

The Shopfront

YOUTH LEGAL CENTRE

Criminal Procedure - an overview

1 Introduction

Most criminal cases are started by the police (although some proceedings are commenced by the Director of Public Prosecutions or other government agencies such as local councils, Workcover, RailCorp, or Roads and Maritime Services).

The officer who starts the criminal proceedings is usually called the **officer in charge**, **informant** or **prosecutor**.

A person who is charged with a criminal offence is usually called the **accused** or **defendant**. A person who hasn't yet been charged but is under investigation is usually called a **suspect**. A defendant who has been found guilty (or pleaded guilty) is often referred to as the **offender**.

An alleged victim in a criminal case is usually called the **complainant**. If the accused is found guilty or pleads guilty, the complainant is then called the **victim**.

2 Police investigation or arrest

2.1 Investigation

Before commencing criminal proceedings, the police (or other authority) will often conduct an investigation. This may involve questioning, searches, surveillance, etc.

The police have a range of powers to help them investigate crimes.

However, in most cases **the police cannot arrest you simply to conduct an investigation**, and you do not have to answer their questions.

2.2 Arrest

Sometimes the police will arrest a suspect in order to commence criminal proceedings. Being **arrested** means you are taken into police custody, usually to a police station, and you are not free to leave.

Police may arrest you if they catch you in the act of committing an offence, or if they suspect on reasonable grounds that you have committed an offence.

It is possible to commence criminal proceedings against you without arresting you. Arrest must be used as a last resort, where police believe it is necessary in order to get you to court, to prevent you committing further offences, to stop you interfering with witnesses, etc.

There is a limit on how long police may detain you before taking action (e.g. issuing a court attendance notice, issuing a penalty notice, taking action under the *Young Offenders Act*, or releasing you without charge).

2.3 Police questioning

The police will often want to interview a suspect as part of their investigation.

In many cases, this interview will take place after the suspect has already been arrested. However, there is no need to arrest someone in order to interview them (and in fact, it is unlawful for police to arrest someone just to interview them).

Whether you are under arrest or not, answering police questions is voluntary (except in relation to some traffic offences, drug importation, terrorism, etc).

If a **person aged under 18** is being interviewed by police, there must be an independent adult present. If not, any answers the young person gives usually cannot be used against them in court.

2.4 More information about investigations and arrest

For more information see our fact sheets on ***Police powers and your rights*** and ***Acting as a support person at the police station***.

3 Alternatives to court proceedings

3.1 Penalty notices

For some offences, usually less serious ones that do not carry a sentence of imprisonment, the police or other authority may issue a **penalty notice** (also known as an **infringement notice** or **on-the-spot fine**) instead of commencing court proceedings.

A person who receives a penalty notice may elect to challenge it in court.

For more information, see our fact sheet on ***Fines***.

3.2 Diversionary options for juveniles

Some kinds of offences committed by people under 18 can be dealt with under the *Young Offenders Act*.

This means that a young person can be **warned, cautioned** or sent to a **youth justice conference** instead of going to court.

For more information, see our fact sheet on ***The Young Offenders Act***.

4 Court Attendance Notice

If police decide to commence criminal proceedings (often referred to as “laying charges”) they will give the person a **Court Attendance Notice (CAN)**.

A CAN may be issued with or without the person being arrested first.

A CAN sets out the court date, place, and a brief description of the alleged offence.

Unless the defendant is refused bail, the **first mention date** will usually be about 3-4 weeks after the CAN is issued. Sometimes the first mention date may be only a few days away, e.g. if you are charged with a domestic or personal violence offence and the police are also applying for an apprehended violence order.

There are basically two types of CAN:

Firstly, a **“Bail CAN”**, which means the defendant may be either:

- **refused bail** (see “Bail” below); or
- **granted bail**. The defendant must sign a bail acknowledgement which may have conditions attached. The defendant has to appear personally at court and can be charged with “fail to appear” if they don’t turn up.

