dispenses with bail a prosecutor can seek a stay of decision and the offender will not be granted their liberty immediately. A serious offence includes murder, any offence carrying a maximum penalty of life in jail, or allegations of sexual intercourse or attempted intercourse with a child under 16. The stay continues until the prosecution withdraws it, the decision is considered by the Supreme Court, or three business days elapse, whichever is the sooner. If the matter gets to the Supreme Court, the Court can affirm or vary the original decision or make a fresh bail determination.

The Supreme Court

The Supreme Court can hear a release application if bail has been refused by any other court except the Court of Criminal Appeal.

The Supreme Court can hear a detention application or a variation application if the District Court or Local Court or an authorised justice or police officer made the original bail decision.

Revocation of bail

A bail decision continues until varied or revoked or until the proceedings are finalised. Bail can be revoked and a person remanded in custody if, when a person is brought before a court or authorised justice, for failing to comply with their bail acknowledgement or conditions or because the police fear on reasonable grounds a breach may occur, and the authorised justice or court is satisfied:

- the person has failed or was about to fail to comply with a bail acknowledgment or bail conditions; and
- having considered all possible alternatives, the decision to refuse bail is justified.

Bail can also be revoked and a person remanded in custody, where the prosecutor has made and given notice of a detention application and the court is

satisfied that there is an unacceptable risk and bail should be refused (s 50).

PART 3 – COURT

Criminal Court process

[14.530] There is an overview of the court hierarchy and the court system in NSW in Chapter 1, About the Legal System.

In New South Wales, three levels or jurisdictions of criminal courts can deal with criminal charges, the Local Court, the District Court and the Supreme Court. The Land and Environment Court also has a criminal jurisdiction and operates at the same level as the Supreme Court.

The Local Court deals with summary charges and charges on indictment that can be dealt with summarily. The Local Court deals with most criminal matters. More serious crimes and most jury trials are dealt with by the District Court. The District Court hears most appeals from the Local Court. The Supreme Court deals with the most serious matters such as murder and terrorist offences. Judges of the Supreme Court hears some appeals from the Local Court if they involve legal issues. They also sit on the Court of Criminal Appeal which hears appeals from single judges of the District and Supreme Courts. The High Court of Australia is the ultimate court of appeal for all New South Wales criminal proceedings but leave or permission to appeal to that court is granted rarely.

Indictable offences

Most indictable (serious) offences are dealt with in the District and Supreme Courts. Certain indictable offences may be dealt with summarily by the Local Court. They fall into two groups:

- those where the offence may be dealt with summarily with the consent of both the prosecution and the accused;

- those where only the consent of the prosecution is required.

The choice – to proceed before the magistrate or go to the District Court – must be made before evidence is called or, if a guilty plea has been entered, before the police facts are put to the court.

Offences that can be dealt with summarily

Indictable offences that can be dealt with summarily are listed in Sch 1 of the *Criminal Procedure Act*. They include stealing offences where the value of the property does not exceed \$5,000, burglary where less than \$15,000 is involved, and assaults and matters that are generally regarded as serious but considered not to justify available maximum penalties of more than two years.

Where only the prosecution need consent

Indictable offences such as larceny, false pretences, obtaining credit by fraud and malicious damage can be dealt with summarily with only the prosecution's consent if the amount of money or value of property involved does not exceed \$5,000 (s 260). Minor shoplifting charges are dealt with in this way. The case proceeds like a summary offence (see [14.540]).

Making the choice

The prosecution considers:

- the seriousness of the offence;
- the maximum penalty that could be imposed;
- the limits of the courts' sentencing powers.

What the accused should consider

The accused should take into account that:

- the chances of an acquittal may be higher before a jury than a magistrate;
- the defence may be better able to present its case before a jury, because it can rely on the evidence given in committal proceedings;
- after conviction by a magistrate, there may be a second chance through an appeal to the District Court. This is not available after conviction by a jury;
- the penalties a magistrate can impose are less than those a judge can impose – up to two years' jail and/or up to \$11,000 (100 penalty units) or five years for multiple offences.

Offences heard in the Local Court

[14.540] The most common criminal charges – *summary offences* – are heard by a magistrate in a Local Court.

The main Local Court in NSW is at the Downing Centre, 143 Liverpool Street, Sydney. There are also courts in major suburban locations and in country towns.

[14.550] How the Local Court works

The magistrate

Cases are conducted before a magistrate, who sits at a raised level at the front of the court.

The prosecution

Most criminal cases are the result of police action. The case for the police is presented by a *police prosecutor* (normally not uniformed) or a Director of Public Prosecutions solicitor, either from their own desk or from a large table for the legal profession (the bar table) in front of the magistrate.

The defence

If the accused is represented by a lawyer, the lawyer sits at the bar table and the accused sits behind the lawyer. An unrepresented accused has a chair near the bar table, facing the magistrate.

If the accused is in custody, they are generally required to sit in a special secure area known as a “dock”.

If there is a dock

In many court buildings, an accused in custody usually remains in the *dock* (a closed box in the middle or to the side of the court) even if they are not represented.

Leave can be granted for a person in custody to sit out of the dock near their lawyer.

Recording the case

In most courts, the proceedings are recorded by audio recording. On occasions, they may be recorded by a shorthand writer or typist who sits below the magistrate.

Who can attend the court?

Local Court hearings must be heard in public unless a person under 18 is involved (see Chapter 7, Children and Young People).

When the court is closed

The court can, in the interests of justice, exclude the public (a *closed court*) to protect the identity of a child witness, victims of certain sex offences or an undercover police officer.

[14.560] Starting a criminal action

Court attendance notices

All court proceedings for criminal offences in the Local Court are commenced by the issuing and later filing in court of a *court attendance notice* (*Criminal Procedure Act*, s 172).

The notice can be issued on the spot, after arrest or on application to a chamber magistrate at a courthouse. Generally, a court attendance notice is issued by police or an authorised public officer from an agency such as the Director of Public Prosecutions or a local council.

Prosecution by a private citizen

A private citizen can apply to a registrar at a courthouse for a court attendance notice to be issued (s 173). Grounds must be shown to the registrar before the notice will be issued (s 174).

The right of private citizens to personally conduct a criminal prosecution is restricted to summary cases in the Local Court (see *R v George Maxwell Ltd* [1980] 2 All ER 99).

Prosecution by private citizens is rare.

Prosecution by police

In most cases, prosecutions for summary offences are brought by police officers in their own name, and a police prosecutor or a solicitor from the office of the Director of Public Prosecutions conducts the prosecution.

Some government authorities, such as the Australian Securities and Investments Commission, State Rail and Sydney Water employ their own legal officers for criminal prosecutions.

Bringing the accused to court

For proceedings to commence, the accused person must first appear before the court. Police can:

- arrest the person, give them a court attendance notice, then release them on bail; or
- simply issue them with a court attendance notice.

The notice is usually given at the police station, but can also be given out elsewhere.

When a warrant may be issued

In some cases, a warrant is issued, empowering police to arrest a person and bring them before a court. This usually happens when:

- the offence is so serious that it is feared the person will disappear if only a court attendance notice is issued;
- the person's address is not known; or
- the person has ignored a court attendance notice (see [14.290]).

Giving details of charges to the accused

An accused should be given enough information (*particulars*) about the alleged offence to enable them to decide whether to plead guilty or defend the matter.

For example, in a dangerous driving case, an accused should be given details of the exact time

and place of the alleged offence, and in what way the driving was supposed to be dangerous.

If the accused is not given enough information

If sufficient particulars are not provided, a request should be made to adjourn the case until they are.

[14.570] Appearing in the Local Court

If a person has been given a court attendance notice, they must normally appear in court on the date set out in the notice (but see box below).

