RUNNING A GUILTY PLEA OR DEFENDED HEARING IN THE LOCAL COURT

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The Local Court is the busiest Court in the State for criminal matters. The Local Court deals with over 90% of all criminal matters in the State.[2] This includes the finalisation of charges for summary offences and the summary hearing of certain indictable offences under the tables in the *Criminal Procedure Act 1986* (NSW). For very serious offences, including those that are strictly indictable or where there has been an election of a 'table offence', the Local Court will nevertheless handle the matter by committing it for trial or sentence in the Supreme Court or District Court.

It can be appreciated at the outset that the Local Court is a very fast-paced environment. Time is very precious and the Court is very busy. It is not an uncommon sight to have Magistrates handling upwards of 100 matters in a list in one day. It is also not uncommon for Magistrates to list 10-13 hours of hearings on one day with the knowledge that some are likely to result in a plea of guilty or withdrawal of charges. Trials with estimates that run into weeks, once the domain of the Supreme Court and the District Court, are becoming more prevalent in the Local Court, as its breadth of jurisdiction is expanded. As officers of the Court, lawyers are expected to be prepared and familiar with their matter and assist the Court with determining the matter in a just and quick manner.

This paper is separated into two parts. The first concerns how to run a defended hearing. The second concerns how to run a guilty plea and will deal with issues relating to sentencing. For the purposes of an example, I will consider how to deal with a charge of common assault. However, the issues that I will raise in this paper will be applicable to other offences and for both prosecutors and lawyers for an accused.

Defended Hearing

I turn first to consider the running of a defended hearing where there is a not guilty plea in the Local Court for a summary offence or a table offence that is being dealt with summarily. Any lawyer appearing before the Court in these matters should, at a minimum, be familiar with Part 4 of the

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[2] Local Court of New South Wales, *Annual Review 2021* (30 May 2022) 5.

Criminal Procedure Act 1986 (NSW) and the relevant regulatory provisions related to that Part, as well as Local Court Practice Note Crim 1.

Procedural Steps Before the Hearing

On the first mention, if the accused enters a plea of not guilty, the Magistrate will usually make case management orders and directions. The kinds of orders that the Court makes will be determined by whether a prosecution brief of evidence is required to be served.

Under s 187 of the *Criminal Procedure Act 1986* (NSW) and cl 24 of the *Criminal Procedure Regulation 2017* (NSW), certain kinds of proceedings do not require a prosecution brief of evidence to be served. These include proceedings where a penalty notice may be issued or where there is only a monetary penalty,[3] for the offence of possessing a prohibited drug,[4] for the offence of offensive conduct[5] and certain road transport offences.[6] In circumstances where a prosecution brief of evidence is not required to be served, the Court will generally list the matter for hearing at the first mention.[7]

Where a prosecution brief of evidence is required to be served, a Magistrate will generally make orders for service of the prosecution brief of evidence upon the accused in 4 weeks and adjourn the proceedings for a second mention in 7 weeks.[8] Section 183 of the *Criminal Procedure Act 1986* (NSW) provides that a brief of evidence is to consist of documents regarding the evidence that the prosecutor intends to adduce in order to prove the commission of the offence. It is to include written statements from any person that the prosecutor intends to call to give evidence in the hearing[9] and copies of any document or any other thing, identified in such a written statement as a proposed exhibit.[10] The brief of evidence must also contain a Court Listing Advice.[11] To avoid a dispute on the day of the hearing, as to which documents have or have not been served, it is advisable to keep a file note of any service effected, perhaps best achieved through the table of contents page to the brief of evidence.

At the second mention, unless the accused enters a plea of guilty, the Court will list the matter for hearing at the earliest available opportunity.[12] It is important to note that the Court can still list the matter for hearing even if there are items in the brief that are outstanding.[13] Absent a satisfactory explanation, the Court will not make further brief service orders and list the matter for another mention.

