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10861NAT Diploma of Aboriginal and Torres Strait Islander Legal Advocacy

LEARNER MANUAL

Block 2 Court & Bail

NAT10861001 Support clients needing legal assistance

NAT10861003 Assist persons seeking bail

NAT10861004 Manage responsibilities for court appearances

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Introduction to NAT10861001 Support clients needing legal assistance

This unit describes the performance outcomes, skills and knowledge required to support the rights, interests and needs of Indigenous clients in need of legal assistance. The unit involves the communication of basic information about legal services and liaison between the client and legal system.

Responding to client entering legal system

What is the role of Aboriginal & Torres Strait Islander field officers?

The role of the field officer between organisations and across jurisdictions varies. In some jurisdictions, field officers may engage in advocacy at court, in other jurisdictions, this is not commonplace and may be restricted. Across all jurisdictions, the cultural expertise shared by field officers is invaluable to the quality of the legal services provided to clients.

The Victorian Aboriginal Legal Service highlight the important role of client service officers:

> "VALS maintains a strong client service focus which is achieved through the role of Client Service Officers (CSOs) who act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community."[1]

The Aboriginal Legal Service of Western Australia sets out the duties of court officers (field officers) in their jurisdiction as follows:

> Court Officers are Aboriginal people employed by ALSWA. One of the main duties of an ALSWA Court Officer is to represent Aboriginal and Torres Strait Islander people in the Court of Petty Sessions and Children's Court. A Court Officer's authority to appear in Court comes from a Certificate granted under Section 48 of the Aboriginal Affairs Planning Authority Act 1972 (WA).

[1] https://vals.org.au/about/.

The main responsibilities of a Court Officer are:

- To represent clients in the Court of Petty Sessions and Children's Court for pleas of guilty, not guilty, remands and bail applications;
- To assist in ensuring strong and successful communication between ALSWA lawyers and clients. This includes acting as a bridge in communication when there are language barriers, to ensure complete understanding and ultimately the proper representation of clients;
- To do regular prison visits;
- To provide basic legal advice to clients on all legal issues;
- To do community legal education and liaison within Aboriginal, Torres Strait Islander and wider communities"[2]

It is important to have a clear understanding of the role and responsibilities prescribed by the particular organisation that the field officer (or any other position) is to perform (and limitations) to ensure the role is performed effectively and clients are well served.

Meet with client and receive instructions or information

When a lawyer first meets a client, he/she needs to interview the client and gather facts about their problem in order to understand the client's needs and assist the client in making an informed decision. Interviews with clients will be vital in obtaining information necessary to prepare their legal proceedings, inform clients of court procedures and respond to any questions or concerns they may have regarding their circumstances. Further points to consider:

- **Appropriate location to meet with a client (including in outreach settings)**
  It is important to choose a safe and comfortable space to meet with a client. Different contexts that could be appropriate, depending on the client, include: an office space or a community centre room (if in outreach setting). Privacy is always important. It is

[2] https://www.als.org.au/about/court-officers/.

important to be flexible, but to ensure both the practitioner and the client feel comfortable. In certain circumstances you should seek the permission of appropriate community members and/or organisations before entering a community and or using certain facilities within a community.

- **Consider who is in the room when you speak with the client**

  If a client arrives with family, friends or other support persons, it is advisable to ask to see the client alone first. The purpose of doing this is to ask the client in a private setting if they authorise anyone else being present when the interview is conducted. If you ask this question in the presence of family members, it can often be difficult for the client to say that they would rather be alone. Once you satisfy yourself that the client would like support persons present, it is then important to ensure that no-one present is a witness or potential witness in the case as this can have detrimental impacts for their case (e.g. contamination of evidence).

- **How to prepare for taking instructions**

  Ensure that there is writing material available to be able to take notes throughout the interview. It is often helpful, if time permits, to engage in conversation to establish rapport before diving into the core aspects of the legal matter. It is important to remember that the role of legal practitioners is to take instructions from the client. It is important to keep the interests of the client at the forefront of any interview.

- **Setting client expectations at first meeting**

  Setting appropriate expectations from the first meeting with the client is extremely important. For example, it is important to give realistic time frames on how long a case may take to resolve. How long a person may be at court that day. The lawyer should give advice which appropriately sets out the client's options and possible outcomes in relation how the case may resolve. If the outcome may involve a serious impact upon the client (such as a jail penalty), it is important to deliver this advice sensitively with the time and space for the client to ask questions and understand their situation and options fully. Providing unrealistic or insensitive advice perpetuates tensions that exist between client, or communities, and the legal justice system.

- **Explaining the role of a legal practitioner and the process that will follow the initial meeting**

  It is the role of a legal practitioner to listen to the client, to identify the legal issues, and advocate on behalf of them, in accordance with what the client instructs the lawyer to do. After the client has provided the practitioner with all of the relevant information, the practitioner will explain the next steps in the process and the client's legal options before the conclusion of the interview. The practitioner should remind the client of the time and place of the next court appearance and what is likely to happen on that day. Providing the client with information to contact the field officer or practitioner (e.g. by providing a business card) and assuring the client that they should feel free to contact the practitioner if they have any questions is important. Make the client feel comfortable that they are entitled to call and have any issues clarified before the next court date.

- **Full and correct recording of client personal details (especially contact details)**

  Ensure that all details provided by the client are documented correctly. This includes full name, address, date of birth and contact details. It is helpful to obtain the contact details of support persons or family members so that they can be called if there are any issues contacting the client. You should record if the client provides authority for you to talk about their case with any person or to contact support persons.

- **Safety of self and client during interview**

  If meeting outside of an office, ensure that other staff are aware of the meeting and location. If meeting within an office, become aware of safety devices, such as a duress button and exits. A common method of ensuring safety during an interview is having the practitioner sit closest to the door.

Duty of care and legal responsibilities

Duty to client

Practitioners have ethical duties to act in their client's best interests. The duty requires the practitioner to be loyal to their client's interests, subject to the obligations which lawyers

have to the court and to justice. This is because practitioners are 'officers of the court'. The Law Society of NSW has published a useful 'Statement of Ethics":

> "We acknowledge the role of our profession in serving our community in the administration of justice. We recognise that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.
>
> Our conduct and behaviour should reflect the character we aspire to have as a profession.
>
> This means that as individuals engaged in the profession and as a profession:
>
> - We primarily serve the interests of justice.
> - We act competently and diligently in the service of our clients.
> - We advance our clients' interests above our own.
> - We act confidentially and in the protection of all client information.
> - We act together for the mutual benefit of our profession.
> - We avoid any conflict of interest and duties.
> - We observe strictly our duty to the court of which we are officers to ensure the proper and efficient administration of justice.
> - We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.
> - We charge fairly for our work."[3]

Field officers and client service officers should also be aware and adopt standards consistent with this statement as well as observing and complying with internal codes of conduct and any ethical obligations which the organisation they work for requires to be upheld.

[3] https://www.lawsociety.com.au/practising-law-in-NSW/ethics-and-compliance/ethics/statement-of-ethics.

It is of great importance that any person who is not a lawyer is not to provide legal advice or act as a solicitor (this includes field officers, court officers and client service offers). Legal information can be provided, including court procedures, information about confidentiality and privacy, the role of the various people involved in the court process.

As a field officer, the role includes:

- maintaining confidentiality and privacy of client information
- avoiding conflict of interest
  \Maintaining professional standards
- Ensuring safety and welfare of client at all time
- Acting honestly, fairly and with competence and diligence in the service of clients

Introduction to legal ethics

A legal practitioner is bound by the general principles of professional conduct.

Duty to the law: Legal practitioners are part of the administration of our legal system. They may not agree with some of it, and are entitled to lobby for its reform, but they must obey the existing laws.

Duty to the court: Legal practitioners must act with honesty, integrity and candour and must discharge all duties owed to a court or tribunal, including undertakings.

Duty to client: Legal practitioners must act with due skill and diligence, reasonable promptness and courtesy, while maintaining a client's confidences and avoiding conflicts of interest.

Sometimes these duties may appear to be in conflict. Detecting ethical issues and avoiding breaches of ethical duties is best done by knowing what your ethical duties are so that potential breaches can be detected. Where an ethical issue arises, it is important to seek appropriate advice.

What is professional negligence?

The Legal Service Commission of QLD provides a helpful summary of professional negligence:

"Lawyers owe their clients a duty of care. Negligence is a failure to exercise the degree of care considered reasonable in the circumstances, resulting in financial or other loss.

Clearly, the mere fact that a lawyer fails to achieve what a client hoped to achieve with the lawyer's advice and assistance does not, in itself, mean that the lawyer was negligent.

Equally clearly, lawyers do have a responsibility to their clients. A lawyer who fails to provide a legal service to a client with at least reasonable care and skill and whose failure causes the client to suffer a financial or other loss may well have breached his or her duty of care. The breach of that duty may amount to negligence and the client may be entitled to compensation for the loss."[4]

Anti-discrimination

It is important to note that legal practitioners cannot fail to take on a client based on race or ethnicity, disability, gender and so on. This would be a breach of ethical obligations and may enliven anti-discrimination legislation.

A summary of Australia's anti-discrimination law can be found on the Federal Attorney General's website:
https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Australias-Anti-Discrimination-Law.aspx

Privacy, Confidentiality and Privilege

Office of the Privacy Commissioner[5]

What is Privacy?

The word 'privacy' means different things to different people. Your idea of privacy is likely to be different from the ideas of your family and friends.

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[4] https://www.lsc.qld.gov.au/__data/assets/pdf_file/0009/97749/Fact-Sheet-3-Negligence-April-2019.pdf.

[5] https://www.oaic.gov.au/privacy/your-privacy-rights/what-is-privacy/.

Types of privacy

The type of privacy covered by the *Privacy Act 1988* (Cth) and is the protection of people's personal information. However, this is just one aspect of privacy. Other types of privacy can include territorial privacy and physical or bodily privacy and privacy of your communications.

The Office of the Privacy Commission generally handles privacy issues which involve a person's personal information. This can include privacy issues associated with *information* about location, health and body and communications with others.