If the person is in custody

If the person has been arrested and refused bail (see [14.230]), they will be given a court attendance notice at court.

When to arrive at court

Many courts now call through all cases before a magistrate or *registrar*, at 9.30 am, to deal with minor matters, adjournment applications and so on. Most Supreme and District Courts commence at 10 am. Even if the court notice says 10 am it is best to arrive early.

Appearance of persons in custody

Most courts now have a video link with the state's jails. As a consequence, for bail applications and short appearances, rather than bring the person to court they will stay at the jail and communicate with their lawyers by phone and with the court via the video link. If a personal appearance is required, a special request must be made to the magistrate so that arrangements can be made to bring the person in custody to court.

Must the accused appear?

For minor offences where a court attendance notice was issued, no appearance at court is necessary on the date set out in the notice. The accused, however, must send to the registrar of the court a form saying whether they will plead guilty or not guilty. The form must be delivered five days before the appearance date on the court attendance notice.

If pleading guilty for a minor matter (such as a traffic offence or where no jail penalty can be imposed), an accused can send with the form a written statement and references setting out the matters they want the court to consider in mitigation of the offence and any penalty (*Criminal Procedure Act*, s 182).

The matter will either:

- be dealt with in their absence and a penalty imposed; or
- they will receive a notice setting out the date they must appear for sentence.

If an accused does not appear and fails to send in the form, they may be convicted and punished in their absence (s 190(3)), or have a warrant issued for their arrest.

What happens at the Local Court

The accused will be asked whether they wish to plead guilty or not guilty.

If the accused pleads guilty

If the accused pleads guilty to the charge, the magistrate considers the penalty.

Getting legal advice

A person should not decide what plea to make without legal advice (see Getting legal advice at [14.570]). If an accused is not legally represented, they should ask the magistrate to adjourn the matter so they can obtain advice.

Getting legal advice

The duty solicitor

A solicitor employed or funded by the Legal Aid Commission NSW is usually available every day at all Local Courts and Children's Courts to advise people who cannot afford a private solicitor. If the accused has not made contact with one of these solicitors before the hearing date, they should arrive at the court early to find and speak to the duty solicitor.

Chamber registrars

In country areas, chamber registrars (formerly chamber magistrates) may provide advice and referral.

See Chapter 4, Assistance With Legal Problems, for information on getting advice and assistance.

Setting another date

Cases are normally adjourned for at least a week so that the accused can obtain legal advice.

The magistrate has a general power to adjourn cases, either before or during a hearing.

For plea or mention

The case is listed for the adjourned date as being either for *plea* or *mention*. This means that on the adjourned date:

- the magistrate will hear the case if the accused pleads guilty; or
- another date will be set for a full hearing if the accused pleads not guilty.

On the adjourned date

If the accused pleads guilty

If the accused pleads guilty to the charge, the magistrate considers the penalty. The accused must appear personally in this case.

If the accused pleads not guilty

If the accused pleads not guilty it may be possible with a less serious charge for the accused not to attend, provided the police involved do not object.

In this case, the matter is merely mentioned and a date is set for a defended hearing.

[14.580] The defended hearing

Service of the police brief

At least 14 days before any date fixed for a hearing, the prosecution (the Director of Public Prosecutions or the police) must *serve on* (give to) the accused or their lawyer a copy of all written statements and exhibits on which they intend to rely (*Criminal Procedure Act*, ss 183–189). If it is not practicable to serve copies of exhibits, the accused must be given reasonable opportunity to inspect them.

Special time standards apply to encourage prompt hearing of domestic violence charges. A defendant may be asked to enter their plea on the first day in court or be given only seven days to decide what they are going to do. Any time standards imposed must be complied with.

Where the brief is not served

For minor matters, including most cases where a penalty was used to commence the proceedings, and drink driving offences, a brief of evidence is not served (*Criminal Procedure Regulation 2010* (NSW), cl 24). All that is provided is a summary of the prosecution case. Other documents relating to non-material witnesses need not be served (cl 24A).

The courts are encouraged to list matters even if all documents have not been served, as long as arrangements are made to serve them before the hearing. The court can also order that parts of a brief not be served (*Criminal Procedure Act*, s 187).

If the rules set by the court are not complied with, the prosecution must ask for an adjournment or the evidence in the documents cannot be used, unless the defence consents (s 188).

Conducting the prosecution case

All criminal court hearings follow the same basic procedures and are subject to the same rules of Evidence (see Evidence and defences below).

On the day of the hearing, the magistrate first calls on the prosecutor to present the prosecution case.

Calling witnesses

The prosecutor calls on the police witnesses and other witnesses for the prosecution to give their evidence one by one. Each witness enters the witness box near the magistrate and takes a religious oath, or makes an affirmation to tell the truth (*Criminal Procedure Act*, s 195; *Oaths Act 1900* (NSW), s 13).

Who prosecutes?

Summary offences

Summary (minor) matters are usually prosecuted by a police prosecutor (when the charge has been laid by the police and not by a private citizen).

Indictable offences heard summarily

Certain indictable (more serious) offences can also be heard summarily in the Local Court instead of

going before a jury in the District Court. It is now the general practice for such cases to be prosecuted by a solicitor from the office of the Director of Public Prosecutions.

The accused or (sometimes) the prosecution must decide if they want an indictable offence to be heard summarily before evidence is called (*Criminal Procedure Act*, s 260).

Examination-in-chief

When the witness has taken the oath or made the affirmation, the prosecutor asks the witness questions (*examination-in-chief*).

Cross-examination

When the prosecutor has finished, the accused or their lawyer can ask the witness questions about their evidence in *cross-examination*.

Not all questions are acceptable

The magistrate decides whether questions asked by either side are permissible in terms of the rules of evidence for criminal court hearings.

Request that the charge be dismissed

When the witnesses for the prosecution have been heard and the prosecution case has closed, the accused may submit to the magistrate that there is no case to answer and ask that the charge be dismissed without the defence case being heard, on the basis that the prosecution has not enough evidence to prove the legal elements of the charge.

If the magistrate agrees there is no evidence or other legal flaw in the prosecution case, the charge

is dismissed and the case against the accused is over.

If the magistrate does not agree, the accused then has the choice either to present a defence case or ask the Magistrate to find that prosecution evidence is simply not good enough to prove the charge beyond reasonable doubt. Again, if the Magistrate agrees the charge is dismissed and the case against the accused is over. However, if the Magistrate fails to agree the accused does not then get the opportunity to put a defence case (for a detailed explanation of the steps involved, see *DPP (NSW) v Elskaf* [2012] NSWSC 21).

The defence case

If the magistrate does not agree with the submission by the accused (if one was made) that there is no case to answer, the defence will be called on to present its case.

The accused does not have to prove their innocence. However, it is often necessary for them to call evidence.

The prosecutor's reply

When the defence case is finished, the prosecution may give evidence in reply to any new points raised in it.

Addresses to the magistrate

After all the evidence has been heard, both prosecutor and accused (or the accused's lawyer) have the right to address the magistrate on why the accused should or should not be found guilty.

The prosecution speaks first, then the defence (*Criminal Procedure Act*, s 195).

The verdict

After hearing all the evidence and the final addresses, the magistrate must decide the matter.

The magistrate may adjourn the case to consider the verdict, but usually gives it immediately.

Is the case proved?

If there is any reasonable doubt that the accused is guilty, the magistrate dismisses the charge and the accused goes free.

If, however, the magistrate is satisfied *beyond reasonable doubt* that the accused is guilty, they will find the offence proved and consider what penalty should be imposed.

[14.590] Local Court sentencing procedures

If the accused pleaded guilty

If the accused pleaded guilty, so that there was no defended hearing, the magistrate calls on the police prosecutor to outline the facts.

