SENTENCING IN THE DISTRICT COURT

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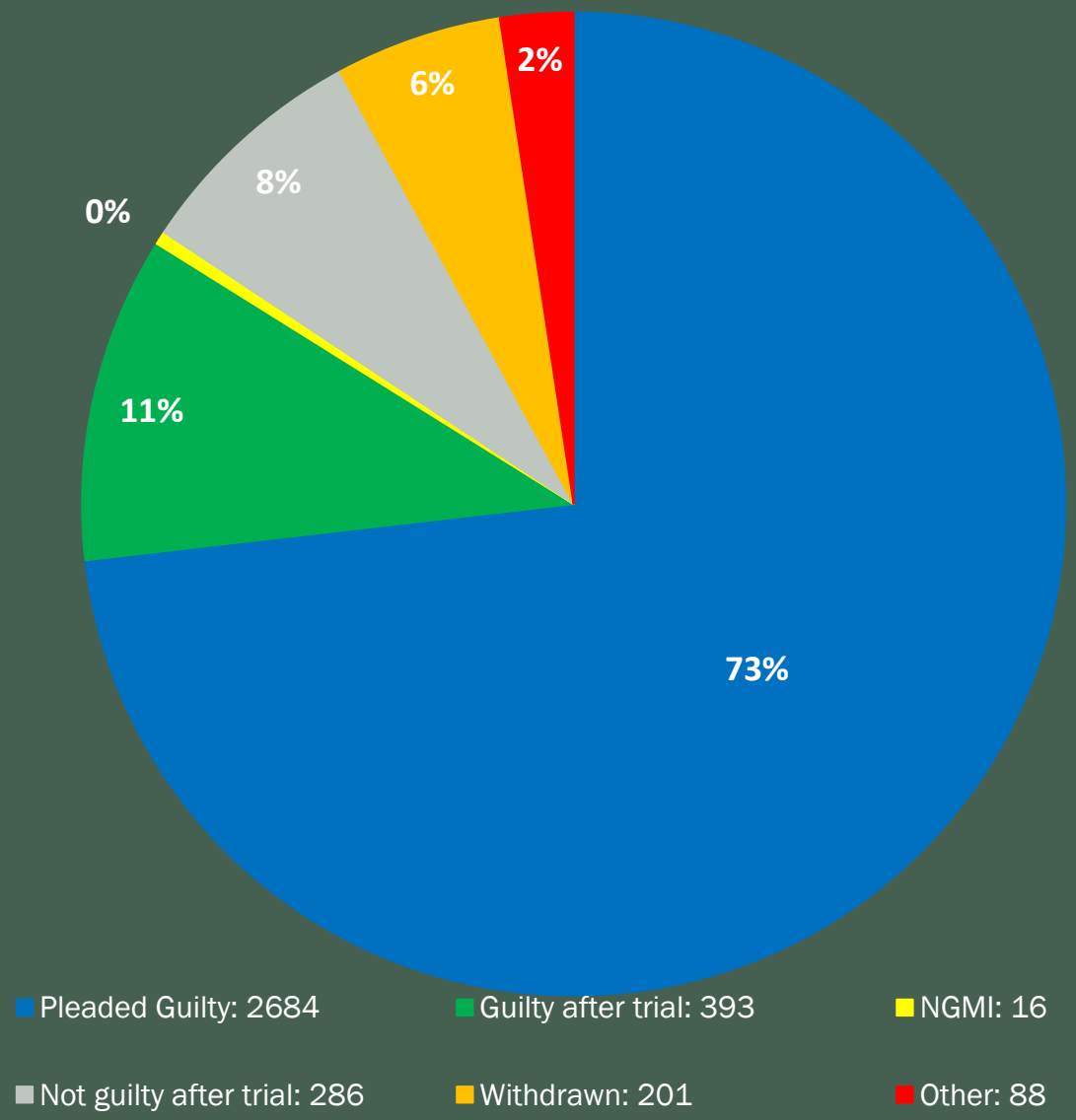
Overview

- The Bureau of Crime Statistics and Research (BOCSAR) reports that in NSW between 1 July 2020 until 30 June 2021 there were 140,644 individuals whose matters were finalised.
- The vast majority of cases resolve with either a plea of guilty being entered or a conviction after trial, specifically:
- **89.4% of people charged with an offence were either found guilty after trial / hearing or pleaded guilty to at least 1 charge.**
  - *Local Court: 90%*
  - *District Court: 84.4%*
  - *Children's Court: 79.9%*
  - *Supreme: 75.3%*



District Court finalisations

- Total number of defendant's whose matters were finalised in the District Court between 1 July 2020 to 30 June 2021 was 3,668 (about 400 lower than pre Covid).
- There were 695 defended hearings (i.e, 19% went to trial.)
- Of that 695 that went to trial there were 393 convictions (56% conviction rate).

