NSW GOVERNMENT | Victims Services
Justice & Attorney General

Sentencing

INFORMATION PACKAGE

This information package is jointly produced by
Victims Services and Criminal Law Review,
Department of Justice and Attorney General
and NSW Sentencing Council.

REINFORCING THE NSW GOVERNMENT'S COMMITMENT
TO VICTIMS OF CRIME WITH THE VICTIMS RIGHTS ACT 1996.

Victims Services
Justice & Attorney General

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Department of Justice and Attorney General
and
NSW Sentencing Council.

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INTRODUCTION

This booklet is provided to assist victims of crime in understanding the sentencing process. The aim of this booklet is to explain the purposes of sentencing, the basic elements of sentencing procedure and the terminology used by a sentencing court. The information contained within this booklet is largely based on sentencing legislation in New South Wales set out in the *Crimes (Sentencing Procedure) Act 1999*. Victims of crime and other interested parties are encouraged to contact Victims Services or the prosecuting authority to discuss the information or to ask any questions.

WHEN IS AN OFFENDER SENTENCED?

An offender is sentenced after he or she:

- has pleaded guilty to an offence; or
- has been found guilty of the offence after a summary hearing in the Local Court; or
- has been found guilty of the offence following a trial by judge alone or trial by jury in the District or Supreme Court.

THE SENTENCING HEARING

Sentencing often takes place on a separate day to the trial or summary hearing and is conducted before the judicial officer (the judge or magistrate). A victim, like all members of the community, has the right to be present at the sentencing hearing. At the sentencing hearing, the defence has the opportunity to put forward evidence and arguments about what the sentence should be. The prosecution assists the court by providing information about applicable law and relevant sentencing statistics.

Oral and written arguments can be made by both the defence and the prosecution, and evidence in support can be called by both sides. The prosecution may challenge evidence put forward by the defence at the sentencing hearing, and may challenge or cross-examine defence witnesses. The prosecution will normally provide information concerning any prior criminal convictions of the offender.

Evidence presented by the defence may include:

- evidence of the offender's previous good character, usually in the form of statements from family members, friends, employers or other associates;
- documents such as psychiatric or psychological reports.

The court often obtains a pre-sentence report from the Community Offender Services, which will detail the offender's background and any appropriate or available sentencing options. In the case of a juvenile offender, a background report must be provided by Juvenile Justice, detailing this information.

An offender can only be sentenced for the charge of which he or she has been found guilty. The judicial officer can only take into account factors that are relevant to that charge.

Sometimes an offender will ask that other outstanding offences for which he or she has been charged but not convicted, be taken into account when being sentenced for the offence before the court. This is recorded on a document called a Form One. This means that the offender admits his or her guilt in relation to those additional offences, without being formally convicted of them.

The sentencing judge is then free to take those additional offences into account when setting the appropriate sentence for the offence before the court. As a result of the additional offences, this will normally result in a harsher sentence being imposed than would otherwise have been the case.

PURPOSES OF SENTENCING

Under New South Wales law the purposes for which a court can sentence an offender are:

- to protect the community from the offender;
- to ensure that the offender is adequately punished for the offence;
- to prevent crime by preventing (deterring) the offender and other persons from committing similar offences;
- to promote the rehabilitation of the offender;
- to make the offender responsible (accountable) for his or her actions;
- to condemn (denounce) the conduct of the offender; and
- to recognise the harm done to the victim of the crime and the community.

RELEVANT FACTORS DETERMINING A SENTENCE

In determining the sentence, the judicial officer must take into account a number of factors, such as:

- the facts of the offence;
- the circumstances of the offence;
- subjective factors about the offender; and
- relevant sentencing law.

The judicial officer may also consider the general pattern of sentencing by criminal courts for the offence in question.

Maximum penalty

The maximum penalty that a judicial officer can impose for each criminal offence is set out in legislation.

The maximum penalty for individual offences differs according to their seriousness. When maximum penalties are set by Parliament, it is intended that such penalties will be given only when the case falls within the "worst" category of cases for which the penalty is prescribed. Examples of maximum penalties are life imprisonment for murder and two years imprisonment for common assault.

Aggravating and mitigating factors

In determining the appropriate sentence for an offence, the court must first identify the seriousness of the offence, by reference to the actual conduct of the offender giving rise to that offence.

The court must also take into account any aggravating factors concerning the commission of the offence, as well as any mitigating factors relevant to the offence, or to the personal circumstances of the offender. An aggravating factor can increase the potential sentence, whereas a mitigating factor can reduce it.

Not every aggravating and mitigating factor present in a particular case will automatically lead to an increase or reduction of a sentence. The relative importance of each factor will vary, depending on the circumstances of the case. In the case of young offenders, for example, promoting a young offender's rehabilitation will be considered more important than the principles of general deterrence and public condemnation. This principle will be considered less important, however, if the crime committed by the youth is very serious or if the young offender is approaching adulthood.

Both aggravating and mitigating factors are set down in legislation and in case law, and may change over time.