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[3] *Criminal Procedure Regulation 2017* (NSW) cll 24(a), (d).
[4] *Criminal Procedure Regulation 2017* (NSW) cl 24(e).
[5] *Criminal Procedure Regulation 2017* (NSW) cl 24(b).
[6] *Criminal Procedure Regulation 2017* (NSW) cl 24(c).
[7] Local Court Practice Note Crim 1, para 5.4(b).
[8] Local Court Practice Note Crim 1, para 5.4(a).
[9] Written statements must comply with r 3.13 of the *Local Court Rules 2009* (NSW), which require, amongst other things, that they include an endorsement that the statement accurately sets out the evidence that the person would be prepared to give in court as a witness (unless there is an exception).
[10] *Criminal Procedure Act 1986* (NSW) s 183(2).
[11] Local Court Practice Note Crim 1, para 5.4(c).
[12] Local Court Practice Note Crim 1, para 5.5.
[13] Local Court Practice Note Crim 1, para 5.6(b).

Experience shows that, generally, the gap of time between the second mention and the hearing – which is usually of a few months – can be used to accommodate service of the brief, provided that it is served not less than 14 days prior to the hearing date. In this regard, prosecutors should pay careful attention to the prime facie prohibition in s 188 of the *Criminal Procedure Act 1986* (NSW) on admitting evidence that does not comply with the requirements in that Division or the rules made under it. Special attention must be paid to the statutory requirement in s 183(3) of the *Criminal Procedure Act 1986* (NSW) that the brief of evidence is to be served at least 14 days before the hearing of the evidence for the prosecution unless there is consent of the accused for a later date or a Magistrate considers that the interests of justice require it.[14]

Of course, when charges are very serious, the interests of justice may weigh in favour admitting the evidence when the brief service orders have not been complied with. But I would emphasise that it is the expectation of the Court that its orders are complied with. Moreover, it is a fundamental aspect of procedural fairness that the accused must know the case that they must answer and should not be taken by surprise at the hearing. Those are pertinent considerations that should be kept in mind by those appearing in the Local Court.

On the second mention, where the accused has legal representation, the legal representative of the accused should hand to the Court and to the prosecutor a completed Court Listing Advice.[15] Lawyers should take care in preparing the Court Listing Advice. This is because the prosecution is required only to call at the hearing those witnesses nominated for cross-examination on the Court Listing Advice and the remainder of the brief of evidence can be tendered by the prosecution in its case.[16] However, a notation on the Court Listing Advice by the legal representative of the accused that a witness is not required to be called for cross-examination does not prevent the prosecution calling that witness in the prosecution case if the prosecutor is of the opinion the witness is required.[17]

Preparation Before the Hearing

The time between the mentions and hearing is the most critical. It is the best time for lawyers to ensure they are adequately prepared for the hearing. As I mentioned before, time is very precious in the Local Court. To avoid delays during the hearing, the Court expects that practitioners are very well prepared. It is at this stage that three very key steps are taken.

First, lawyers should identify the various elements of the offence. Although this may sound elementary, a lack of clarity about the elements will make any advocate go astray. It is helpful to keep each of those

[14] See Local Court Practice Note Crim 1, para 5.6(b).
[15] Local Court Practice Note Crim 1, para 5.7(c)(i).
[16] Local Court Practice Note Crim 1, para 5.7(g).
[17] Local Court Practice Note Crim 1, para 5.7(g).

elements clearly in your mind. They are like a checklist that you must address in your submissions. For the offence of common assault, the elements are:

(1) An act by the accused which causes another person to apprehend immediate and unlawful violence or an application of force by the accused to another person;
(2) That such conduct of the accused was without the consent of the complainant;
(3) That such conduct was intentional or reckless; and
(4) That such conduct was without lawful excuse.[18]

These elements can then be used as headings for the submissions to be made. Even in making oral submissions, it is very helpful if advocates signposted as they spoke. For example, they would say, 'In relation to the first element, I submit…' or 'On the issue of consent, I submit…'.

Secondly, a lawyer must focus on whether the admissible evidence is capable of proving each element to the requisite standard. A defence lawyer will have the benefit of reviewing the prosecution brief of evidence and should pay very careful attention to the written statements and proposed exhibits. Forensic decisions need to be made as to what evidence should be objected to or whether the evidence should be left to cross-examination. It may be necessary to make decisions about obtaining further witnesses or documents, which may require them to take steps for a subpoena to be issued.

