# PREPARING A DEFENDED HEARING IN THE LOCAL COURT

## I. INTRODUCTION

There are several ways to approach a defended hearing, and each advocate will have a different approach and style. The purpose of this paper is to set out a number of matters to be considered when preparing and appearing in a Local Court defended criminal hearing on behalf of an accused person.

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

The Acts that are referred to throughout this paper are the:

- *Crimes Act 1900* (NSW) (the *Crimes Act*).
- *Criminal Procedure Act 1986* (NSW) (the *Criminal Procedure Act*).
- *Evidence Act 1995* (NSW) (the *Evidence Act*).

## II. THE OFFENCE

### A. What is your client charged with?

It is important to be aware of the precise offence that your client is charged with, and to thoroughly research the law in relation to that offence.

A number of offences have specific legal principles. For example:

- In relation to offences of receiving or disposing of stolen property (ss 188 and 189 *Crimes Act*) one of the elements is "knowing that an item was stolen". "Knowing" has a specific meaning at law.
- In relation to Malicious Wounding (s 35(1)(a) *Crimes Act*) the intention that has to be proved is the intention to cause some physical injury and not the particular injury that may have been caused (*R v Stokes and Difford* (1990) 51 A Crim R 25).

Secondly, an offence may include a number of different types of conduct. It is important to be aware of what exactly the type of conduct alleged by the prosecution is.

For example, Goods in Custody (s 527C *Crimes Act*) encompasses a person:

- Having any thing in his/her custody;
- Having any thing in the custody of another person;
- Having any thing in or on premises, whether belonging to or occupied by him/her, or whether that thing is there for his/her own use or the use of another; or
- Giving custody of any thing to a person who is not lawfully entitled to possession of the thing;

and that thing may be reasonably suspected of being stolen or otherwise unlawfully obtained.

It is important to obtain and look at the Court Attendance Notice (CAN) to clarify the particulars of the charge. If the CAN does not clarify the particulars of the charge, you can request these particulars from the prosecutor (see below). You should confirm the particulars of the offence with the prosecutor at the time of the hearing.

Commentaries on the law relating to specific offences can be found in good loose-leaf services. In addition, the Acts listed in the NSW Consolidated Acts section of Austlii have a ‘noteup’ facility, where the cases which consider each individual section of an Act can be accessed. See <http://www.austlii.edu.au/au/legis/nsw/consol_act/>

**B. The elements of the offence**

It is very important at the outset to identify the elements of each offence with which your client is charged. As the elements are the individual components of an offence, the prosecution must prove each element beyond reasonable doubt.

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

- Divide a page into two columns.
- Label one column "the elements of the offence" and the other column "the evidence".
- Write down each element of the offence on one side of the column, and on the other side, the evidence that the prosecution brief relies upon to prove each element.

After you have examined the elements, you should re-examine the wording of the charge for possible defects. For example, the offence might be duplicitous or ambiguous.

**C. The type of offence and directions that may apply**

Some types of offences have specific law and procedure related to them. For example, as Leonie Flannery points out in her paper *Matters to Consider when Preparing and Conducting Sexual Assault Trials* <http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_sexualassaulttrials> these following issues are usually relevant in sexual assault offences:

- The admissibility of tendency evidence and relationship evidence.
- The admissibility of complaint evidence.
- The probative value of medical evidence.

Similarly, there are offences where there may be specific directions of law that may be applicable. Continuing with sexual assault matters as an example, the applicable warnings may include:

- A *Murray* direction (*R v Murray* (1987) 11 NSWLR 12) - that where there is only one witness asserting the commission of a crime, the evidence of that witness must be scrutinised with great care before arriving at a verdict of guilty.
- A *Longman* direction (*Longman v R* (1989) 168 CLR 79) - that by reason of delay, it would be unsafe or dangerous to convict on the uncorroborated evidence of the complainant alone, unless the jury scrutinizing the evidence with great care, considering the circumstances relevant to its evaluation and paying heed to the warning, were satisfied of its truth and accuracy.
- A *Gipp* warning (*Gipp v R* (1998) 194 CLR 106) - concerning the way in which evidence of uncharged sexual conduct between an accused and a complainant can be taken into account as showing the nature of the relationship between them, but not so as to substitute satisfaction of the occurrence of such conduct for proof of the act charged.