Aggravating factors may include:

a) The victim:
- was a public official exercising public or community functions, for example, a police officer, emergency services worker, health worker, or teacher, and the offence arose from their work;
- was vulnerable (for example, because of age or disability), or because of the victim's occupation (such as a taxi driver, bus driver or other public transport worker, bank teller or service station attendant).

b) The offence involved:
- the actual or threatened use of violence;
- the actual use or threatened use of a weapon;
- needless (gratuitous) cruelty;
- multiple victims or a series of criminal acts.

c) The offence was:
- committed in company;
- committed without regard for public safety;
- committed in the home of the victim or any other person;
- committed while the offender was on conditional liberty in relation to an offence (for example, if the offender was on bail or on parole);
- motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability);
- part of a planned or organised criminal activity;
- involved a grave risk of death to another person or persons;
- an offence in which the injury, emotional harm, loss or damage caused was substantial.

d) If the offender:
- has a record of previous convictions;
- abused a position of trust or authority in relation to the victim (such as a school teacher and the victim is a pupil of the offender, or a health professional and the victim is a patient of the health professional, and similar positions where the offender has responsibility/authority over the victim).

Mitigating factors may include:

a) The offence was not part of a planned or organised criminal activity.

b) The offender:
- was provoked by the victim;
- was acting under duress;
- does not have any record (or significant record) of previous convictions;
- was a person of good character;
- is unlikely to re-offend;
- has good prospects of rehabilitation;
- has shown remorse (for example, by making compensation (reparation) for any injury, loss or damage or in any other manner);
- was not fully aware of the consequences of his or her actions because of his or her age or any disability
- provided assistance to law enforcement authorities;
- pleaded guilty.

c) The injury, emotional harm, loss or damage caused by the offence was not substantial.

Cumulative and concurrent sentences

If an offender is to be sentenced for more than one offence, then he or she will be given a separate sentence for each offence. In such a case, the court can order that the sentences be served concurrently or cumulatively, or a combination of both.

Concurrent sentences commence at the same time as each other and run at the same time. Cumulative sentences run consecutively, that is, one after another. A sentence may be partly concurrent and partly cumulative upon an earlier sentence.

If the offences have features in common, or if they happened at around the same time and are connected (for example, if all the offences arose in a single course of criminal conduct) a court may decide that the sentences should be served concurrently or at least partly concurrently. This means that if an offender is given a two-year sentence for one offence and a five-year sentence for a related offence, and those sentences are directed to be served concurrently, the total period of imprisonment will be five years.

Totality

Where a court sentences an offender for a number of offences of which the offender has been convicted, then at the end of considering the appropriate sentence for each offence the judge must look back at the total sentence to ensure that the result is appropriate. The sentence to be served by the offender must reflect the total criminality of the crimes committed.

Victim Impact Statements

A victim impact statement is a written statement that describes the impact of a crime upon a victim or a victim's family member. It is given to the court after a person has been convicted and before the person is sentenced.

Legislation allows a victim impact statement to be received and considered in certain cases in the Supreme Court, the District Court, the Local Court, and the Children's Court. In the Supreme Court and District Court, a victim impact statement may be received by the court in relation to an offence that involves:

- actual or threatened violence (including some sexual offences); or
- the death of, or any actual physical bodily harm, to any person.

A statement can be made:

- by a victim (or their representative, such as a family member or counsellor) who has suffered personal harm as a direct result of an offence (the primary victim); or
- a family member of a primary victim (or their representative) who has died as a direct result of the offence.

A victim impact statement can be read by the victim or their representative in open court or handed up in written form. The maker of the statement can be cross examined or questioned in relation to the statement.

For more information on victim impact statements, see the *Victim Impact Statements Information Package*, jointly produced by the Office of the Director of Public Prosecutions, NSW Police Force and Victims Services.

SENTENCING OPTIONS

A court can sentence an offender to any of the following types of sentences:

Rising of the court

The court orders the defendant to "remain in court until the next adjournment" (that is, until the next break in the sittings of the court that day). This is a symbolic way of saying that an offender is convicted but no formal sentence is imposed. This order is reserved for the least serious of offences.

Non-conviction orders

Non-conviction orders (often referred to as a Section 10 and previously known as a section 556A order) may be conditional or unconditional.

Unconditional discharge

The court finds the offender guilty but dismisses the charge without recording a conviction.

Conditional discharge

The court can discharge the offender, without recording a conviction, on a condition that he or she enter into a good behaviour bond or enter into an agreement to participate in and comply with an intervention program designed to promote the offender's treatment or rehabilitation.

In determining whether or not to make a non-conviction order the court must take into account:

- the offender's character, previous criminal history, age, health and mental condition;
- the extenuating (mitigating) circumstances in which the offence was committed;
- any other matter that the court thinks proper to consider.

If an offender breaches the condition to be of good behaviour he or she can be convicted and sentenced for the original offence.

Conviction order without any additional penalty

In some instances the court may find the offender guilty and record a conviction but order that no sentence be imposed.

Good Behaviour Bond (section 9 bond)

The court can also record a conviction and instead of imposing a sentence of imprisonment make an order directing the offender to enter into a good behaviour bond.

A good behaviour bond always contains the condition that the person under the bond must be of good behaviour during the term (that is, the duration) of the bond. An offender under a bond must appear before the court if called on to do so at any time during the term of the bond for any alleged breach of it. An offender who has breached a good behaviour bond may be re-sentenced by the court for the original offence. A good behaviour bond cannot exceed five years.

Probation attached to a bond

When a court decides to attach a condition of probation to a bond, the offender is subject to the supervision and control of the Community Offender Services for a specific period of time. If an offender breaches the probation order they can be re-sentenced by the court for the original offence.

