Limitations on the power of a Local Court to accumulate sentences and the (sometimes associated) problem of late elections by the prosecution.

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Introduction

The criminal law landscape has changed significantly in recent years. More and more serious offences are being dealt with in the Local Court and longer sentences of imprisonment are being imposed. Issues arising from the limited jurisdiction of the Local Court are arising more frequently. Late elections are being made, sometimes at the urging of Magistrates frustrated by a lack of jurisdiction. Defence lawyers are trying to push back but, when faced with resistance from the bench, what, if any, remedy is available?

That was the catalyst for this paper when first delivered in mid 2022. It is understood these issues continue to arise with some regularity. The purpose of this paper is to provide some practical guidance directed at:

1. When and how must an election be made
2. What is the purpose of s.58 *Crimes (Sentencing Procedure) Act 1999* (CSPA) and when and how does it work in practice
3. A word of caution in relation to appeals

When and how must an election be made

s.263 *Criminal Procedure Act 1986* (CPA) provides:

263 Time for making election

(1) An election to have an offence dealt with on indictment must be made within the time fixed by the Local Court.
(2) An election may, with the leave of the Local Court, be made after the time so fixed if the Court is satisfied that special circumstances exist.
(3) However, an election may not be made after the following events—
  (a) in the case of a plea of not guilty—the commencement of the taking of evidence for the prosecution in the summary trial,
  (b) in the case of a plea of guilty—the presentation of the facts relied on by the prosecution to prove the offence.
(4) An election may be made on behalf of a corporation by a person appearing as a representative of the corporation.
(5) The jurisdiction of the Local Court under this section may be exercised by a registrar.

The Local Court has fixed a time frame for election through the issue of Practice Notes. However, there is an inconsistency in the Practice Notes. The relevant practice notes are as follows:

1. Local Court Practice Note Crim 1 **[Crim 1]**: this practice note sets out the procedures to be adopted in summary proceedings (including indictable offences which are proceeding summarily)
2. Local Court Practice Note Comm 1 **[Comm 1]**: the practice note sets out the procedure to be adopted in committal proceedings which commenced prior to 30 April 2018.
3. Local Court Practice Note Comm 2 **[Comm 2]**: the practice note sets out the procedure to be adopted in committal proceedings which commenced on or after 30 April 2018.
4. Local Court Practice Note Comm 3 **[Comm 3]**: the practice note sets out the procedure to be adopted in committal proceedings which commenced on or after 9 January 2023.

Comm 2 coincided with the introduction of the Early Appropriate Guilty Plea [EAGP] scheme. It is to be expected that there would be very few (if any) matters still before the Local Court which commenced before the introduction of that scheme.

The time for making an election is (relevantly) defined in Crim 1 as follows:

> **5.3 Table matters and Commonwealth optional indictable matters**
>
> (a) On the first mention, if there is no decision as to whether or not an election is to be made in a Table matter:
>
> (i) If the accused enters a plea of not guilty – orders will be made for the service of the brief in accordance with paragraph 5.4;
>
> (ii) If the accused enters a plea of guilty –
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> - the prosecution will be entitled to an adjournment for 2 weeks to consider whether or not to make an election; and
> - the facts are not to be tendered.
>
> (b) Pursuant to s 263(1) CPA, an election in relation to a Table matter must be made on or by the first return date after an order is made for service of the brief of evidence (ordinarily, the second mention). The proceedings are to be dealt with summarily in accordance with this Chapter unless an election is made. (emphasis added)

Comm1 makes similar provisions to that in Crim 1 above.

By contrast Comm 2 and Comm 3, which are on this point in identical terms, require that:

> **4. Election in Table matters and Commonwealth optional indictable matters**
>
> 4.1. A brief of evidence will not be ordered in a Table matter unless the Court is informed that a plea of not guilty is entered.
>
> 4.2. A Table matter will proceed summarily pursuant to Chapter 5 of Practice Note Crim 1 unless an election is made to proceed on indictment in accordance with section 260 of the CPA within the timeframes set out in paragraph 4.3.

4.3. Pursuant to section 263(1) of the CPA, an election must be made no later than 14 days prior to the allocated hearing date. (emphasis added)

4.4. Where a plea of guilty to a charge for a Table offence or a Commonwealth optional indictable matter is entered at the first mention, upon application by the prosecution the Court will grant an adjournment for 2 weeks to consider whether or not an election is to be made. A statement of facts is not to be tendered.