See *R v BWT* (2002) 54 NSWLR 241 at [32] per Wood CJ at CL.

In addition to directions relating to the type of offence, there are also other directions that may be relevant, including directions against an accused (such as lies as consciousness of guilt). It is important to be aware of all potential directions in a matter.

The following are excellent sources of information on the elements of an offence and directions that may apply:

- The Judicial Commission Criminal Trial Bench Book:

<http://www.jc.nsw.gov.au/bench%20books%20and%20references/Criminal%20Trial%20Courts/Agreement%20for%20Use%20internet%20only.htm>

- John Stratton's Criminal Law Survival Kit:

<http://www.users.bigpond.com/JohnStratton/>

**D. The date of the offence**

The date of the offence will be found on the police facts and court attendance notice.

Some of the reasons why the date of the offence is important include:

- For some offences, a charge must be laid within a certain period.

  A strictly summary offence (one that can only be dealt with in the Local Court) must be laid within six months of the date of the offence (s 179 *Criminal Procedure Act*). There are some exceptions.

- Police officers may be able to read their statements in court.

  Police officers can read their statements in court or can be lead through their written statements if the statement was made at the time of, or soon after the event to which the statement refers (s 33 *Evidence Act*). Therefore, if a police officer's statement is made weeks or months after an offence, the police officer will not be able to read it onto the record unless you consent to this happening .

- The date of offence will determine the correct section under which an offence may be laid.

It is always important to check what the *Crimes Act* provisions (or of any other Act under which an offence is laid) were at the time of an offence, as they may have been amended, substituted or repealed.

The NSW Government legislation website <http://www.legislation.nsw.gov.au/> is an excellent resource for historical versions of legislation is

**E. Does the Local Court have jurisdiction to hear and finalise the matter?**

You should always check what type of offence your client is charged with and whether it is an offence that can be dealt with to finality in the Local Court.

To find out whether an indictable matter can be dealt with to finality in the Local Court, look at the Tables in the *Criminal Procedure Act* (which are located towards the end of the Act). Table One and Table Two offences can be dealt with in the Local Court, unless there is an election for them to be dealt with in the District Court.

The type of offence (in a Local Court hearing - whether it is a Table One, Table Two or strictly summary offence) is also relevant to the admissibility of oral admissions. In a Local Court hearing, the requirement in s 281 *Criminal Procedure Act* that there be electronic recordings of admissions made by suspects only applies to Table One offences.

**F. The maximum penalty for the offence**

Although not relevant until guilt is proved, the maximum penalty for an offence, as a matter of thorough preparation for the hearing, you will need to know what the maximum penalty for each offence with which your client is charged.

You will find out the maximum penalty for the offence your client is charged with by looking at the legislation defining the offence. Almost all offences in the *Crimes Act* state the maximum penalty. For other offences, such as in the *Drug (Misuse and Trafficking) Act 1985* (NSW), the maximum penalty will be found within the Act but not in the section of the Act where the particular offence is set out.

The maximum penalty for an offence may be lower if the matter is heard in the Local Court. For example:

- Steal From Person (maximum penalty of 14 years imprisonment if dealt with in the District Court) can be either a Table One or a Table Two Offence, depending on the value of the property stolen. If the value of the property exceeds $5000.00, it is a Table One offence and carries a maximum penalty of 2 years imprisonment. If the value of the property does not exceed $5000.00 it is a table 2 offence and the maximum penalty is 2 years, or a fine of 50 penalty units or both ( unless the amount concerned is less than $2000 in which case the fine is reduced to a maximum of 20 penalty units).

## III. THE PROSECUTION CASE

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

### A. The Brief of evidence

The prosecution is required to serve the brief of evidence on the defence before a matter is set down for hearing: Part 2 Division 2 *Criminal Procedure Act*; Local Court Practice Direction 8/2003; Local Court Practice Direction 2/2004.

