Practical tips for young criminal lawyers

Forensic decision making and summary hearings

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As practitioners our number one duty is to the Court. Yet it is important to understand that as defence lawyers, clients place an enormous amount of faith in our abilities to provide them with high level legal representation. Similarly prosecutors' bear a responsibility to the community to appropriately prosecute matters.

Regardless of which side of the bar table you sit, you are called upon to make a number of decisions on a day-to-day basis. As advocates, can we do things in a more efficient manner, whilst faithfully discharging our duties and obligations?

Whilst primarily directed at defence lawyers, the relevant considerations, save for the taking of instructions, are equally applicable to prosecutors.

What does it mean to 'take instructions' and give 'legal advice'?

There is no 'right' way to take instructions or provide advice. When we do so we analyse a number of factors, for example:

- Nature of the charge:
  - » Is there mandatory sentencing
  - » Is the an error with the charge(s)
- Current state of the evidence:
  - » Are there independent witnesses
  - » Are there exhibits, photos etc.
  - » Is there an EROI
- Likely/unlikely outstanding evidence:
  - » Medicals?
  - » Forensics

It is important to always bear in mind that a 'precis' or 'statement of alleged facts' is NOT evidence. Review the statements on file.

We are required to balance a number of considerations and make decisions in the interest of our clients, sometimes we do this consciously sometimes we do it as a matter of habit. Either way, these decisions we make will impact upon the manner in which a matter proceeds.

It is important to recognise these decisions and understand why and when to take particular courses of action.

Forensic decision making

Examples of considerations and decisions we make include:

- Is an interpreter required:
  - » Is an interpreter available
- When and upon what do we seek instructions:
  - » Personal circumstances
  - » Allegation
  - » Recollection
  - » Nothing
  - » Prosecution witnesses prior criminal history
  - » Motives
- When and how do we give legal advice:
  - » Strength of case
  - » Elements of the charge
  - » Defences and defence witnesses
  - » Alibi
  - » Alternative hypothesis consistent with innocence
  - » Will a conviction attract mandatory sentencing:
    - – As a matter of course
    - – On a subsequent matter
- Considerations as to admissibility of certain evidence
- Mental health issues
- The issue of bail applications
- Witnesses that will or may be required for hearing/PEO

- Seeking of reports:
  - » Independent psych report
  - » Court ordered:
    - – S103
    - – Full PSR
    - – Institutional report
- Charge negotiations
- Sending of representations

Some of these decisions will necessarily mandate the course of a matter and allow your client to instruct you in relation to the most fundamental aspect of a matter: is it contested; if yes—why? If no—why?

What will affect your decision making process?

Before you first conference with a client you will/ should already have a good idea about:

- Any issues on the face of the charge(s)
- Strength of case and availability of positive defences:
  - » By reference to the evidence NOT the precis
- Mandatory sentencing implications:
  - » Exceptions to mandatory sentencing implications
- Bail presumptions

You will need to provide appropriate advice on these matters and tread carefully regarding substantive instructions.

In particular instances such as serious sexual offences or serious violence/homicide matters you will give general advice but you will almost certainly not want instructions on the allegation early in the piece. This may be the case on some other matters but will require case-by-case considerations.

If having received your advice you get instructions, the next phase of decision making comes into play.

Local Court matters in particular, wherever possible, should be dealt with as expeditiously as possible.

If you have instructions to plead guilty or send reps consider the following:

- Potential penalty
- Will there be prejudice by an adjournment
- If seeking adjournment how long do you need/why
- Should indications be made on the record
- Do you need:
  - » References or testimonial materials
  - » Reports—pros and cons
- The question of bail

Representations should be sent as soon as possible and followed up prior to the adjournment date.

If you have instructions to contest a charge(s) or elements of charge(s) consider the following:

- What evidence if any do you seek to impugn
- What evidence do you assert is inadmissible
- **What are your closing arguments**
- How will you XXN to meet your closing arguments
- What witnesses are required
- What facts do you want to agree and why
- Do you need to summons or subpoena evidence

These factors are also relevant to considerations on PEM matters in particular whether to PEP or PEO on a matter heading to trial.

Make sure that by the first directions hearing or PEM listing these decisions have been made. Ongoing adjournments for further material or instructions inevitably result in delays in setting hearing dates and mean more time on remand for clients in custody and endlessly clogs up court lists. →

Putting the decision making into practice: preparing a summary hearing

The defence you run will dictate the materials required to assist in preparation, however there are some important issues to be aware of from the outset:

- What are the points of proof for the prosecution?
- Does s31 or part IIAA criminal responsibility arise?
- If it is a strict liability offence; are their 'mental element' defences available?
- Will the prosecution be making an unavailable witness application?
- Likelihood of unfavourable witness application(s)?
- Voir dire arguments:
  - » Admissions
  - » Documentary evidence/exceptions to hearsay
  - » Execution of duty

Defence lawyers and prosecutors alike should be armed with both the relevant legislation and case law required for the hearing.