Non-association and place-restriction orders

For an offence that has a penalty of six months imprisonment or more, a court may, in addition to any other sentence, make a non-association order, a place-restriction order or both in respect of the offender if it is satisfied that it is reasonably necessary to do so to ensure that the offender does not commit any further offences.

A non-association order can prohibit the offender from mixing with or associating with a specified person for a specified term.

A place restriction order can prohibit the offender from frequenting or visiting a specified place or district for a specified term. The order can be for a period of up to 12 months.

Fines

A fine is a monetary penalty and is the most frequently used sentencing option in Australia. The amount of the fine is expressed in penalty units and one penalty unit is currently $110. The maximum penalty units available for an offence are set out in the legislation.

Community Service Orders

Instead of imposing a sentence of imprisonment on an offender, a court can impose a Community Service Order of up to 500 hours, depending on the class of offence (for some offences the maximum number of hours may be less).

When a Community Service Order is imposed, the offender is required to perform supervised work for the community, for which he or she is assessed to be suitable. The Community Offender Services are responsible for supervising the offender.

Imprisonment

A sentence of imprisonment is the most serious sentence that can be imposed and must only be imposed when no other sentence would be appropriate. It is seen as a sentence of 'last resort'. It can take the form of full-time imprisonment served at a correctional centre, periodic detention or home detention. A term of imprisonment usually involves (unless the term is of 6 months or less) a 'non-parole period' which is the minimum term that the offender will spend in custody and an 'additional term' which is the period of time to be served on parole.

Periodic detention

If a court has decided to sentence an offender to imprisonment for less than three years, the court may order that the offender serves the sentence by way of periodic detention. This means that the offender will spend a certain period of time each week or month in prison, but not the whole time. For example, an offender can be sentenced to weekend detention, which means he or she spends the weekend in gaol, but is free to work or attend education in the remaining period.

Sentences for certain offences, for example some sexual offences, cannot be served this way.

Home detention

Where a total sentence (that is, the non-parole period and additional term) of 18 months or less is imposed, the offender might apply to serve the sentence by way of home detention.

Sentences for certain offences involving violence, such as murder, attempted murder, manslaughter, sexual assault, armed robbery, firearms offences, assault occasioning actual bodily harm, stalking or certain serious drug offences cannot be served this way.

A sentence of home detention cannot be imposed if the offender:

- has a record for any of the above offences; or
- has been convicted of a domestic violence offence in the past five years; or
- has had an Apprehended Violence Order made against them in the past five years, where the victim of that order lives at the proposed home detention address.

Home detention is regarded as a lesser sentence than full-time imprisonment. Conditions can be imposed, which permit the offender to leave home for certain approved periods, for example, for the purpose of employment or receiving medical treatment. Compliance with the order is supervised by way of electronic monitoring and random visits by a Probation and Parole Officer.

Suspended sentence

Sentences of imprisonment for two years or less may be suspended on the condition that an offender enters into a good behaviour bond. This means that the offender does not serve the term of imprisonment provided they enter into the bond and are of good behaviour for the term, that is, commit no further offences and follow any conditions of the bond. If the conditions of the bond are breached, the court, unless it is satisfied the breach was trivial in nature or there are good reasons for excusing the breach, will revoke the bond, and the offender will be required to serve the sentence that was suspended.

Deferred sentence

The court can postpone passing sentence on an offender for a period of up to 12 months from the date of conviction to allow the offender:

- to be assessed for rehabilitation; or
- to demonstrate that rehabilitation has taken place; or
- for any other purpose.

At the end of the period the court will sentence the offender after considering any additional information or developments that have occurred.

Proceeds of crime

Money or property that offenders have obtained through criminal activities can be recovered from offenders in many cases under the proceeds of crime legislation. This confiscation action may occur in addition to other consequences such as a fine or imprisonment.

UNDERSTANDING THE SENTENCE

When sentencing an offender to imprisonment, a judicial officer will first set a non-parole period and then note the balance of the term of the sentence.

Non-parole periods

A non-parole period is the minimum amount of time that an offender will be kept imprisoned before being eligible to be released on parole.

The balance of the term of the sentence must not exceed one-third of the non-parole period for the sentence.

This rule applies unless there are "special circumstances" for setting the balance of the term at more than one-third of the non-parole period. Factors such as the age, state of health, prospects of rehabilitation or the personal circumstances of the offender may constitute a finding of "special circumstances" so as to allow for a longer period of time on parole.

The earliest release date is the end of the non-parole period.

Where the total sentence is of three years or less, the judicial officer must make an order directing the offender's release at the end of the non-parole period. Whether or not the offender is then released on parole, subject to the supervision of the Community Offender Services depends upon the decision of the NSW Parole Authority.

Where the sentence imposed is more than three years, the offender becomes eligible to apply for parole at the end of the non-parole period. In this situation, parole is not an automatic right and the NSW Parole Authority will determine whether the offender will be released from custody or remain there until the end of the parole period.

A judicial officer may decline to set a non-parole period for a sentence in particular circumstances, (such as the nature of the offence, or the criminal history of the offender) and must give reasons for any such decision.

Where an offender fails to comply with his or her conditions of parole the NSW Parole Authority may revoke the parole.

