

The criminal prosecution process in New South Wales

INTRODUCTION

The purpose of the criminal prosecution process is to determine whether a person is guilty of a crime which he or she is alleged to have committed. In 1987 the New South Wales (NSW) Government instituted major changes to the administration of justice. Important amongst these were changes to the responsibilities vested in the various persons and agencies involved in the criminal prosecution process. The aim of this bulletin is to describe the procedures now involved in the prosecution of a person for a criminal offence in NSW.

The bulletin provides a general guide to the ways in which a prosecution can be commenced, the persons involved in the prosecution process and the types of procedures that may be used. This area of the law can be technical and complicated. It is not intended to cover all aspects of the law relating to criminal prosecutions, and many of the terms and procedures discussed have been simplified.

THE COURTS

In order to understand the criminal prosecution process, it is necessary to appreciate the hierarchical structure of the NSW criminal court system. Figure 1 illustrates this hierarchy and the number of criminal matters heard in the respective courts.¹

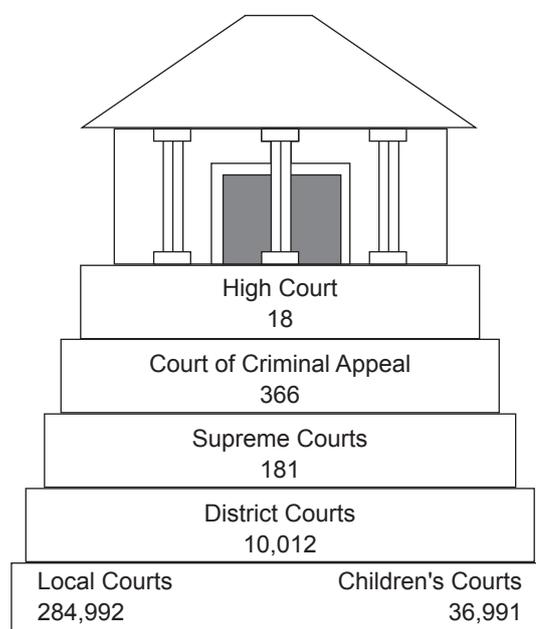
Local Courts and Children's Courts are the 'lower' courts and proceedings here are conducted by a magistrate. As indicated in Figure 1, the majority of criminal matters are dealt with in the Local Court.

District Court proceedings are presided over by a District Court Judge. The District Court hears trials, sentencing matters and appeals against decisions made in the Local Courts.

Supreme Courts conduct trials for a few offences which are more serious than those heard in the District Court, for example, murder. The proceedings here are presided over by a Supreme Court Judge.

The Court of Criminal Appeal hears appeals against sentence and conviction from the District and Supreme Court. An appeal is conducted in the presence of three Supreme Court Judges.

Figure 1. Criminal matters dealt with in NSW Courts in 1986



The High Court hears appeals against decisions made in the Court of Criminal Appeal. It is the final court of appeal and thus there is no appeal against a High Court decision.

All criminal courts, with the exception of the Children's Courts, are generally open to the public.

CRIMINAL OFFENCES

Most criminal offences are offences against state law but some, such as the illegal importation of narcotics, are violations of laws made by the Federal Government. All offences, however, are divided into two categories, namely, summary offences and indictable offences. As the procedures involved in the prosecution process vary according to the category of offence being prosecuted, it is essential to understand the difference between these two categories of criminal offences.

Summary offences are relatively minor offences which are usually dealt with by a magistrate in a Local Court. There is no jury trial for a summary offence.

Most offences are summary and examples include offensive behaviour, most motor traffic offences and drink-driving. The penalties for summary offences can range from a bond or fine to a maximum gaol sentence of two years, or three years if the person has committed more than one offence.

A prosecution for a summary offence must generally commence within six months of the date the offence is alleged to have been committed.