The brief of evidence consists of the written statements regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence. Section 183 *Criminal Procedure Act* states that a brief of evidence is to include:

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

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

The brief of evidence will usually include:

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

Always check the following:

- That statements have been signed and dated.
- That any expert certificates included in the brief comply with s 177 *Evidence Act*, particularly in relation to s 177(2) (that the writer has specialised knowledge) and s 177(3) (that the opinion is based on the specialised knowledge).
- That the other requirements in relation to expert certificates contained in s 177 *Evidence Act* are complied with. Section 177 sets out the procedure for certificates of expert evidence, including the time for service (s 177(3)). If you require the expert who made the statement to give evidence, you have to serve written notice on the prosecution as otherwise the expert certificate can be tendered in the hearing (s 177(5)).

**B. Making requisitions and requests for particulars: sections 166 - 169 *Evidence Act***

Once you have read the police brief of evidence consider whether you need further information. Often there will be additional information or details that are required but which are not contained in the brief of evidence.

You can seek this information by making requisitions or seeking particulars from the prosecution. This is done by writing to the Officer in Charge of the matter and sending a copy of that letter to the senior police prosecutor at the relevant court or police station.

Examples of matters that might be requisitioned, if relevant, are:

- Your client's criminal record.
- The criminal records of the victim or other relevant witnesses.
- Original medical and other records.
- Applications for search warrants and listening device warrants.
- Custody management records pursuant to Part 10A *Crimes Act*.
- Other documents that are referred to in the brief but are not contained in the brief.

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

### C. Subpoenaing documents

Subpoenas are often issued to obtain material that might not have been provided by the prosecution.

Sections 220 - 232 *Criminal Procedure Act* relate to subpoenas in the Local Court. The procedures relating to issuing and setting aside subpoenas are also covered by the court rules in each jurisdiction. In the Local Court, the applicable rules are contained in Part 7 (rules 40-49) of the Local Courts (Criminal and Applications Procedure) Rule 2003.

A detailed discussion of the considerations involved in subpoenaing documents can be found in chapter 7 of the NSW Young Lawyers Criminal Law Committee's *A Practitioner's Guide to Criminal Law* (3rd ed).

## IV. YOUR INSTRUCTIONS

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

After you have the brief of evidence, you can take detailed instructions from your client.

Your instructions should include:

- Your client's version of the events.
- Your client's comments on the victim and witness statements.
- Your client's comments on their arrest, charging, detention and interviewing.

You should always get your client to sign his/her instructions to you.

## B. Does your client have a defence?

Your client may deny the allegation altogether, dispute certain facts alleged by the police in support of one or more elements of the offence, raise a defence at law, or seek to put the prosecution to proof.

It is important to be aware of what defences may be available in a particular case.

There are a number of defences at law, such as duress, necessity, claim of right and self defence. Strictly speaking not all of these are "defences" but are matters that, once raised, the prosecution has to prove beyond reasonable doubt were not present in the particular case.

Other defences may operate in different ways depending on the type of offence. For example, intoxication at the time of the relevant conduct may be taken into account (see Part 11A *Crimes Act*) in the following way:

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

## C. Evidence of good character

Evidence of good character is significant for two reasons:

- An accused is, by virtue of his/her good character, considered unlikely to be guilty of the offence charged.
- Good character can be used in assessing the credibility of the accused in the denial of the charge, and therefore the unlikelihood of guilt

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

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

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

Evidence of good character can be led from:

- The officer in charge of the matter.
- The accused.
- Any defence witnesses called to give evidence in relation to the accused’s character.

**D. Defence witnesses**

In the same way as you take a statement from your own client, you also take statements from other defence witnesses if you have any. Defence witnesses may support your client's case in important respects.

You need your client’s instructions as to what witnesses may be able to give evidence in the defence case. These may include witnesses that the prosecution has overlooked or who the prosecution does not intend to call to give evidence.