The police facts

The prosecutor generally makes available a document setting out these "facts" before the hearing commences. The document is presented either by the prosecutor or through the police officer in charge of the matter.

If the accused does not agree

The accused (or their lawyer) should check the police facts for accuracy before they are read or given in evidence. If the accused does not agree with them, they should not be allowed to be used.

If the accused pleaded not guilty

A magistrate who finds someone guilty of an offence after a defended hearing will consider the penalty according to the facts found to be proved beyond reasonable doubt.

Whether the plea was guilty or not guilty

Record of previous convictions

The prosecutor hands up a record of any previous convictions recorded against the accused.

This should also be checked for accuracy.

Facts in mitigation

The magistrate calls on the accused or their lawyer to present any facts in mitigation (lessening) of the offence.

This is the opportunity to explain the circumstances that led the accused to commit the offence, put forward any references or call evidence of good character, and mention factors that might be taken into account to reduce the penalty; for example, the hardship that will be caused by losing a driver's licence.

Parole reports

If a Community Corrections parole officer has been supervising the accused, they will prepare a sentence assessment report for the court and can, if asked, be available to answer questions. In most cases (except traffic matters not involving alcohol), the magistrate asks that a parole report be obtained to help determine the sentence.

Many courts now have parole officers on duty to prepare reports on the spot. If a parole officer is not available, the case must normally be adjourned for two weeks or more for a report to be obtained.

The defence address

Finally, the lawyer for the accused addresses the magistrate on why a severe penalty should not be imposed, and suggests an appropriate penalty.

Special sentencing arrangements

A number of intervention programs have been established to encourage rehabilitation and community involvement in the sentencing of those convicted of relatively minor matters. These include the Magistrates Early Referral Into Treatment scheme (MERIT) for those with drug addiction problems, the Drug Court and programs for traffic and drink drive offenders. Some courts operate circle sentencing (see Circle sentencing in Chapter 2, Aboriginal People and the Law) where members of the local Aboriginal community sit with the magistrate to assist in fixing appropriate sentences for Aboriginal offenders.

[14.600] Costs

Where proceedings were brought by police

Although a magistrate may order legal costs against an accused who has been found guilty, this is not the practice in NSW if the police bring the original proceedings (*Criminal Procedure Act*, s 215). Where a private or government agency, such as the RSPCA or the Department of Planning and Environment, brings the prosecution, costs can be substantial.

If either party causes a case to be adjourned by their unreasonable conduct, they may be ordered to pay the costs of the adjournment (s 215).

The court levy

Anyone convicted of an offence must pay a court levy which is paid into the Victims Compensation Fund. The levy is adjusted annually each July according to the CPI index. As at June 2016, it was \$76 for the Local Court and \$169 for the District Court.

Charges by private citizens or agencies

Where a charge is brought by a private person (including an officer from a government department), the accused may have to pay legal costs if found guilty.

If the accused is found not guilty

A court has only limited power to award an accused, if successful, costs against the person or agency that brought the charge (s 214).

In all but the most exceptional cases, costs will be awarded only if:

- the investigation was improper or unreasonable or there was a failure to investigate in a reasonable matter;
- the prosecution was initiated improperly or without reasonable cause.

[14.610] Appeals

Appeals to the District Court

Appeals against a magistrate's decision are generally made to the District Court, either seeking a rehearing or appealing against the severity of the sentence. The appeal form must state the general grounds of the appeal; for example, "the sentence

is too severe" or "the magistrate made an error in their decision".

The appeal automatically stays the penalty unless it involves a licence suspension that was imposed when the person was charged or a jail sentence, in which later case bail must be sought from the magistrate or the District Court (*Crimes (Appeal and Review) Act*, s 63).

Appeal against a driving conviction

Since the appeal stays any penalty, someone appealing against a driving conviction can continue driving until the appeal is decided, unless their licence was suspended when they were charged, such as in high range prescribed concentration of alcohol matters. Unless the person asks the court to lift the suspension it continues until the appeal is determined (*Crimes (Appeal and Review) Act*, s 63(2A), 63(2B)).

Time limits

The appeal must be made within 28 days of the date of conviction and sentence. This limit can be extended by two months by the court.

Appeals to the Supreme Court

It is also possible to appeal to the Supreme Court about a magistrate's decision, on a question of law or of mixed law and fact, by applying for special types of orders. This is rarely done because of the other rights of appeal mentioned above (*Crimes (Appeal and Review) Act*, ss 52, 53).

How to appeal

The first step is to complete an appeal form, available at any Local Court. A magistrate can grant bail and specify conditions, including whether any surety bail is required. Appeals can be lodged against conviction, sentence, or conviction and sentence.

If bail is refused

If bail is refused, an application can be made to another magistrate or the Supreme Court (see [14.230]).

Appeal against conviction

If the appeal is *against conviction* the matter is reheard, and a District Court judge reviews all the material that was before the magistrate, including a transcript of what was said. The judge has the

same powers as the magistrate to make a decision (*Crimes (Appeal and Review) Act*, ss 18–20).

Fresh evidence will not be allowed unless the judge thinks it is in the interests of justice to do so.

Normally witnesses will not be called again, or new witnesses be allowed to be called, unless “substantial reasons” are given.

Alleged victims of violence or sexual assault cannot be called unless “special reasons” are given.

“Special reasons” are far more difficult to show than “substantial reasons”.

Appeal against severity

A person who believes that the sentence was too harsh can appeal *against severity* only. The hearing is restricted to evidence and submissions that affect the sentence.

In an appeal against the severity of the sentence, not only is the material that was before the magistrate reviewed but new evidence, such as character witnesses, may be called on the appellant’s behalf. The appellant (or their lawyer) and the prosecutor then in turn make submissions to the judge (s 17).

Appeals to the Court of Criminal Appeal

If the person believes that a judge hearing the appeal has made a mistake about a legal question or issue (as opposed to a wrong or unfavourable decision about the facts of a case), an appeal can be made to the Court of Criminal Appeal.

Appeals are made by requesting the judge to “state a case”; that is, refer the specific legal question in dispute to the Court of Criminal Appeal for it to rule on and, if appropriate, direct the judge how to properly apply the law. The rules relating to stated cases are strictly applied (see *Talay v The Queen* [2010] NSWCCA 308).

Time limits

Appeals to the Court of Criminal Appeal must be lodged within 28 days (*Criminal Appeal Act 1912* (NSW), s 5B).

Leave to appeal out of time can be given by the court if the reasons for the delay are properly explained.

Deciding whether to appeal, and on what grounds

Someone who is in doubt about whether they should appeal, or appeal against conviction or only against the severity of the sentence, should get legal advice.

There are two drawbacks to appeals:

- There are fees for lodging the appeal, and the appellant may have to pay some costs if they lose.
 - A District Court judge can increase the sentence, although the judge must give the person the option of withdrawing the appeal if they are contemplating an increase.
-

Offences tried by a judge and jury

[14.620] More serious offences than those heard and decided by a magistrate in a Local Court are generally heard before a judge and jury in the District Court or Supreme Court.

These are called *indictable* offences (although some indictable offences can be heard by a magistrate (see Indictable offences dealt with summarily at [14.50])).

wounding and dangerous driving causing death are heard before a judge and jury in the District Court.

[14.630] The committal hearing

In 2018, the procedures regulating how serious matters are sent to the District and Supreme Courts were changed. A magistrate no longer determines whether there is sufficient evidence to commit an accused person for trial. Instead, a magistrate only needs to be satisfied that the prosecution and defence have complied with certain specific requirements before committing

Supreme Court or District Court

Very serious indictable offences, like murder and gang rape, are heard before a judge and jury in the Supreme Court. Other indictable offences, like manslaughter, arson, perjury, bigamy, armed robbery, malicious

the accused for trial or sentence in a higher court. These changes to committal procedures also apply to Commonwealth offences dealt with on indictment.

