APPEARING IN COURT IN THE YEAR OF 2020

Part 1 - Practical difficulties in the practice of criminal law in 2020

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In *R v Macdonald; R v Edward Obeid; R v Moses Obeid (No 11)* [2020] NSWSC 382 at [29] Fullerton J said:

> *The accused are entitled to a fair trial which includes, necessarily, fair process and procedures. I am of the view that a trial of the accused in a virtual courtroom is impractical. I have further resolved to the view that the accused's right to a fair trial would be at risk were I to order that it continue at this time, subject as it is to the current health and safety regime imposed under the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (NSW) under s 7 of the* Public Health Act 2010 *(NSW), and the Chief Justice's direction that there be no physical appearances in trial proceedings.*

Introduction

1. The purpose of this presentation is to provide practitioners with some practical advice about the conduct of criminal practice during the Covid -19 pandemic and beyond. As a result of the restrictions that have been imposed on society and the need to ensure that we're all kept safe, the practice of criminal law has had some significant changes in the way it goes about its business.

2. It is acknowledged that there have been a number of very helpful presentations, papers and discussions about this subject matter. Our intention is not to repeat or regurgitate what is already out there. But we acknowledge there may be some overlap.

3. The presentation is going to be broken up into three areas:
    a. Practical difficulties in the practice of criminal law *(presented by Daniel Pace, Solicitor Advocate at Legal Aid NSW)*
    b. Advocacy Tips when appearing in Court *(presented by Riyad El-Choufani, Barrister, Forbes Chambers)*
    c. Bail and Sentencing *(presented Rose Khalilizadeh, Barrister, Forbes Chambers)*

Practical Difficulties

4. In this section of the presentation I intend on dealing with some of the practical difficulties that we have been experiencing in the practice of criminal law during the Covid – 19 Pandemic.

5. The list of practical difficulties identified are by no means an exhaustive list and you may have experienced something that is not covered.

6. Having identified some of the practical difficulties, there will then be discussion about possible remedies that may be available.

7. It is proposed that this topic will be broken up into three pillars:

    i. **Practical difficulties that when appearing in Court (noting appearance can now extend to in person, by AVL or by phone).**

ii. Practical Difficulties in communicating with stakeholders (including the Court, your opponent, the registry etc)

iii. Ethical considerations in dealing with these practical difficulties

i. Practical difficulties that when appearing in Court (noting appearance can extend to in person, by AVL or by phone).

8. In the Supreme Court of NSW, Chief Justice Bathurst has issued a directive which indicates that all appearances are to be done remotely (via AVL or telephone), unless you are in a jury trial that commenced before 16 March 2020.[1]

9. In the District Court of NSW, Chief Judge Price has issued directives that all appearances (where possible) should be done remotely (video or telephone).[2] The District Court website states that '*we are limiting the need for people to attend District Court rooms in person by using the current AVL system (Virtual Courtroom). Legal practitioners **are expected to appear** by using the Virtual Courtroom.'* However, on 20 April 2020 in a directive Justice Price said: *The general policy of the Court is that, for the time being, there will be no personal appearances and that hearings are to proceed by use of a virtual courtroom. However, the Court is aware that in some cases, particularly in Judge alone trials, that the interests of justice are best served by allowing parties to be physically present in the courtroom. In such a case the prosecutor and defendant's lawyers should apply to the Trial Judge, List Judge, Resident Judge or Circuit Judge for the Court's general policy to be dispensed with.*

10. In the same directive of 20 April 2020 Chief Judge Price said:

> *Due to a gradual improvement in the Court's audio visual technology, the temporary suspension of hearing criminal matters where a defendant is not in custody will be lifted on and from 4 May 2020 for those matters where the defendant's lawyers are able to make satisfactory arrangements for the defendant to appear remotely so as to enable the hearing to proceed by use of a virtual courtroom. The lifting of the temporary suspension will also apply to a self-represented defendant who is not in custody and is able to make satisfactory arrangements to appear remotely for the hearing to proceed by use of a virtual courtroom.*

11. Unlike the Supreme and District Court, at this stage none of the memorandums issued by Chief Magistrate Henson, identify an impediment on practitioners appearing in person for their sentence and bail matters in the Local Court (it is acknowledged that most sentence matters are being adjourned for 8 weeks for finalisation). However, because of things like the centralised bail courts, the Court is permitting appearances by practitioners via video or telephone (in some other cases their appearances may be noted by receipt of written submissions only).