It is important to remember that Practice notes issued by the court are intended to be a guide as to "the general course that will usually be followed". They are not intended to be inflexible and "do not have a binding effect"[1]. The Court may therefore make orders varying the time for making an election which could include extending the time for making an election.

However. in the absence of an order to the contrary, the time for making an election is fixed according to the terms of the relevant practice note. As seen above, the time fixed varies between Crim 1 and Comm 2/3. The question will therefore be, which Practice Note is applicable?

The answer is to be found in the nature of the proceedings themselves. Comm 2 applies only in respect of committal proceedings. That term is defined (at s.3(1) CPA) as follows:

> ***committal proceedings*** *means a hearing before a Magistrate for the purpose of deciding whether a person charged with an indictable offence should be committed for trial or sentence.*

The procedure to be adopted in committal proceedings is found at Part 2 of Chapter 3 CPA and forms part of the 'Indictable procedure'. However, s.260 provides that, unless and until an election is made, all Table 1 and Table 2 offences are to be dealt with summarily. The proceedings are therefore to be regarded as summary proceedings and will only become committal proceedings if an election is made[2].

It is difficult to envisage a situation in which the time in which to elect, as fixed by Comm 2, could ever apply. Clause 4.3 requires an election 'no later than 14 days prior to the allocated hearing date". The hearing date could only be the date set for summary hearing of the matter. If the case had been set for summary hearing, then it was not (and until election continued to not be) a committal proceeding; Comm 2 would have no application.

It is therefore expected that in Table matters the accused will be asked to enter a plea and, if that plea is not guilty, orders for service of the brief will be made. An election should be made on the first return date unless the time to elect is extended by the court. A failure to do so would mean that an election subsequently made would be out of time.

Late elections

Section 263(2) allows the Court to grant leave to a party to elect to proceed on indictment notwithstanding that the time fixed for election had passed. This has arisen in the past and can do so for a number of reasons. A common reason is that the operation of s.58 (discussed below) was not considered.

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[1] *Oxley v Oxley* [2018] NSWSC 91
[2] *Hall v R* [2015] NSWCCA 298 at [34]

Another common situation occurs where an accused is, by reason of mental illness or cognitive impairment, unfit to plead. The statutory provisions for dealing with an unfit accused in the higher courts[3] are not available to the Local Court. That being so, an accused found unfit by the Local Court must be discharged unconditionally[4]. A prosecution faced with such an outcome may seek to elect to have the matter dealt with on indictment[5]

The requirement for leave means that argument will need to be made as to why leave should be granted. The terms of the section will require that the party seeking leave demonstrate that special circumstances exist to justify the grant of leave. In *Hall v R* [2015] NSWCCA 298 Johnson J (Simpson JA and Davies J agreeing) said at [54]:

> Where a s.263(2) application is made, it is necessary to consider the reasons why election was not made by the prosecution within the relevant time period, for the purpose of determining whether the Court can be satisfied that special circumstances exist for granting leave for an election to be made out of time. To this end, something is required which distinguishes the case from others - that sets it apart from the usual or ordinary case: Kiefel J in *Secretary, Department of Family and Community Services v Chamberlain* at [19] (see [52] above).
>
> A primary focus of the decision under s.263(2) will be any explanation as to why the prosecution did not make the election in time. The length of time since expiration of the s.263(1) time limit will be significant. In a particular case, it may be that the circumstances of the offences, and the dates upon which they were allegedly committed, will bear upon this issue as well. It may be that there are groups of charges which will need to be considered together by the prosecution, to decide whether a s.263 election ought be made. This appears to be the case here, where groups of charges were considered at about the same time, to allow a decision to be made about s.263 election.
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> The overall administration of justice is also important, being justice as it affects the community as well as the individual: *D (A Child) v White* at 93. This aspect may arise if a s.263(2) refusal left the Local Court with inadequate sentencing powers to deal with the offences at hand, or where refusal may see a co-accused being dealt with separately in the District Court.

The focus is thus on the reason for the late election. However, the weight given to the reasons may be greater depending on the consequences of a refusal to grant leave. In the examples given it might be that the issue of fitness was not known to the prosecution at the time an initial decision not to elect was made. Similarly, a s.58 issue may have been overlooked but discovered late; a refusal to grant leave would tie the courts hands as to penalty and, particularly in cases involving serious offending, may be seen as contrary to the interests of justice.

Practitioners should keep in mind what was said in *Hall* and in particular the need to advance reasons for the failure of the prosecution to act within time. If it is advantageous to your client to proceed summarily then you should be ready to argue against the grant of leave. If no good reason is shown for the failure to elect, and particularly if the circumstances now relied upon were always known (or knowable), then an argument could, and should, be made against the grant of leave.