The new rules relate to the prosecution certifying the charges and the holding of a mandatory case conference.

There are also specific rules about the prosecution serving a simplified brief of evidence. For State offences, the level of any discount or reduction in sentence for an early plea of guilty are fixed sentencing to the time the guilty plea is entered.

If there is an issue about an accused person fitness to participate in court proceedings because of a mental illness or other disability, the magistrate will commit the accused for trial so that a fitness hearing can be conducted.

The first step is that following an arrest or the issue of a CAN (Court Attendance Notice) being issues or a serious matter the prosecutor, in most cases State or Federal Police, must serve on the accused person a simplified brief of evidence relating to each offence. The Magistrate sets a time frame for this to be done.

The brief is required to include copies of:

1. all material forming the basis of the prosecution case;
2. any material reasonably capable of being relevant to the defence; and
3. any material affecting the strength of the prosecution case.

Not every piece of prosecution evidence need be provided, a summary of complex evidence such as telephone intercepts or medical reports can suffice.

Charge certification

The next step is charge certification. Only the ODPP, the CDPP, and the NSW and Commonwealth Attorneys General may certify charges. The charge certificates must specify the charges that it is intended will proceed to trial or sentence, any back up or related charges and any charges that will be withdrawn.

The certificate must be served on the accused and filed in the Local Court no later than six months after the first return date or any later date set by the magistrate. Best practice requires they should be served within six weeks of the service of the brief.

If the prosecutor has not filed a charge certificate within the required time, the magistrate must

decide whether it is in the interests of justice to discharge the accused or adjourn the proceedings.

A compulsory case conference

After the charge certificate is filed, there must be a case conference between the prosecutor and the accused's legal representative. A case conference is a structured meaningful negotiation to facilitate a review of the charges and available evidence. A conference can only occur if the accused is represented and has not yet entered a guilty plea to each charge.

The aim of the case conference is:

1. to see if the accused is willing to plead guilty to any offence;
2. to facilitate the provision of information to help the accused decide whether or not to plead guilty;
3. to narrow issues in dispute; and
4. to identify key issues in the accused's trial and areas of agreement or dispute with respect to the facts.

If there are multiple accused, a joint case conference may be held with the consent of the prosecutor and each co-accused. No case conference is required if, before the case conference, the accused pleads guilty the plea has been accepted by the magistrate.

No case conference will be held if the accused is unrepresented. However, in this case before sending the matter to the higher court the magistrate must be satisfied the accused has had a reasonable opportunity to obtain legal representation and advice.

If the conference results in a decision to plead guilty to a charge after the case conference, the magistrate will refer (commit) the accused to the higher court for sentence. If the accused does not plead guilty, the matter will be referred to the higher court for trial and a case conference certificate must be filed in the Local Court. The certificate is confidential. Confidentiality is intended to encourage the accused to make offers without prejudice to their trial. It can only be used in very specific circumstances if relevant to sentencing; for example if the accused is later convicted of an offence which they offered to plead guilty to at the conference.

Case conference procedures include the following:

- The accused must be available in person or via video link during the first case conference to give instructions to his lawyer.
- An accused's legal representative is obliged to explain the effect of the sentencing discount scheme.
- If the accused does not intend to plead guilty, she or he must sign a declaration certifying that their legal representative has provided this explanation.
- If, as a result of the case conference, the charges to be proceeded with change, the prosecutor must file an amended charge certificate before committal.

Where a case conference certificate has not been filed by the date fixed, the magistrate may discharge the accused or adjourn the proceedings if satisfied, in the interests of justice, that there has been an unreasonable failure by the prosecutor to participate in a case conference or file a certificate.

After the charge certificate and case conference certificate have been filed, the magistrate must commit the accused for trial or sentence.

An early guilty plea

A guilty plea saves the courts, the police and the prosecution time and money. Importantly, a guilty plea means witnesses particularly crime victims do not have to give evidence at trial. In recognition of the utilitarian benefits of early guilty pleas, a fixed discount on the otherwise appropriate sentence is generally given. The court must set out to the offender how the sentence discount was calculated and any reasons for not applying the eligible discount. The scheme is intended to create a strong incentive for early guilty pleas.

The discounts for indictable offences are based on the timing of the plea: If the plea is entered before committal for trial from the Local Court –25%: 10% for a plea or formal notice of plea up to 14 days before the first day of trial in the higher court; and 5% in any other circumstances.

A sentencing court may vary the application of the fixed sentence discounts where an offender made an offer to the prosecutor, which was refused and:

- the offender is later found guilty of the offence the subject of the offer or an offence that is "reasonably equivalent" to the offence the subject of the offer (in these circumstances "found guilty" includes a verdict of guilty after trial, and a plea of guilty); or
- the offer is later accepted by the prosecutor after committal for trial and the offender pleads guilty to the offence at the first available opportunity obtained by the offender.

Where this occurs, the offender will be entitled to the fixed sentencing discount available when the offer was made.

Exceptions

The exceptions to the sentencing scheme are:

- the court may decline to apply or apply a reduced fixed sentence discount if a disputed facts hearing, not determined in the offender's favour, erodes the utilitarian value of the guilty plea. The onus of proof is on the accused in any dispute about whether there should be a discount;
- the court may decline to apply or apply a reduced fixed sentence discount where the court considers the level of culpability is so extreme that the discount should not be applied on sentence;
- the court must not apply any fixed sentence discount if a sentence of life imprisonment is imposed on the offender.

Offences involving a child or young person

The changes to committal proceedings only apply to children and young people charged with serious children's indictable offences (SCIOs). The statutory discount on sentence does not apply.

Section 31 of the *Children (Criminal Proceedings) Act 1987* (NSW) has been amended, and a new Div 3A inserted, which sets out the committal procedure (including the committal hearing and threshold tests) for indictable offences.

For indictable offences (other than a SCIO) involving a child or young person, no aspects of the reform apply. These offences will continue to be dealt with summarily, as required by s 31(1) of the *Children (Criminal Proceedings) Act*. If the Children's Court determines that an accused charged with an indictable offence should be dealt with according to law, they must be dealt with according to the committal procedure in Div 3A.

When is it held?

If the accused is in custody, the committal hearing is generally held within three months. If they are on bail, it may not be held until many months after the arrest.

What is it for?

Can the defence cross-examine witnesses?

Witnesses are usually only required to give evidence once, at the trial rather than the committal hearing.

The prosecution or defence must ask the magistrate for permission to call a witnesses they want to give evidence in person. An order will be made if both parties consent to the witness should be called. Otherwise it must be shown that it is in the interests of justice the witnesses give oral evidence (s 82(1)).

Cognitively impaired witness or child complainants in sexual assault matters cannot be called to give oral evidence at committal.

For other vulnerable witnesses offences, it must show there are *substantial reasons* in the interests of justice (eg, to clear up ambiguities in statements or to test identification evidence) to cross-examine witnesses (s 84).

Section 41 of the *Evidence Act* gives a court the discretion to disallow questions that are unduly offensive, annoying or repetitive.

Sentencing

The case is normally listed in the Supreme or District Court within one or two months before a single judge without a jury to consider what sentence should be imposed (see Sentencing and penalties at [14.670]).

Record of the hearing

The evidence of witnesses at the committal hearing is recorded and typed up in documents called *depositions*. A free copy is available from the court for the accused person to use at the trial.