[1] Chief Justice announcement dated 23 March 2020.

[2] District Court of New South Wales Media Release, 30 March 2020 and published information online.

12. All clients who are in custody are appearing by AVL only and in a case where your clients are in the community they're appearing in person or by video/phone from a remote location.

13. As a result of the above we are in a current situation where:
    a. The Supreme Court are conducting all appearances by video
    b. The District Court general policy is that parties are to appear by virtual Court and from 4 May 2020 clients not in custody will also appear remotely by use of a virtual courtroom (**if the defendant is able to make satisfactory arrangements to appear remotely)**
    c. In the Local Court practitioners may appear by video/phone or in person

14. *So, what are some of the practical difficulties in appearing in criminal matters by video, phone or in writing? How may one deal with these issues?*

15. A survey of a number of legal aid staff have revealed some of the following practical difficulties when appearing in Court by video/phone:
    a. Difficulties with the quality of video connection. E.g. poor vision, poor sound, delay in transmission
    b. Difficulties with drop-outs
    c. Difficulties in holding confidential discussions with their client
    d. Difficulties in clients being able to 'follow along' the proceedings
    e. Not being provided with details for the video connection
    f. Difficulties in being persuasive through video link
    g. Documents:
        - Difficulties in having documents sought to be tendered before the court
        - Difficulties in showing documents to witnesses and the Court

a) Difficulties with the quality of video connection. E.g. poor vision, poor sound, delay in transmission & b) Difficulties with drop-outs

16. The unfortunate reality of our AVL system when appearing in Court, is that it in order to appear successfully (without issues) it is entirely dependent on many things going right for you, which in practice is rarity. Some of these include; a solid internet connection, how good your video camera/audio is and what the 'traffic' on the system is like at the relevant time. Other things might include how well behaved your children feel like being at that exact moment and not having them yelling in the background.

17. For Legal Aid lawyers or those private practitioners with a grant of Legal Aid it is highly recommended that you utilise the AVL suites at the respective Legal Aid Offices to increase your chances in obtaining the best possible video connection. This is going to be the best possible connection that you will be able to achieve when appearing remotely.

18. It is recommended that prior to appearing in Court you have a contingency plan in place in circumstances where the AVL connection drops out or stops working. So, you may wish to have your hybrid or an ipad on standby to use. Alternatively, you may wish to have the dial in detail by telephone ready to go in the event of a drop-out.

19. If the connection is of such poor quality and you are unable to represent your client's best interest in an alternate way, such as by phone, then don't be afraid to seek an adjournment of your matter. The adjournment may be only for a matter of hours to resolve the issue or it may involve putting your matter over to another day.

20. One should not overlook the fundamental rights of your client to receive a fair hearing or trial. Failure for this to occur results in a miscarriage of justice.

c) Difficulties in holding confidential discussions with their client

21. At this stage clients in custody are only permitted to appear by AVL.

22. Section 22C *Evidence (Audio and Audio Visual Links) Act 1998* and r4A *Evidence (Audio and Audio Visual Links) Regulation 2015*, is where we find the Courts power to direct the accused to appear by AVL for all "physical appearance proceedings." "Physical appearance proceedings" are defined in s3 *Evidence (Audio and Audio Visual Links) Act 1998* and include trial, 'hearing of charges', fitness inquiries and certain bail applications.

23. The consequence of these emergency provisions means that our clients are no longer being physically brought into Court from custody.

24. That means for most of our clients in custody, all face to face communication with practitioners has been eliminated and the only way to communicate with your client is by phone or AVL. Legal Aid policy is that our staff are not to attend the gaols without 'director' approval.

25. This means that taking instructions and holding confidential discussions is now more difficult than ever.

26. Section 22C(3) states that the Court may direct the accused to appear by AVL for all "physical appearance proceedings". Read in isolation, s22C(3) suggests that the accused could be directed to appear by AVL for contested matters, including for trial in the District or Supreme Court.