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[3] Part 4, *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*
[4] *Mantell v Molyneux* [2006] NSWSC 955, 165 A Crim R 83 at [28]
[5] Alternatively, the prosecution may consent to and support an application for diversion pursuant to s.14 *MH&CIFP Act 2020*

What is the purpose of s.58 and how does it work.

s.58 *CSP Act* places limitations on the power of a Local Court Magistrate to accumulate sentences of imprisonment. The section relevantly states:

> **58 Limitation on consecutive sentences imposed by Local Court**
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> (1) The Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.
>
> (2) Any period for which an existing sentence has been extended under this or any other Act is to be disregarded for the purposes of this section.
>
> *****
>
> (4) In this section—
>
> ***existing sentence*** means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).
>
> ***sentence of imprisonment*** includes an order referred to in section 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987*.

I have not included ss.3 and 3A but it is important to note that they create exceptions where the new sentence is imposed for certain nominated offences committed by inmates including escape, assaults on officers and possessing weapons and other prohibited items in custody.

Where an offender is facing sentence for multiple offences the Local Court is restricted in its power of accumulation to a period of 5 years imprisonment. However, if the client is already serving a sentence of imprisonment (an existing sentence), then the earlier sentence must be taken into account when calculating the 5 year period.

What is an existing sentence?

The question of what is meant by the term 'existing sentence' has arisen recently in *Stoneham v DPP* [2021] NSWSC 735 [*Stoneham*] and *Perrin v R* [2022] NSWCCA 170. In both cases the offender, when he entered custody, was serving a sentence of imprisonment. However, by the time they stood for sentence on fresh charges all earlier sentences had been served in full. The Local Court Magistrates both imposed lengthy sentences of imprisonment which were backdated to account for their remand custody. The effect was that *Stoneham*'s sentence was wholly cumulative on his earlier sentences, whereas *Perrin*'s sentence was backdated further such that it was partly concurrent with the earlier sentence.

Stoneham had in fact appeared before the court for sentence at a time when he was still serving his previous sentence but where that sentence was due to soon expire. Pleas of guilty were entered and facts and record tendered. The existing sentence meant s.58 was engaged and no sentence of imprisonment could be imposed. That was so despite the fact that the nature of the offences and his antecedents meant that imprisonment was the appropriate penalty. The Magistrate, after hearing argument, determined to adjourn the proceedings to a

date after the earlier sentence expired. He, on that later date, proceeded to impose a period of imprisonment.

In *Stoneham* two issues arose. Firstly, what was the correct interpretation of the terms "existing sentence" and "unexpired sentence" in s.58. In particular, what was the point in time when the sentence needed to be existing and unexpired. It was argued that the purpose of the section was to limit accumulation and, in order to achieve that purpose, the section should be interpreted as "existing and unexpired at the time the sentence commences". The respondent argued that the time at which a sentence needed to be existing and unexpired was on the day sentence was imposed.

In *Stoneham* Ierace J accepted the respondent's position with the effect that, at the expiration of any prior sentence, the 5 year period was taken to have 'reset'.

The plaintiff in *Stoneham* was however successful in arguing that the Magistrate's decision to adjourn was done with an intention to "defeat the legislative intent" of s.58 and was "not a valid exercise of legislative power"[6]. In short, the Magistrate, whilst understandably frustrated by the effect of s.58, was required to apply the section according to its terms. He was not permitted to engage in a process designed to subvert the section. Jurisdictional error was found to have occurred and the matter remitted to the Local Court.

In *Perrin* the earlier sentences had expired but not as a result of any manipulation. Mr Perrin faced a large number of charges which had been subject to brief orders whilst an election was being considered. The passage of time whilst that occurred was sufficient to see the earlier sentences expire. On appeal from the Local Court's sentence Haesler DCJ acknowledged the decision in *Stoneham* but appeared to have regarded that as having application peculiar to the context of that case. His Honour was of the view that where, as occurred in Perrin, the sentence was backdated so as to be partly concurrent with the previous sentence, s.58 was engaged notwithstanding the fact that the earlier sentence had expired[7].

At the request of the Crown Judge Haesler posed two questions to the CCA as a 'stated case' appeal[8]. In responding to the Crown position it became clear that the defence position taken in *Stoneham* was weakened by the lack of a clear and consistent legislative intent on this issue. The section does not expressly state that the intention of the legislature was to capture previous sentences even if they have all expired at the time of sentence and, indeed, prior versions suggested otherwise.