If the accused is relying on alibi evidence

An accused must give notice in advance if they are going to rely on alibi evidence. The magistrate must inform the accused of the law of alibi evidence at the committal hearing, and the accused must then give notice of an alibi defence within 21 days of the date set for trial, with particulars of the alibi and the name and address of anyone proposed to be called in support of it (s 150).

Application for a no-bill from the accused

If the case against the accused is weak or important evidence in their favour was revealed at the committal hearing, the accused should consider

applying to the Director of Public Prosecutions for a *no-bill* before the trial starts.

There is no special form for this application. It can be made in a letter setting out why the accused should not be required to stand trial.

The accused is notified by letter of the result of the application before the trial starts.

If the prosecution has new evidence

The accused is entitled to know if the prosecution intends to:

- call witnesses at the trial who were not called at the committal hearing; or
- change the charges.

When the prosecutor intends to call a new witness, they must send the accused a copy of the statement made by the witness so that the accused can properly prepare a case.

If notification is not given

Failure to serve new statements can be grounds to adjourn a trial.

Trial case management

After the indictment is presented in the Supreme or District Courts the prosecution must disclose all the material relevant to their case. The defence must then respond with the prosecution making a further response to whatever the defence discloses. Timetables are set by the court when the indictment is first presented. In more complex District Court and most Supreme Court trials, the court can make specific orders about the management of how evidence is to be presented.

The defence can be required to disclose expert reports and certain special defences on which they seek to rely, such as self-defence, insanity, intoxication or provocation. Failure to disclose can cause a court to refuse to admit evidence and could mean the court allows the prosecution to ask that unfavourable inferences be drawn (ss 134–149F).

[14.650] Jury trials

The arraignment

After committal, the magistrate or District Court *listing directorate* fixes a date for an *arraignment* (the first time the formal indictment is read to the court and to the accused). This generally takes place eight weeks after committal.

The prosecution must have their case, and the indictment, ready, as the accused will be asked by

the judge if they wish to plead guilty or not guilty. If either side is not ready, generally only a short adjournment of a week or two will be allowed.

Should the accused plead guilty?

The accused should consider their position carefully while in the Local Court. An early guilty plea in the Local Court could see the sentence reduced by up to 25%. A plea at arraignment could still mean a reduced penalty of 10%. A guilty plea is also one reason for not imposing a standard minimum non-parole period (*R v Way* (2004) 60 NSWLR 168).

Filing a notice of motion

If there are matters that should be raised before the trial, such as an application to be tried separately from a co-accused, or a request for a new trial date because witnesses are sick or otherwise unavailable, a *notice of motion* must be filed, supported by an affidavit setting out the reasons.

In some cases, these will be dealt with by a judge before the date fixed for the trial.

At the hearing

On the hearing date, the case will be listed to commence, generally, at 10 am.

When the case is called, the accused person is placed in the dock in the centre of the court, the judge's associate reads out the written accusation and the person is asked to plead.

Pleading

If the accused pleads guilty, there is no need for a jury, and the judge considers the sentence.

If they plead not guilty, a jury is empanelled.

The jury

The jury consists of 12 people out of about 30 summoned to the court and given numbers which are chosen at random from a box by the judge's associate. Their names are not disclosed.

In long trials, up to 15 jurors can be selected but before the jury retires to consider its verdict excess jurors are balloted off so only 12 remain.

Challenging the jury

Both the accused and the prosecution have the right to refuse (*challenge*) up to three jurors without having to give a reason. Further challenges are allowed if good reason is shown; for example, that one of the prospective jurors is the prosecutor's mother.

Trials with judge alone

If an accused after legal advice elects and the Director of Public Prosecutions agrees, a trial must be held without a jury (*Criminal Procedure Act*, s 132). If an accused elects and the DPP does not consent, the court can still make a judge alone order if it is in the interests of justice to do so. In exceptional circumstances, a judge can order the trial proceed without a jury (s 132A(7)).

The prosecution case

After the jury has been empanelled, the trial begins. The Crown prosecutor makes an opening statement to the jury, telling them what witnesses will be called and what the prosecution says the case is about.

The defence can also make an opening statement if they wish, in answer to the prosecution.

Evidence of witnesses

The prosecutor calls the prosecution witnesses one by one. Police officers who have made statements in relation to the matter soon after the event are allowed to read the statement to the jury, rather than giving their evidence from memory, if the statement has been signed and provided to the defence.

The accused's lawyer may cross-examine the witnesses.

The defence case

After the prosecution case, if it is appropriate, the lawyer for the accused may submit that the judge should direct the jury to acquit on the basis that there is no case to answer. If this submission does not succeed, evidence may be called, both from the accused and from other witnesses.

The accused as a witness

To give evidence, the accused must go into the witness box, give evidence on oath and be cross-examined.

No adverse inference can be drawn against an accused person who chooses to remain silent. Nevertheless, the decision to remain silent or give evidence should be made only after careful consideration and legal advice.

Address to the jury

After all the evidence has been given, both prosecutor and defence lawyer address the jury.

The judge's summing up

The judge then sums up the case for the jury, and explains and rules on matters of law.

The verdict

The jury leaves the courtroom to consider its verdict. It then returns and the foreperson gives the verdict, which must be unanimous.

After a long trial a jury may be given days to try to reach a unanimous decision. If a jury cannot agree, a judge will urge them to carefully review the evidence and the opinions of each other. If they still cannot agree after at least eight hours of deliberation, the judge may allow a majority verdict *but only where one juror disagrees*. If a jury still cannot reach a verdict, they will be discharged and the prosecution may ask for a new trial.

[14.660] If the person is found guilty

After someone has pleaded guilty to, or been found guilty of, an indictable offence, the judge hears evidence about the offence and the person's character, background and previous criminal convictions. Sentence hearing can be heard immediately after the verdict is returned but generally another day is set for the sentence hearing. A Community Corrections officer involved may be asked to prepare a *sentence assessment report*, setting out the person's background and suggesting sentencing options. The person can give evidence and call witnesses on their background and character or provide reports from experts such as psychologists.

The defence then addresses the judge on the aspects of the case most favourable to the accused.

The judge then formally convicts the accused, now called the *prisoner*, and passes sentence.

[14.670] Sentencing and penalties

Sentencing is covered by the *Crimes (Sentencing Procedure) Act*.

The Act establishing the offence generally sets out the penalty for it. This is a maximum only, and a lesser penalty may be imposed (s 21).

What must be considered

In considering the sentence, the court must balance the nature and circumstances of the offence and aggravating circumstances, such as the age and vulnerability of any victim, with mitigating factors such as the age, character and rehabilitation prospects of the accused (s 21A).

Discounts for pleading guilty

Courts must take a plea of guilty into account to reduce penalties (*Crimes (Sentencing Procedure) Act*, s 22 and s 25D). The earlier the guilty plea, the greater the reduction – from 5% to 25% discount (see *R v Thomson and Houlton* (2000) 49 NSWLR 383).

Where the court decides not to punish

Sometimes the court considers that, though a charge is proved, the offender, because of their character, background, age, health or mental condition (or because the offence is trivial or there are extenuating circumstances), should not be punished or should be punished only nominally.

In this case, the court may make an order:

- dismissing the charge; or
- after making a formal finding of guilt discharging the person without penalty or on a conditional release order bond under s 9 and s 10 of the *Crimes (Sentencing Procedure) Act* (this does not have the effect of a conviction (see [14.700]), which can be very important); or
- recording a conviction but imposing no other penalty (s 10A). As a formal conviction is recorded, the effects of conviction, such as licence suspensions, still apply.

Commencement of sentence

The court must specify when the sentence is to begin – generally, this is either the date of sentencing or the date on which the person was taken into custody.

For a cumulative sentence, it is the expiry date of the non-parole period already being served.