More BOCSAR statistics

- The median time from arrest to finalisation for defendants finalised by trial in the District Court in 2020/21 increased by 19 days to 742 days.
- The median time from arrest to finalisation for defendants finalised by sentence fell by 25 days to 456 days.
- District Court finalisations fell by 12% (down 518) between 2019/20 and 2020/21, from 4,186 to 3,668. This was in addition to the drop of 14% (down 691) seen between 2018/19 and 2019/20.

District Court Practice Note 20

- This PN commenced on 31 August 2020 and it applies to all proceedings in the DC.
- The PN contains a number of procedural issues relating to arraignments and procedural matters. The critical issues are:

11. *The matter will not be listed for a sentence hearing unless there is a signed Statement of Agreed Facts.*
12. *If the Statement of Agreed Facts cannot be agreed, there is a FURHTER listing date set for mention and between the first and second date:*

(a) The prosecution is to serve on the offender a statement of proposed facts;

(b) The offender is to reply within one week of receiving the statement of proposed facts, a response noting areas of dispute and a list of any witnesses required for cross examination*; and*

(c) The prosecution is to serve on the offender, within one week of receiving the response, a final version of proposed facts and witness availability. ***Only then will a hearing date be given.***

District Court Practice Note 20

13. Is a sentence assessment report required?

15. "Standard Directions"

(a) The prosecution is to file and serve the Crown Sentence Bundle no later than two weeks prior to the sentence date.

(b) The offender is to file and serve any documentary material, including expert reports, to be relied upon on at sentence no later than seven days prior to the sentence date.

(c) The prosecution and the offender are to file and serve any further documents they rely on and an outline of submissions no later than three days prior to the sentence date.

District Court Practice Note 20

Non-compliance with the court's directions

- 17. If it appears to the court that a party has not complied with this Practice Note or with any other direction made by the court, the court may contact the offending party directly or list the matter for mention, either on the court's own initiative or at the request of either party.
- 18. Without limiting the court's power otherwise to deal with a failure to comply with a direction, the court may order the offending party to file an affidavit, or give evidence in court, explaining the failure to comply.

The Statement of Agreed Facts

As you know, there are two critical matters to be negotiated with the Crown:

(1) the Crown will accept a plea to fewer or different charges; and

(2) The facts for sentence.

If there are agreed facts for sentence the Crown should not tender material in the brief which is inconsistent with the agreed facts: see *R v Palu* (2002) 134 A Crim R 174 at para [21], *R v Falls* [2004] NSWCCA 335 at para [37] - [39]; *R v Shearer* [2020] ACTSC 100 at [30].

Proof in sentence proceedings

- Section 4 of the Evidence Act states that unless the court makes an order otherwise, the Evidence Act does not apply to sentence proceedings.
- For the prosecution to establish an aggravating factor, the onus is on the prosecution to establish that **aggravating factor beyond reasonable doubt, but for the offender to establish a mitigating factor, proof only has to be on the balance of probabilities**: *Olbrich v The Queen* (1999) 199 CLR 270.

Sentencing assessment reports

In matters where the client is likely to receive a custodial penalty, think carefully about whether a SAR is useful BECAUSE…

Once the report is ordered you lose control over (a) what will be in the report and (b) whether it is tendered or not.

Psychiatric/Psychological reports: Do I get one and what kind do I need?

Obtaining a psychological or psychiatric report is fairly standard. My default position is to obtain one but do not necessarily serve it.

But – psychiatrist or psychologist.

Underlying psychiatric conditions or pre-existing psychiatric diagnoses should be addressed in a report from a psychiatrist or a clinical psychologist qualified to make psychiatric diagnoses.

Offenders suffering from cognitive impairments are better seen by a psychologist who can perform psychometric testing.