What is personal information?

The *Privacy Act 1988* (Cth) defines personal information as follows[6]:

personal information means information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and

(b) whether the information or opinion is recorded in a material form or not.

The *Privacy Act 1988* (Cth) is a Commonwealth act and as such applies Australia-wide; however States and Territories all have additional privacy laws which can be accessed here:

https://www.oaic.gov.au/privacy/privacy-in-your-state/

Confidentiality v Privacy

"Confidentiality" and "privacy" are often used interchangeably, however:

'they mean distinctly different things from a legal standpoint. To begin with, confidentiality refers to personal information shared with an attorney, physician, therapist, or other individual that generally cannot be divulged to third parties without the

[6] Section 6.

express consent of the client. On the other hand, privacy refers to the freedom from intrusion into one's personal matters, and personal information'[7]

A legal practitioner has an ethical duty to maintain communications and documentation relating to a client's case confidential unless the practitioner is expressly authorised to disclose the information.

Legal professional privilege

Historically, at common law, legal professional privilege protected confidential communications between a lawyer and client from compulsory production in the context of court and similar proceedings.

The rationale for the creation of the privilege is the enhancement of the administration of justice by promoting free consultation and disclosure between clients and lawyers, and assisting in the production of information in litigation. On balance, this freedom is considered to outweigh the alternative benefit of having all information available to facilitate the trial process. In *Baker v Campbell*[8], Deane J described legal professional privilege as 'a fundamental and general principle of the common law'. The protection only applies where it is intended for a proper purpose — communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected.

Until recent changes to the law, the communication that was sought to be protected had to be made for the sole purpose of contemplated or pending litigation or for obtaining or giving legal advice, as enunciated in *Grant v Downs*[9]. Following the enactment of s 118 and 119 of the *Evidence Act 1995* (Cth), the 'sole purpose' test was replaced with a 'dominant purpose' test. Later, the High Court's decision in *Esso Australia Resources Ltd v Commissioner of*

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[7] Findlaw: https://criminal.findlaw.com/criminal-rights/is-there-a-difference-between-confidentiality-and-privacy.html.

[8] *Baker v Campbell* (1983) 153 CLR 52.

[9] *Grant v Downs* (1976) 135 CLR 674.

Taxation[10] overruled *Grant v Downs,* holding that the common law test for legal professional privilege was the dominant purpose test.

The law protects disclosure of documents and communications which are subject to legal privilege from being disclosed, except in a number of circumstances (e.g. where the client waives privilege and allows the document to go into the public domain or of the document or communication made in furtherance of a fraud).

There are two primary limbs of privilege: litigation privilege and advice privilege.

Litigation privilege

- Applies where there are actual or anticipated proceedings.
- It can cover communications between the lawyer and third parties, as well as between lawyer and client.

Advice privilege

- Applies in Australia to documents and communications between lawyer and client for the dominant purpose of seeking or giving legal advice.
- For further information on the "dominant purpose" test, see *Esso Australia Resources Limited v Federal Commissioner of Taxation* (2000) 168 ALR 123.

Exceptions

Some lawyer-client communications will not usually attract privilege. For example:

- Communications made for the purpose of facilitating a crime or fraud. See *R* v *Cox and Railton*[11].
- A client's name. See *Southern Cross Commodities Pty Ltd (In Liq) v Crinis*[12].

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[10] *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] 201 CLR 49.

[11] *R* v *Cox and Railton* (1884) 14 QBD 153.

[12] *Southern Cross Commodities Pty Ltd (In Liq) v Crinis* [1984] VR 697.

- The fact that a client sought legal advice. See *R v R*[13].

However, remember that obligations of confidentiality may still apply to non-privileged communications. Confidentiality should always be considered before making disclosure.

Conflict of Interest

Recommendation 106 of the Royal Commission into Aboriginal Deaths in Custody:

"That Aboriginal Legal Services recognise the need for maintaining close contact with the Aboriginal communities which they serve. It should be recognised that where charges are laid against individuals there may be a conflict of interests between the rights of the individual and the interests of the Aboriginal community as perceived by that community; in such cases arrangements may need to be made to ensure that both interests are separately represented and presented to the court. Funding authorities should recognise that such conflicts of interest may require separate legal representation for the individual and the community" [14]

What is a conflict of interest?

Identifying Conflicts of interests are related to the duty of care to clients. That is, you act in your client's best interest by ensuring that you do not have any conflicts of interest in relation to representing them and acting in their case.

The NSW Office of the Legal Services Commission outlines the three main areas where conflicts of interest arise in legal cases:

Conflict with the lawyer's own interests

Lawyers must keep their own business interests and investments, and the business interests and investments of their associates (e.g. relatives or business partners) separate from the

[13] *R v R*[13] [1995] 1 Cr App R 183.

[14] Aboriginal Legal Service of Western Australia.
http://als.org.au/Pamphlets/EDUCATION.PAMPHLET.CONFLICT.PDF.

interests of their clients. For example, a lawyer who advises clients to invest in a mortgage company in which the lawyer has a personal interest might be guilty of professional misconduct. Lawyers cannot borrow money from their clients. While they can make loans to clients there may be ethical problems if they do so in some circumstances. Further, the lawyer must not exercise any undue influence over a client for the benefit of the lawyer and/or their associates. The lawyer is entitled to fair payment for the legal services provided to the client — but no more. This means that a lawyer cannot draft a will for a client where the lawyer or an associate of the lawyer may receive a substantial entitlement. If it is apparent that a lawyer's interests will be in conflict with the client's interests, the lawyer must not accept the client's retainer. Similarly, if a close associate of the lawyer stands to gain from an investment or other transaction by a client then the lawyer should not act for the client in that transaction. A lawyer who has already accepted instructions from a client should terminate the client's retainer as soon as a conflict of interests is apparent.

Conflict with the interests of another client

As long as there is no dispute or disagreement between the parties to a legal transaction, the parties can both instruct the same lawyer. This may be convenient for both parties and it may save them costs. For example, a lawyer might act for the co-executors of a will. However, lawyers should avoid taking instructions from more than one party if there is any potential for a dispute. For example, acting for both the buyer and seller of a property is unwise although permitted. A lawyer can accept instructions from more than one party to any proceedings or transaction only if each of the clients:

- is aware that the lawyer is intending to act for the others as well
- understands that the lawyer might not be able to give all of the information relevant to the matter to all of the parties
- accepts that the lawyer will not give one client advice that is against the interests of another client, and
- consents to the arrangement.

If it appears to the lawyer, or to any of the parties, that the interests of the parties are in conflict, the lawyer should stop acting for all of the parties. However, a lawyer may continue to act if an effective information barrier has been established.

Conflict with the interests of a former client

A lawyer must not act for a new client against the interests of a former client if:

- the lawyer has confidential information about the former client, which is relevant to the new proceedings, and
- it is reasonable for the former client to think there is a real possibility that the information would be used against them.

Unless:

- the former client gives informed written consent to the lawyer acting; or
- an effective information barrier has been established"[15]

If there is any doubt about whether a conflict of interest exists, the best practice is to refer a client to another service or practice which has capacity to assist them. Some different referral services include:

- Legal Aid Commission
- Aboriginal Legal Service
- Private representation
- A Community Legal Centre
- NSW Bar Association or NSW Law Society Pro Bono Scheme

The actual referral process itself will vary depending on the organisation in which you are working and the nature of the client's issues/needs.

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15 http://www.olsc.nsw.gov.au/Documents/FAct%20Sheet%2011%20Conflict%20Interests%20July2015%20AC.pdf.

Interviewing clients

Communicating according to Aboriginal cultural approaches

When a lawyer needs to obtain information from an Aboriginal or Torres Strait Islander person, it will need to be in a way that which acknowledges Aboriginal cultural approaches to obtaining information, which tend to be in a way indirect means rather than by a confronting style of questioning. Some key issues to consider:

- Identify whether an interpreter is needed
- Take time and establish trust
- Understand that silence is part of the process
- Direct eye contact may be inappropriate
- Asking questions indirectly
- Allow clients to speak in their own time.

The Northern Territory Law Society has published a “Indigenous Protocols for Lawyers” which is a good aid for introducing cultural competence for non-Aboriginal practitioners:

https://www.lawsociety.com.au/sites/default/files/2018-03/indigenous_protocols_for_lawyers_0.pdf

Respect and Sensitivity

The Aboriginal Services Branch of the Department of Community Services provide the following guidance in their practice resource ‘Working with Aboriginal People and Communities":

- "Respect is very important in every social structure in Aboriginal communities. Respect for Elders, the land, animals and ancestors are fundamental aspects of Aboriginal culture" [16]
- "Be sensitive to the use of nonverbal communication cues which are a part of Aboriginal communication patterns. The use of silence does not mean Aboriginal people do not understand, they may be listening, remaining non-committal or waiting for community support"[17]

The same practice resource provides guidance on being aware of and properly validating a client's feelings. Be aware that the person brings to the interview emotions and often, a significant degree of stress. It is helpful to building the relationship with the client to spend some time in the interview, asking the person how they are and acknowledging their feelings.

Preparing client statement

If you are tasked with gathering information from a client, it is best to clearly type this information. You should approach the task by allowing the client to give a full narrative in their own words. Capture the words of the client in the document. Once the client has had a chance to tell the story, try to identify any gaps that might exist and ask open questions to prompt the client to give further information about those issues, if they can.

It is best if the client's account of events can be put into chronological order. This will assist the lawyer to understand the sequence of events. If appropriate, you could use headings. For example, you might use dates as headings. In a case, for example, involving an illegal arrest by police, the following headings may assist: *Events leading up to arrest, Client's account of what happened when arrested, what followed the arrest, Impact of the arrest on the client*. Thinking about the framework of the interview by considering the topics you wish to cover,

[16]NSW Department of Community Services. 2009. *Working with Aboriginal Peoples and Communities: A Practice Resource.* Accessed at http://www.community.nsw.gov.au/docswr/_assets/main/documents/working_with_aboriginal.pdf at page 18.