27. For an order to be made for the accused to appear by AVL pursuant to s22C(3) the following preconditions must be met:
    a. The parties must be afforded an opportunity to be heard (s22C(5));
    b. The direction must be in the interests of justice (s22C(6));
    c. The direction cannot be inconsistent with the advice of the Chief Medical Officer of the Ministry of Health relating to Covid-19 (s22C(6));
    d. **The Court must be satisfied that there is a reasonable opportunity for the accused to have private communication with their legal representative (s22C(7)).**

28. Therefore, if circumstances arise where you have NOT been given a reasonable opportunity to have a 'private communication' with your client, you may wish to give consideration to raising this with the Court and seek time to hold the conference. If refused, then give consideration to objecting to your clients appearance by AVL given one of the pre-conditions under s22C have not been met.

29. For example one way I have been able to communicate with my client is by asking the Court to adjourn to allow your client to be kept on screen so you can have a discussion with them to obtain instructions or call them by phone.

d) Difficulties in clients being able to 'follow along' the proceedings

30. There is no easy fix to this issue. It is important that when you're in Court (by video or in person) that you 'check in' with you client from time to time to see if their connection is still present.

31. At law your client is entitled to be 'present' from the proceeding unless they voluntarily absent themselves from the proceedings **see *Williams v R* [2012] NSWCCA 286 and *R v McHardie & Danielson* [1983] 2 NSWLR 733.**

32. The practical advise to share with you is that given the technological difficulties we've all been experiencing before you appear in Court you may wish to obtain formal instructions from your client to proceed in their absence in the event of a drop out or other unrelated event. The Court may give leave to continue in their absence given the accused is legally represented (subject to the substance of the hearing).

33. For example recently I had a hearing in the Local Court where a split screen worked when the witness was dialling in from a police station, however it did not work when another witness was dialling from their personal computer. To avoid the proceedings being delayed (given the witness was not a critical witness in the case) the client consented to being 'absent' during the evidence of that witness. Once we reconnect the Court allowed me time to catch him up on what the evidence was. It is accepted this isn't ideal but given the issues in that case it wasn't fatal to his case.

e) Not being provided with details for the video connection

34. The District Court practice seems to operate on the basis that once you've communicated with the Court or associate that you appear in a matter, then a link with a dial-in time will be provided to you by email.

35. There are an array of platforms you can connect with very helpful assistance in the attachments sent by the District Court registry called 'DISTRICT COURT AVL GUIDE.'

36. In the Local Court it is important that practitioners email the relevant registry (ahead of time) and inform them of their intention to appear remotely (or by email) and within that email you provide your contact details. In practice what has been occurring is the court staff will phone you when the Court is ready to hear your matter and you will be provided with the dial in details.

f) Difficulties in being persuasive through video link

37. This will be dealt with in Riyad's section of the discussion. But I want to highlight three things at this point:
    a. Talk slowly
    b. Mention your name (where possible) before speaking

c. Be punchy in your submissions. Remember the magistrate or judge has probably been dealing with links dropping out and poor video quality all day. They are probably frustrated and annoyed. Be concise and to the point where you can.

g) Documents:

i. Difficulties in having documents sought to be tendered before the court
ii. Difficulties in showing documents to witnesses and the Court

38. It is important in the District Court that parties ensure that they continue to comply with the relevant practice notices, rules of the court or timetables that have been set for the filing of material.

39. Where practitioners may have previously been able to tender 'that' document that they overlooked on the day of the hearing, in this climate you will almost certainly be met with criticism if you attempt the same.

40. Whenever practicable, you should email the documentary evidence you rely on to both the registry and the Judge's associate. It is important you cc your opponent (see ethics section).

41. If the evidence is large and not able to be sent by email, then arrangements should be made in advance to deliver the material to the Court.

42. Think about how you seek to refer to the material. It is best practice where possible to both paginate and index your material. However, don't forget that your index should include (where possible) the pages for which the material refers. Alternatively you may wish to include a cover page at the beginning of every new item referred to in the index. The best example for criminal lawyers is to look at any appeal book to the CCA or High Court. Guidance can be obtained from the practices of the Family Court.[3]

43. Showing documents to witnesses and the Court while appearing remotely is no easy task. For non-contentious material, with consent of the party and the prosecutor obtaining the parties email address can assist in providing the evidence ahead of time or in real time via email.

44. Consider here that if the issue of credit arises and the Court is required to make observations of demeanour of the witnesses then they should be asked to ensure they work from a split screen so that the court does not lose vision when they review the document.