Psychiatric/Psychological reports

- The expert should be briefed with:
  - A proper letter of instructions setting out any known conditions or issues that the client suffers with and specific questions you want addressed;
  - Agreed Facts;
  - Other medical notes? Consider whether existing reports should be provided – this will depend on whether you want to use those reports or your client would be prejudiced by their disclosure to the Crown;
  - The offender's criminal history.

Psychiatric/Psychological reports

1

REMEMBER just because you have a report, you do not need to serve it.

2

Read the report carefully and consider whether the report actually assists your case, prior to the report being served on the Crown or tendered.

3

Get instructions from your client about the report's accuracy and whether they are happy for it to be served.

How strong is my subjective evidence?

- Obtaining a psychological or psychiatric report is standard and is often used as a means of putting a subjective material before the sentencing judge. Adducing evidence in this way, rather than calling your client to give evidence and exposing them to cross-examination, is common.
- Almost as common is the criticism this approach receives in the Court of Criminal Appeal. For instance:

Regina v Qutami [2001] NSWCCA 353 at [58] – [59] Smart JA:

> *There is one further general observation. In this case reliance appears to have been placed on statements made by the prisoner to psychiatrists and the psychologist. While those statements are admissible in evidence, very considerable caution should be exercised in relying upon them when there is no evidence given by the prisoner. In many cases only very limited weight can be given to such statements.*
>
> *There has been a noticeable and disturbing tendency of more recent years for prisoners on a sentence hearing not to give evidence and to rely on statements made to experts. Prisoners should realise that if this course is taken great caution will be exercised in respect of the weight, if any, given to those statements.*

R v McGourty [2002] NSWCCA 335 at [24] Woods J :

- *“So far as I can see, there was no factual basis for the finding made by his Honour beyond a self-serving and untested statement made by the respondent to the psychologist. Recently this court has criticised the practice of placing material of this kind before sentencing judges in an attempt to minimise the objective seriousness of a crime otherwise apparent on the face of the record…I wholeheartedly agree with the criticism offered in that case. If an offender appearing for sentence wishes to place evidence before the court which is designed to minimise his/her criminality, then it should be done directly and in a form which can be tested.”*

R v Elfar [2003] NSWCCA 358 at [25] Whealy J:

The matters of principle stated in R v McGourty and R v Qutami are plainly important. They require emphatic endorsement by this court. Indeed it needs also to be further emphasised that this principle extends not only to statements in psychological reports, but also to statements by offenders in pre-sentence reports… In addition, the current practice of tendering a note or letter from an offender in sentencing proceedings attracts the same admonishment. Considerable caution should be exercised in reliance upon such exculpatory material where there is a matter in dispute and where no evidence is given by an offender or other direct evidence is not placed before the court. The essential reason for treating the material in that way is precisely because it remains untested. Indeed, where the Crown has either objected to the tender of this type of material or has made it clear, either at the time of tender or when submissions are made, little or no weight should be placed upon the material, that the sentencing court would be entitled to treat the material as being of little or no weight. Indeed, in an appropriate case, it ought to do so.

Cressel v R [2021] NSWCCA 26 at [45]: Bellew J

”As I have already noted, the applicant did not give sworn evidence before the sentencing judge but wrote a letter for his Honour’s consideration. Such a course has consistently been the subject of disapproval by this Court. In the circumstances, I place little weight on the contents of that letter.”