[17] Ibid at 23.

will ensure you address the necessary issues to understand the client's case and effectively document the information for the legal representative.

If the document is a statement by the client, at the end of the conference, print the document, date it and ask the client to sign it as a record. You should also sign the document and clearly print your name on it as a record that you assisted in the preparation of the document. A copy should be placed on the file and ask the legal practitioner if it is appropriate to provide a copy to the client.

Accurately complete required reports and records

It is always important to note down communications with the client or relevant witnesses/people involved in the matter. In addition to enabling the lawyer to get a better understanding of the client's circumstances, it will also assist the client to better recall the circumstances. It is also important as a means of protecting the legal service if any disputes arise about what a client said to a legal service.

It is necessary to obtain written authority from the client if the client wants to lawyer to discuss the case with relevant people. Be mindful of any ethical issues and the duty to avoid conflicts of interest when discussing a client's case with others, even when a client says that you may do so.

Familiarise yourself with workplace policies and procedures. Take the time to read internal policies. This will ensure you are best placed to deliver appropriate services in line with the functions of your organisation.

Be aware of the forms and records that need to be kept and complete them properly. This is important for maintaining a high level of professional standards but also to ensure the information which is required is at hand.

Identify client legal issues and determine if matter is to be retained internally

An essential skill of a legal practitioner is being are able to identify the nature of the client's problem, and into which area of law it falls (e.g. civil, family, or criminal). After the client has

provided the practitioner with all of the relevant information, the practitioner will explain the next steps in the process before the conclusion of the interview. This is dependent on the area of law relevant to their issue. This will be an important factor in relation to whether the client's case can be retained internally, that is, does your organisation represent people in relation to the legal issues identified?

Determining whether a case can be retained internally, or if it needs to be referred externally will also be determined by whether any conflict of interest arises. An organisation's own policies and guidelines also need to be consulted to determine if a case can be kept internally or not.

Sometimes, a person may be experiencing multiple legal issues. In these circumstances, it should be considered whether one service can deal with the matters as a whole or if the client requires assistance form more than one service.

There are obvious practical benefits to maintaining a client's legal matters with one service, if possible. This also may assist the client to feel less overwhelmed by their complex legal needs.

Liaise between client and legal system

Sentencing options in Criminal Proceedings

Alternative sentencing options (NSW)

In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the sentencing options. On 24 September 2019, major reforms were introduced. In addition to full-time imprisonment, the court may also impose: Community Release orders (CRO), Community Corrections orders (CCO) and Intensive Corrections orders (ICO).

Offenders who are put on a CCO or an ICO are typically required to adhere to a number of "conditions," which may include:

- To be of good behaviour, not commit any further offences
- Supervision by the community corrections
- Abstain from the use of alcohol or the use of any drugs.

- Engage in treatment programs
- Community service
- Home detention (ICO only)

If a CRO, CCO or ICO is breached, the order may be revoked and the person re-sentenced to a more severe penalty.

The consequence of a breach of bail

When a client is granted bail, they sign an acknowledgment of the bail and its conditions and the client is released. If the client does not comply with a condition of the bail, they are in breach of their bail. A failure to comply with a bail condition is not an offence but it can lead to the bail being arrested by police and bail being reconsidered by the court.

The police are to consider alternatives to arresting a person for breach of bail before proceeding to arrest, however, a client should be advised that if they do breach their bail, they may be arrested and have their bail refused. Bail conditions should be strictly complied with.

Failing to appear at court (as required when on bail) is a criminal offence.

Remarks of the Magistrate and the legal practitioner

Maintaining clear and accurate written records of court appearances and conferences with the client and the legal practitioner is essential for later explaining the outcome and clarifying issues for the client. Use plain language, ask the client to explain to you what they understand to be the outcome to be confident they understand what has taken place.

A lot of legal jargon is used in court. An important role in assisting clients is to ensure they understand exactly what happened in court. Make sure you understand the legal language

used by the Magistrate (and the practitioner) and if you are unsure, ask the legal practitioner to clarify what the terms mean. Some example of legal jargon commonly used, include:[18]

Adjournment	Postponing a court hearing or other court appearance to another date.
Affidavit	A written statement prepared by a person. The statement must be sworn or affirmed to be true in front of a solicitor, barrister or justice of the peace.
Amend	To make changes to a document that has already been filed at court. The amended document is then filed and served on the other party.
Annulment Application	1. An application to Revenue NSW to cancel your Enforcement Order and have your case heard at court; or 2. An application to the court to cancel or reverse a decision made by the court and have the matter re-listed, because you missed court.
Apprehended Personal Violence Order	An order made by a court that is aimed at protecting someone from another person who they are not in, and have never been, in a domestic relationship with. For example, neighbours.
Breaching an AVO	When a person who has an AVO against them (the defendant), does something that they are not allowed to do under that AVO. For example, the defendant telephones the protected person when

[18] Examples are from the NSW Communities and Justice website: https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_legalwords.aspx.

	the Final AVO says they cannot contact the protected person. A breach of a Provisional, Interim or Final AVO is a criminal offence.
Brief of Evidence	The documents, including statements and photographs, that the police prosecutor will rely on in a case against a person charged with a criminal offence.
Closed Court	A courtroom that is not open to the general public. Most matter involving children are heard in closed court.
Contravene AVO	To breach or refuse to comply with a condition of a Provisional, Interim or Final AVO.
Court timetable	Orders made by a court regarding the serving and filing of witness statements or any other documents, and the date the case is next in court.
Duty of care	A person's legal responsibility to be careful when doing something that could result in someone getting hurt or property being damaged by the action. This duty only applies if it could have been predicted that someone could have been hurt by the action. For example, Brian was speeding through a red light and hits a pedestrian. Brian breached his duty of care to the pedestrian.
Ex parte	A decision of the court made without notice to the other party, or without the other party being present.
Legal costs	The money a person spends running a court case. If the person has a lawyer, the costs will include the lawyer's fees.
Legally binding	Something that can be enforced through the legal system.

Liability	A person's legal obligation to do something or pay something.

There are many more examples. The NSW Communities and Justice website is helpful to consult if you need to clarify a legal term:
https://www.lawaccess.nsw.gov.au/Pages/representing/lawassist_legalwords.aspx

Respond to client questions with accuracy and clarity

The legal system may be complex, so it is important to provide advice and information to the client that is in plain language, that is easy to understand. This is to assist clients who may have less of an understanding of, or exposure to, the legal justice system. It is necessary for the lawyer to provide clear explanations to any questions asked by the client. Repeating important aspects of advice given to the client may be beneficial or providing information or advice in writing may also assist.

It is important to take the time to allow the client to ask questions. It is important to convey information clearly. If the client does not understand information or does not have the opportunity to ask questions to clarify matters, the information is of little value to them. Listening to a client's question is a window into understand whether they understand the information provided. Answering a client's questions clearly is not only helpful and necessary to provide appropriate assistance, it's also a way of demonstrating to the client that you care about their needs which assists with building rapport and trust.

Introduction to *NAT10861003 Assist persons seeking bail*

This unit describes the performance outcomes, skills and knowledge required to prepare and present an application for bail for an Indigenous client in custody. It includes explaining to the client the procedures relating to bail and the potential conflicts between Aboriginal and Torres Strait Islander cultural needs and bail requirements.

Preparing and making bail applications before a court requires sound knowledge of the bail laws. In New South Wales, the relevant legislation is the *Bail Act 2013* (NSW) https://www.legislation.nsw.gov.au/#/view/act/2013/26

The key provisions of the *Bail Act 2013* (NSW) are set out below.

Preparing the client for interview

A person who requires assistance at court or who is in police custody or detained in a correctional facility may, of course, be experiencing a significant degree of stress and anxiety. Clients may be even more vulnerable because of other reasons, for example, they may be experiencing symptoms of a mental illness or a cognitive disorder, they may have an intellectual disability or they may be a young person.

Understanding the nature of the person's vulnerability and understanding the special assistance they require is a priority role and responsibility of legal advocates. In addition, the role of the legal advocate is to:

- advise their client about the court procedure and ensure that the court is aware of the nature of the client's vulnerability
- ensure that the client understands the court proceedings which is essential to obtaining proper access to justice
- ensure that the client understands the legal rules around bail and have any queries answered
- inform the client about possible conditions/options if bail is granted
- make necessary referrals to ensure they receive appropriate assistance including an interpreter if the accused is from a non-English speaking background.

Types of bail applications (NSW)

There are 3 types of bail applications which a court may determine:

- *a release application*: a release application is where the accused person is in custody and asks the court to grant bail (or to dispense with bail)19
- *a detention application*: the prosecutor may make an application for the accused to be refused bail or ask for their bail to be revoked where the person is on bail, or to ask the court to impose bail conditions.20
- *a variation application*: any "interested person" (including the prosecutor, accused, complainant in a domestic violence matter and the Attorney General) may apply to vary the conditions of the accused person's bail.21 For example, the accused may apply to the court to vary their bail by reducing their reporting conditions from every day to 3 days per week or they may vary the address at which they reside.

For the purpose of this course, we will focus on release applications.

Decision of the court (NSW)

Upon hearing a release application, the court may make one of the following decisions[22]:

- release the person without bail for the offence
- dispense with bail for the offence
- grant bail for the offence, which may be either with or without conditions (i.e. conditional or unconditional release)
- refuse bail for the offence.

[19] Section 49 of the *Bail Act 2013* (NSW)

[20] Section 50 of the *Bail Act 2013* (NSW)

[21] Section 51 of the *Bail Act 2013* (NSW)

[22] Section 8 of the *Bail Act 2013* (NSW)

The legal tests for release applications (NSW)

When a court hears a release application, there are two questions it must ask:

The first issue which needs to be determined is whether or not the offence is a "show cause offence". Bail must be refused for a show cause offence *unless the accused person shows cause why his or her detention is not justified*.[23] You can work out whether the offence is a "show cause" offence by referring to section 16B of the *Bail Act*: https://www.legislation.nsw.gov.au/#/view/act/2013/26/part3/div1a/sec16b

If the person applying for bail does show cause (or if the offence is not a show cause offence), the court must then ask whether the person presents an unacceptable risk. The court is to refuse bail if it is satisfied that there is an unacceptable risk that the accused person, if released from custody will[24]:

- fail to appear at any proceedings for the offence, or
- commit a serious offence, or
- endanger the safety of victims, individuals or the community, or
- interfere with witnesses or evidence

If there are no unacceptable risks the court must grant bail, release the person without bail, or dispense with bail.