[3] See FCoA FCC Practitioner and Litigant Guide to Virtual Hearings and Microsoft Teams 22Apr20

45. Where material is contentious, you should determine methods of making the material available safely. It might be necessary to seek to have the witness brought to a location near the Court such as the Court remote witness room and have a sealed envelope provided (as they do in CSA matters). If as a matter of practicality, it is simply not possible then in seeking to protect your clients interest you may need to vacate the hearing.

46. If you are tech savy, you can show a document by sharing your screen: If you need to show a document an option, when using Jabber, is to share your screen.[4] This will allow you to show the Court your document and point to things using your cursor. If you're using the legal aid avl suite you can plug you hybrid into the HDMI cable and share the screen with the Court.

2. Practical Difficulties in communicating with stakeholders (including the Court, the prosecution, the registry)

ODPP

47. In an email from the Annemarie Lumnsden, Director of Criminal Law, on 24 April 2020 to staff she identified the following concerns raised by staff when dealing with the DPP:
    - ODPP solicitors not responding to emails sent by our solicitors which seek to adjourn matters in accordance with the Chief Magistrate's Memoranda. This is important because the *Uniform Conduct and Practice Rules* require us to obtain our opponent's consent before communicating with the court.
    - Given we are experiencing extensive delays accessing our clients on remand, delays in offers or considering our representations, may result in us having to obtain an adjournment to get and not resolve matters as quickly as they should be.
    - Before the EAGP brief is complete and where both the OIC or the ODPP solicitor (who does not yet carriage), are providing instructions to the police prosecutors, clarity on who we should be negotiating with.

48. Legal Aid is speaking directly with the ODPP management seeking to address these issues. You should raise anything not on the list above with you SIC or the criminal executive.

Police Prosecutors

49. Communicating with police prosecutors is difficult at the best of time. Fortunately, a list of the police prosecutors email address and contact details is located on the law society webpage. It is in the members section and you'll need your law society id.

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4 http://www.supremecourt.justice.nsw.gov.au/Documents/Home%20Page/Announcements/Fact%20Sheet.1.1%20-%20Practitioners.pdf

50. Alternatively for any given prosecutor – or indeed any police officer, station, or section at all – you can just call 9281 0000.

51. You'll get an automated prompt, and if you want prosecutors for a particular court, you just say "Sutherland prosecutors" or "Hornsby Prosecutors" (or "John Bloggs" or "Sydney City Detectives") and you'll get put through.

52. It's not perfect (particularly trying to get through to an individual officer, because often they've moved on from the number recorded in EagleNet), but it generally works. If you can't get the voice recognition to work, you'll get put through to a person at the switch who will find the officer for you.

The Court

53. Communication with the Court and receiving responses about an outcome has been difficult for many of us. I don't propose to offer a solution to the problem, but it is important practitioners ensure they are clear in their communication. Guidance can be found in the template of emails circulated by Emma Manea to the division. Your message must be clear and concise.

3. Ethical obligations in dealing with these practical difficulties

54. It is proposed in this section to cover four areas:
    a. Formality before the Court
    b. Communicating with the Court
    c. Communicating with your Opponent
    d. Prosecutor duties
    e. Providing documents to the Court

Formality before the Court

55. Whilst there may be a temptation either consciously or sub consciously to treat the proceedings less formal when appearing by video or phone. Practitioners are reminded of s18 of the Rules below:

> *18 Formality before the court*
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> *18.1 A solicitor must not, in the presence of any of the parties or solicitors, deal with a court on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court.*

56. It is even more important to remember that your face is being projected on a large screen in Court. Every expression you make is being seen and every sound you make is being heard.

Communicating with the Court and your opponent

57. It is important remember that when you're seeking to communicate to the Court you should:
    a. Notify your opponent in writing and obtain their consent or;
    b. You should cc them into your correspondence to the Court.

58. If there is a need to communicate with the Court where you're unable to identify your opponent or for urgent reasons, remember you have a duty of candour. In sum if you're not prepare to say something on the record in Court then don't put it in an email.