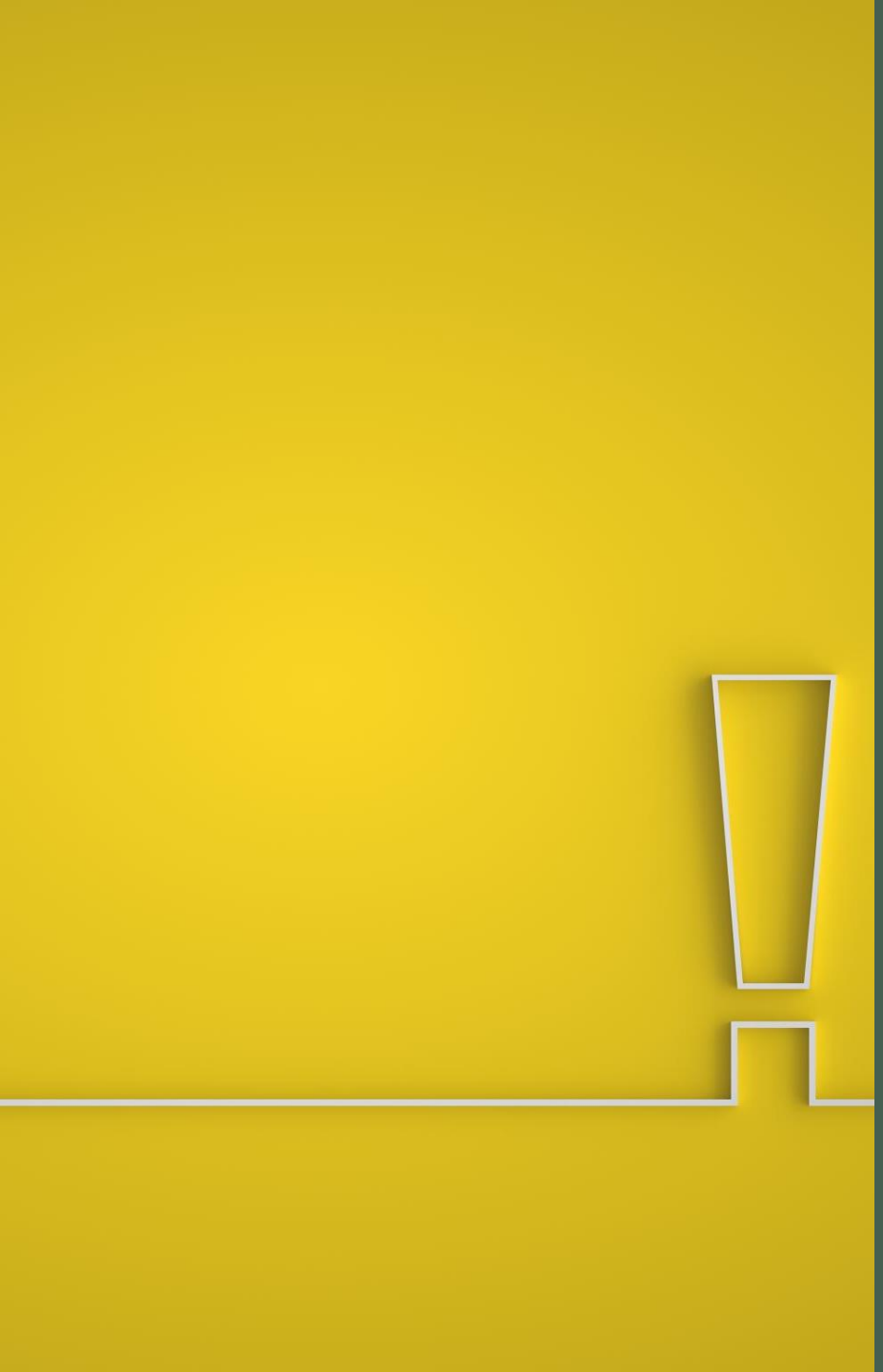
Lai v R [2021] NSWCCA 217 at [79] Bellew J

> *"Those observations have since been consistently reiterated by this Court. There is, in my view, no utility in adopting the practice of tendering a statement in the absence of sworn evidence, in circumstances where this Court has made it abundantly clear that little or no weight should be attached to its contents. It follows that in my view, such a practice is to be strongly discouraged."*

<u>However:</u>

Butters v R [2010] NSWCCA at [16] – [17]: Fullerton J:

> *The applicant submitted, and correctly, that the prosecutor misstated the law when he submitted that s 21A(3)(i) of the Crimes (Sentencing Procedure) Act requires an offender who is claiming the benefit of remorse in mitigation of sentence to give evidence in the sentence proceedings, and that in the absence of such evidence little weight ought attach to out of court statements of remorse by the offender. Contrary to the prosecutor's submission there is no statutory requirement that an offender give evidence before remorse can be taken into account in the calculation of sentence. Furthermore, the prosecutor's reliance on R v Thomas [2007] NSWCCA 269 as authority for the proposition he advanced was in error.*
>
> *On a proper construction, s 21A(3)(i) requires an offender to provide evidence that he or she has accepted responsibility for his or her actions and has acknowledged any injury, loss or damage caused by his or her actions or any reparation for such injury, loss or damage (or both), as a statutory precondition to any reliance on remorse as a mitigating factor. The requirement to provide evidence before remorse can be relied upon does not equate with a requirement that an offender give evidence either of remorse generally or of the matters set out in the section…*



In light of all that…Does my client give evidence?