It is at this stage that lawyers should anticipate the issues at trial. Perhaps it is an identification issue as to whether the accused is really the person on CCTV footage or the person that the complainant saw. Perhaps it is about an issue of consent. Perhaps there is an alibi. Using the example of a charge of assault in circumstances where there has been a touching of another, there are exceptions recognised in law such as the correction of children by their parents and self-defence as well as a broader exception for the exigencies of everyday life. This can include jostling in crowded places and tapping someone on the shoulder to get their attention. Under this exception, courts are required to consider whether the alleged impropriety goes beyond generally acceptable standards of conduct. It must be remembered that the golden thread throughout the criminal law is that the prosecution must prove its case beyond a reasonable doubt. Thus, if such an exception is invoked by the defence, the prosecution must prove beyond reasonable doubt that the act by the accused was done without lawful excuse.

Thirdly, conference with witnesses and opposing legal representatives. My former colleague, Magistrate Hugh Dillon, once stated:

> It is amazing to me how often witnesses reveal in court that they have not read their statements since giving them months before, or have only done so for the first time while waiting at court to give evidence. In my view, unless there is some very good reason, an advocate should rarely start a case without having had a conference with his or her principal witnesses.

[18] *R v Burstow; R v Ireland* [1998] 1 AC 147.

> *It is, of course, imperative that witnesses not be coached or prompted or told what other witnesses will say* but they can be taken through their statements and any issues clarified with them. They should be asked to read their statements over carefully and asked if there is any other relevant material they can remember. If necessary, supplementary statements of evidence should be prepared. It is best, if possible, however, to avoid the production of supplementary statements because the suggestion may be made that the witnesses have reconstructed the fresh evidence or even fabricated further evidence to suit the case of the party calling them. This emphasises the need for the careful and thorough preparation of the initial statements.
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> …
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> Witnesses can also be given instructions about where to go to court, how to dress appropriately and so on.[19]

At this stage, legal representatives of the police and accused may wish to discuss their cases and potentially consider a negotiation of the charges. This can also help narrow the issues and reduce court time. It cannot be emphasised the importance of speaking to your opponent well before the trial or the week before. As I have said, the Court's time is precious. It significantly hinders the work of the Court if, when the matter begins, the legal representatives ask for adjournments to work through objections or have discussions. That preparation should occur ahead of the hearing. The Court has the discretion to refuse such adjournments and it should not be assumed that every request would be automatically acceded to.

Hearing

The applicable provisions in the *Criminal Procedure Act 1986* (NSW) for conducting a defended hearing was recently considered in the decision of Walton J in *Transport for NSW v Chapoterera* [2022] NSWSC 976. His Honour stated (at [17]) as follows:

> (1) If the accused pleads not guilty, the Court "must proceed to hear and determine the matter": *CP Act* s 194(1). The date, time and place for hearing and determining the matter must be set on the first return date for a court attendance notice or at a later time: *CP Act* s 190(1);
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> (2) At the hearing, the Court "must hear the prosecutor, any witnesses and other evidence of the prosecutor and must hear the accused person and any witnesses and other evidence of the accused person": *CP Act* s 194(2). Relevantly, both the prosecutor and accused may examine and cross-examine the witnesses giving evidence for the parties: *CP Act* s 195. The procedures and practice for the examination and cross-examination of witnesses, and the right to address the court on the case in reply or otherwise, are, as far as practicable, to be conducted in accordance with Supreme Court procedure for the trial of an indictable offence: *CP Act* s 38. The evidence of each witness must be recorded: *CP Act* s 39(1); and
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> (3) Lastly, "after hearing the accused person, prosecutor, witnesses and evidence", the Court must determine the summary proceedings by convicting the accused person or making an order as to the accused person, or by dismissing the matter: *CP Act* s 202.

Magistrate Dillon gave this very valuable advice about fairness in advocacy in the courtroom:

> Fairness as an advocate is not only a question of honour, it has a powerful effect on tribunals of fact. We have a cultural predeliction for fairness. We want fair trials run by fair judges, fair prosecutors and fair

[19] Magistrate Hugh Dillon, 'Staying afloat and navigating homeward: Practical tips from the Bench on Advocacy in the Local Court' (LexisNexis Conference on Criminal Law and Advocacy, Sydney, 12 August 2005) <https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Local%20Court%20Advocacy.pdf> (emphasis in original).