59. In R v Lazarus [2017] NSWCCA 279 at [85] – [88] the Court set out a neat reminder for practitioners as to their ethical obligations when communicating with the Court. Bellew J said:

> 85 Part 2 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* ("the Rules") includes the following provisions:
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> > 22.5 A solicitor must not, outside an ex parte application or a hearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
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> > > 22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court;
> > >
> > > 22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.
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> > 22.6 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in Rule 22.5.
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> > 22.7 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which an opponent has consented under Rule 22.5.2 other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.
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> > 22.8 A solicitor must take steps to inform the opponent as soon as possible after the solicitor has reasonable grounds to believe that there will be an application on behalf of the client to adjourn any hearing, of that fact and the grounds of the application, and must try, with the opponent's consent, to inform the court of that application promptly.
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> 86 For the purposes of those rules the term "court" is defined in the glossary in the following terms:
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> > **"court"** means:
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> > > (a) any body described as such;
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> > > (b) any tribunal exercising judicial, or quasi-judicial, functions;
> > >
> > > (c) a professional disciplinary tribunal;
> > >
> > > (d) an industrial tribunal;
> > >
> > > (e) an administrative tribunal;

(f) an investigation or inquiry established or conducted under statute or by a Parliament;

(g) a Royal Commission;

(h) an arbitration or mediation or any other form of dispute resolution.

87 **Plainly, a judge must <u>not</u> receive representations from one party to litigation, behind the back of the other: *Re JRL; Ex parte CJL* (1986) 161 CLR 342; [1986] HCA 39 at 346 per Gibbs CJ (emphasis added).** The overwhelming inference is that Mr [redacted] correspondence with DCTS, which was not notified to the Director, set in train a series of events in which the trial judge received, in some form or another, notice of Mr [redacted] assertion that there was a typographical error in her reasons, following which she amended that asserted error.

88 ***The practice of a party's legal representative engaging in correspondence of this kind, without informing the representative of the other party to the proceedings, is one which must be firmly discouraged*** (emphasis added). In not notifying the Director of his correspondence, Mr [redacted] contravened the principle to which Gibbs CJ referred in *Re JRL*. That it may have been, in one sense, an indirect contravention is not to the point. Although, in light of the definition of the word "court" in the rules, Mr [redacted] did not breach the terms of r. 22.5, in my view he acted clearly contrary to the spirit, and the underlying rationale, of that rule, and in a way which was at odds with the level of candour that is expected of any legal practitioner.

Prosecutor Duties

60. The below rules outline the prosecutor duties. There may be occasion from time to time to remind some of our colleagues of their ethical duties which are found below:

29 Prosecutor's duties

29.1 A prosecutor must fairly assist the court to arrive at the truth, must seek impartially to have the whole of the relevant evidence placed intelligibly before the court, and must seek to assist the court with adequate submissions of law to enable the law properly to be applied to the facts.

29.2 A prosecutor must not press the prosecution's case for a conviction beyond a full and firm presentation of that case.

29.3 A prosecutor must not, by language or other conduct, seek to inflame or bias the court against the accused.

29.4 A prosecutor must not argue any proposition of fact or law which the prosecutor does not believe on reasonable grounds to be capable of contributing to a finding of guilt and also to carry weight.

29.5 A prosecutor must disclose to the opponent as soon as practicable all material (including the names of and means of finding prospective witnesses in connection with such material) available to the prosecutor or of which the prosecutor becomes aware which could constitute evidence relevant to the guilt or innocence of the accused other than material subject to statutory immunity, unless the prosecutor believes on reasonable grounds that such disclosure, or full disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person.

29.6 A prosecutor who has decided not to disclose material to the opponent under Rule 29.5 must consider whether:

29.6.1 the charge against the accused to which such material is relevant should be withdrawn, or

29.6.2 the accused should be faced only with a lesser charge to which such material would not be so relevant.

29.7 A prosecutor must call as part of the prosecution's case all witnesses:

29.7.1 whose testimony is admissible and necessary for the presentation of all of the relevant circumstances,

29.7.2 whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue, UNLESS:

- *the opponent consents to the prosecutor not calling a particular witness,*
- *the only matter with respect to which the particular witness can give admissible evidence has been dealt with by an admission on behalf of the accused,*
- *the only matter with respect to which the particular witness can give admissible evidence goes to establishing a particular point already adequately established by another witness or other witnesses, or*
- *the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, provided that the prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within (ii), (iii) or (iv) together with the grounds on which the prosecutor has reached that decision.*

29.8 A prosecutor who has reasonable grounds to believe that certain material available to the prosecution may have been unlawfully or improperly obtained must promptly:

29.8.1 inform the opponent if the prosecutor intends to use the material, and

29.8.2 make available to the opponent a copy of the material if it is in documentary form.