Standard non-parole periods

Certain specified serious offences have "standard non-parole periods" set in legislation.

This is what governments are usually referring to when they talk about 'minimum sentences'. The standard non-parole period is regarded as a reference point for the judge and aggravating and mitigating circumstances may be taken into account in determining the sentence.

APPEALS

An offender (known as the appellant or applicant) may appeal against the conviction, the severity of the sentence, or both.

Victims of crime are an important part of the prosecution's case but are not a legal party in criminal proceedings and therefore have no right to appeal a conviction or sentence of an offender. Such appeals are proceedings between the Crown (DPP) and the offender or vice versa.

Appeals against convictions

An appeal against conviction means that the appellant is arguing that he or she did not commit the offence for which he/she was found guilty.

Sentence appeals

The Crown (DPP) can appeal against a sentence on the grounds that it is inadequate or too lenient. An offender may appeal as of right to the District Court against a sentence imposed in the Local Court. An offender can appeal directly to the Supreme Court against such a sentence only on a question of law. An offender sentenced in the District or Supreme Court may seek leave (permission) to appeal to the Court of Criminal Appeal to have the sentence reduced.

A sentence appeal to the District Court from the Local Court is a rehearing of the case. This means that the judicial officer hearing the sentencing appeal will reconsider all of the evidence presented in the initial sentencing hearing. The judicial officer will usually undertake this task by reading all documents tendered at the Local Court hearing. The defence might also call witnesses to provide further evidence as to why the sentence is too harsh. The defence and prosecution will then make (usually oral) submissions.

An appeal to the Court of Criminal Appeal from a sentence imposed in the District Court or the Supreme Court will only be successful if the sentencing judge is found to have committed a legal error, including imposing a sentence that was manifestly lenient or excessive.

In very special circumstances, an appellant might be able to seek leave (permission) to appeal to the High Court against the severity of a sentence. This is the highest court in Australia.

An appellant may have bail continued or granted while waiting for the appeal even if they were given a prison sentence.

NSW STATE PAROLE AUTHORITY

The NSW State Parole Authority (the Authority):

- decides which inmates, whose sentence includes a non-parole period, will be released to parole;
- sets the conditions of release;
- determines if and how a parole order should be revoked; and
- determines if and how a home detention or periodic detention order should be revoked, substituted or reinstated.

The Authority considers the release to parole of inmates who have sentences of more than three years with a non-parole period. A non-parole period is a minimum term of imprisonment during which an offender is not eligible to be released from prison to parole.

A court which sentences an offender to a term of imprisonment of three years or less to may also set a non-parole period. The non-parole period for these shorter sentences entitles the offender to be 'automatically' released from custody without the case having to come before the Authority. The release of offenders subject to 'automatic court based parole orders' is also dependent on appropriate post release plans and arrangements being made by the Probation and Parole Service.

When deciding whether to release an offender on parole, the Authority considers the interests of the community, the rights of the victim, the intentions of the sentencing court and the needs of the offender. The Authority considers a broad range of material when deciding whether or not to release an inmate to parole and must have determined that it has sufficient reason to believe the offender, if released from custody, would be able to adapt to normal lawful community life.

The principal purpose of granting parole is to serve the public interest by closely supervising the offender during his or her period of reintegration into the community. In all cases, strict conditions of parole are imposed and the Authority may also set additional conditions specifically tailored to address the underlying factors of an inmate's offending behaviour.

If a parolee fails to comply with the conditions of a parole order, it is the Authority's role to consider the revocation of parole orders, including those issued by courts. The Authority may also consider the revocation of a court-based parole order, before release, if the inmate shows an inability to adapt to normal, lawful community life.

Assistance to victims

The Authority welcomes letters from all victims. If an offender is a "serious offender" managed by the Serious Offenders Review Council any registered victim of crime (that is, on the Victims Register) is able to make a submission to the Parole Authority before it makes its final decision on whether or not to release the offender on parole.

Victims of serious offenders are encouraged to register with the Victims Register (Corrective Services NSW) and to seek their assistance and advice in preparing a submission.

Access to documents

A victim of a "serious offender" also has a right under legislation to access edited copies of specific reports received and considered by the Authority. Arrangements to access documents are coordinated by the Victims Register.

Attendance at Court

Any victim of crime can attend an Authority court hearing. The offender appears at this hearing by way of a video conferencing link to the correctional centre where they are housed. Victims need to be aware that the offender can see a section of the public gallery via the video conferencing link. Victims are therefore encouraged to speak to the Sheriff's Officer or to the Authority court staff to be directed to the section of the public gallery that is not subject to a video link camera.

NSW SENTENCING COUNCIL

The NSW Sentencing Council (the Council) advises and consults with the Attorney General in relation to offences suitable for standard non-parole periods. The Council also monitors and reports annually to the Attorney General on sentencing trends and practices, including the operation of standard non-parole periods, and prepares research papers or reports on particular subjects in connection with sentencing. The Council also has an educative function and seeks to promote public awareness and understanding about sentencing issues.

The Council consists of 15 members appointed by the Attorney General:

- a retired judicial officer;
- one with expertise or experience in law enforcement;
- four with expertise or experience in criminal law or sentencing;
- one with expertise or experience in Aboriginal justice matters;
- one with expertise in corrections;
- one with expertise in juvenile justice;
- one representing the Department of Justice and Attorney General;
- four representing the general community. Two out of these four persons must have expertise or experience in matters associated with victims of crime; and
- one with academic or research expertise relevant to the Council's functions.