# V. BEFORE THE HEARING

## A. Speaking to the prosecutor

There are several reasons why it is beneficial to speak to the prosecutor before a hearing, including:

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

If the DPP has carriage of a matter, a DPP solicitor is allocated to each individual matter. If the matter is prosecuted by police prosecutors the prosecutor is likely to be reading the brief of evidence on the date of the hearing. You can still ring the police prosecutors in advance of the hearing though and ask to speak to either the senior police prosecutor or another police prosecutor to discuss the case.

## B. Speaking to prosecution witnesses

There is no property in witnesses. Therefore, you are able to speak to the prosecution witnesses, although it will be in a small minority of cases that you will actually want to speak to prosecution witnesses.

Police and civilian witnesses

You should be very careful when speaking to prosecution witnesses, especially civilian witnesses. It is preferable before speaking to a civilian witness to speak to the Officer in Charge of the case as well as the solicitor with carriage or the police prosecutor.

It would be an unusual case where you would seek to speak to a victim in a matter, even where the victim wishes to speak to you. You should also note that the Law Society has issued Guidelines in relation to contact with complainants in apprehended violence orders and family violence matters. The Guidelines are available from the Law Society.

Expert witnesses

You should always consider speaking to an expert witness to be called by the prosecution. Most experts pride themselves on their impartiality. You will benefit from speaking to the prosecution's expert by talking to them about their evidence and how they arrived at their opinions. This information will help you in preparing your case, and particularly your cross examination.

**C. Late service of statements**

Police and prosecutors may seek to serve additional statements within 14 days of the hearing date, and frequently even on the date of the hearing.

You can object to the contents of the statement being led as evidence in the hearing, as evidence not served in accordance with the procedure set out in the *Criminal Procedure Act* is inadmissible (s 188 *Criminal Procedure Act*).

It is for the prosecution to provide reasons as why the evidence contained in the statement should be led. The evidence may still be led, as a court has the power though to order that all or part of the brief not be served (s 187(1) *Criminal Procedure Act*) or to adjourn the proceedings to allow the prosecution to comply with s 183 *Criminal Procedure Act* (s 187(4) *Criminal Procedure Act*).

# VI. THE HEARING

Both the *Criminal Procedure Act* (particularly Chapter 4 Part 2) and the *Evidence Act* contain a number of important sections relating to the taking of evidence from witnesses.

Some of the important sections to be aware of are set out below.

**A. How evidence is to be taken**

- Section 195 *Criminal Procedure Act*

A prosecutor and an accused may each give evidence and may examine and cross-examine witnesses called by the prosecution or by the accused.

- Section 27 *Evidence Act*

A party may question any witness, except as provided by the *Evidence Act*.

- Section 28 *Evidence Act*

Unless the court otherwise directs, cross-examination of a witness is not to take place before the examination in chief of the witness, and re-examination of a witness is not to take place before all other parties who wish to do so have cross-examined the witness.

**B. Questioning witnesses**

- Section 29 *Evidence Act*

A party may question a witness in any way the party thinks fit, except where such questioning contravenes the *Evidence Act* or a direction of the court.

- Section 37 *Evidence Act*

A leading question is one that suggests the answer, or presumes matters not yet in evidence.

A leading question must not be put to a witness in examination in chief or in re-examination except in certain circumstances, including where the court gives leave or the question relates to a matter that is not in dispute.

- Section 42 *Evidence Act*

A party may put a leading question to a witness in cross-examination unless the court disallows the question or directs the witness not to answer it.

A court may take into account a number of matters in deciding whether to disallow the question or give such a direction, including the extent to which evidence that has been given by the witness in examination in chief is unfavourable to the party who called the witness, the witness' age, or any mental, intellectual or physical disability to which the witness is subject, and which may affect the witness' answers.

- Section 39 *Evidence Act*

In re-examination a witness may be questioned about matters arising out of evidence given by the witness in cross-examination, and other questions may not be put to the witness unless the court gives leave.

**C. Improper questions**

- Section 41 *Evidence Act*

The court may disallow a question put to a witness in cross-examination, or inform the witness that it need not be answered, if the question is misleading, or unduly annoying, harassing, intimidating, offensive, oppressive or repetitive.

A court can take into account certain matters including any relevant condition or characteristic of the witness, as well as age, personality and education, and any mental, intellectual or physical disability to which the witness is or appears to be subject.