- Personally, I try and call the offender.
- The most important reason for this is to remove the otherwise available Crown submission that the material in the psychiatric / psychologists report should be rejected (assuming you are seeking to rely on one).
- Secondly, it may harder for a judge to impose a long sentence on someone from whom they have heard.
- Thirdly, if there is genuine contrition and remorse, this is best emphasised by the client in his or her own words.
- Fourthly, seriously consider how much damage can really be done by your client giving evidence compared to the benefits.

- Fifthly, if the Crown appeals the sentence, it may be easier to hold the sentence in the CCA if the client has given evidence.
- Have a written proof of evidence from your client before calling them and explain the process of giving evidence. The evidence would usually involve:
  - *A brief chronological account of the client's life, in particular the time leading up to the commission of the offence;*
  - *Then deal with the offence itself - not traversing the facts! - but in order to express their remorse or the surrounding circumstances of the offence (drug use, relevant personal circumstances);*
  - *any expression of remorse the client can make;*
  - *progress in custody / plans in custody re working or training upon release;*
  - *hopes and plans for the future; and*
  - *If your client is in some form of protection or HRMU, have them explain the harsh condition of custody, emphasising the number of hours he or she is spending in their cell each day, lack of resources, education etc.*

Could I just use an affidavit?

- If you want to place evidence from your client before the Court, you can do so either by way of oral evidence or affidavit.
- The benefit of the affidavit is that you can ensure everything you want to cover IS covered and that the evidence is complete.
- However, relying on an affidavit does not remove the possibility of cross-examination.
- Relying on this course does not receive universal support. In ***Imbornone v R*** **[2017] NSWCCA 144 at [57] Wilson J said:**

  "Affidavits relied upon in the absence of oral evidence on oath frequently contain self-interested assertions of a character which makes them almost impossible to verify or test (particularly when served on the Crown in close proximity to, or on, the date of hearing). In the absence of any independent verification of the asserted behaviour, or state of mind, or of a tangible expression of contrition, "to treat this evidence with anything but scepticism represents a triumph of hope over experience": R v Harrison (2002) 121 A Crim R 380] at [44]."

Character witnesses

- It is better to have two or three good character witnesses rather than dozens.
- IF you were calling live character witnesses (rarely done nowadays) it would be a rare case in which you would consider calling more than two witnesses.
- A written character reference must cover the following material:

  (1) An acknowledgment that the offender has committed the specific offences for which they are being charged.

  (2) An explanation for the relationship between the witness and offender. A reference by a witness who has not had contact with the accused for many years is generally worthless.

  (3) A statement to the effect that the offence was out of character for the offender is a must.

Sentencing tables / Statistics

Use the Public Defenders' web site for sentencing tables.

JIRS statistics.

Written Submissions

The Practice Note assumes parties will provide a written outline of submissions. This is a good thing.

It assists the judge and it assists you in having a structure.

- My standard outline has the structure:
  1) *Plea of guilty discount (if applicable);*
  2) *Backdated sentence commencement date;*
  3) *Objective seriousness;*
  4) *Relevant aggravating and mitigating factors under s. 21A Crimes (Sentencing Procedure) Act. (for a NSW offence or alternatively for a Commonwealth offence, Crimes Act 1914 (Cth);*
  5) *Subjective considerations;*
  6) *Assistance to the authorities;*
  7) *Special circumstances (not relevant to Commonwealth offences)*
  8) *Range of sentences for this Offence / JIRS statistics.*

Finally, some random things to remember:

- a factor cannot be an aggravating factor if it is an element of the offence: for example, a sentencing judge should not treat the simple fact threatened use of violence as an aggravating factor for an offence where the threatened use of violence is an element of the offence, such as in robbery offences: *R v Ibrahimi* [2005] NSWCCA 153 at paras [16] to [18].
- Commonwealth and NSW offences have different sentencing regimes and any offences from the two regimes cannot be aggravated: the offender needs discrete sentences for each regime.
- Commonwealth charges cannot appear on a Form 1, nor can a NSW charge appear on Commonwealth s 16BA Schedule.

After the sentencing pronouncement

Speak to your client!

Clients who have just been sentenced are very unclear about what sentence they have received.

Depending on the result, you may want to either advise the client of his right of appeal. If the client thinks they have been hard done by, but you think it is a good result, tell them.