When assessing whether a bail concern exists, the court is to consider the factors set out in section 18 of the *Bail Act 2013* (NSW) which include:

- the accused person's background, including criminal history, circumstances and community ties
- the nature and seriousness of the offence
- the strength of the prosecution case
- whether the accused person has a history of violence

[23] Section 16A of the *Bail Act 2013* (NSW)

[24] Section 19 of the *Bail Act 2013* (NSW)

- whether the accused person has previously committed a serious offence while on bail
- whether the accused person has a history of compliance or non-compliance with court orders
- whether the accused person has any criminal associations
- the length of time the accused person is likely to spend in custody if bail is refused
- the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence
- if the accused person has been convicted of the offence, but not yet sentenced, the likelihood of a custodial sentence being imposed
- if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success
- any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment
- the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice
- the need for the accused person to be free for any other lawful reason
- the conduct of the accused person towards any victim of the offence, or any family member of a victim, after the offence
- in the case of a serious offence, the views of any victim of the offence or any family member of a victim, to the extent relevant to a concern that the accused person could, if released from custody, endanger the safety of victims, individuals or the community
- the bail conditions that could reasonably be imposed to address any bail concerns.

Flow chart of the two tests for a release application

If the offence for which the accused is applying for bail, is not a "show cause" offence, **Step 1** does not apply, and the court need only consider whether the accused presents an unacceptable risk (**Step 2,** below).

In determining whether the person has "shown cause":

Step 1: has the accused person shown cause as to why his or her detention is not justified?

If the answer to this question is **no** → bail will be **refused.**

If the answer to this question is **yes** → the court will then determine **step 2**

Step 2: does the person present an unacceptable risk? (taking the section 18 matters into account)

If the answer to this question is **yes** → bail will be **refused**

If the answer to this question is **no** → the court must ask whether there are any conditions which must be imposed to address any bail concerns.

If conditions are required → conditional release

If no conditions are required → unconditional release

Taking appropriate information and instructions from the client

The following notes are a guide to understanding some of these major issues and the sorts of detailed instructions you should obtain from a client. These will likely be the points the representative will argue in the application to the Court. Please note that every application is different and that you should carefully go through the factors set out in section 18 above to work out which issues are relevant to your case and then tell the court about those issues.

The offence

The strength of the prosecution case, the circumstances of the offence and the maximum penalty and likelihood of a custodial penalty are all important considerations.

If the Crown case is strong, the Court may be of the view that this is an incentive for the person not to attend Court, particularly if the likely outcome is gaol. However, if the person has a viable defence (which is made clear by pointing out holes in the prosecution case) the Court may think the person will attend Court to defend their case and, in their interest, should be released to prepare their case.

Background and community ties

Issues you would raise here include where the accused has lived and for how long, family and community ties, the accused's employment, and any other supports the accused has in the community.

Likelihood of appearance at Court

A person's criminal record will be relevant here. You need to address any breaches of bail or failure to appear on the accused's criminal history. If a person has no 'fail to appears' or breaches, this is a strong argument that the person has demonstrated they are likely to appear. The availability of a surety and how much the surety is able to put up is also a very important. If the person was using alcohol or other drugs at the time of the alleged offences but is now in a rehabilitation program, this would be a strong factor in favour of their likelihood of appearing at court and protection of the community.

Protection of the community

The Court will need to make an assessment about whether the accused is likely to commit further offence whilst on bail. The accused's criminal record is usually a central focus of this consideration.

Protection of the alleged victims

This is of particular concern if the charge is one involving violence, including domestic violence. Proximity of the alleged victim's place of work and residence will be important and whether or not any threats have been made or potential for unwanted contact.

Accused's interests

It is very important to take full instructions from the person applying for bail in relation to how being in custody affects them and their family as these issues may persuade the Court in some circumstances to release the accused on appropriate conditions.

Some issues which may be taken into consideration include: the accused's ability to prepare their defence, maintaining employment, family responsibilities, mental or physical health issues, conditions in custody and distance from family whilst in custody will all be relevant to this aspect of the bail determination.

Explaining bail process to client

Bail is the release from custody of a person charged with an offence on the basis that they sign an undertaking to turn up to court to answer the charge which they face.

Bail may be granted unconditionally or on conditions that the accused person agrees to certain orders which the police or court thinks are necessary to protect the community and ensure the person's attendance at court.

The police may grant or refuse bail at the station following a person being charged. If the person is refused bail by the police, the person may make a bail application to the court.

Local and District Court decisions can be reviewed by the Supreme Court. In NSW a Court is to refuse to hear a second bail application where a previous application has been made unless there are grounds for a further application for bail (this does not apply if the accused was unrepresented when the first bail application was made).

The bail determination is a very important step in the criminal process. The refusal of bail has a significant impact upon many issues including a person's ability to conduct their defence, conviction rates, and the size of remand populations.[25]

Sentencing outcomes may be more limited for a person who is sentenced whilst on remand. For example, the person refused bail does not have the opportunity to engage in rehabilitation programs within the community to demonstrate their prospects of rehabilitation when facing sentence. A person who is on remand also has more limited access to drug and alcohol programs than sentenced prisoners which creates further disparities between those on bail and those on remand by virtue of being refused bail.

Each State and Territory has its own legislation relating to bail. Each jurisdiction has differences in relation to the legal tests and procedures, however, there are general themes in relation to the main considerations a Magistrate or Judge considers when making a bail determination.

These include:

- the likelihood of the accused appearing at Court
- the protection and safety of victims and the community
- the likelihood of further offences and the accused's interests.

Bail options and conditions

Options and conditions can range from being light (e.g. simply residing at a particular residence) to being very onerous (e.g. conditions which have the effect of placing the accused under house arrest except for attending Court) depending upon what the Court thinks is necessary to mitigate any "unacceptable risk".

The *Bail Act 2013* (NSW) sets out the conditions which the Court may impose when granting bail and include:

[25] Brown et al ((2011), "Criminal Laws", Federation Press, at p177.

- Conduct requirements: E.g.: reporting, residence, attendance at particular services
- Security requirements (surety provided by the accused or by another person)
- Character acknowledgments
- Accommodation requirements (for children only)

When proposing conditions, it is also important to think about issues which the Court will have concern about and try to propose conditions to overcome any concern the Court may have.

For example, if the accused has an alcohol or other drug dependence and their prior offending has been related to alcohol or other drug use, the Court may think there is an "unacceptable risk" that the accused may commit a serious offence. To mitigate this risk, it may be appropriate to arrange (after seeking instructions) for the accused to be assessed for a residential rehabilitation service. If the accused is assessed as suitable and willing to enter the program, then the Court may grant bail to the accused on condition that they enter in into the treatment program and comply with all directions of that service (conduct requirements).

Consequences of breaches in bail conditions

It is an offence to fail to appear in court, without reasonable excuse, in accordance with a bail undertaking. The maximum penalty is three years gaol and/or fine[26].

Significantly, if a "fail to appear" offence is on the accused's record, it may have an adverse effect on any future bail application. Additionally, the client may forfeit any security that they, or heir family or friends, may have lodged as a bail condition.

If the accused is granted bail which is very strict or difficult to comply with, the accused may make an application to the Court to vary the conditions of bail.

[26] Section 79 *Bail Act* 2013 (NSW).

Alternative outcomes to prison sentencing (NSW)

In New South Wales, the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the sentencing options. On 24 September 2019, major reforms were introduced. In addition to full-time imprisonment, the court may also impose: Community Release orders, Community Corrections orders and Intensive Corrections orders. The sentencing options in NSW from most lenient to most severe are as follows:

Options (i) to (ii) do not involve a criminal conviction

i. Section 10(1)(a): **unconditional dismissal of charges**

ii. Section 10(1)(b)/Section 9(1)(b): **discharging the person under a conditional release order (CRO)**

iii. Section 10(1)(c): **discharging the person on condition that the person participate in an intervention program**

All other options which follow include the recording of a conviction

iv. Section 10A: **conviction with no other penalty**: https://www.legislation.nsw.gov.au/#/view/act/1999/92/part2/div3/sec10a

v. **Fines**: Section 15: https://www.legislation.nsw.gov.au/#/view/act/1999/92/part2/div4/sec15

vi. **Community release order (CRO)** (with a conviction): Section 9(1)(a): https://www.legislation.nsw.gov.au/#/view/act/1999/92/part2/div3/sec9

vii. **Community Corrections Order (CCO):** Section 8: https://www.legislation.nsw.gov.au/#/view/act/1999/92/part2/div3/sec8

The following options (viii) and (ix) are terms of imprisonment:

viii. **Intensive Corrections order (ICO)**: Section 7: https://www.legislation.nsw.gov.au/#/view/act/1999/92/part2/div2/sec7

[an ICO is a term of imprisonment served in the community – subject to certain conditions, such as engaging in particular programs, being supervised by community corrections]

ix. Full time Imprisonment

NSW Legal Aid Commission has put together a package of information which carefully explains the sentencing options in NSW: https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/sentencing-reforms

Offenders who are put on a CCO or an ICO are typically required to adhere to a number of "conditions," which may include:

- to be of good behaviour, not commit any further offences
- supervision by the community corrections
- abstain from the use of alcohol or other drugs
- engage in treatment programs
- community service
- home detention (ICO only).

If a CRO, CCO or ICO is breached, the order may be revoked, and the person re-sentenced to a more severe penalty.

Circle Sentencing

The Circle Court is available to some Aboriginal and Torres Strait Islander offenders, depending on the nature of their offence and aims to enhance their respect for, and thus their compliance with, the law through the self-determined process.