> defence teams. The late Judge Joe Ford QC was regarded as a brilliant and devastating Crown Prosecutor. Justice Peter Hidden of the Supreme Court regards him as one of the best Crown Prosecutors he saw during his career at the Bar. It was said by some that he could make juries eat of his hand. He prepared his cases meticulously but one of the reasons juries found him so persuasive was that he was always impeccably fair to the accused and to his opponent in court. The combination of high intelligence, excellent preparation and fairness rarely left juries with a doubt about the guilt of the accused. (On the other hand, many an apparently strong Crown case has resulted in an acquittal when a jury has formed an impression of unfairness on the part of the prosecutor or the police.)[20]

There has been some confusion about whether there should be opening addresses in defended hearings in the Local Court. Especially in matters where there is some complexity or one where there are multiple witnesses, it can be of assistance to the Court for lawyers to open. Whilst any opening should be very short – it should be a matter of minutes, not hours – it is helpful to set out where the issues are in dispute. If lawyers for the accused intend to open, it is important to notify the prosecutor beforehand to avoid them being taken by surprise.

The best advocacy involves deploying simple, direct language and is economical with it. The courtroom is not the place for one to experiment with grandiloquent phrases. The Court is not assisted by lawyers making inflammatory or heavily exaggerated statements. That kind of conduct may be common in the halls of Parliament or in debating societies but it occupies no place in the courtroom. It must be remembered that a lawyer is not a mouthpiece for a client. A lawyer must take responsibility for the tactics used in the courtroom. In contrast, an elegantly simple sentence or verbal picture can be a valuable and powerful advocacy tool.

Justice Hayne, former Justice of the High Court, laid down six useful rules for advocacy in the High Court, namely, that counsel must:

- Know the facts of the case;
- Know the law that applies to the case;
- Know what order that he or she wants the court to make;
- Know how he or she wants to achieve that result;
- Convey that to the court; and
- Avoid distracting the court from the path that he or she wants it to follow.

Aside from the fact that that checklist should not be limited to Counsel but include solicitors appearing in Court too, those six rules are applicable to the Local Court.

Lawyers should consider the use of chronologies, maps and diagrams to assist the Court. The use of a chronology is very helpful to the Court in a complex case to synthesise and digest material. Maps and diagrams are also helpful because human beings naturally are visual learners. Using maps and diagrams

[20] Magistrate Hugh Dillon, 'Staying afloat and navigating homeward: Practical tips from the Bench on Advocacy in the Local Court' (LexisNexis Conference on Criminal Law and Advocacy, Sydney, 12 August 2005) <https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Local%20Court%20Advocacy.pdf>.

can save time in examining witnesses and ensure that the Magistrate, witness and lawyer are all on the same page.

It is also important to note that having multiple copies of exhibits can be very helpful. Too common, lawyers only make available one copy in the Local Court despite it being the practice in superior courts for both an official Court copy and working copy to be tendered. It would assist the Magistrate if they too had a working copy to follow along as a witness is speaking.

It is necessary, both as a matter of fairness and professionalism, to provide a copy of relevant legislation and cases when arguing a point of law, particularly one that is contested. There is no general requirement for lawyers to produce an Authorities Bundle in the Local Court in defended criminal hearings, however, this can be of assistance where there is a dispute on a question of law. It should go without saying that any document handed up to the Bench should also be provided to, or at least viewed, by your opponent. It is discourteous, unfair and unprofessional for a lawyer to rely on an authority without either giving notice of it to their opponent or furnishing a copy for them. Unfortunately, however, many lawyers in the Local Court not only ignore their opponents' needs but fail even to provide copies for the Court.

In examining witnesses, it is important that lawyers are familiar with the rule in *Browne v Dunn*. The rule in *Browne v Dunn*[21] requires that unless prior notice has been given as to the intention of the cross-examiner to rely on evidence which is contradictory to that given by the witness being cross-examined, the cross-examiner must first put the nature of the contradictory evidence to the witness. This gives the witness the opportunity to agree or disagree with the evidence. Lord Halsbury said:

> To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.[22]

Courts take the rule in *Browne v Dunn* very seriously because it is designed, fundamentally, to achieve fairness not only to a witness, but a trial between the parties.[23]

Running a Guilty Plea

I now turn to running a guilty plea in the Local Court. I will begin by going through the two ways in which a guilty plea can be entered in the Local Court. I will then turn to advice about preparing and making submissions in relation to sentencing, including specifically for a dismissal of a charge under s

[21] (1894) 6 R 67.
[22] Ibid 76–7.
[23] *Seymour v Australian Broadcasting Commission* (1977) 19 NSWLR 219, 224.