FURTHER INFORMATION

NSW Sentencing Council

Phone.....(02) 8061 9333
Website.....www.lawlink.nsw.gov.au/sentencingcouncil

NSW State Parole Authority

Phone.....(02) 8688 3635
Website.....www.paroleauthority.nsw.gov.au

The court for public review hearings is located at Court 7, Level 4, West Sydney Trial Courts, 6 George Street, Parramatta.

Witness Assistance Service (WAS), Office of the Director of Public Prosecutions (ODPP)

Phone.....(02) 9285 2502
Website.....www.odpp.nsw.gov.au

LawAccess

Phone.....1300 888 529
Website.....www.lawaccess.nsw.gov.au

Judicial Commission of New South Wales

Phone.....(02) 9299 4421
Website.....www.judcom.nsw.gov.au

NSW Courts

Local Courts

Website.....www.lawlink.nsw.gov.au/lc

District Court

Website.....www.lawlink.nsw.gov.au/dc

Supreme Court

Website.....www.lawlink.nsw.gov.au/sc

NSW Bureau of Crime Statistics and Research (BOCSAR)

Phone.....(02) 9231 9190
Website.....www.lawlink.nsw.gov.au/bocsar

Victims Services

Victims Support Line – 24 hours, 7 days a week

Phone.....1800 633 063
Website.....www.lawlink.nsw.gov.au/vs

Victims Registers

If you are a victim of crime and you wish to get information about an offender who is an adult or a young person in custody, or who is a forensic patient, you may be eligible to be listed on a Victims Register.

Corrective Services NSW Victims Register

Corrective Services NSW has responsibility for people who have been accused or convicted of an offence and are in custody.

Phone.....(02) 8346 1374
Website.....www.dcs.nsw.gov.au

Mental Health Review Tribunal Forensic Patients Victims Register

The Forensic Division of the Mental Health Review Tribunal has responsibility for maintaining a register for victims of forensic patients.

Phone.....(02) 9816 5955
Website.....www.mhrt.nsw.gov.au

NSW Juvenile Justice Victims Register

NSW Juvenile Justice has responsibility for juveniles who have been accused or convicted of an offence and are in custody.

Phone.....(02) 9219 9400
Website.....www.djj.nsw.gov.au

Additional Victims Support Services

Enough is Enough Anti-Violence Movement Inc.

Enough is Enough has qualified counsellors who provide counselling and support for victims of crime and their families.

Phone.....(02) 9542 4029
Website.....www.enoughisenough.org.au

Homicide Victims Support Group (Aust) Inc.

Homicide Victims Support Group provides support, counselling, information and referrals for victims of crime.

Phone.....(02) 8833 8400 / 1800 191 777
Website.....www.hvsgnsw.org.au

Victims of Crime Assistance League Inc (NSW) (VOCAL)

VOCAL provides information, referral and support to people affected by serious crime.

Phone.....(02) 4926 5826
Website.....www.vocal.org.au

CHARTER OF VICTIMS RIGHTS *(VICTIMS RIGHTS ACT 1996)*

1 COURTESY, COMPASSION AND RESPECT

A victim should be treated with courtesy, compassion, cultural sensitivity and respect for the victim's rights and dignity.

2 INFORMATION ABOUT SERVICES AND REMEDIES

A victim should be informed at the earliest practical opportunity, by relevant agencies and officials, of the services and remedies available to the victim.

3 ACCESS TO SERVICES

A victim should have access where necessary to available welfare, health, counselling and legal assistance responsive to the victim's needs.

4 INFORMATION ABOUT INVESTIGATION OF THE CRIME

A victim should, on request, be informed of the progress of the investigation of the crime, unless the disclosure might jeopardise the investigation. In that case, the victim should be informed accordingly.

5 INFORMATION ABOUT PROSECUTION OF ACCUSED

1. A victim should be informed in a timely manner of the following:
   a) the charges laid against the accused or the reasons for not laying charges,
   b) any decision of the prosecution to modify or not to proceed with charges laid against the accused, including any decision to accept a plea of guilty by the accused to a less serious charge in return for a full discharge with respect to the other charges,
   c) the date and place of hearing of any charge laid against the accused,
   d) the outcome of the criminal proceedings against the accused (including proceedings on appeal) and the sentence (if any) imposed.
2. A victim should be consulted before a decision referred to in paragraph (b) above is taken if the accused has been charged with a serious crime that involves sexual violence or that results in actual bodily harm, or psychological or psychiatric harm to the victim, unless:
   a) the victim has indicated that he or she does not wish to be consulted, or
   b) the whereabouts of the victim cannot be ascertained after reasonable inquiry.

6 INFORMATION ABOUT TRIAL PROCESS AND ROLE OF WITNESS

A victim who is a witness in the trial for the crime should be informed about the trial process and the role of the victim as a witness in the prosecution of the accused.

7 PROTECTION FROM CONTACT WITH ACCUSED

A victim should be protected from unnecessary contact with the accused and defence witnesses during the course of court proceedings.

8 PROTECTION OF IDENTITY OF VICTIM

A victim's residential address and telephone number should not be disclosed unless a court otherwise directs.