**D. The Court's control over questioning of witnesses**

- Section 26 *Evidence Act*

The court may make such orders as it considers just, including in relation to the way in which witnesses are to be questioned, and the order in which parties may question a witness, and the presence and behaviour of any person in connection with the questioning of witnesses.

Note also the provisions of the *Evidence (Children) Act, which* contain special provisions for the giving of evidence by children in certain matters.

## VII. CHALLENGING THE PROSECUTION CASE

The prosecution will present their case first. In the Local Court the prosecution generally calls witnesses in this order:

- Police witnesses.
- The alleged victim.
- Other witnesses (including expert witnesses), if any.

**A. Exclusion of evidence**

Admissibility of evidence

You should diligently consider all relevant aspects of the *Evidence Act* with a view to ascertaining the admissible and inadmissible evidence. This will assist in determining the issues at hearing.

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

Unlawfully or improperly obtained evidence

These matters include:

- The lawfulness of arrest. See *Christie v Leachinsky* [1947] AC 573; *Adams v Kennedy* [2000] 49 NSWLR 78. An arrest solely for the purposes of questioning a person or to obtain evidence is unlawful: *Williams v R* (1986) 161 CLR 278; *R v Foster* (1993) 67 ALJR 550.
- The suitability of arrest. See *DPP v Lance Carr* (2002) 127 A Crim R 151; *DPP v CAD* [2003] NSWCCA 196; *DPP v Coe* [2003] NSWSC 363.
- Compliance with the detention after arrest provisions contained in Part 10A *Crimes Act* and the Crimes (Detention After Arrest) Regulation 2000, especially in relation to vulnerable persons.
- Powers of search and seizure. See for example s 28A *Summary Offences Act 1988* (NSW).
- Oral questioning of witnesses in the absence of videotape or audio taped recordings (s 281 *Criminal Procedure Act*).
- Police impropriety (ss 84, 85, 86, 90 *Evidence Act*).

Proven impropriety in the conduct of police may lead to the exclusion of evidence improperly or illegally obtained (s 138 *Evidence Act*).

Discretionary exclusion of evidence

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

- The discretion to exclude admissions (s 90).
- The general discretion to exclude evidence (s 135).
- The general discretion to limit use of evidence (s 136).
- The exclusion of prejudicial evidence in criminal proceedings. Such evidence must be excluded if the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant (s 137).
- The exclusion of improperly or illegally obtained evidence (s 138).
- The exclusion of evidence if the person was not under arrest and no caution was given (s 139).

**B. Challenging the evidence**

Challenging the credibility of the police or their witnesses

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

- You may cast doubt on the ability of a witness to observe the events they have stated in evidence.
- You may be aware of a prior inconsistent statement made by a witness and can cross-examine the witness on that prior inconsistent statement.

Inconsistency between prosecution witnesses

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

Corroboration of the defence case from prosecution witnesses

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

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

The rule in *Browne v Dunne*

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

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

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

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

<u>Unreliability of evidence</u>

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

- Hearsay evidence.
- Evidence of admissions.
- Identification evidence.
- Evidence, the reliability of which may be affected by age, ill health (whether physical or mental), injury or the like.
- Evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding.
- Evidence given in a criminal proceeding by a witness who is a prison informer.
- Oral evidence of official questioning of an accused that is questioning recorded in writing and has not been signed, or otherwise acknowledged in writing.

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

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

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

### C. Assessing the evidence at the end of the prosecution case

At the end of the prosecution case, in some cases you can make a submission that your client has "no case to answer". The court is required to decide whether a prima facie case exists. The question at this stage is, on the evidence as it stands, could the accused lawfully be convicted. This is a question of law (*May v O'Sullivan* (1955) 92 CLR 654).

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

You need to be mindful about making a 'second limb' submission, because some Magistrates take the view that if the submission is made and is unsuccessful, the accused is then precluded from giving evidence or calling evidence in the defence case. It is advisable to seek an opinion from the Bench before making a 'second limb' submission.