In towns where Circle Courts operate, Indigenous offenders may be referred to the Circle Court for sentence following a plea of guilty. The court comprises a magistrate, police prosecutor, the victim and local Aboriginal Elders, all of whom have a voice in relation to the sentencing of the offender. The court must operate within normal sentencing guidelines prescribed by legislation.

Further resources relating to circle sentencing:

- NSW Judicial Commission: https://www.judcom.nsw.gov.au/education/education-dvds/circle-sentencing-in-nsw/
- Creative Spirits: https://www.creativespirits.info/aboriginalculture/law/circle-sentencing
- ABC News February 2019: https://www.abc.net.au/news/2018-09-04/circle-sentencing-to-be-reviewed-for-first-time-in-10-years/10198802

Restorative Justice

The term 'restorative justice' implies the notion of the offender making amends to the victim. It refers to approaches to sentencing and punishment which aim to get the offender to take responsibility for their crime through the process of direct interaction with the victim via a conference. This objective facilitates the victim being given a voice and also hearing the offender express remorse and apologise for their actions. Examples of sentencing processes which embody the notion of restorative justice are:

- Youth Justice Conferencing
- Circle Sentencing of Indigenous offenders

Mental Health Diversion (NSW)

In addition to the sentencing options at law in the Local Court, clients must also be advised in appropriate cases about the possibility of making an application in relation to section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). This section allows for a person who is mentally ill or suffering from a mental health condition or cognitive impairment to be diverted from being dealt with at law. The court may discharge the person (with or without conditions) if it determines that it would be more appropriate to deal with the defendant in accordance with section 32 than in accordance with law. There are also other diversionary options available for mentally ill persons (section 33).

Section 32: https://www.legislation.nsw.gov.au/#/view/act/1990/10/part3/sec32

Section 33: https://www.legislation.nsw.gov.au/#/view/act/1990/10/part3/sec33

The Intellectual Disability Rights Service has developed a helpful step-by-step guide for making a section 32 application: https://idrs.org.au/resources/section-32/

Conflicts between Aboriginal & Torres Strait Islander cultural needs & bail requirements

The Aboriginal Legal Service provides an important telephone advice service (custody notification service - CNS) which is staffed by ALS lawyers to give legal advice and check on the person's welfare. In some circumstances the lawyer assisting can help to negotiate bail for the person in custody with the custody manager. Police are required under the NSW *Law Enforcement (Powers and Responsibilities) Regulations 2016* (NSW) - to notify the Aboriginal Legal Service NSW/ACT when an Aboriginal or Torres Strait Islander person is taken into custody (see regulation 37: http://classic.austlii.edu.au/au/legis/nsw/consol_reg/learr2016542/s37.html)

There is a distinct lack of culturally appropriate diversion programs, mental health and alcohol and other drugs programs which would support an Aboriginal and Torres Strait Islander person applying for bail. The lack of programs was recognised in the 2017 ALRC *Pathways to Justice report* (see recommendation 5-2) at this link to the report: https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/1-introduction-to-the-inquiry-18/

The Australian Law Reform Commission in its *Pathways to Justice Report* (2017) comprehensively discusses issues relating to bail and culture in Part 2 of its report which can be found at this link: https://www.alrc.gov.au/publication/incarceration-rates-of-aboriginal-and-torres-strait-islander-peoples-dp-84/2-bail-and-the-remand-population/background-28/

Further resources:

Denning-Cotter (2008), *Bail Support in Australia*, Indigenous Justice Clearing House: https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/publications/files/brief002.v1.pdf

Preparing bail application information

The most common situation where you will be required to assist someone with a bail application is if the person is in custody having been refused bail by the Police. In these cases, you are permitted to make a verbal application for bail. Effective interviewing skills and assessment of the law are essential to providing your client with accurate legal advice and making the best bail application on their behalf.

There are a number of forms available on the Local Court website, for example in cases where a person wants to have their bail reviewed or for a Supreme Court Bail application. See here under the heading "Bail Forms".

Local Court Forms:

http://www.localcourt.justice.nsw.gov.au/Pages/forms_fees/forms.aspx

Supreme Court forms:

http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_formsfees/SCO2_forms/SCO2_forms_subject/crime_bail_forms.aspx

You must always ensure that your client understands the law in relation to bail, especially the importance of putting forward the best application you can. There are some situations where seeking a short adjournment to provide the court with some relevant supporting documentation may be in your client's interests.

Bail options and rights of juveniles in the justice system

Where bail has been refused by a police officer, the child will be brought before the court as soon as practicable. Most bail conditions are in the form of meeting certain conditions rather than a surety of money. However, conditions imposed cannot be unreasonable or unrealistic. Factors taken into account are education, health and wellbeing and the likely effect of exacerbating problems at home.

It is important to make contact with family and support persons prior to making the bail application to identify the most appropriate bail proposal for the child and, where possible,

have the family or support persons attend court. The Juvenile Justice officers may also be an important source of assistance as well as any youth services which provide assistance to young persons in custody.

Personnel involved in bail applications

The Local Court tends to be less formal than the Supreme Court in relation to procedures for bail applications. The following material details the process you can expect at a bail hearing.

1. The accused person will be brought to Court
2. The legal representative will mention the matter (in the Local Court it would be indicated that bail is sought. In the Supreme Court, the Court will be aware that the bail application is listed as they are listed weeks in advance).
3. The prosecution will hand up their material (usually the police facts, the accused's record (if they have one) and sometimes witness statements and a letter from the officer in charge stating their views on bail & the Judge or Magistrate reads this material
4. The accused's representative hands up any evidence which they seek to rely upon (e.g. support letters) and this material is then read
5. The Judge/Magistrate will ask the Prosecutor what the prosecution's attitude is, to bail (they will either oppose or consent or say they don't wish to be heard)
6. The Judge/Magistrate will then ask you to make your submissions on bail
7. The prosecution will have an opportunity to make submissions
8. The Judge/Magistrate then makes their determination about the application and gives reasons granting or refusing bail. If bail is granted, the conditions of bail will be made clear in the judgement.

If bail is granted, the person will be released once the conditions have been met and bail undertaking signed.

If bail is refused, the person is remanded in custody until the matter is next mentioned at Court.

Preparing instruction for legal representatives to make a bail application

The Legal Representative needs to have all relevant information and any relevant evidence to ensure they can make the best bail application on behalf of their client. If you are working as a legal advocate, it is your role to help to ensure all relevant material is on the file, this includes supporting documentation such as a letter from a doctor or rehabilitation centre.

Evidence to support bail proposals (e.g. where a person will live or who they will see for counselling) are usually higher in the Supreme Court than the Local Court. It is advisable that evidence is obtained to strengthen your bail application, for example:

- It may be advantageous to call one of the accused's parents to give evidence if the bail proposal is that the accused lives with their parents whilst on bail. This gives the Judge the opportunity to see that the parent is a responsible person who takes Court orders seriously and will help the accused to comply with bail
- Obtaining letters from employers or other support networks to prove that the person has community ties
- Obtaining medical information from doctors to show if the accused suffers from a physical illness or mental health issue
- Obtaining letters from sureties to confirm they are an acceptable person and to advise the Court of the sums of money they are willing to forfeit

Additional articles and resources:

- Weatherburn and Holmes (2017), *Indigenous imprisonment in NSW: A closer look at the trend*, BOCSAR: https://www.bocsar.nsw.gov.au/Documents/BB/Report-2017-Indigenous-Imprisonment-in-NSW-BB126.pdf

- Willis (2017) *Bail support: A review of the literature*. Research Reports no. 4. Canberra: Australian Institute of Criminology. https://www.aic.gov.au/publications/rr/rr004

- NSW Legal Aid Commission, *A Guide to Bail*: https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/guide-to-bail

Introduction to *NAT10861004 Manage responsibilities for court appearances*

This unit describes the performance outcomes, skills and knowledge required to support Indigenous clients to prepare for and appear in court. It includes preparing for a plea in mitigation and communicating outcomes and available options to the client.

Gather and record relevant information to advise client

Explain the purpose and format of interview to the client

When a lawyer first meets a client, he/she needs to interview the client and gather facts about their problem in order to understand the client's needs and assist the client in making an informed decision. Interviews with clients will be vital in obtaining information necessary to prepare their legal proceedings, inform clients of court procedures and respond to any questions or concerns the client may have regarding their circumstances.

The structure of an interview can vary. It can range from an informal first point of contact to a relatively formal meeting. Your interview may also vary in nature, from meeting with a client in person, to speaking with a client over the phone and what is becoming increasingly popular, interviewing a client via video conference. Regardless of the nature of formality of the interview, it is of upmost importance to ensure the client feels comfortable. Building rapport is essential, and first impressions are very important. It is necessary to gauge how you will structure the interview based on the needs of the client, which is particularly relevant for Indigenous clients.

Utilise effective communication techniques to determine client knowledge and understanding of the circumstances

Always keep in mind that the legal system is complex, and a client may not be as familiar with specific legal terminology and procedure. Therefore, it is essential to continually clarify any advice given to the client, and ask questions to ensure that they understand the information provided.

Another technique to ensure mutual understanding between interviewer and client is to repeat what the client has just discussed with you, such as 'my understanding of your situation is x, y and z". This technique is known as 'active listening'.

Giving clients a hypothetical scenario similar to their own circumstances is a further method of testing their level of understanding. An example of this would be asking a client, 'if you had a bail condition to report to police Monday, Wednesday and Thursday and you didn't report on Wednesday because you were working late, could the police arrest you for breaching your bail?'

Follow statutory and workplace guidelines when conducting a client interview

Client interviews are conducted following guidelines of confidentiality and conflict of interest, and it is essential that these are explained to the client (see ILACSA501A for further information about this). It is vital to listen to all the information that the client shares and to make the client feel comfortable in the interview.