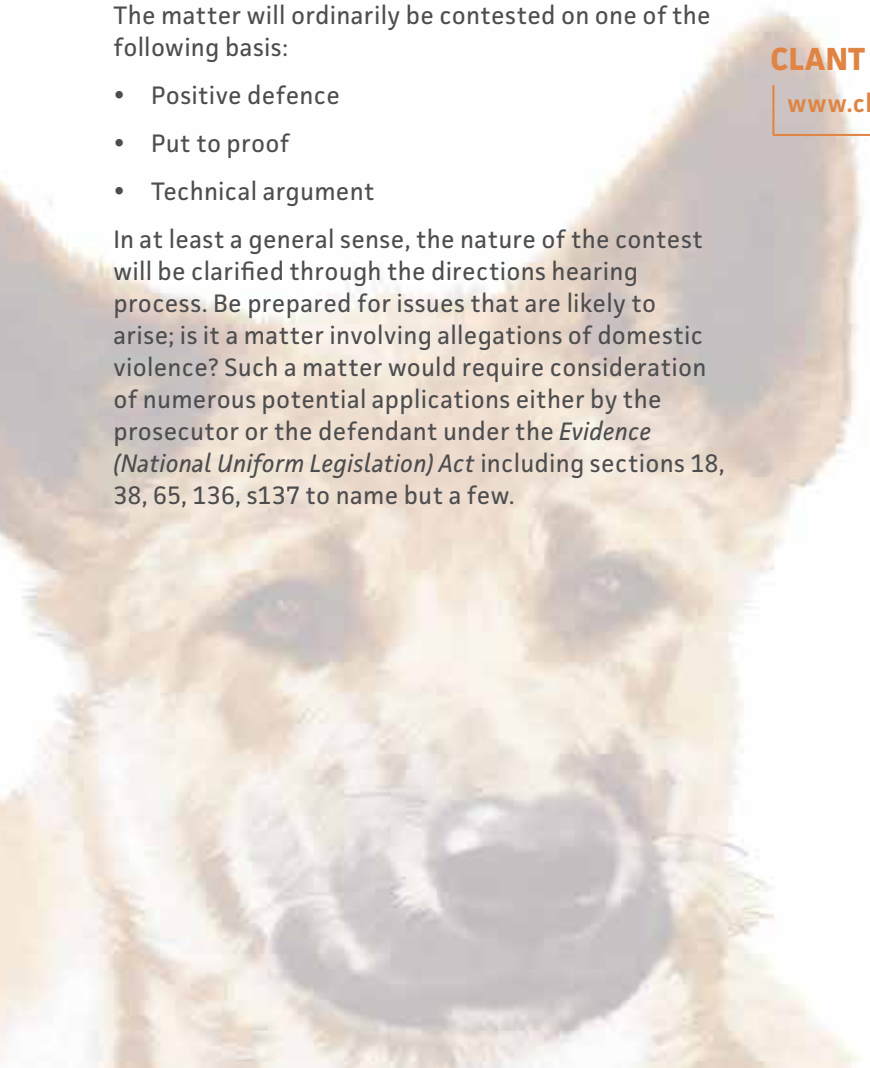
There may well be matters of fact that can be agreed between parties and either reduced to an admitted facts document or tendered by agreement. It is important to effectively communicate with one another prior to the hearing.

The contest

The matter will ordinarily be contested on one of the following basis:

- Positive defence
- Put to proof
- Technical argument

In at least a general sense, the nature of the contest will be clarified through the directions hearing process. Be prepared for issues that are likely to arise; is it a matter involving allegations of domestic violence? Such a matter would require consideration of numerous potential applications either by the prosecutor or the defendant under the *Evidence (National Uniform Legislation) Act* including sections 18, 38, 65, 136, s137 to name but a few.



Cross-examination

Your cross-examination should be purposeful. Don't ask questions that you don't need to ask or if you don't know what the answer will be.

Prepare a broad outline of the questions you intend to ask, they may not all be relevant as the evidence unfolds but know where you are headed.

If you are establishing grounds in cross-examination that give rise to a positive defence and you intend or at least envisage your client may need to give evidence, make sure your cross-examination is prepared in a manner consistent with your client's version.

The point of your examination is to draw out the matters upon which you intend to close.

Closing submissions

Your submissions should be concise. They will have largely been prepared at the time of listing the hearing. Your close is pointing out to the judge, based on the evidence, why the charge has failed to be proven.

You **do not** need to be lengthy. You **do** need to point out the key areas in which the evidence has been undermined or why particular answers support your case theory.

If you have argued legal points, refer to the pinpoint of any case to support your argument. ■

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