Secondly, a “**No bail CAN**”, “**Field CAN**”, or “**Future CAN**”:

- These have different names but are all quite similar.
 - A **Field CAN** is a small yellow piece of paper which is given to the defendant on the spot.
 - A **No Bail CAN** is often issued at the police station.
 - A **Future CAN** is usually sent out a few weeks (or even months) after the alleged offence.
- They are normally used for less serious offences, where there are no serious concerns about the defendant failing to appear or re-offending.
- The defendant does not have to sign a bail acknowledgement and is free until their court date with no conditions attached.
- Failure to appear is not an offence.
- The defendant can send a lawyer to court in their place (at least on the first court date).

5 Bail

If the police decide to commence court proceedings, they must first decide what sort of CAN to issue. If they decide to issue a Field, Future or No Bail CAN, bail does not apply.

Otherwise the police must decide whether to grant bail or refuse bail. This decision is usually made by the **custody manager** at the police station.

If the police decide to grant bail, the defendant will usually be released from the police station once they have signed their bail acknowledgement.

If the police refuse bail, the person must be taken to **court** as soon as possible (the same day or the next morning) and has another chance to apply for bail.

If the court refuses bail, the defendant may apply for bail in the same court again if they can show that there are new facts or circumstances. Alternatively, the defendant may apply to the Supreme Court, but it usually takes several weeks to get a Supreme Court bail application listed.

Bail may be **unconditional** or subject to **conditions**, e.g. to put up money, to live at a certain address, to report to the police station on certain days. A defendant can apply to the court to vary their bail conditions.

For more information, see our fact sheet on **Bail**.

6 Which court?

6.1 Summary offences – Local or Children’s Court

A **summary offence** is a relatively minor offence which is always dealt with by a **magistrate** in a Local or Children’s Court.

Examples include drug possession, offensive conduct, goods in custody, and most traffic offences,

Adults accused of summary offences will appear in the **Local Court**.

Children (aged under 18 at the time of the alleged offence and under 21 when charged) will appear in the **Children’s Court**.

6.2 Indictable offences

An indictable offence is a more serious offence, traditionally tried by a **judge and jury** in a **superior court** (i.e. the **District** or **Supreme Court**).

Some fairly minor offences are actually indictable, e.g. common assault, shoplifting.

Most indictable offences can be (and usually are) **dealt with summarily**, which means they are finalised by a magistrate in the Local or Children's Court.

For adult matters, it is usually the prosecutor who decides whether the matters stay in the Local Court or go to a superior court. For children's matters, it is usually the magistrate who makes this decision.

(a) Indictable offences dealt with summarily – Local or Children's Court

Most indictable offences are actually finalised by a magistrate in the Local or Children's Court. The procedure is basically the same as for summary offences (see part 7 below).

(b) Strictly indictable offences - District or Supreme Court

Some offences are **strictly indictable**, which means they are too serious to be finalised by a magistrate. These matters usually go to the District Court, except for extremely serious offences such as murder, which go to the Supreme Court.

Examples of strictly indictable offences include armed robbery, serious types of sexual assault, dealing in commercial quantities of drugs, murder and manslaughter.

For strictly indictable offences (or other indictable offences where someone has decided that the case should be sent to a superior court) the case will first go through **committal** proceedings in the Local or Children's Court (see part 8 below).

6.3 More information

See our fact sheet on ***Criminal Procedure – summary and indictable offences***.

7 Court procedure – Local and Children's Court

7.1 Plea

Usually, the defendant must enter a **plea** of **guilty** or **not guilty**.

The plea may be entered on the first court date, or the court may allow the defendant a 2-3 week **adjournment** to obtain legal advice. For domestic violence matters, the court will usually require a plea of guilty on the first mention date, or within 2 weeks after that.

There are some situations where the defendant may not have to enter a plea. For example, a defendant can be referred to the MERIT program without entering a plea.

A defendant can also make an application under section 32 or section 33 of the *Mental Health (Forensic Provisions) Act* without entering a plea, although the court will often ask them to indicate a plea before adjourning the matter for a section 32 application.