Record client responses in an appropriate format

It is important to take notes about important details throughout the interview, but not write down everything the client says. Names and dates are often important to write down as the client is talking given that they can be easily forgotten or confused over time. However, the interviewer must remain focused on the client, with their head up and keeping eye contact (if appropriate). After the conclusion of the interview, the interviewer can then include more detail in their notes while all of the information is still fresh. You may also consider at times video or voice recording an interview with a client, but these are less commonly used techniques and would certainly require permission.

In some circumstances, to properly prepare for a court case, it may be necessary to take a formal statement from the client in which the client's version of events is recorded word for word and the client signs the statement as a true record of their instructions.

Debrief Post Interview

The debrief with the client is essentially explaining 'where to from here?' After the client has provided the interviewer with all of the relevant information to take preliminary instructions with, the interviewer will explain the next steps in the process before the conclusion of the interview. In a criminal context, this may be ensuring that a client is aware of their current bail conditions, or what would happen if they breached bail. The practitioner may explain what is likely to happen at the next court date and the approximate time frames for proceedings.

Additionally, the practitioner will inform the client what steps they will take on behalf of the client. Such as, they may discuss their matter with an instructing solicitor, or other relevant personnel. If relevant, they may organise rehabilitation services or liaise with a psychologist. Moreover, the practitioner will indicate anything the client needs to do for them, such as complete an application form, send through relevant documents, contact any particular services, or to come into the office for a further appointment at a given time.

Advise client on court procedures and options

Identify and acknowledge client's issues and needs

One of the greatest challenges a legal practitioner/interviewer has is building and maintaining rapport. Consequently, if a client has specific needs, or certain goals, it is important to make the client aware that they have been acknowledged.

Some common needs of a client may include:

- Family: custody of children, separation proceedings (divorce and property settlement)
- Civil: consumer rights, tenancy, neighbour disputes
- Criminal: criminal charges, breach of bail, AVOs

It is important to be aware that clients often present with a similar set of, often intergenerational, underlying economic and social issues, for example:

- Drugs and alcohol
- Mental health

- Homelessness
- Lower socio-economic status
- Poor educational outcomes
- Low job prospects
- Broken families
- Domestic violence victim, witness or both
- Criminal history

Refer client and/or client issues to appropriate practitioner

If appropriate, legal practitioners can refer a client to a service that is better suited to their needs, or has capacity to assist them. Some different referral services include:

- Aboriginal Legal Services
- Legal Aid Commissions
- Private representation
- Community Legal Centres
- Law Society solicitor referral service and pro bono schemes
- Bar Association Pro Bono Scheme
- Self-represented (which is a last resort)

Additionally, a practitioner can refer internally, such as to a solicitor who specialises in family law, if it is a family law matter.

Identify and explain available options to the client for their court appearance, case strategy, plea/s and potential outcomes

An essential skill of a legal practitioner is being able to identify the nature of the client's problem, and what area of law it falls into e.g. civil, family, or criminal. A practitioner should have an approximate idea following the initial interview with the client. After the client has provided the practitioner with all of the relevant information, the practitioner will explain the next steps in the process before the conclusion of the interview. This is dependent on what area of law their matter will come under.

For example, in a criminal matter, a practitioner would advise their client in relation to the strength of the prosecution case and the client's option to plead guilty or not guilty, and what the likely outcomes of both of those pleas would be.

The client can plead guilty at any time from the first mention in Court or at a later time up until their matter has been determined by way of a hearing or trial. A person can change their plea to guilty, even if they have pleaded not guilty at an earlier time.[27]

If the client pleads not guilty, then the defendant indicates that they wish to defend the charge and the case may be determined by the hearing of evidence either in the Local/Magistrates' Court before a Magistrate or in a higher court, depending on the seriousness of the charge.

Summary matters and *indictable* charges that the Director of Public Prosecutions (DPP) decide not to have dealt with in the District Court, are dealt with in the Local/Magistrates' Court. *Strictly indictable* matters must be dealt with in the District or Supreme Courts. The DPP may, in some circumstances, decide to elect to have some charges dealt with in the District Court if they are of the view that they are of sufficient seriousness and the Local/Magistrates' Court does not have enough power to sentence the offender for the charge.

In all other states and territories apart from NSW charges which are dealt with in the District/County or Supreme Court all commence in the Local/Magistrates' Court and are transferred to the higher Court in proceedings which are called a "committal". A Magistrate "commits" a matter to the higher court if it is satisfied that there is sufficient evidence to prove the charges. The Judge of the District/County or Supreme Court finalises the matters either by presiding over a trial if the matter is defended or at a sentence hearing if the person is convicted after trial or if the person pleads guilty.

Note: In NSW now Defendants charged with indictable offences no longer have the right to a Committal Hearing. Instead, the Magistrate's role is now limited to overseeing the procedural steps required under the Criminal Procedure Act 1986. This means ensuring a **brief of evidence** is served on the defendant or their lawyer, ensuring that a **charge certificate** is filed and served on the defendant or their lawyer, and ensuring that a case conference is held

[27] http://www.legalaid.wa.gov.au/InformationAboutTheLaw/crime/appearing/Pages/PleadingNotGuilty.aspx.

between the prosecution and the defence (if the defendant is represented) and that a **case conference certificate** is subsequently filed with the court. The accused person must then enter a plea to each of the charges that prosecution is proceeding with and the Magistrate will commit the matter for trial or for sentence (Section 55).

Summary or indictable matters which are dealt with in the Local/Magistrates' Court are either finalised by a defended hearing before a Magistrate or a sentence hearing before a Magistrate. The procedures set out below are those relating to matter finalised in the Local/Magistrates' Court (which represents the vast majority of charges which come before the Courts).

Pleading guilty:

- After a client pleads guilty, depending on the seriousness of the matter or if the defendant wishes to gather documents or other material to assist their case on sentence. The matter may be adjourned for a period for this to happen. Examples of the sorts of document which may be ordered or obtained:
  - A pre-sentence report (Court ordered document which sets out the person's background and issues contributing to their offending as well as assessing whether they are eligible for community based sentencing options e.g. community service). This assessment is prepared by Probation and Parole, or the equivalent Department in other states and territories.
  - Psychiatric or Psychological reports
  - Character references
- If the person is on bail and there have not been any issues with the person complying with their bail, they will likely remain on bail until the next Court date.
- If client has limited criminal history and the facts of the offence are not too serious, then the Magistrate may sentence the client at the first appearance

Pleading not-guilty:

- Magistrate adjourns the matter, usually for 6 weeks, for a 'brief of evidence' to be served. Police may sometimes be granted more time from the Court to collect their evidence, particularly if the evidence includes testing of drugs or DNA evidence which can, in some cases, take a significant period of time to be obtained.
- Once the client's legal representative receives the brief of evidence from the police, the legal representative will contact the client to take further instructions on the charge.
- At the next court date the client will need to either confirm the plea of not guilty after which the matter will be set for hearing (some weeks later), or enter a plea of guilty.
- After hearing Magistrate will find client either guilty (and therefore the client will be sentenced) or not guilty and dismiss charges without the matter going on client's criminal record.

It is also relevant to note that there are also provisions for defendants to be diverted from the general criminal justice system. A sound understanding of the diversion options in the court system within which you are assisting clients is essential to achieving the best possible result for the client. For example, circle sentencing for Indigenous clients, youth justice conferences for young people and the Drug Court.

Importantly, it is also important to understand the options available for people with mental health issues. For example, in NSW, it is important to work out whether a client suffering from a mental health condition may be eligible to be diverted from the criminal justice system under s32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW). The effect of a person being dealt with under this section is that they are "discharged" or not required to have the matter dealt with in the usual way of pleading guilty or not guilty and will receive no record for their charge on the condition that they comply with a mental health treatment plan for a certain period of time.

Visit court room with client and explain court room procedures

The court operates under strict, traditional rules and everyone behaves very formally. It is important that the client understand court etiquette, particularly if they have not had any experience in a courtroom before.

Everyone that appears in court should[28]:

- Dress neatly
- Turn off their mobile phone
- Take off hats and sunglasses
- Not eat, drink or chew gum
- Sit quietly
- Not speak to any member of the jury in the District Court or Supreme Court.

To acknowledge the judge or magistrate, everyone should:

- Stand whenever the depositions clerk or bailiff calls 'all rise' as the magistrate or judge enters or leaves the courtroom and take a seat only once the magistrate or judge does so themselves.
- Bow their head to acknowledge the magistrate or judge every time they enter or leave the courtroom
- Address the magistrate or judge as 'Your Honour'.

When inside the courtroom a defendant should:

- Stand up whenever the judge or magistrate is speaking to them and maintain eye contact
- Speak clearly and read from notes if needed.

Prepare and present detailed case notes, client instructions and other relevant material to the practitioner

Most of the case notes that will be useful will be obtained from client interviewing. Thus, it is necessary to make clear notes, during and also following the conclusion of the interview, in order to advance the clients wishes to the practitioner and ensure the file contains all relevant information. It is important to present the information in a clear and concise manner.

[28] http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/30620/GoingToCourt_booklet.pdf.

Keeping a written record[29]

One of the most useful things a practitioner can do is to help the client write a detailed record of the whole story. It may not be appropriate to try to do this at the first interview, especially if they are distressed, but it is important to do it as soon as possible to make sure they don't forget important details.

It may help to get them to provide other details of the day when the incident happened, what the weather was like? How did they get to the place where the incident occurred, did they drive? Who else was there? Questions like these will help the person remember the details of the incident.

When they describe the actual incident a practitioner must keep asking questions to fill in the detail. Who else was there then? Did they say anything?

When the whole story is written down, the practitioner should get the client to go over it again to see if they remember anything else.

When the practitioner has the full story, they can work through to see where the problems lie and begin to work out what information is needed and how the problems might be resolved.

Additionally, it is useful to keep a written record, as if a client complains about the practitioner or another colleagues conduct, there will be physical evidence of what actually occurred.

It is also important to keep file notes/case notes. For example if in court a practitioner is asked by the Magistrate the name of the client's treating psychiatrist, then they are able to automatically check on the file note.