## VIII. THE DEFENCE CASE

If you are not making or are unsuccessful with either of the submissions mentioned immediately above, the hearing proceeds to the defence case.

**A. Opening statements**

Section 159 *Criminal Procedure Act* allows an accused person or his/her counsel to make opening addresses at two points:

- Immediately after the opening address by the prosecutor. Any such opening address is to be limited generally to an address on the matters disclosed in the prosecutor's opening address, including those that are in dispute and those that are not in dispute, and the matters to be raised by the accused person.
- If the accused intends to give evidence or to call any witness in support of the defence, the accused person or his or her counsel is entitled to open the case for the defence before calling evidence, whether or not an address has been made after the prosecutor's opening address.

Although s 159 refers specifically to addresses to the jury, opening addresses in the Local Court can be effective. Your opening address will be the first opportunity to tell the Magistrate what the case is about.

An opening address should clearly and logically outline the facts, and perhaps give a general outline of the issues involved in the case. The purpose of the opening address is not to put a legal argument (that is for the closing address). You should always be mindful about not disclosing too much of your case to the Crown.

**B. To call your client or not to call your client?**

Every accused has a right to silence. The decision to call your client to give evidence is therefore an important one.

The advantage is that the Magistrate will hear your client's sworn evidence. There are a number of disadvantages. Your client might not cope well under cross-examination. Your client may not make a good witness (you will be able to assess this through your conference with your client). In some cases, the prosecution may be assisted in proving matters if your client was to give evidence.

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

Calling a client to give evidence is not a necessity, and in some cases, it may be better for the client to exercise their right to silence. Each case and client needs to be assessed before the decision is made, and you may wish to see how the evidence in the hearing is progressing before you make this decision. You should get your client's written instructions about whether he/she wishes to give evidence.

**C. Calling witnesses in the defence case**

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

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

**D. Closing addresses**

The closing address is the last opportunity where you will have to present your version of the events and your position in relation to the facts and the issues to the Magistrate. The closing is a presentation of an argument as to why your client should be acquitted.

The closing address will highlight:

- The evidence in relation to the elements of the offence and why the prosecution has not established the elements of the offence beyond reasonable doubt.
- The important issues in the case.
- The weaknesses in the prosecution case.
- Any defences raised.
- Relevant case law.

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

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

## IX. TIPS ON PREPARING FOR A DEFENDED HEARING

### A. Analyse the case in minute detail

It is essential to go through the statements in the most exacting detail. It can literally be a case of going through every word in the statements - such as dates, times, and words spoken - to analyse the prosecution case. The following two points (in addition to the other points made in this paper) discuss some of the ways that a prosecution case can be analysed in minute detail.

**B. Create a detailed summary of the statements of each witness**

Preparing a detailed paragraph-by-paragraph summary of the statements of each witness is a useful tool of preparation. It will be helpful in determining the evidence that is in dispute and the evidence that is not.

**C. Create a detailed chronology of the matter**

It will often be helpful in your preparation to write down a detailed chronology of the events, both leading up to an incident and after the incident. The chronology may be a summary of the different statements contained in the brief of evidence.

**D. Prepare your closing address first**

It is often said that the preparation of a case should commence with the closing address.

The reason for preparing closing addresses first is that it highlights the crucial issues in your case, such as:

- Important issues in your case.
- Possible statutory defences.
- What evidence you will have to lead from particular witnesses.
- Case law that is relevant and which supports your case.

You closing address (as well as your preparation for questioning, as discussed below) will have to have a degree of flexibility, to allow you to include matters that arise out of the evidence during the hearing.

## E. Prepare your question areas

It is always more persuasive to be able to look at a witness, and to listen to the answers that a witness gives. For this reason, writing down every question you propose to ask in examination in chief and cross examination can be of limited value only.

It may be more helpful to write down a list of topics or areas for examination in chief and cross-examination. If you are well prepared, you will have a good understanding of the case and the evidence you are trying to elicit, and you can rely on your notes less.

## F. Use exhibits as much as you can

Exhibits can take the form of diagrams, models, maps, photographs, actual objects, audio and video recordings. Exhibits can also take the form of summary charts of evidence or of other information involved in the case.