9 ATTENDANCE AT PRELIMINARY HEARINGS

A victim should be relieved from appearing at preliminary hearings or committal hearings unless the court otherwise directs.

10 RETURN OF PROPERTY OF VICTIM HELD BY STATE

If any property of a victim is held by the State for the purpose of investigation or evidence, the inconvenience to the victim should be minimised and the property returned promptly.

11 PROTECTION FROM ACCUSED

A victim's need or perceived need for protection should be put before a bail authority by the prosecutor in any bail application by the accused.

12 INFORMATION ABOUT SPECIAL BAIL CONDITIONS

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

13 INFORMATION ABOUT OUTCOME OF BAIL APPLICATION

A victim should be informed of the outcome of a bail application if the accused has been charged with sexual assault or other serious personal violence.

14 VICTIM IMPACT STATEMENT

A relevant victim should have access to information and assistance for the preparation of any victim impact statement authorised by law to ensure that the full effect of the crime on the victim is placed before the court.

15 INFORMATION ABOUT IMPENDING RELEASE, ESCAPE OR ELIGIBILITY FOR ABSENCE FROM CUSTODY

A victim should, on request, be kept informed of the offender's impending release, or escape from custody, or of any change in security classification that results in the offender being eligible for unescorted absence from custody.

16 SUBMISSIONS ON PAROLE AND ELIGIBILITY FOR ABSENCE FROM CUSTODY OF SERIOUS OFFENDERS

A victim should, on request, be provided with the opportunity to make submissions concerning the granting of parole to a serious offender or any change in security classification that would result in a serious offender being eligible for unescorted absence from custody.

17 COMPENSATION FOR VICTIMS OF PERSONAL VIOLENCE

A victim of a crime involving sexual or other serious personal violence should be entitled to make a claim under a statutory scheme for victims compensation.

Criminal Procedure Amendment (Case Management) Act 2009 commences

Significant amendments to the *Criminal Procedure Act 1986* commenced on 1 February 2010. The key reforms are highlighted in the following article.[1]

The *Criminal Procedure Amendment (Case Management) Act 2009* commenced on 1 February 2010. It makes a number of amendments to the *Criminal Procedure Act 1986* ('the Act') arising out of the recommendations of the Trial Efficiency Working Group.

The Trial Efficiency Working Group was chaired by Justice McClellan, Chief Judge at Common Law of the Supreme Court of NSW, and was made up of members of the judiciary and senior representatives of the legal profession from both sides of criminal practice (including representatives from Government bodies as well as the private Bar), and was formed to consider the causes of delay in criminal trials and to propose possible solutions. As part of this endeavour, the Working Group was requested by the Attorney General to consider the use and efficacy of existing provisions aimed at reducing the length of trials, such as the existing pre-trial disclosure provisions under Chapter 3, Part 3, Division 3 ('the Division') of the Act.

The Working Group identified a number of factors contributing to inefficient criminal trials, including a lack of early identification of issues in contention, and the method in which some evidence was presented. It recommended significant reforms to the existing pre-trial disclosure requirements under the Act. The recommendations of the Working Group are contained in the *Report of the Trial Efficiency Working Group*, which is available on the website of the Criminal Law Review Division, Department of Justice and Attorney General.[2]

Reforms to pre-trial disclosure

The existing complex trial provisions have been replaced with a new regime, which significantly expands the options available to the courts in managing a criminal trial that shows signs of being long or drawn out. The regime incorporates multiple tiers of case management, from the mandatory exchange of information at the lower end, to pre-trial hearings and conferences, through to court ordered pre-trial disclosure at the higher end, and provides courts with powers to ensure the efficient management and conduct of the trial.[3] The operation of the Division is to be reviewed in 2 years.[4]

The new tiers do not represent a strict hierarchy. It will be open to courts to immediately order pre-trial disclosure where it appears to be in the interests of the administration of justice, and the courts may waive the requirements of the Division.[5] Both the Supreme and District Courts of NSW have issued new practice notes outlining their requirements on practitioners in order to ensure compliance with the

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[1] A slightly modified version of this article was published in the February issue of the Law Society Journal.
[2] www.lawlink.nsw.gov.au/clrd
[3] Section 149E.
[4] Section 314A.
[5] Section 148.

new provisions. *Practice Note SC CL 2* and *District Court Criminal Practice Note 8 – Standard Case Management Directions* are available online at the courts' respective websites.

The exchange of notices is the only requirement that will be mandatory in all criminal trials on indictment. As noted in the second reading speech:

> "The amendments recognise that the majority of criminal trials do not require substantial case management. Most trials are straightforward affairs and it is not the intention of the Government to impose unnecessary red tape on comparatively simple cases. Rather, the focus is on those criminal trials that would benefit from pre-trial case management, due to the complexity of the relevant issues, the volume of evidence involved, or for other reasons that are apparent to the courts."[6]

Notable provisions of the new Division are briefly outlined below.