[29] NSW Department of Community Services. 2009. *Working with Aboriginal Peoples and Communities: A Practice Resource.* Accessed at http://www.community.nsw.gov.au/docswr/_assets/main/documents/working_with_aboriginal.pdf at page 46.

Initiate court process

File pleadings and other documents at the court registry

Pleadings are formal claims, defences and replies stated in documents throughout the court process. Originating processes are filed by the plaintiff and served on defendants within any limitation periods. More key documents must be filed at the court. Practitioner/client should obtain a 'sealed copy' of the relevant document after filing. This is a copy of the document that the court registry has stamped with the court seal indicating that the document has been formally filed at court.

There are different regulations for criminal and civil matters.

For a criminal matter the police or DPP will file their documents with the court to initiate court process.

For a civil matter the client (if a plaintiff) would need to file a statement of claim. If the client were the defendant, then they would be required to file a notice of appearance or defence.

A statement of claim is a document that is made up of a number of elements:

- Type of claim: such as a mercantile claim (money lent) or sale of goods and services (work done)
- Relief claimed: a monetary amount
- Pleadings and particulars of the claim: specific details of the circumstances leading to the statement of claim

Seek leave to appear

A person has a right to appear before a Court if they are qualified as a solicitor and have a current practising certificate. Note: There are some jurisdictions where there are special rules in place for non-solicitors to appear in court. For example, in Western Australian Aboriginal Court Officers have the right to appear in court in certain matters. They hold a special certificate that gives them permission to do this.

In some Courts, a person who is not a solicitor may "seek leave" to appear. That is, ask for special permission to appear in a matter when they do not hold a current practising certificate.

The procedure for seeking leave to appear is:

- stand when your matter is called by the Magistrate or when it is your turn to mention your matter
- announce your appearance and ask the Court for leave to appear. For example,
- 'Your Honour, my name is Mr Morris, field officer with the Aboriginal Legal Service. I seek your Honour's leave to appear in the matter of [*state your client's name*].'

The Magistrate may immediately grant you leave to appear or they may ask you questions about what is happening with the matter and why you are appearing (rather than the solicitor in charge of the case). Some Magistrate may grant a person leave to appear on a mention, for example, but not on a bail application where it is presumed greater legal knowledge or training may be expected. A Magistrate may also refuse to grant leave.

Prepare and submit request for adjournment, hearing date, call over or mention, as appropriate

When you appear in a court matter, you may need to request an adjournment, call over or hearing date, or another mention date It is important that you understand what each of these mean.

Adjournment: To suspend a court hearing to a future specified day. If an adjournment is granted, it will usually be for two or three weeks, but it can be longer depending on the reason. During this time, you should make sure you do everything you can to be ready for your next appearance in court.[30]

Call over: A call-over is a meeting where the Judge and the lawyers for both sides discuss any pre-trial issues. For example, a witness may need to give video evidence as they will be

[30] http://www.lawhandbook.org.au/handbook/go01.php.

overseas at the time of the trial. Or the defence counsel might make a case for some evidence to be excluded. Alternatively, at some local courts, you might have to appear before a registrar who will ask you how you intend to plead. A trial date is set.[31]

Mention: In Magistrates' Court criminal matters, the first day on which a matter is listed at court. A case can only be heard on the mention day if it is a plea of guilty. There are no witnesses at the first mention and the magistrate makes all decisions based on the information presented.[32]

Hearing: A summary hearing will take place if the accused pleads not guilty to the charge(s). At this hearing, both parties present their case to the Court and a magistrate will determine the outcome.[33]

The process at a Hearing[34]

Prosecution case

- the prosecutor will outline the evidence
- each witness is led to the witness box and asked to swear an oath or make an affirmation to tell the truth
- the prosecutor may question each witness to obtain their evidence, which is called the evidence in chief of the witness
- the magistrate may ask each witness a few questions.

Defence case

When the prosecutor is finished questioning their witnesses

[31] http://www.justice.govt.nz/services/access-to-justice/civics-education-1/the-criminal-justice-system/the-crime/before-the-trial.

[32] http://www.justice.qld.gov.au/justice-services/courts-and-tribunals/going-to-court/what-happens-in-court/magistrates-court/the-first-mention-date.

[33] http://www.magistratescourt.vic.gov.au/jurisdictions/criminal-and-traffic/criminal-proceedings/types-hearings.

[34] http://www.justice.qld.gov.au/__data/assets/pdf_file/0011/30620/GoingToCourt_booklet.pdf.

- the defence lawyer or the defendant may then question (cross-examine) the witness to confirm or contest their evidence
- the prosecutor may re-examine each witness to clarify anything
- the defence lawyer may then submit there is no case to answer
- if the magistrate finds that there is not enough evidence the case will be dismissed
- if the magistrate decides there is a case to answer the defence lawyer can then call defence witnesses and the whole process will be repeated.

Final submissions

When all witnesses are questioned, the prosecutor and the defence lawyer will address the magistrate to sum up their cases. These are called submissions, and are usually given verbally but in some cases, you may need to provided written submissions to the court. If this happens you will be given directions as to when the documents need to be filed with the court registry.

The decision

After hearing all the evidence, the Magistrate may find the defendant:

Not guilty - the magistrate will dismiss the charges against the defendant

Guilty - the magistrate will decide on the penalty or set a sentence hearing.

After the decision, the magistrate will adjourn the court and the depositions clerk will call ‘all rise’ as the magistrate leaves the courtroom.

<u>Contact opposing parties and negotiate an outcome or potential settlement, where possible</u>

There are often many ways to resolve a dispute. Negotiation is one of them. It's usually better to sort out problems away from the court. Court can be costly, stressful, time consuming and may not lead to the outcome you want. Going to court should be a last resort. Legal practitioners should act in the best interests of the client, and work to ensure the best, most efficient and cost effective outcome.

Negotiation is the process where the client and the person they are in a dispute with each set out what they want and try to reach agreement. This can be done in writing or by talking to

each other (provided there are no court orders preventing this). Often, negotiation can occur with the assistance of legal representation.[35]

In civil matters, if a practitioner considers settlement to be an appropriate method for their client, and the client is agreeable, they should contact the legal representation of the opposing party. This may be in writing or face-to-face. The practitioner should discuss with the opposing lawyer the prospect of negotiation. If the other party is agreeable, a date should be set up for the parties to negotiate an outcome, as opposed to going to court.

In criminal matters, it may be appropriate to, subject to your client's instructions, to enter into a charge negotiation with the Police or the DPP. This usually involves writing representations to the Police or DPP. Each negotiation is different and depends on the facts of the case. You may for example request to have a charge or charges withdrawn, to amend the facts, to substitute a less serious offence in exchange for a plea of guilty.

Prepare for a plea in mitigation

Explain the sentencing procedure to client

After a defendant has pleaded guilty, or if a charge is proved following a hearing, the magistrate will have to decide what sentence to impose. All defendants are given the opportunity to say something about the sentence that the magistrate should impose, and to tell the magistrate about their background and personal circumstances. This is called "presenting a plea in mitigation".

- **Plea:** that which is alleged, urged or pleaded in defence or justification[36]
- **Mitigation:** a reduction or attempt to secure a reduction in damages or punishment[37]

It is necessary to explain what the likely outcomes will be if the client pleads guilty or not guilty. This is clearly dependent on the facts of the matter.

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[35] http://www.legalaid.wa.gov.au/InformationAboutTheLaw/legalproblem/Disputeresolution/Pages/Negotation.aspx.

[36] Macquarie Dictionary , 2 Ed. 1991.

[37] Ibid.

The plea in mitigation is one of the most common occurrences in the criminal justice system.[38]

It is important to note that the legislation that guides sentencing is the *Crimes (Sentencing and Procedure) Act 1999* (NSW). Section 21A of the Act sets out the aggravating and mitigating factors of the matter which help to determine the sentencing outcome. Additionally section 22 states that a guilty plea is to be taken into account in sentencing; a person who pleads guilty as opposed to not-guilty, will be rewarded with anywhere up to a 25% reduction on their ultimate sentence. Moreover, the various divisions of the Act give specific guidance on aspects of sentencing: Custodial sentences (Division 2), Non-Custodial sentences (Division 3) and Fines (Division 4).

Some of the things that may be raised in a Plea in Mitigation include:

- An explanation of the facts and circumstances of the offence
- Whether anyone else participated in the offence
- The age, criminal record and personal background of the defendant
- The work history and current employment situation of the defendant
- The obligations of the defendant to support a family or other people
- The defendant's health now or at the time of the offence (if it is relevant)
- Whether drugs or alcohol influenced the offence, in some cases the prospect of rehabilitation or engagement with counselling services
- Whether the defendant cooperated with the police when he or she was arrested, and whether or not the defendant pleaded guilty straight away and
- Whether the defendant is sorry about what happened (i.e. any remorse shown by the offender for their actions).[39]

Assist the practitioner to explain the range of possible penalties and/or sentences to client

In the justice system, there is a range of penalties available to a defendant, varying in severity. Although generally each crime has a maximum penalty allocated to it, this can be increased if

[38] http://search2.austlii.edu.au/au/journals/DeakinLRev/2004/7.html.

[39] http://www.legalaid.wa.gov.au/InfoAboutLaw/aspx/default.aspx?Page=Going/Plea.xml.

there is aggravating circumstances. The final penalty will be dependent on a number of factors:

- The seriousness of the crime
- The effect on the victim
- The offender's circumstances
- The offender's criminal history
- Whether the offender has cooperated with police.

Options could include monetary fines of various amounts, bonds or even imprisonment.

Obtain comparative sentencing results and communicate these to client as required

You can help the client to prepare for what may happen in court by explaining outcomes that have happened in similar cases. You will help the client to grasp the potential outcome by sharing information about a similar matter, with similar facts, a judge in the same court gave a penalty/sentence of X. This will assist them in deciding whether to plead guilty or not guilty.