10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which I will refer to as 'the Act' from hereon.

Written Plea

First, an accused person may enter a guilty plea by completing the Written Notice of Pleading form and lodging it with the Registrar.[24] The written notice may be accompanied by additional written material containing matters in mitigation of the offence.[25] This can include character references, a letter to the Court or some other material. If this option is chosen and the written notice is lodged not less than seven days before the date on the Court Attendance Notice, the accused is not required to attend the Court unless they have been granted or refused bail.[26] This option is common for very minor offences and allows the Court to deal with the charge on an ex parte basis.

The Supreme Court has recently emphasised that Local Court Magistrates are nonetheless required to give reasons when an accused has chosen the option of submitting a written plea. In *Roylance v Director of Public Prosecutions (NSW)* [2018] NSWSC 933, Bellew J stated that a Magistrate is 'under a duty to give reasons in a way which expressed his [or her] findings clearly, and which enabled the parties to understand the basis for his [or her] decision'. In *Hayes v Director of Public Prosecutions (NSW)* [2019] NSWSC 378, Campbell J stated that '[t]he obligation to give reasons in simple cases dealt with under s 182(3) need not be onerous' and 'succinct reasons are appropriate'. This included 'mak[ing] some brief, succinct assessment of objective seriousness' and the 'need to engage with the issues put forward for determination by the parties and explain, shortly, why a decision is made one way rather than the other'.

In *Balach v Director of Public Prosecutions (NSW)* [2019] NSWSC 377, Campbell J emphasised that, where there is a 'live question' about whether the Court should exercise its power under s 10, it would be necessary for the Court to deal with the issue and give reasons as to whether or not such a penalty should be imposed. The significance is that, although the accused person may not have expressly sought a s 10 disposition, it must still be considered by the Magistrate where it is clear on the material.

Although it is rare for an accused person who is legally represented to choose the option of submitting a written plea and not attending the Court listing, if that option is chosen, it would be helpful for the Local Court if their written material included, not only any references they wish to provide to the Court but also any submissions about the mitigating factors that they rely on, and if appropriate, make submissions about whether a conviction should be imposed.

Appearance

[24] *Criminal Procedure Act 1986* (NSW) s 182(1).
[25] *Criminal Procedure Act 1986* (NSW) s 182(2).
[26] *Criminal Procedure Act 1986* (NSW) ss 182(3)–(4).

The second option is to appear and enter a guilty plea. Often, for minor offences, the Local Court will deal with the matter in the list and can impose a penalty after hearing submissions and receiving evidence from the parties.

If this option is pursued, lawyers need to make a forensic decision whether they are ready to proceed with sentencing on that mention or whether they wish to seek an adjournment so that documentary material can be organised or for the accused, particularly in some traffic offences, to undertake a course or diversionary program.

Sentencing Submissions

I turn now to give seven pieces of advice in relation to submissions made about sentencing. In particular, the first three items of advice address some of the common issues when lawyers for the accused make submissions that their client should be discharged without conviction under s 10 of the Act.

First, it is tempting for some advocates to make submissions that the offence was trivial merely by reference to the fact that the maximum penalty is a fine only or a limited period of imprisonment. That approach should not be taken and it is contrary to authority. In *Walden v Hensler* (1987) 163 CLR 561, Brennan J (as the Chief Justice then was) stated:

> Triviality must be ascertained by reference to the conduct which constitutes the offence for which the offender is liable to be convicted and to the actual circumstances in which the offence is committed. It is erroneous to ascertain the triviality of an offence by reference simply to the statutory provision which prescribes the maximum penalty.

Secondly, sometimes lawyers make submissions that the accused would not be able to travel to the United States if they received a conviction, particularly if it involves the possession of prohibited drugs. On occasions, lawyers have cited the decision in *R v Mauger* [2012] NSWCCA 51 ('*Mauger*') as authority for that proposition. This submission should not be made without research and evidence. I will explain why in two parts. First, § 212(2)(A)(i) of the *Immigration and Nationality Act* of the United States (8 USC § 1182) makes provision for 'any alien convicted of, or *who admits having committed*, … (II) a violation of … any law or regulation of a State, the United States, or a foreign country relating to a controlled substance' (emphasis added in italics). Secondly, *Mauger* does not assist a submission of that nature. Indeed, it is authority for the contrary proposition. This is because Harrison J (with whom Beazley JA, as Her Excellency then was, and McCallum J, as the Chief Justice then was, agreed) expressed agreement with the Crown's submission at [30] that 'the nature or extent of any restrictions upon the respondent's ability to travel to the USA were not supported by the evidence and his ability to travel to other countries was irrelevant and should have been given no or little weight.'