Maximum sentences

Usually, the section of an Act that creates an offence sets the maximum period of imprisonment. Maximum

penalties are normally reserved for the worst type of conduct that could constitute the offence, and the magistrate can impose a shorter period (s 21).

Concurrent and cumulative sentences

If a person is convicted of more than one offence, they are given a separate sentence for each. The judge may order that the sentences be served at the same time (*concurrently*), or increase the time the person will spend in prison by directing that the sentences be served one after the other (*cumulatively*), or be partially concurrent (s 55).

Aggregate sentences

Where a court is sentencing for a number of matters it can fix one aggregate sentence and an aggregate non-parole period to reflect the appropriate punishment for all the offences. In doing so, it must also indicate the appropriate sentence for each individual offence (s 53A).

Mandatory minimum sentences

People who commit certain specified offences face the risk that the court will impose a standard minimum non-parole period. These sentences are the minimum period that must be served and are very severe: 20 or 25 years for murder, 10 years for aggravated sexual assault and five years for aggravated break and enter.

Minimum non-parole periods relate to offences said to fall into the middle of the range of objective circumstances (s 54A). As there are many reasons for departing from this minimum, including an early guilty plea or the case made for the person, judges have considerable discretion to vary the standard minimum (see *Muldock v The Queen* [2011] HCA 39).

In addition, after a conviction for an assault causing death by an offender who heavily intoxicated the least penalty that can be imposed is eight years (*Crimes Act 1900*, s 25B).

Other offences taken into account

If a person being tried for one offence, such as armed robbery, committed another at about the same time, such as stealing a car, and has other charges before the court, they may, with the Crown's consent, ask the court to take them all into account when passing sentence.

The advantage is that the conviction is only on the first offence. No proceedings can be taken for the others and, in most cases, the sentence will be

less severe than if the matters had been dealt with separately.

Restrictions on Magistrate's sentences

Generally, Acts allow magistrates to impose sentences of up to one year's imprisonment. Exceptions are drug cases and indictable offences dealt with summarily, where a magistrate can impose up to two years' imprisonment.

There is no limit on the number of consecutive sentences magistrates can impose. The magistrate may direct that a sentence of imprisonment not commence until the accused has completed all or part of a term already being served. The maximum total sentence they can impose is five years (s 58).

[14.680] Penalties

Imprisonment

A court may not impose a full-time prison sentence without considering all possible alternatives and deciding that none is appropriate (*Crimes (Sentencing Procedure) Act*, s 5).

Parole and the non-parole period

The court can impose a fixed term of detention or, if the sentence is over six months, fix a period that must be spent in detention (the *non-parole period*) with the remainder to be spent on parole.

The parole period is generally one-quarter of the sentence unless special circumstances are shown to justify making the parole period longer. If a court considers that a person should have a longer than normal parole period, it must set out the reasons for its decision.

In setting both parole and non-parole periods, the court must always consider that the total term must be appropriate to the criminality involved in the offence, and the subjective circumstances of the person being sentenced.

Fixed terms

A court may impose a fixed term of imprisonment, with the prisoner being released at the end of that term without parole. Sentences under six months must be fixed terms.

Life imprisonment

Where the maximum penalty is life imprisonment

If the maximum sentence for an offence is life imprisonment, the judge can normally pass a

sentence of lesser duration (*Crimes (Sentencing Procedure) Act*, s 21).

Life sentences for murder or heroin trafficking

A life sentence imposed for murder, acts of terrorism or trafficking in commercial quantities of heroin is for the term of the prisoner's natural life (*Crimes Act 1900*, s 19A(2)).

From September 2018, significant changes were made to sentencing options other than full time imprisonment. Suspended sentences were abolished. Home detention and community service orders are no longer available as separate sentencing options. The terms good behaviour bonds is no longer used.

Intensive correction orders (ICOs)

A court which has sentenced an offender to imprisonment may make an intensive correction order directing that the sentence be served by way of intensive correction in the community. The sentence must be for two years or less for a single offence and three years or less for multiple offences.

Community safety is the paramount consideration when a court is deciding whether to make an ICO. The court must assess whether serving the sentence by way of ICO or full-time detention would be more likely to address the offender's risk of re-offending. An ICO cannot be made for murder/manslaughter, certain sexual offences, terrorism offences, and offences involving the discharge of a firearm.

ICO conditions

Supervision is a standard condition of an ICO. Further conditions may also be imposed by the court at the time of sentence. Home detention and electronic monitoring are available as additional conditions for an ICO. Other conditions can include a curfew, electronic monitoring, community service work and attendance at programs or treatment for drug addiction or mental health problems. A breach of an ICO can lead to the offender being sanctioned and can if a serious breach is proved involve serving the remainder of the sentence in prison. Decisions about sanctions and return to prison are not made by the sentencing court but by the State Parole Authority.

Community Correction Orders (CCOs)

Instead of imposing a sentence of imprisonment on an offender, a court that has convicted a person of an offence may make a CCO. The maximum term of a CCO is three years.

Standard and additional conditions can be imposed or subsequently on the application of a community corrections officer, juvenile justice officer or the offender. Courts may also vary or revoke additional and/or further conditions on application. Conditions can include community service work and attendance at programs or treatment for drug addiction or mental health problems.

Conditional release orders (CROs)

A court that finds a person guilty of an offence may make a CRO discharging the offender, with or without proceeding to a conviction. The maximum term of a CRO is two years. Home detention and community service work cannot be imposed but other conditions can include supervision, attendance at programs drug testing and place and association restrictions.

As with CCOs, the court has power to revoke a condition or impose additional conditions on application.

Breach of CCO or CRPO

If a court is satisfied that an offender has failed to comply with any of the conditions of a CRO or CCO, the court may:

1. decide to take no action; or
2. vary or revoke any of the conditions of the order (other than standard conditions), or impose further conditions; or
3. revoke the order.

If a court revokes a CCO or CRO, it may re-sentence the offender for the original offence.

Assessment reports

A sentencing court has power to request an assessment report on an offender from Community Corrections probation and parole service. The report will set out the offender's background and make suggestions for how they might be supervised in the community and conditions that might be imposed if they aren't sent to gaol.

An ICO must not be imposed without an assessment report unless the court is satisfied there is sufficient information before it to justify making the ICO without obtaining one.

A home detention condition cannot be imposed on an ICO, and a community service work condition cannot be imposed on an ICO or CCO, unless an assessment report has been obtained in relation to the imposition of such a condition and the offender is found suitable.

Fines

The Act creating an offence will usually set out the maximum fine that can be imposed. Fines can be in addition to other penalties (*Crimes (Sentencing Procedure) Act*, ss 14–16). The court is required to take into account the person's capacity to pay (*Fines Act 1996* (NSW), s 6).

Once a fine is imposed, notice is given of the amount and how it is to be paid.

Time to pay

Fines must normally be paid in 28 days.

A person who cannot pay a fine can approach the registrar of the Local Court and, if there is a reasonable explanation (which may involve giving details of income and expenditure), they will be given additional time to pay (*Fines Act 1996*, ss 10, 11).

Penalty units

Fines are often expressed in terms of *penalty units*. At present, one penalty unit is \$110 for state offences and \$180 for Commonwealth offences.

Good behaviour bonds

A court may order the person's immediate release on the person entering into a bond to be of good behaviour for a period that the judge or magistrate thinks appropriate, normally between one and five years. The court may impose conditions as part of the bond, such as accepting supervision from Community Corrections or attending rehabilitation programs. A court must take care to ensure that a condition of a bond is not too onerous or unreasonable (*R v Bugmy* [2004] NSWCCA 258).

Supervision by Community Corrections means that a parole officer remains in contact with the person, ensuring that living and work arrangements and other aspects of the person's life are satisfactory.