In some matters, particularly where the offence is serious, or where the offence is infrequently dealt with in the local court it is worthwhile looking at, and if appropriate tendering, a copy of the Judicial Commission of NSW statistics. These statistics are useful for considering what the range of results are for certain offences, and where this matter might fall within the range. Where the pool of matters dealt with in the local court is large, then the statistics can be even more persuasive to a magistrate, in that the sentence they wish to impose may fall outside of the range reflected in the statistics.

Moreover, it is always useful to be aware of relevant case law that may touch upon the offence for sentence and provide some guiding principles on sentencing when dealing with a particular kind of offence. Examples of this are particularly guideline judgments such as *Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act 1999*[40] regarding high range drink driving offences, or *R v Ponfield*[41]regarding break, enter and steal offences.

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[40] *Re Attorney General's Application under s 37 Crimes (Sentencing Procedure) Act 1999* (2004) 61 NSWLR 305.

[41] *R v Ponfield* (1999) 48 NSWLR 327.

(http://www.criminalcle.net.au/attachments/Sentencing_Advocacy_in_the_Local_Court.pdf)

An important principle that applies in sentencing offenders in criminal matters is called the parity principle.[42] This principle requires of consistency and equality before the law – the treatment of like cases alike, and different cases differently: *Green v The Queen.*[43]

Gather further information and instruction from client relevant to the plea

If any of the following points apply to the client, it may be of assistance if the practitioner includes them in the plea in mitigation. To do this, the client may need to provide specific documentation, such as health records, enrolment in a rehabilitation program, character references or client's criminal record.

- They have a good explanation for committing the offence
- They were not involved in the offence as much as some others (you were not the "ring-leader")
- It was a one-off mistake
- They are young and inexperienced
- They have no criminal record or if they have a record, it contains nothing similar to the present offence
- They have support from family and friends which will help to ensure they don't get into trouble again
- They have done, are doing, or will do, things to help themselves so they won't get into trouble again, for example no longer associate with certain people, do an anger management course, get debt management advice, or get treatment for alcohol or drug use problems
- They co-operated with police
- They have apologised to the victim of their offence

[42] http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/parity.html.

[43] *Green v The Queen*[43] (2011) 86 ALJR 36.

- They are responsible for supporting their family or other people[44]

Assist the practitioner to prepare the plea for submission

To ensure effective case management, particularly in preparing pleas, it is very important that files are tidy and organised in a consistent way. It is imperative that any file notes are dated, and clearly identify the solicitor giving the advice and the para-legal assisting.

All file notes should include a brief summary of the legal problems and/or questions the client has, followed by detailed notes of the advice given and/or referrals made.

File notes must be dated and clearly identify the solicitor giving the advice and/or the para-legal assisting.

Gathering documents regarding any mitigating factors surrounding the matter would be necessary to assist in preparing the file note for the plea. This may include records from a treating psychiatrist, other, health record or documents outlining enrolment in a rehabilitation program.

Communicate outcomes to the client

Analyse court rulings and explain to client

When it comes to deciding on the appropriate sentence for the client, the options available to the court will depend on the offence that has committed. Some offences can attract no more than a fine, while others are serious enough for imprisonment to be an option. For certain offences the court has no option and must impose a minimum fine or a minimum term of imprisonment. Some offences are State offences and others are Commonwealth offences and this also affects what the court can do when it sentences the client.

The following is a list of the sentencing options available in the Magistrates' Court for State offences:

- No penalty

[44] http://www.legalaid.wa.gov.au/InformationAboutTheLaw/crime/appearing/Pages/PleadingGuilty.aspx.

- Conditional Release Order
- Fine
- Community Based Order with or without community service work or other requirements
- Intensive Supervision Order with or without community service work or other requirements
- Suspended term of imprisonment
- Conditional suspended term of imprisonment (option if appearing in the Drug Court)
- Immediate imprisonment.[45]

After your matter has been dealt with and the sentence handed down it is important that you speak with your client. In some cases this will mean going down to the court cells for an interview. You will need to take this opportunity to explain what occurred in court, what the sentence was, appeal options and respond to any questions your client may have.

Identify the client's responsibilities and available options for action consistent with court rulings

After any sentence, but particularly after the imposition of a jail sentence, it is a wise practice to speak to the client to discuss the result and consider, if appropriate, the possibility of appeal. If the client is not happy about the Magistrate's decision, they can appeal. Appeal can be made against the conviction and or sentence or both. Leave to appeal can be made up to three months after the date of conviction and sentence. The client can lodge the appeal form at court (or from jail if they have received a jail sentence). There is a fee for lodging an appeal form. They must lodge the appeal within 28 days of the sentence/conviction date. In some circumstances this can be extended to three months with the permission of the Supreme Court. The appeal process is set out in the *Crimes (Appeal and Review) Act 2001* (NSW), predominately in section 11.

[45] http://www.legalaid.wa.gov.au/InformationAboutTheLaw/crime/appearing/Pages/PleadingGuilty.aspx.

If you have been sentenced to a short gaol sentence, appeals bail (bail granted while you are awaiting an appeal on conviction or sentence) may be given. With longer prison sentences, appeals bail is very hard to obtain.[46]

A practitioner must explain the client's rights, but also their responsibilities. If for example, the client has to pay a fine, the practitioner will explain how the client will undertake the payment process. It is necessary to ensure the client is aware of their obligation to pay the fine within a certain time frame. In some situations, there may be payment plan options available for people who suffer from financial hardship. It is important that you explain these options and refer your client to obtain the correct forms to make such an application.

Example of Appeals form on following page:

[46] http://www.legalanswers.sl.nsw.gov.au/guides/defend_yourself/appeals.html.

IV

Criminal Appeal Act 1912

NOTICE OF APPEAL

or

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

(Rule 23C of the Criminal Appeal Rules requires this notice to be accompanied by a statement of the grounds for appeal, written submissions in support of the appeal, a certificate of availability of transcript and exhibits, and a statement nominating the solicitor and counsel acting for the appellant)

NAME OF

APPELLANT:_____

Date of Birth:

_____

M.I.N.:

_____

CNI:

_____

Lower Court File No:

_____

THE APPELLANT APPEALS AGAINST: – CONVICTION ONLY

– CONVICTION AND SENTENCE

– SENTENCE ONLY

PLEA ENTERED: – GUILTY

– NOT GUILTY

DETAILS OF COURT OF TRIAL: – SUPREME COURT

– DISTRICT COURT

AT (Location): _____

NAME OF JUDGE: _____

DATES OF TRIAL AND SENTENCE HEARINGS: _____

_____

DATE OF SENTENCE: _____

CONVICTED OF (LIST ALL OFFENCES): _____

_____

LONGEST SENTENCE: _____

NON-PAROLE PERIOD:

_____

IF HELD IN CUSTODY, LOCATION OF GAOL: _____

IF NOT IN CUSTODY, RESIDENTIAL ADDRESS: _____

LEGAL REPRESENTATIVE: _____

(List name and address. If seeking legal aid, an

_____

application must be sent to the Legal Aid Commission

_____

of NSW)

_____

DOES APPELLANT WISH TO BE PRESENT AT HEARING OF APPEAL? YES/NO

SIGNED (by appellant or solicitor or counsel):

_____

DATE: _____

Explain responsibilities and available options to the client and assist them to make their decision on preferred option

It may be that your client wishes to appeal their conviction or their sentence. You will need to provide them with advice about important court timeframes for filing documents, and the merits of the option and the appeals process.

The judge may increase the sentence should he or she consider the existing one too lenient. (Section 20(2)(b) *Crimes (Appeal and Review) Act 2001* (NSW) allows the court to vary a sentence; section 3 defines this to include increasing it).

However, most practitioners would be aware of the "Parker warning" or "Parker direction", a well-established rule of procedural fairness which requires the judge to warn the appellant of the intention to increase the sentence. Parker warnings may be very general, and the judge is only required to indicate that he or she is considering an increased sentence.

If a practitioner receives a Parker warning, they must take immediate instructions from their client, who will probably instruct them to seek leave to withdraw the appeal. Leave is required to withdraw an appeal[47] and is almost always granted even though the court is not bound to grant it.[48]

Children in the Courts

There are special courts that deal exclusively with court matters relating to children, these are called Children's Courts. These courts have special jurisdiction to deal with children who have court matters relating to the Criminal Law or Child Protection matters. The Magistrates, lawyers and other support staff are specially trained to ensure children feel safe and understand the proceedings.

[47] Section 67(1) *Crimes (Appeal and Review) Act 2001* (NSW).

[48] http://www.criminalcle.net.au/attachments/Appeals_to_the_District_Court.pdf.

Criminal Law

In Criminal Law children are usually referred to as 'juveniles' and this jurisdiction is governed by special juvenile justice principles that are different to the adult jurisdiction based around diversion, rehabilitation and custody being used as a measure of last resort.

The Children's Court deals with the following criminal cases: -

- "Criminal cases where the defendant was under 18 years of age at the time of the alleged offence.
- Traffic cases where the defendant is not old enough to hold a driver's license or permit, or where the Children's Court is dealing with other related criminal offences.
- Breaches of parole, and in some cases the eligibility of children and young persons for release on parole".[49]

There is special legislation that governs some aspects of this jurisdiction in NSW such as the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceeding) Act 1987* (NSW). The principles of the *Bail Act 2013* (NSW) equally apply to children.

Care and Protection

In the Care and Protection jurisdiction the court deals with matters relating to the care and protection of children and young people under the age of 18 years. These court cases occur when the relevant state Department has concerns about the safety, welfare and well-being of a child and / or concerns that they are at risk of harm. They may have either already taken steps or may want to take intervening steps to protect the child. In many cases the court may require that they have representation by a special lawyer who is an independent legal representative. The main piece of legislation that governs this area in NSW is the *Children and Young Person's Care and Protection Act 1998* (NSW). Chapter 6 of this Act deals with Court Procedure and Chapter 2, Part 2 deals with special guiding principles that apply to Aboriginal and Torres Strait Islander children, specifically in relation to self-determination, family involvement in decision-making and placement principles.

[49] http://www.childrenscourt.justice.nsw.gov.au/childrenscourt/typesofcase.html,c=y (extracted 4/5/2015).