29.9 A prosecutor must not confer with or interview any accused except in the presence of the accused's legal representative.

29.10 A prosecutor must not inform the court or an opponent that the prosecution has evidence supporting an aspect of its case unless the prosecutor believes on reasonable grounds that such evidence will be available from material already available to the prosecutor.

29.11 A prosecutor who has informed the court of matters within Rule 29.10, and who has later learnt that such evidence will not be available, must immediately inform the opponent of that fact and must inform the court of it when next the case is before the court.

29.12 A prosecutor:

29.12.1 must correct any error made by the opponent in address on sentence,

29.12.2 must inform the court of any relevant authority or legislation bearing on the appropriate sentence,

29.12.3 must assist the court to avoid appealable error on the issue of sentence, and

29.12.4 may submit that a custodial or non-custodial sentence is appropriate.

29.13 A solicitor who appears as counsel assisting an inquisitorial body such as the Criminal Justice Commission, the Australian Crime Commission, the Australian Securities and Investments Commission, the ACCC, a Royal Commission or other statutory tribunal or body having investigative powers must act in accordance with Rules 29.1, 29.3 and

29.4 as if the body is a court referred to in those Rules and any person whose conduct is in question before the body is an accused referred to in Rule 29.

Providing documents to the Court

61. There is a difference between filing and tendering documents.

62. In this current climate most of the documents we seek to rely are being emailed through to the registry or associate. The latest District Court Practice Note 20 dated 28 April 2020 states in sentence hearings that the offender's material is to be filed 1 week before the hearing.

63. If you're seeking to rely on documents in your hearing, ensure that they are formally tendered. Don't overlook this fact and actually say the words 'I seek to formally tender XX.' This is important for any appeal.

64. What do I do if I want to adduce further evidence post hearing and pre-judgement? In the current climate, some practitioners may be in a position where they didn't have the opportunity to put on any evidence about the COVID-19 pandemic at the initial hearing. There is a process by which practitioners are able to adduce further evidence in these circumstances.

65. In *Taitako v R* 2020 NSWCCA 43 The Court said regarding the filing of materials after a decision of the sentencing court has been reserved at [65] – [68]:

> 65 Proposed ground 2 was not based on any submission made in advance of or during the sentencing hearing. After his Honour had reserved his decision, counsel for the applicant supplied a further two-page submission, dated 8 November 2018. This occurred without leave being given or sought, although seemingly with the consent of the Crown. In this Court, Mr Russell maintained that he was entitled to take that course.
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> 66 It seems necessary to reiterate what was put by Mason J in *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 258; [1981] HCA 20:
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> > "The impression, unfortunately abroad, that parties may file supplementary written material after the conclusion of oral argument, without leave having been given beforehand, is quite misconceived. We have to say once again, firmly and clearly, that the hearing is the time and place to present argument, whether it be wholly oral or oral argument supplemented by written submissions."
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> That strong language was reiterated by McHugh J in *Eastman v Director of Public Prosecutions (ACT)* (2003) 214 CLR 318; [2003] HCA 28 at [28]-[31]; see for more recent authorities *Wollongong City Council v Papadopoulos* [2019] NSWCA 178 at [49] and, in this Court, *Nguyen v R* [2008] NSWCCA 322 at [27]-[32].
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> 68 It would have been open to the sentencing judge to ignore the unsolicited submission, supplied without leave and unaccompanied by any application for leave. However, his Honour said that he had received the supplementary submission, marking it MFI 3, and considered it.

66. Given the above remarks and to avoid any criticism, you are required to seek leave to re-open your case in order to file/submit any additional the material.

67. Practitioners should not just assume the Crown will consent to the additional material being tendered and don't just assume you'll get leave from the Court. In preparing your arguments for an application for leave, you should focus on what are the change in circumstances which justify the Court receiving additional material.

68. Relevantly for this presentation, Covid-19 pandemic should justify a change in circumstances to allow you to re-open your case to adduce further evidence about the impact it has had on your client, the gaols, society etc. Rose will address in her section how one may go about adducing evidence of this type.

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