Section 29 *Evidence Act* states that evidence may be given in the form of charts, summaries or other explanatory material if it appears to the court that the material would be likely to aid its comprehension of other evidence that has been given or is to be given.

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

## G. Have a view of the area where an offence is alleged to have been committed

It is often invaluable to have a view (that is, a visual inspection) of the location where the allegation is said to have occurred. This will help you understand the area in a way that photographs (which might be included in the brief of evidence) will not be able to show. You will also gain an appreciation of the surrounding location.

## H. Take thorough notes of the evidence

To be able to take useful notes of the evidence at the hearing, you must be as organised as possible.

It might be useful to have your list of areas of questioning on a separate document to the notes you take. The notes of evidence in chief might be divided into two columns. On one side of the page, you can write the actual evidence. On the other side you may be able to make notes on cross-examination or notes for your closing address.

Similarly, during your client or witness' cross-examination, you may write the evidence they have given on one side of a column, and any re-examination points on the other side.

You will also need to maintain a list of the exhibits as they are tendered at hearing.

## I. Make effective objections

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

There can be no substitute for a thorough understanding of the *Evidence Act* and the grounds for objection contained in the *Evidence Act*. It is useful to have a list of headings of the most common grounds for objection to assist you in determining the basis of your objection. Some of these grounds are:

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

You object to evidence by standing and stating “I object”.

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

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

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

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

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

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

**K. Subpoena witnesses for the defence**

As a matter of caution, it is always preferable to subpoena your own witnesses, even if they tell you that they will be coming to court to give evidence. In case one of the defence witnesses is not able to attend court on the date of the hearing and you are seeking an adjournment, it will usually assist you that you have made formal arrangements to have that witness attend court through having subpoenaed them to give evidence.

# X. STEPS FOLLOWING CONVICTION AT THE HEARING

## A. Sentencing

If your client is convicted, the Magistrate will expect to be able to proceed to sentence as soon as possible, and so you should be ready to proceed with your matter to sentence immediately after the hearing. Exceptions would be when a pre-sentence report is required, or when you require references to be obtained on your client's behalf.

In all other matters, you should be ready to proceed to sentence immediately. It may be that the Magistrate does not require a pre-sentence report, or that references do not add anything to your client's case. In these circumstances, you should be able to have your client sentenced immediately. Ensure that you have the necessary instructions at the outset of the hearing.

## B. Appealing to the District Court

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

Appeals to the District Court are dealt with in the *Crimes (Local Courts Appeal and Review) Act 2001.* Appeals to the District Court are generally argued on the transcript of the hearing in the Local Court. That is, witnesses are not usually called to give evidence once again in the District Court.

### C. Bail pending an appeal to the District Court

If your client is likely to be given a sentence of imprisonment after conviction and sentencing, you should have sufficient instructions to be able to apply for bail on your client's behalf.

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

## XI. PRACTICE NOTES RELATING TO LOCAL COURT HEARINGS

There are a number of Practice Notes relevant to hearings in the Local Court. These can be found at:

http://www.lawlink.nsw.gov.au/lc.nsf/pages/practice_collections

The following is a list of the Practice Notes relevant to defended hearings.

### A. Local Court Practice Note Number 2 of 2004: Listing procedure for summary criminal trials

This Practice Note applies where a plea of not guilty is entered in respect to proceedings for summary offences including proceedings for indictable offences that are being dealt with summarily.

The Practice Note sets out these procedures:

- Where a person is charged with a Table One offence or a plea of not guilty is entered to a charge that is to be dealt with summarily, a Registrar or a Magistrate is to fix a timetable for service of the prosecution brief of evidence upon the accused.
- The period allowed for service of the brief will generally be at least 4 weeks from the date of the making of the order.
- A Court Listing Advice listing the statements contained within the brief is to be served by the prosecution with the brief. (The form of the Court Listing Advice is attached to the Practice Note).
- The proceedings are generally adjourned to a date 14 days after the date for the service of the brief. This period is to be used by the accused and/or legal representatives to consider the evidence and the prosecution witnesses required for cross-examination.
- A date for hearing will not generally be allocated until the plea of not guilty is confirmed on the return date after the period specified for service and consideration of the brief.
- A Notice of Appearance (to allow for the service of the brief).
- A Local Court Listing Advice. The prosecution is required only to call at the hearing those witnesses nominated for cross-examination on the Listing Advice.