7.2 Guilty plea

A defendant who pleads guilty may be **sentenced** on the same day, or the matter may be **adjourned** to allow the defendant more time to prepare or to obtain reports.

See part 9 below and our fact sheet on ***Sentencing***.

7.3 Not guilty plea

If the defendant pleads **not guilty**, in most cases the court will **adjourn** the matter for about 4-6 weeks and order the police to provide a **brief of evidence**. The brief contains

witness statements and other evidence the police intend to rely on (e.g. photographs, fingerprint evidence, CCTV footage).

After receiving the brief, if the defendant maintains their plea of not guilty, the matter will be set down for **hearing** on another date. This may be several months away, especially if there are a lot of witnesses involved.

Domestic violence offences and **minor summary offences** are usually set down for hearing without the police first providing a brief.

A **hearing** in the Local or Children's Court is before a **magistrate** without a jury.

If the prosecution is unable to prove its case **beyond reasonable doubt**, the defendant is found **not guilty**.

If found **guilty**, the defendant is said to be **convicted**. **Sentencing** will follow, either straight away or at a later date. See part 9 below and our fact sheet on **Sentencing**.

7.4 Diversionary and treatment programs

At Local Courts (and, to a lesser extent, Children's Courts) there are a range of programs available for eligible offenders.

These include MERIT (Magistrates' Early Referral Into Treatment), the Adult Drug Court, and the Youth Koori Court.

In most cases, court proceedings are adjourned while the defendant participates in the program. Successful completion usually results in a more lenient sentence.

For people with mental health issues or cognitive impairments, the court may make an order under section 32 of the *Mental Health (Forensic Provisions) Act 1990* to dismiss the charges and instead divert the defendant into treatment or support. For more information see our fact sheet on **Mental health and intellectual disability - criminal proceedings in Local and Children's Courts**.

8 Court procedure – District and Supreme Court

8.1 Committal proceedings in Local Court

Even if the offence is strictly indictable, the defendant will first appear in the Local or Children's Court (except in very rare cases). Indictable matters go through **committal** proceedings before being sent to the District or Supreme Court.

Traditionally, committal proceedings involved the Magistrate reading the brief of evidence, and sometimes hearing evidence from witnesses, and making a decision about whether there was enough evidence for the matter to proceed to a superior court.

Since 2018, when the Early Appropriate Guilty Plea (**EAGP**) scheme was introduced, the focus of committal proceedings for adults in the Local Court is now different. The emphasis is on the prosecution and the defence conducting negotiations to try to resolve the matter at an early stage.

The committal process usually involves at least three adjournments and can take several months. Firstly, a **brief of evidence** will be provided without the defendant having to enter a plea. There will then be **charge certification** and a **case conference** between the prosecution and defence.

Sometimes, the prosecution will end up proceeding with less serious charges which can be finalised in the Local Court. Otherwise, the defendant will be **committed for trial** (if they wish to plead not guilty) or for **sentence** (if they wish to plead guilty) in a superior court.

8.2 Committal proceedings in Children's Court

The procedure in the Children's Court is different from the Local Court.

The EAGP scheme does not apply in the Children's Court (although there is nothing to stop the prosecution and defence from having negotiations), and the magistrate has more say over whether the matter stays in the Children's Court or ends up in a superior court.

8.3 Trial

A defendant who pleads not guilty will appear at a **trial** before a **judge and jury** in the District Court or Supreme Court.

As with a defended hearing in the Local Court, the prosecution must prove its case beyond reasonable doubt. If they do not do this, the defendant will be found **not guilty (acquitted)**.

If found **guilty**, the defendant is **convicted** and **sentencing** will follow, either immediately or at a later date. Sentencing is performed by a **judge** without a jury.

8.4 Guilty plea

Instead of going to trial, a defendant may plead guilty at any time and will be **sentenced** by a **judge** without a jury.