In *R v Hayes* (1977) 1 NSWLR 364 the CCA considered s.444(4)(b) *Crimes Act 1900* (a predecessor of the present s.58 CSP Act) and held that it applied to limit a Magistrate's power to accumulate not only upon any sentence the magistrate had imposed in the same sittings, but upon an earlier sentence which had been imposed by the District Court. Begg J, with whom Carmichael J agreed, considered that section 444 "appears to be concerned with the situation where the prisoner is serving a sentence and has an unexpired period yet to serve." (emphasis added)

[6] *Stoneham* at [31]
[7] *Perrin v DPP* [2021] NSWDC 408, at [86]
[8] *Criminal Appeal Act 1912*, s.5B

The terminology in s.444 *Crimes Act* differed from that used in s.58 CSP Act. The sentences relevant to the issue of accumulation for the purpose of s.444 were sentences "then imposed" or "being served". In *R v Clayton* (1997) 42 NSWLR 268 Sperling J interpreted those terms respectively as meaning "Imposed in the same proceedings" and "being served at the time of those proceedings". That meant that an earlier sentence which had expired was not considered even if there was a sentence "being served" which had been accumulated on it.

In the absence of clear contrary intention the CCA in *Perrin*, concluded that the literal meaning of the words used should prevail. Wright J (with whom Ward P and Harrison J (as his Honour then was) stated the position as follows [47]:

> The use of the expression "existing sentence" itself suggests that the sentence must be existing at the time when the Local Court comes to impose the new sentence. The definition of that expression in s 58(4) establishes that a sentence will be existing if the sentence is "unexpired". The use of the present continuous tense in the expression "is being served" in the definition also indicates that the expired sentence or sentences are only to be taken into account for the purpose of s 58 if the term of the "unexpired sentence" forms part of a continuous period of imprisonment (as a result of the combined effect of the expired sentence or sentences and the unexpired sentence) which has not yet come to an end, at the time the Local Court comes to impose the new sentence.
>
> Thus, a construction of s 58 which requires the questions of whether a sentence is "existing" or "unexpired" to be determined as at the date the new sentence is imposed reflects the text of the provision. It is also consistent with ss 47 and 55 of the *Crimes (Sentencing Procedure) Act* which relate to the commencement dates and accumulation of sentences generally.

The CCA thus confirmed the position preferred in *Stoneham.* As a result, the 5 year limitation will 'reset' upon the expiration of the last of the earlier sentences and that will be so even where the accused remains in continuous and unbroken custody immediately following the expiration of those sentences.

Anomalies that continue to exist.

It is apparent that s.58 throws up anomalies and is likely is long overdue for amendment. However, I fear if that were to occur the possibility of removing the section altogether is on the cards. Below are just a few examples of scenario's that demonstrate the potential for peculiar, to say the least, results:

1. A person who on arrest is serving parole in relation to a 5 year sentence which expires tomorrow. If sentencing today, the Local Court could not extend the term of imprisonment, however if sentencing took place in two days time the 5 year period would have reset such that accumulation would be limited only by the combined effect of the maximum penalties of the charges before the court.
2. In the second of the above scenarios, if the Magistrate were sentencing for 3 Break enter steal offences, then an aggregate sentence of up to five years could be imposed. But if the Magistrate intended to impose individual sentences totalling 5 years (eg 2 + 2 + 1), then it might be argued that whereas the first sentence could validly be imposed, upon doing so it became an existing (unexpired) sentence for the purposes of the remaining sentences. That being so, arguably, sentences 2 and 3 could not be imposed since they are accumulated on the existing sentence, sentence 1, which,

relevant to sentences 2 and 3, becomes part of an unbroken series of sentences which included the expired 5 year sentence.

- Put simply, the early sentence must be ignored for the purpose of imposing sentence 1, but it seems could be picked up by sentence 1 such that the s.58 restriction applies to sentences 2 and 3.

3. Similarly, if an accused had matters before multiple courts then, for the reasons shown in example 2, perhaps he would be better off being sentenced individually at each court, so as to achieve the latter scenario, rather than drawing all matters together and risking a single (and longer) aggregate sentence. Although to do so might trigger an election at the latter courts and expose him to higher penalties and reduced appeal rights.

The second and third examples above are admittedly anomalies that exist in the eyes of the author, there being no conclusive authority confirming the interpretations argued. However, if the above interpretation is correct then the 'reset' mentioned above that occurs after the prior sentences expire is a qualified reset in that it would apply only to the first sentence imposed.