Mandatory exchange of notices

Section 137 requires the prosecution to give the accused person notice of the prosecution case, and sets out the matters that are to be included in that notice. This includes a statement of facts, as well as evidentiary material that significantly overlaps with material the prosecution is already required to provide as part of the brief of evidence. Section 138 requires the accused person to provide a response to the prosecution notice, which includes the name of the legal practitioner proposed to appear on behalf of the accused person at the trial and notice of any consent that the accused proposes to give pursuant to s.190 of the *Evidence Act 1995* in relation to any witness statements or summaries of evidence the prosecutor proposes to adduce at the trial. The notice must also include a statement as to whether or not the accused intends to give a notice of alibi or notice of intention to adduce evidence of substantial mental impairment under Division 4. The timetable for exchange of the notices is set by the presiding judge at the first mention, although the new District and Supreme Court practice notes dictate the standard directions that are to apply in the absence of specific directions by the court.[7]

Pre-trial hearings

Section 139 enables the court, at the first mention or at any other time, to order the parties to attend one or more pre-trial hearings, provided that the hearing is scheduled for a date after the indictment has been presented. At a pre-trial hearing, the court has broad powers to make orders, determinations, or findings, or to give such directions or rulings as it thinks appropriate for the efficient conduct of the trial. Such an order can be made on application by a party or on the court's own initiative. Notably, two of the actions that can be taken by the court at a pre-trial hearing are hearing and determining an objection to the indictment, and giving a ruling or making a finding under s.192A of the *Evidence Act 1995* as if the trial had commenced.[8]

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[6] The Hon Penny Sharpe, *Criminal Procedure Amendment (Case Management) Bill 2009: Second Reading*. Hansard (NSW Parliament, Legislative Council) 1 December 2009: 20,186

[7] In the District Court, the prosecution is to give its s.137 notice no later than three weeks before the trial date, with the defence to respond within seven days. In the Supreme Court, the prosecution must give its notice six weeks before the trial date, with the defence to respond in two weeks.

[8] Section 192A states:

> "Where a question arises in any proceedings, being a question about:
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> (a) the admissibility or use of evidence proposed to be adduced, or

Issues related to these two matters cannot be raised at trial without leave of the court where a pre-trial hearing was held, and the issues were not raised at that hearing.

Pre-trial conferences

Section 140 enables the court, at or after first mention, to order the parties to attend a pre-trial conference, provided that the conference is scheduled for a date after the indictment has been presented. The purpose of a pre-trial conference is to determine whether the parties are able to reach agreement regarding the evidence to be admitted at trial themselves. A conference can be requested by the parties or be ordered on the court's own motion. After such a conference, the prosecutor and the accused person's legal representative will file a pre-trial conference form indicating the areas of agreement and disagreement regarding the evidence to be admitted at the trial. Departure at trial from the agreements indicated in the form will not be permitted without the leave of the court, based on an "interests of justice" test.

Pre-trial disclosure

After the indictment is presented, s.141 enables the court to order pre-trial disclosure under any or all of sections 142 –144, provided it is of the opinion that it would be in the interests of the administration of justice to do so. Such an order may be made on application by a party or on the court's own initiative. The "interests of the administration of justice" test is a notable change from the earlier provisions of the Division. Previously, pre-trial disclosure could only be ordered by a court where it was satisfied that the trial was likely to be complex. Orders had been made in very few matters and the Working Group proposed the new test to give the courts greater flexibility to order case management.

Under s.142, the prosecution may be required to give notice of all the matters required under the mandatory requirement in s.137 as well as a copy of any material in the possession of the prosecutor that would reasonably be regarded as adverse to the credit or credibility of the accused person, and a list identifying the statements of those witnesses who are proposed to be called at the trial. The provisions then outline the requirements on the defence in reply, as well as on a further response by the prosecution.

Under s.143 the court may require the defence to provide a response, including a statement in relation to each fact set out in the prosecution statement of facts, which indicates whether the accused person considers the fact to be an agreed fact, or disputes the fact. The response should also include notice of certain matters that the defence intends to raise in relation to the evidence proposed to be adduced by the prosecution, including a broad requirement to give notice as to whether the admissibility of any evidence disclosed by the prosecution will be disputed, and the basis for that objection (s.143(d)). Other requirements on the defence in relation to the prosecution's evidence require the defence to give notice of more specific issues taken with material disclosed by the prosecution, including whether expert evidence

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(b) the operation of a provision of this Act or another law in relation to evidence proposed to be adduced, or

(c) the giving of leave, permission or direction under section 192,

the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings."

disclosed by the prosecution is disputed, and whether the authenticity or accuracy of any proposed documentary evidence or other exhibit is disputed.

Similarly, s.144 requires the prosecution to provide a response to the defence response that indicates any disputes in relation to the evidence proposed to be adduced by the defence. In addition, the prosecution response must include a copy of any information, document or other thing in the possession of the prosecutor, not already disclosed to the accused person, which might reasonably be expected to assist the case for the defence.