A fine can be imposed in addition to the bond.

If a bond is breached

A person who is convicted of another offence during the period of the bond, or who breaks any of its conditions, will be called up for breach of the bond before the judge or magistrate who originally gave it, or another judge or magistrate.

At the hearing, the prosecution must prove the fact of the original conviction and the bond, as well as the breach.

After hearing evidence of the breach and any evidence called by the accused, the court may decide to either take no action or impose a sentence for the original offence (see *Crimes (Sentencing Procedure) Act*, ss 9, 10, 11; Pt 8).

Enforcement proceedings for unpaid fines

If a fine is not paid, enforcement proceedings are commenced by the State Debt Recovery Office. An enforcement notice is sent, giving 28 days to respond.

If no arrangements are made to pay the fine (and any additional costs accrued along the way), the person's driving licence is suspended and, after six months, cancelled, and any vehicle registration is cancelled.

If there is nothing to cancel and no action is taken to pay the fine, civil action, including seizure of property or garnisheeing of wages, follows.

Community service orders

If all measures to recover the money are unsuccessful, a community service order can be imposed requiring the debt to be worked off.

Breaching the order can lead to imprisonment to serve out the debt. If imprisonment is ordered, an application can be made to the Commissioner of Corrective Services for it to be served as an intensive correction order (*Fines Act 1996*).

Fines and work development orders

Some people with intellectual disabilities or mental illnesses or who are suffering homelessness or experiencing acute economic hardship simply cannot pay a fine or do community service in lieu of paying their fines. They can apply to do unpaid work for an approved organisation or undergo medical or mental health treatment or counselling or do an educational course for a certain period as an alternative (*Fines Act 1996*, s 99A).

Financial hardship

If someone is unable to pay a fine because of financial hardship, or there are other special circumstances, an application for remission of the fine in whole or in part may be made to the governor, who will refer the matter to the Attorney General (s 100).

The application should be in writing and should set out details of:

- the accused;
- the case, date and court where they were convicted;
- the circumstances put forward as the grounds for remission.

Traffic cases

In traffic cases, such as drink or drug driving, where a person who is convicted may be disqualified from holding a licence, dealing with the case under s 10 means that there is no disqualification. A second s 10 order cannot be made within five years of the first (*Road Transport Act 2013*, s 203).

Compensation

Compensation for a crime causing personal injury or death can be paid, up to a maximum of \$50,000, by NCAT under the *Victims Support and Rehabilitation Act 2013* (NSW) (see Chapter 39, Victims Support).

In some cases, the money can be recovered from the offender.

[14.690] Appeals

A person who has been convicted by a jury or has pleaded guilty and been sentenced by a Supreme Court or District Court judge can appeal to the Court of Criminal Appeal.

How to appeal

The notice of intention to appeal, or to seek leave to appeal, must be lodged with the Court of Criminal Appeal within 28 days of the date of conviction or sentence. Extensions can be granted if proper reasons are given.

Within six months of filing the notice, an applicant must file both the grounds of appeal and written submissions in support of the appeal. A date for hearing will then be set by the court.

The appellant may be present at the hearing.

Grounds of appeal

The appeal can be:

- against conviction on any ground that only involves a question of law;

- with the leave of the court, against conviction on any ground involving a question of fact, both law and fact, or another sufficient ground of appeal;
- with the leave of the court, against the sentence (*Criminal Appeal Act 1912* (NSW), s 5(1)).

Appeal against conviction

The matter is not completely reheard by the Court of Criminal Appeal, as is the case with appeals from magistrates.

The appellant must convince the court that:

- the verdict was unreasonable or unable to be supported; or
- there was a wrong decision on a question of law; or
- there was a miscarriage of justice.

The appeal is generally decided on the transcript of the evidence at the trial, but if the appellant has new evidence, this should be placed before the court in the form of affidavits from witnesses, saying what they would say if called in a new trial.

Even if the court finds in the appellant's favour, it may dismiss the appeal if it decides that no *substantial* miscarriage of justice has occurred (s 6).

Appeal against sentence

If the Court of Criminal Appeal agrees that the sentence is too severe, it may reduce it.

The Crown can also appeal against the sentence imposed by the trial judge if it thinks it was too lenient, and the court can increase the sentence if it thinks fit (s 5D).

Risks of appealing from jail

There are two reasons why an appellant in jail should be careful about appealing:

- on rare occasions, if the court considers the appeal frivolous or unarguable, time spent in jail awaiting appeal does not count toward the sentence (s 18(3));
- it may be several months before the appeal is heard, and an appellant in custody may not be eligible for various prison programs during that time.

Effect of conviction

[14.700] Criminal records

The Police Service has a Criminal Records Unit that records all court appearances, arrests and convictions for:

- offenders aged 14 and over; and
- offenders under 14 where the offender was fingerprinted.

Records of juvenile offenders

Separate records of juvenile offenders are kept by the Criminal Records Unit, the Department of Community Services and the main Children's Courts (see Chapter 7, Children and Young People).

Records of traffic convictions

Traffic convictions are recorded by the Roads and Maritime Services in a traffic convictions record.

Is the record permanent?

A person's criminal history remains on record permanently unless they have had a charge dismissed and have applied to the police commissioner to have fingerprints destroyed and evidence of the charge removed.

When can information be released?

The police commissioner can release information from a criminal record only:

- with the person's consent; or
- on the request of a police officer or authorised public body.

What information is released?

Where information is requested by a police officer or authorised public body, a summary is normally released that omits:

- juvenile offences;
- arrests;
- dismissed charges;
- charges where the offence was proved but no conviction was recorded under s 10 of the *Crimes (Sentencing Procedure) Act*.

If a person received a bond and has not re-offended for 15 years, that conviction can be disregarded (*Crimes Act 1900*, s 579).

Federal law matters

For federal law matters, where a person was convicted of a minor offence (with a sentence of less than 30 months' imprisonment) and has been of good behaviour for 10 years, the conviction cannot be disclosed.

[14.710] Problems arising from a conviction

As well as being sentenced for the offence, offenders generally suffer other disabilities as a result of conviction – both legal and social – which may last for life.

Loss of voting rights

While serving a prison sentence of a year or more, a person loses their NSW voting rights (*Parliamentary Electorates and Elections Act 1912* (NSW), s 21).

In Federal elections, the High Court has held that persons serving sentences of more than three years are unable to vote (*Roach v Electoral Commissioner* (2007) 233 CLR 162).

Deportation

An immigrant who is not an Australian citizen and who has been sentenced to more than 12 months' imprisonment may be deported if they have been an Australian resident for less than 10 years.

Disqualification from jury service

People are disqualified from jury service if:

- they have been served a sentence of imprisonment in the last 10 years;
- they have been detained in a juvenile institution in the last five years;
- they are currently subject to bail, a domestic violence order, a court order to be of good behaviour, or parole;
- they are serving a sentence.

Employment in the public sector

A criminal conviction may affect a person's ability to obtain or keep a job in the public sector. Disclosure of any convictions, including dismissals without conviction, and the authorisation of a

criminal record check is generally required on application for a position.

While rights of appeal are provided, failure to reveal a conviction when asked or failure to disclose a conviction that occurs while employed can result in suspension or dismissal. The person can appeal with the help of their relevant union. Much will depend on the nature of the offence. Failure to disclose is generally regarded more seriously than the commission of a minor offence.

Applicants for licences

Licensing authorities can require details of criminal offences and any pending proceedings (*Licensing and Registration (Uniform Procedures) Act 2002* (NSW), s 14(2)).