**B. Amended Local Court Practice Note 1 of 2001: Practical matters in relation to defended hearings**

The Practice Note sets out ways in which practitioners can assist the work of the court, including ready identification of issues genuinely in dispute, ensuring readiness for trial and providing reasonable estimates of the length of hearings.

The Practice Note covers matters such as:

- Setting matters down for hearing.
- Interlocutory matters, such as return dates for subpoenas.
- Vacating hearing dates.
- Adjournment applications.

**C. Local Court Practice Note Number 10 of 2003: Representations for withdrawal and time standards for matters being dealt with summarily**

This Practice Note sets out the procedures when a party intends to make representations for withdrawal of proceedings and the consequent adjournment of proceedings, including:

- The information to be specified in the representations.
- Notification of the court in writing of the fact and date of service of the representations by the accused's legal representative.
- The place of Service of Representations

**D. Local Court Practice Note Number 3 of 2004: Criminal proceedings involving child witnesses**

The purpose of this Practice Note is to ensure the management and expeditious hearing of criminal proceedings involving child witnesses. The Practice Note includes matters such as:

- Parties' obligation to notify the Court that the proceedings involve a witness who is a child.
- The Court making directions for arrangements to be made to facilitate the giving of evidence in chief by the child witness.
- Directions such as the use of CCTV facilities and other arrangements for the giving of evidence by a child witness.
- Other matters relating to the *Evidence (Children) Act 1997* (NSW).

## XII. THE ADVOCACY RULES

It is very important to be aware of the Advocacy Rules. They apply to all solicitors who appear as advocates in court. There are specific rules relating prosecutors.

The Advocacy Rules are found in Rules A15 to A72 of the Revised Professional Conduct Rules. They refer, among other matters, to:

- The efficient administration of justice.
- The duty to the client.
- Frankness in court.
- The integrity of evidence.
- The duty to the opponent.

## XIII. LEARNING ABOUT ADVOCACY

You can learn about advocacy. A number of CLE providers run seminars with speakers dealing with advocacy.

It is important to always evaluate your performance after court. Advocacy may be taught. Someone can tell you what you are doing well and what you can improve. Courses are run by the Australian Advocacy Institute, and are invaluable.

The following is a list of sources of information on advocacy and preparing and acting in defended hearings:


- Anthony Cook *Issues that Commonly Arise in Trials* at <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/76990001097626098421.doc>
- James Glissan *Advocacy in Practice* (3rd edition, Sydney, Butterworths, 1998).
- George Hampel *Hampel on Ethics and Etiquette for Advocates: A Guide to Basics* (Melbourne: Leo Cussen Institute, 2001).
- Bruce Hodgkinson SC 'Preparing the Case' (A paper presented at a NSW Young Lawyers seminar, Sydney, 21 July 2004).
- Thomas A Mauet and Les McCrimmon *Fundamentals of Trial Techniques* (2nd edition, Sydney, Law Book Company, 2001).
- NSW Young Lawyers Criminal Law Committee *A Practitioner's Guide to Criminal Law* (3rd edition) (NSW Young Lawyers, 2004).
- Max Perry *Hampel on Advocacy* (Melbourne, Leo Cussen Institute, 1998).
- Lee Stuesser *An Introduction to Advocacy* (Sydney, Law Book Company, 1993).
- Keith Tronc and Ian Dearden *Advocacy Basics for Solicitors* (Sydney, Law Book Company, 1993).
- Hugh van Dugterun *Checklist in Defended Local Court Hearings* at <http://www.legalaid.nsw.gov.au/data/portal/00000005/public/12311001063173796093.document>

# XIV. ACKNOWLEDGMENTS

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# APPENDIX I: IMPORTANT SECTIONS OF THE *EVIDENCE ACT* RELATING TO LOCAL COURT HEARINGS

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