9 Sentencing

Sentencing is when the court decides on a penalty after a person is found (or pleads) guilty.

Courts take into account a number of factors in sentencing. These may include:

- the **objective** seriousness of the offence: e.g. the extent of injury or harm caused by the offence; whether the offender was provoked by the victim; the involvement of weapons or violence; whether the offence was committed in company with others; the amount of planning involved.
- the **subjective** circumstances of the offender: e.g. whether they have shown remorse for having committed the offence; attempts to voluntarily make up for any damage or loss caused by the offence; criminal record; likelihood of re-offending; prospects of rehabilitation; personal background; youth; homelessness; intellectual disability; mental illness; alcohol and other drug issues.

Sentencing options are slightly different for adults and children. They include non-conviction orders, fines, community-based orders such as good behaviour bonds, and custodial sentences (i.e. imprisonment or control order).

For more details, see our fact sheet on **Sentencing**.

10 Failure to appear

10.1 Consequences of failing to appear

For offences capable of being finalised by the Local or Children's Court, a defendant may be **convicted in their absence ("ex parte")**. Some sentencing options, such as a fine or a dismissal without conviction, may also be imposed in the defendant's absence.

Sentencing options such as bonds and imprisonment cannot be imposed without the defendant present. If the court convicts a person in their absence and is considering one

of these options, it will often issue a warrant (known as a **section 25(2) warrant**) to get the defendant to court for sentencing.

Strictly indictable offences cannot be dealt with in the defendant's absence. The court may issue a **bench warrant** (sometimes known as a "first instance warrant") to have the defendant arrested and brought to court.

A person on **bail** who has failed to appear may also be charged with the extra offence of "**fail to appear**". Also, anyone who has put up money for the defendant's bail may lose their money.

10.2 Options for defendants who have failed to appear

A defendant who has missed the court date but now wants to deal with the matter may be able to rectify the situation.

If a defendant has been **convicted and/or fined in their absence**, they may be able to have the conviction and/or penalty annulled (this is known as a **section 4 application** or simply an **annulment application**). The defendant will have to show a good reason why they didn't turn up to court, or convince the court of another good reason why the application should be granted. If this application is unsuccessful, the defendant may appeal to the District Court.

In most cases, if a **warrant** has already been issued, there is generally no alternative but to have the **police** involved. The defendant can either wait to be picked up (in which case they could have trouble getting out on bail) or hand herself/himself in to the police (this way there is a better chance of getting bail).

In rare cases, the defendant may be able to get the matter **re-listed** before the court has had a chance to issue the warrant. If the defendant has lodged an annulment application, it may be possible to get the warrant **recalled**.

11 Appeals

11.1 Appeal from Local or Children's Court

A defendant may appeal to the **District Court** against a **conviction** and/or **sentence** imposed by the **Local Court** or **Children's Court**.

The appeal must be lodged within **28 days** of conviction/sentence. If the appeal is not lodged within this period, the defendant can seek **leave to appeal within three months**. Leave will be granted if there are good reasons why the appeal wasn't brought earlier.

There is a **fee** involved but this will usually be **waived** for children, people in custody or people in financial hardship.

When dealing with an appeal against sentence (**severity appeal**), the judge may actually **increase** the sentence should he or she consider the existing one too lenient! However, there is a general rule that requires the judge to warn the appellant of the intention to do this (this is known as a "Parker warning"). The appellant then has a chance to withdraw the appeal.

11.2 Appeal from District or Supreme Court

A person who has been convicted or sentenced by the **District** or **Supreme Court** may appeal to the **Court of Criminal Appeal**. However, the defendant must show that the judge in the lower court has made an error of law, so it can be difficult to appeal successfully.

**The Shopfront Youth Legal Centre
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The Shopfront Youth Legal Centre
356 Victoria Street
Darlinghurst NSW 2010
Tel: 02 9322 4808
Fax: 02 9331 3287
shopfront@theshopfront.org
www.theshopfront.org

The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in November 2019 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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