Other questions not yet definitively answered.

When considering the operation of s.58, it has become apparent that some further questions remain as to its interpretation. Commonly occurring questions include the following:

1. Is an ICO a sentence of imprisonment for the purposes of s.58? In the authors view there is a strong argument supporting an affirmative answer to that question. Section 58 when speaking of the existing sentence refers simply to a sentence of imprisonment. An ICO *is* a sentence of imprisonment albeit one directed to be served by an ICO in the community, s.7 CSP Act.
2. Does accumulation refer to the non-parole period(s) or the head sentence? By way of example, a client serving 10 years for manslaughter is released to parole after serving seven years. He is arrested soon after on fresh offences and his parole is revoked such that there is 2 ½ years to serve. Two possibilities arise:
    a. If s.58 is taken to refer to accumulation on the head sentence, then the Local Court can impose imprisonment of up to 2 ½ years. Anecdotally, it is understood that this may be the presently preferred interpretation of the DPP.
    b. Alternatively, if accumulation is upon the NPP, then no sentence of imprisonment can be imposed. There is some authority to support this interpretation, albeit likely obiter dicta and so not binding[9].
3. What happens if an offender's earlier parole is revoked and they remain at large? Subsection 2, accounts for situations where the date of expiration of a sentence is extended. One common example might be where a person had been sentenced to 2 years imprisonment expiring 10 April 2023 with a NPP of 18 months. One month after release to parole (ie 10/11/23) the offender breaches his parole and it is revoked. A warrant is issued but not executed for another 6 months. On arrest the client is ordered to serve the balance of parole of 5 months to date from his arrest, in doing so,

[9] *R v Derbas* [2004] NSWCCA 174 per Simpson J at [39] (Wood CJ at CL and Bell J agreeing)

the last date of the sentence is extended by the period the client was at large[10] meaning the sentence expires on 10 October 2023.

a. On one reading, extending the sentence has the effect that the 2 years has become one of 2 years 5 months. However, s.58(2) requires that the period of extension be disregarded such that the sentence remains 2 years. But what does that mean for the operation of s.58?
b. One interpretation would be that the sentence remains one of 2 years but that the end date and the notional commencement date of the sentence have been adjusted forward to account for (and in the terms of s.58(2) 'disregard') the period at large. That may mean a person serving revoked parole is still subject to an existing sentence of 2 years. If so, it may also mean that earlier sentences upon which that sentence were accumulated may no longer be 'picked up' if, for example, the adjusted starting date was after an earlier sentence expired.
c. Another interpretation might be that the original sentence, including its nominated commencement and end date, remain intact. In the above scenario by the time the offender was re-arrested, the original term had expired. In that interpretation the five year period had, by his arrest, been reset.

Can the *Perrin/Stoneham* interpretation be used to the defence advantage?

When Mr Stoneham first stood for sentence the application of s.58 meant the Court had no power to impose imprisonment. The facts had been tendered and so it was too late to elect. It was noted that a prosecution decision to withdraw an election had led to the situation that unfolded. However, there can be little doubt that the parliament had not intended that Mr Stoneham receive a 'free ride' for the additional offending conduct. The fact that he did means that any legislative reform is likely to remove rather than strengthen the protection provided by s.58.

Whilst Stoneham is not unique, 'free ride' cases such as his are expected to be rare. Having said that, defence counsel are not obliged to advise the prosecution as to the running of its case. If the prosecution fail to see that s.58 is engaged, then defence lawyers are entitled to enter a plea of guilty for their client and ask the court to proceed to sentence in keeping with the limitations of s.58.

However, it seems that Magistrates who discover a s.58 issue, are attempting to encourage the Crown to find a way to proceed on indictment. In my view that should not be happening, but if faced with that situation, practitioners should give consideration to the cautionary word to follow later below.

Ordinarily, one would expect the DPP to elect in a case such as Mr Stoneham's so as to ensure that the Court had appropriate sentencing discretion available to it. That result would expose the accused to the higher jurisdictional maximum penalties of the District Court and limited rights of appeal (generally requiring that error be shown) from that court to the CCA. In some cases, where the DPP is alive to the 58 issue, it might be in the interests of an accused to 'find a way', if one exists, to revive jurisdiction in the Local Court.