Registration of professionals

Most professional bodies have a good character test and registration is dependent on showing such good character. If a person has a conviction, much depends on what it was for and when it occurred. Failure to disclose is generally regarded more seriously than the commission of a minor offence. For example, before registration, health professionals must authorise a criminal record check and disclose any criminal record, including matters where convictions were not recorded and spent convictions (see *Health Practitioner Regulation National Law*, s 77).

Private sector employment

There are no legal disabilities affecting a person with a criminal conviction in the private employment sector, but it is clear that many employers will not employ a person with a criminal record, particularly if it involves dishonesty.

Property insurance

A criminal record may affect a person's chances of obtaining property insurance.

Convicted child sex offenders

A person convicted of a child sex offence will be placed on the Child Sex Offender Register held by the NSW police. They will have special and very strict reporting and other conditions placed on them once they are convicted and, after any sentence, released into the community. The

offences covered and requirements are set out in the *Child Protection (Offenders Registration) Act 2000* (NSW). They include restrictions on employment and where a person can live. Failure to comply strictly with the requirements of the orders made can result in a further jail sentence.

[14.720] What must be disclosed?

What needs to be disclosed depends on the questions an applicant for a job or a licence is asked. These vary, not only in the private sector, but between different parts of the public sector.

Most application forms do not require disclosure of traffic offences, though some do.

Minor offences and spent convictions

Generally, minor matters (except sexual offences) need not be disclosed and can be disregarded if:

- there was a caution in the Children's Court;
- no conviction was recorded under s 10 of the *Crimes (Sentencing Procedure) Act*;
- the bond period for a no-conviction matter has expired and 10 crime-free years have elapsed.

These are called *spent convictions* (*Criminal Records Act 1991* (NSW)).

Once someone has a criminal record it stays on police files forever and can be raised if the person comes before a court again, but spent convictions need not otherwise be disclosed.

Section 10 dismissals

If a form only asks for convictions, a s 10 dismissal without conviction (under the *Crimes (Sentencing Procedure) Act*) need not be disclosed.

If, however, the form asks whether someone has been charged or had offences proved against them, a s 10 dismissal must be disclosed.

Time limits

There is no limit on how far back disclosure must go, and unless the form sets its own limit, an applicant must disclose all relevant offences.

The only exception is, that after 15 years, a suspended sentence can be disregarded for all purposes if the bond entered into was not breached and no other indictable offences have occurred during that time (*Crimes Act 1900*, s 579).

[14.730] Obtaining a person's record

Private employers cannot obtain a person's criminal record without their consent.

Many employers, however, especially when the job is in a sensitive area such as childcare, will not employ a person unless they either:

- obtain a certificate from the police saying they have no relevant convictions; or
- give the employer the authority to apply to the police on their behalf.

Probity checks

Some legislation provides for probity checks of child care or casino employees or security guards. The relevant licensing authority obtains this information. An integrity check for a licensing authority involves an extensive check, but all that is released is a statement of whether or not the person satisfies the test.

There are no appeal or review provisions.

Public service and other agencies

Public servants, on application, sign an authority allowing a record check. Generally only those in sensitive positions, such as child care workers or employees of the Director of Public Prosecutions, are checked, though in theory all can be.

Agencies such as electricity and gas authorities can also require employees to allow a check.

Records released to the public service or related authorities include not only convictions but also matters that did not proceed.

Getting your own record

People can get a copy of their record from the police Criminal Records Unit. It contains only convictions, not arrests or dismissals. There is a search fee.

Contact points

[14.740] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)

www.austlii.edu.au

Australian Federal Police

see Police

Bar Association, NSW

www.nswbar.asn.au

ph: 9232 4055

Council for Civil Liberties, NSW (NSWCLL)

www.nswcll.org.au

ph: 8090 2952

Children's Courts

www.childrenscourt.justice.nsw.gov.au/

See Contact points of Chapter 7, Children and Young People for a list of children's courts.

Community Legal Centres NSW

For a list of Community Legal Centres, see www.clcnsw.org.au.

Coroner's Court

www.coroners.justice.nsw.gov.au

Corrective Services NSW (CSNSW)

www.correctiveservices.justice.nsw.gov.au

ph: 8346 1333

Court of Criminal Appeal

Supreme Court of NSW

www.supremecourt.justice.nsw.gov.au

Crown Solicitor's Office

www.cso.nsw.gov.au

Department of Justice (NSW)

www.justice.nsw.gov.au

ph: 8688 7777

Director of Public Prosecutions, Office of

www.odpp.nsw.gov.au

ph: 9285 8606 or 1800 814 534

Witness Assistance Service

www.odpp.nsw.gov.au/was

ph: 1800 814 534

District Court of NSW

www.districtcourt.justice.nsw.gov.au

Civil Registry

enquiries: 1300 679 272

records: 9377 5355

Criminal Registry

results: 9287 7581

records: 9287 7314

trials: 9287 7332

all other enquiries: 1300 679 272

Domestic Violence Line

www.facs.nsw.gov.au

Family & Community Services

ph: 1800 656 463

A complete list of contacts relevant to domestic violence is in Contact points of Chapter 19, Domestic Violence.

Drug Court of NSW

www.drugcourt.justice.nsw.gov.au

ph: 9287 7305

Family Court of Australia

www.familycourt.gov.au

ph: 1300 352 000

Federal Circuit Court (previously Federal Magistrates Court)

www.federalcircuitcourt.gov.au

ph: 9230 8567

Federal Court of Australia

www.fedcourt.gov.au

ph: 9230 8567

High Court of Australia

www.hcourt.gov.au

ph: 6270 6811

Immigration and Citizenship

see **Department of Home Affairs**

immi.homeaffairs.gov.au/

ph: 131 881

Independent Commission Against Corruption (ICAC)

www.icac.nsw.gov.au

ph: 1800 463 909 or 8281 5999

Justice Action

www.justiceaction.org.au

ph: 9283 0123

Juvenile Justice, Department of

www.juvenile.justice.nsw.gov.au

ph: 8346 1333

See website for a list of Juvenile Justice Centres and services.

LawAccess NSW

www.lawaccess.nsw.gov.au

ph: 1300 888 529

Law and Justice Foundation of NSW

www.lawfoundation.net.au

ph: 8227 3200

Law Society of NSW

www.lawsociety.com.au

ph: 9926 0333

Legal Aid NSW

www.legalaid.nsw.gov.au

ph: 1300 888 529

Youth hotline

ph: 1800 101 810

See website for a full list of Legal Aid offices.

Local Courts

For a list of local courts, see www.localcourt.justice.nsw.gov.au.

National Women's Justice Coalition

www.onlymelbourne.com.au/nwjc-national-women-s-justice-coalition-inc.

NSW Police

(including Witness Assistance Program)

www.police.nsw.gov.au

Customer assistance unit

ph: 1800 622 571

General enquiries

ph: 131 444

Crimestoppers

www.crimestoppers.com.au

ph: 1800 333 000

Office for Women's Policy

www.women.nsw.gov.au

Ombudsman, Commonwealth

www.ombudsman.gov.au

ph: 1300 362 072

Ombudsman, NSW

www.ombo.nsw.gov.au

ph: 1800 451 524 or 9286 1000

Police, Australian Federal

www.afp.gov.au

ph: 5126 0000 for all general enquiries

Public Defender's Office

www.publicdefenders.nsw.gov.au

ph: 1300 888 529

Supreme Court of NSW

www.supremecourt.justice.nsw.gov.au/

ph: 1300 679 272

SWOP (Sex Workers Outreach Project)

www.swop.org.au

ph: 1800 622 902 or 9206 2166

Victims of Crime

A list of contacts relevant to victims of crime is in Contact points of Chapter 39, Victims Support.

Witness Assistance Service

See entry under Director of Public Prosecutions, Office of

Witness Protection Program

www.police.nsw.gov.au