Not every summary offence is dealt with in the Local Court. There are some offences which are heard summarily (i.e. without a jury) in the Supreme Court. These are offences such as water or air pollution which carry very heavy fines.

Indictable offences are the more serious crimes such as murder, armed robbery, sexual assault, arson and drug trafficking. These offences may be tried by a judge and jury in District Courts or Supreme Courts (higher courts). The most serious indictable offences such as murder are tried in the Supreme Court. Before an indictable offence can be tried, a preliminary hearing called a committal hearing, is held before a magistrate in the Local Court. (Committal hearings are explained in more detail further on).

Unlike summary offences, there is no statutory time limit within which the prosecution of an indictable offence must commence, though the courts may refuse to hear charges made too long after the offence.

There are also indictable offences which a magistrate may choose to deal with summarily in the Local Court. A large number of indictable offences fall into this category. These offences are less serious than the indictable offences listed above and usually require the consent of the accused person to be heard summarily. Examples of these 'summary-indictable' offences are break, enter and steal, motor vehicle theft and malicious wounding. In the case of property offences, the value of the stolen goods must be less than \$10,000 if the offence is to be heard summarily.

Depending on the particular offence, penalties for indictable offences range from a bond or fine up to life imprisonment. In the case of indictable offences heard summarily, the maximum penalty which the magistrate can impose is the same as for summary offences, that is, two years imprisonment for one offence, or a total of three years for more than one offence.

COMMENCING A CRIMINAL PROSECUTION

As a general rule, the criminal prosecution process begins when a person lays what is called an 'information' before a court, or a justice of the peace. An 'information' is a written allegation that a particular person has committed a crime. The term comes from England where, before the existence of a police force, the

government paid 'informers' in order to catch and convict people who committed criminal offences.

The person who commences a prosecution is called the *informant*. Any person can commence a prosecution, but in most cases this is done by a police officer. In special cases, such as that of incest, a prosecution cannot be commenced without the consent of the Attorney General.

Although the laying of an information is generally the first step in the prosecution of an offence, a large number of very minor offences are dealt with by the use of infringement notices, such as parking or speeding "tickets", as they are known.

The notice specifies the offence and the amount of the fine to be paid. Rather than pay the fine, a person can choose to contest the matter in court. In that case, the prosecution will take place in the normal manner.

Before a prosecution can commence the alleged offender has to be notified that the prosecution is being commenced and that he or she should attend court. There are four means by which a person is notified:

Summons This is an order to attend court and is issued by the court at the request of the informant. The summons specifies the alleged offence and the time and place where the case is to be heard. If the person does not attend court, the matter can be heard in the person's absence, or a warrant of arrest may be issued. A summons is usually used for minor offences. It may be served in person or through the mail.

Charge An alleged offender may be arrested and taken to a police station to be charged. Details of the person and the offence are entered in a charge book and the accused person is fingerprinted. The person may be kept in custody until the court hearing or may be released on bail. (See Crime and Justice Bulletin No.2 for further details on bail). It is normal practice for police to proceed by way of charge in more serious matters, or where there is some doubt as to whether the person will appear at court.

Court Attendance Notice The court attendance notice is a procedure introduced as an alternative to charge and summons and came into effect on the 1st July 1987. The notice is issued in person by the police and specifies the particulars of the offence, the date and place of the court hearing and the consequences of failure to appear at court. Failing to attend court in answer to an attendance notice can result in the court dealing with the matter in a person's absence. Alternatively, a warrant of arrest may be issued.

Citation Where the police decide to prosecute a juvenile, they may use a citation. This is similar to an attendance notice. However, if the juvenile does not attend court on the date specified in the citation, the court cannot deal with the matter in his or her absence. A decision then has to be made for the issue of a summons or warrant.

PERSONS INVOLVED IN THE PROSECUTION PROCESS

The criminal prosecution process involves a number of people with different roles and functions to perform.