[10] *Crimes (Administration of Sentences) Act 1999*, s.171(4)

If, when negotiating the appropriateness of an election, an earlier sentence is near expiration, the parties might agree to adjourn the sentence to a date after the sentence expires and in doing so have the charges dealt with summarily.

Similarly, if faced with the unanswered question scenario 2 above, one might prefer the interpretation of accumulation being on the head sentence rather than the NPP so as to encourage summary disposition. In the absence of binding authority, the parties would be entitled to take an agreed position to that effect.

Scenario 3 could present different implications as to the operation of s.58 depending on the circumstances. Again, it might be considered preferable to agree a position that would provide the Local Court sentencing scope.

A cautionary word on appeals

When a late election is made, or an attempt to subvert s.58 occurs, the temptation may be to seek a review of the decision of the Magistrate in the Supreme Court. However, care should be taken since such a course is not always wise.

In *Stoneham* an appeal was brought in the Supreme Court arguing jurisdictional error as well as an error in the interpretation of the statute. On the former point the plaintiff was successful, on the latter he was not. He was fortunate to have his case remitted and, so as to ensure the earlier problem was not perpetuated, the Crown agreed that the Magistrate should proceed as though s.58 applied (although strictly speaking the failure on the latter point meant it did not).

In *Hall*[11], Johnson J rejected an appeal against the decision to grant leave to elect late as incompetent. However, he then proceeded to note that the reasons for granting leave by the Magistrate did not refer to the reasons for the delay in electing. As noted above, his Honour was of the view that that needed to be the focus. His Honour also noted that regardless of the view on the grant of leave, the Crown would have been permitted to file an ex-officio indictment and to withdraw the Local Court proceedings.

Similarly, in *Johnston v DPP (NSW)* [2021] NSWSC 333 the Court was considering a situation where there was a previous sentence still existing such that s.58 was engaged. This was not known and so when the accused pleaded guilty the facts were handed up. It came to be known that the DPP had indicated to the police that they intended to elect but that election was not communicated to the court prior to the handing up of the facts. On appeal the DPP argued that the election should be taken to have occurred from the point it was communicated to the police prosecutors.

Cavanagh J rejected that argument finding [at 65] that an election was not valid until it was communicated orally to the court or a written notice advising of the decision was filed with the court. Neither occurred and so the election had not been validly made and, the facts having been presented the matter should have proceeded to sentence. However, in the meantime the DPP had presented an ex-officio indictment in the District Court. His Honour regarded that fact as rendering the appeal of no utility. For the reason advanced in *Hall* and

[11] *Hall v R* [2015] NSWCCA 298 per Johnson J at [64] referring to *Iqbal v R* [2012] NSWCCA 72

Iqbal v R [2012] NSWCCA 72 the DPP were permitted to proceed in that fashion and, having done so, they were entitled to withdraw the proceedings in the Local Court.

Importantly, Cavanagh J went further. Despite having found that the Magistrate was in error, the finding that the grant of relief lacked utility saw his Honour dismiss the appeal and order costs against the plaintiff.

Practitioners should thus be wary of bounding ahead by way of appeal. Such a course will inevitably involve the passing of time, at least for the filing of documentation and the fixing of a hearing date. The Crown will then have time to file an ex-officio indictment and, presuming they do so, the appeal, regardless of its merits otherwise, would be doomed to fail and may additionally result in the award of costs.

Summary

It is unsurprising that when a s.58 issue or similar arises, the presiding Magistrate may look to find a way around the problem. One approach might be to avoid being too quick to announce that a s.58 issue is present. By entering pleas, allowing facts to be handed up and read and waiting for the Magistrate to call for submissions, then you have a better case to answer an attempt to wriggle out from s.58. I have heard of prosecutors claiming the handing up of the facts did not amount to a tender and so an election could still be made[12]. In other cases Magistrates have encouraged an adjournment.

Practitioners should be in a position to argue that, until s.58 was pointed out, the Court and both parties were in a position to proceed to sentence. That being so, the Magistrate is obliged to proceed to sentence and should do so. Practitioners should be ready to point out what was said in *Stoneham* and *Johnston* or to argue against the grant of leave to elect with *Hall* in mind.

You may not always be successful. More often than not you will find that some time is given to prepare an argument, time which is also utilised to get approval for an ex-officio indictment. By all means, when faced with the type of intervention which occurred in *Stoneham* and *Johnston* keep all options in mind, but remain alert to any problems with your appeal and the impact an award of cost may have on an accused.

Scott Fraser
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[12] It is noted that s.263 CPA requires only the presentation of the facts and does not speak of a requirement they be tendered.