Thirdly, although extra-curial punishment is a relevant consideration,[27] it can sometimes be forgotten that the Court of Criminal Appeal has repeatedly emphasised that a s 10 penalty without a conviction

[27] *R v TMTW* [2008] NSWCCA 50, [52].

should not be given 'merely to avoid some other legislative provision that is otherwise applicable'.[28] Submissions of the kind that a conviction may invoke some other legislative provision should not be made without research. For example, s 5(1) of the *Child Protection (Working with Children) Act 2012* (NSW), which is occasionally invoked by lawyers, states that the term 'conviction' in that Act 'includes a finding that the charge for an offence is proven, or that a person is guilty of an offence, even though the court does not proceed to a conviction.' Schedule 1 of the Act, which sets out the 'trigger offences' for an assessment, uses terminology such as 'Proceedings have been commenced against a person for any of the following offences (whatever the outcome of those proceedings)' or 'Proceedings have been commenced against a person for any of the following offences (other than where a person has been found not guilty of the offence concerned)'. Careful attention should be paid to the legislative provisions being relied on.

Fourthly, in circumstances where a fine may be an appropriate penalty, s 6 of the *Fines Act 1996* (NSW) provides that a Court fixing a fine is to have regard to the means of the accused. Too often, lawyers make broad, unsubstantiated, unproven assertions from the bar table about their client's impecuniosity. This should be avoided where possible. If impecuniosity features in a lawyer's submissions, it is suggested that evidence be brought to the attention of the Court. This can be in various forms such as evidence of receiving a pension or means-tested payment or payslips showing limited earnings.

Fifthly, lawyers should be familiar with the structure and provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) in its current form. Even experienced lawyers can lose touch with the amendments that have occurred over the years. For example, there have been submissions to the Court that a Conditional Release Order under s 9 or Community Correction Order under s 8 should be given instead of a fine. However, the latter is not available for fine-only offences because s 8 of the Act says that Community Correction Orders are an alternative to imprisonment.

Another example that has become somewhat common recently is the submission that a Community Correction Order under s 8 or Intensive Correction Order under s 7 should be imposed. That submission is highly dangerous. It must be remembered that an Intensive Correction Order is a form of serving a sentence of imprisonment in the community. An ICO cannot be imposed unless a Court is satisfied that the s 5 threshold – that no penalty other than imprisonment is appropriate – has been crossed. That submission should not be made lightly by lawyers of the accused without careful consideration of the possible implications.

Understanding the provisions of the Act is also crucial to the submissions that a lawyer can make in Court. The High Court emphasised in *Stanley v Director of Public Prosecutions (NSW)* [2023] HCA 3 that a sentencing court must have regard to the provisions in s 66 of the Act when determining whether

[28] *R v Mauger* [2012] NSWCCA 51, [21].

a person sentenced to a term of imprisonment should serve it by way of an Intensive Correction Order. If this is being contemplated, it is crucial that submissions are made as to community safety and whether an ICO or full-time detention is more likely to address the offender's risk of reoffending. In particular, Gordon, Edelman, Gleeson and Steward JJ emphasised at [76] that 'community safety will usually have a decisive effect on the decision to make, or refuse to make, an ICO'.

Familiarity with legislative requirements under the Act is also crucial in knowing when certain penalties require certain reports. For example, a person who was a child when an offence was committed and was under 21 years when charged cannot be sentenced to a term of imprisonment or certain penalties unless a background report has been prepared, tendered into evidence, provided to the child and taken into account by the Court.[29] Another example is that the Court must not impose a home detention condition or community service work condition on an Intensive Correction Order unless an assessment report states that the offender is suitable to be the subject of such a condition.[30]

Sixthly, it is important for prosecutors and lawyers of the accused to confront issues in their cases. For the accused, this may be the objective seriousness, their past record or something else. A technique that can be used is to say 'Your Honour may be troubled by…'. It is much easier for a Magistrate to accept that an offender understands and accepts the seriousness of the offence when they have acknowledged these issues. Likewise, a prosecutor should not, without a proper basis, seek to unfairly argue against every mitigating factor or submission favourable to an accused.