Dispensing with formal proof

In the event that the parties have been made subject to court-ordered pre-trial disclosure, the court will have the power under s.145 to dispense with formal proof of certain matters. Where a fact, matter or circumstance alleged by the prosecution was disclosed to the accused in accordance with the provisions of the Division, the defence was required to provide a response under section 143, and that response did not disclose an intention to dispute or require proof of the fact, matter or circumstance, the court may order that a document asserting that fact, matter or circumstance may be admitted at the trial as evidence of the fact, matter or circumstance, or that evidence may not be adduced by the defence to contradict the fact, matter or circumstance without the leave of the court. Further, where the prosecution has disclosed evidence to the accused, the accused was required to provide a response under s.143, and the accused did not disclose an intention under s.143(d) to dispute the admissibility of that evidence, it is open to the court to order that any one or more of the provisions of Division 3, 4 or 5 of Part 2.1, Part 2.2 or 2.3[9], or Parts 3.2-3.8[10] of the *Evidence Act 1995* do not apply. In effect, where the defence fails to disclose an intention to dispute the admissibility of certain evidence, the court may, by order, treat the evidence as if the defence has given consent to the waiver of certain rules of evidence under s.190 of the *Evidence Act 1995.*

Evidence in summary form

Section 145(3) also enables a court, on the application of a party, to direct that the party may adduce evidence of two or more witnesses in the form of a summary, provided that the court is satisfied the summary is not misleading or confusing, and the admission of the summary will not result in unfair prejudice to any party to the proceedings. In making such a direction, the court may require that the witnesses whose evidence has been summarised be available for cross-examination. The opinion rule does not apply to evidence adduced in the form of a summary.

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[9] Rules relating to documentary evidence, and evidence other than documentary evidence and witness evidence, including demonstrations and experiments.

[10] Rules relating to hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility, and character evidence.

General powers to ensure efficient management and conduct of the trial

In addition to the specific powers to order various case management measures under the Division, s.149E gives the court very broad powers to make such orders, determinations or findings, or give such directions or rulings, as it thinks appropriate for the efficient management and conduct of the trial. These powers can be exercised on or after the commencement of the proceedings, and include the ability to order that the parties to the proceedings disclose any matter that could have been required to be disclosed under the Division prior to the commencement of the trial.

Extension of s.130A

Prior to amendment, s.130A provided that a pre-trial order made by a judge in sexual offence proceedings would be binding on the trial judge, or where on appeal against a conviction for a sexual offence a new trial is ordered, on the trial judge in the fresh proceedings, unless, in the opinion of the trial judge, it would not be in the interests of justice for the order to be binding. The amendment to s.130A extends the application of the section to all criminal trials on indictment, and to all orders. In the absence of any evidence that s.130A has impacted on listing practices, and with the broader policy goal of increasing the efficiency of criminal trials, the application of the section is now extended to orders made during a trial.

Disclosure requirements ongoing

Section 147 provides that the obligation to comply with the requirements for pre-trial disclosure under the Division is ongoing. Consequently, if new material that would have been required to be disclosed comes to light after pre-trial disclosure has been made, that material must be disclosed to the other party as soon as practicable.

Interaction with other disclosure requirements

Section 149F clarifies that the Division does not affect the obligations or powers under Division 4[11], nor any additional disclosure requirements that may apply, such as the requirements of the common law or prosecution guidelines issued by the Director of Public Prosecutions. The Division does not override any such obligations to the extent that it is possible for them to be complied with concurrently with the requirements of the Division.

Exemption for matters previously disclosed

Section 149D makes it clear that material that has been included by the prosecution in a brief of evidence served on the accused person or has otherwise been provided or disclosed to the accused person need not be included in a prosecution notice under the Division. Similarly, the accused need not provide any material that has already been provided or disclosed to the prosecutor.

Sanctions

Section 146 sets out the applicable sanctions for failures to comply with the requirements of the Division. Where a party seeks to adduce evidence that has not been disclosed to the other party in accordance with the pre-trial disclosure requirements imposed under the Division, the court may refuse to admit that evidence. Further, the court may refuse to admit evidence from an expert witness

[11] Division 4 requires the accused to provide the prosecution a notice that he or she intends to adduce evidence in support of an alibi or substantial mental impairment at least 42 days before the commencement of the trial.

that is sought to be adduced by a party if the party failed to give the other party a copy of a report by the expert witness in accordance with requirements for pre-trial disclosure under the Division. Where the court chooses to permit the adducing of evidence that a party failed to disclose in accordance with the requirements of the Division, the court may grant an adjournment to the affected party if the adducing of the evidence would prejudice the case of the party seeking the adjournment.

Concluding remarks

As noted by the Working Group in its Report, the impact of the new provisions on trial efficiency will be limited without a cultural shift amongst practitioners of criminal law.[12] On 1 December 2009, during his Speech in Reply in the Legislative Council, the Attorney General observed:

> "While the fundamental differences between civil and criminal proceedings have necessitated the use of different mechanisms, the aim of the bill is to foster in criminal cases the type of communication that occurs between the parties in civil matters when criminal cases would benefit from such an indication."[13]

Where such communication is achieved, the impact on trials will be significant, allowing cases to be "...focused on the real issues in dispute between the parties, thereby saving costs, time and inconvenience of jurors who would otherwise have to wade through large slabs of evidence that do not go to the real issues which juries are required to determine."[14]

The Chair and members of the profession involved in the Working Group have put significant effort into formulating a workable scheme to improve the efficient hearing of trials. With the cooperation of practitioners and courts alike, it is hoped the commencement of these new provisions will secure the more efficient disposition of complex criminal trials, to the benefit of all who participate in the criminal justice system.

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[12] *Report of the Trial Efficiency Working Group*, March 2009 p.7

[13] The Hon John Hatzistergos, *Criminal Procedure Amendment (Case Management) Bill 2009: Speech in Reply*. Hansard (NSW Parliament, Legislative Council) 1 December 2009: 20,204.

[14] Ibid.