Lastly, I provide a checklist of matters that lawyers should always prepare when making submissions on sentencing:

(1) Identifying precisely the charge and the plea – state the charge (for example, common assault) and any relevant statutory provision (for example, for possession of a prohibited drug, this is s 10 of the *Drug Misuse and Trafficking Act 1985* (NSW)).
(2) The statutory maximum penalty – it has been repeatedly emphasised that the maximum penalty is a yardstick or starting point as to the objective seriousness of the offence. When asked what is the maximum penalty, it is surprising how often lawyers do not know what the maximum penalty is or merely assert that the question can be answered by reference to the Court's jurisdictional limit, which is a term of two years for a single offence or an accumulation of up to five years for multiple offences, where the penalty for each offence is a term of imprisonment. However, this latter approach should be avoided because it is inconsistent with

[29] *Children (Criminal Proceedings) Act 1987* (NSW) s 25.
[30] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 73A(3). However, Yehia J (albeit in dissent) appears to suggest that, in circumstances where an offender is assessed as unsuitable because of the unavailability of work in the offender's catchment area (as distinct from their capacity or willingness to perform such work), the Court may nonetheless impose a condition that requires the offender to undertake volunteer work with a registered charity: *Bresnahan v R* [2022] NSWCCA 288, [157], [159], [161].

R v Doan [2000] NSWCCA 317 and the High Court's recent decision in *Park v The Queen* [2021] HCA 37 where it was held that the jurisdictional limit cannot be regarded as some form of (or substitute for) the statutory maximum penalty. Rather, the jurisdictional limit is applied *after* the appropriate sentence for the offence has been determined.

(3) Summary of relevant facts and the assessment of objective seriousness – this is an opportunity to put to the Magistrate where the particular offence falls in the 'spectrum' of objective seriousness. Common expressions used by courts is to describe offending at then 'lower end', 'towards the lower end', 'below the mid range', 'at the mid range', 'well above the mid range', 'towards the top of the scale'. It is important to remind lawyers that terminology such as 'worst category', which was once used commonly, should now be avoided following the High Court's decision in *R v Kilic* (2016) 259 CLR 256.

(4) Aggravating and mitigating factors – the relevant factor should be identified with precision. Section 21A of the Act or s 16A of the *Crimes Act 1914* (Cth) is a helpful starting point. However, it must be emphasised that that list is not exhaustive and the Court can consider any objective or subjective factor that affects the relative seriousness of the offending.[31]

(5) Sentencing discounts – in the Local Court, the provisions in ss 25A–25F do not apply. Rather, s 22 and the guideline judgment in *R v Thomson and Houlton* (2000) 49 NSWLR 383 continues to guide sentencing discounts for guilty pleas in the Local Court. In that case, the Court of Criminal Appeal emphasised that '[t]he primary consideration determining where in the range a particular case should fall, is the timing of the plea.' Generally the reason for the delay in the plea is irrelevant because, if it is not forthcoming, the utilitarian value is reduced.[32]

(6) Whether certain thresholds or tests have been met – in this regard, considerations of s 5 of the Act is relevant where imprisonment is considered. As mentioned above, s 66 of the Act is relevant when an Intensive Correction Order is considered. It is also relevant where ss 9(2) and 10(3) require certain considerations are relevant for penalties under those sections.

Conclusion

The legal profession has a fundamental part to play in the Local Court. The fast-paced workload of the Court can make the role of being a lawyer challenging and demanding. The Court heavily relies on lawyers to be on their game. As I have stated, time is precious in the Court. Magistrates appreciate efficiency and economy at the Bar table and are irritated by inefficiency, slowness, lack of preparation. The better the legal system works, the greater the confidence the public can have in its legal institutions. The higher the quality of advocacy, the better our legal institutions work. I hope this paper is of assistance for your future endeavours.

[31] *Elyard v The Queen* (2006) 45 MVR 402, 410–11 [39].
[32] *R v Borkowski* [2009] NSWCCA 102, [32(8)]. But see *Shine v R* [2016] NSWCCA 149, [95].