The police Police perform three major functions in the prosecution process. The first is to commence criminal prosecutions. The police can exercise a discretion not to proceed with a prosecution. A second function of the police is to decide on the specific charges to be laid. For example, in the case of an assault, the police have to make a judgement on the degree of seriousness of the assault and charge the alleged offender accordingly. Finally, once court proceedings have commenced, a third important function of the police is to give evidence for the prosecution.

The police prosecutor The police prosecutor is a police officer who appears in Local Courts and Children's Courts, with the consent of the magistrate, as the representative of the police informant. Police prosecutors also represent or prosecute in matters for National Parks and Wildlife, Fisheries, the State Rail Authority and the Water Board. The function of the police prosecutor is to present the case for the prosecution and to question witnesses called by the defence and the prosecution.

The magistrate As discussed earlier, magistrates preside over matters in Local Courts and Children's Courts. In hearing summary offences and the less serious indictable offences, the magistrate decides both the question of guilt and the penalty to be imposed. In the case of more serious indictable offences the magistrate holds a committal hearing to decide whether the person should be sent to stand trial in the District Court or Supreme Court, or be discharged.

The defence lawyer A person appearing before the court has the right to be represented by a lawyer. The role of the defence lawyer is to test the prosecution case by questioning the witnesses called by the prosecution, to put forward the defence case, and to make submissions to the court on why the person should not be convicted. A lawyer, however, must act on the instructions given to him or her by a client. Where the person is found, or pleads, guilty, the defence lawyer will make submissions to the court on the appropriate penalty. Most people appearing before the courts have legal representation. (Legal representation was 74.5% for appearances in Local Courts in 1986.)²

The Director of Public Prosecutions The State's first Director of Public Prosecutions was appointed on the 2nd March 1987 as part of the Government's reform of the administration of criminal justice. The aim of establishing this position was to place the prosecution of criminal matters under the control of a body independent of the Government. Responsibility for bringing proceedings for criminal offences to

the Supreme and District Courts rests with the Director of Public Prosecutions. The Director determines whether a prosecution should continue after a person has been committed for trial by a magistrate. Proceedings for indictable offences, and most summary offences, can also be commenced by the Director in Local Courts. The Director is empowered to take over most prosecutions conducted in Local Courts, and can choose to terminate them.

Figure 2. In New South Wales there are:

- 223 Police prosecutors
- 108 Magistrates
- 45 Crown prosecutors
- 47 District Court judges
- *42 Supreme Court judges

* At any given time 17 of these judges are involved in criminal trials.

The crown prosecutors Crown prosecutors are barristers appointed to conduct criminal proceedings in the District and Supreme Courts on behalf of the Director of Public Prosecutions. When a person is committed for trial by a magistrate, the crown prosecutor decides the charge on which the person is to be tried. (In certain circumstances the crown prosecutor may recommend to the Director of Public Prosecutions that the prosecution does not proceed). Crown prosecutors also appear in appeal matters.

The judge and jury Trials in the District and Supreme Courts are held before a judge and jury. The role of the judge is to preside over the trial and to rule on questions of law. He or she also explains to the jury what the law is. At the end of the trial, just prior to the jury meeting to consider their verdict, the judge summarises the facts of the case for the jury. This is called the summing up. If the jury delivers a verdict of guilty, the judge's role is to decide the objective facts that constituted the offence and consider the subjective material regarding the accused person. The judge then weighs these matters and determines an appropriate penalty. The jury comprises twelve persons selected from the jury roll which is in turn compiled from the electoral rolls. The task of the jury is to decide on the facts of a particular case, and on the basis of the facts to determine whether or not the accused person is guilty. The decision of the jury must be unanimous. If the jury cannot agree on the verdict, the judge will discharge the jury and the matter may be retried before a new jury if the Director of Public Prosecutions decides to pursue the prosecution.

COURT PROCEDURES FOR SUMMARY OFFENCES

As discussed earlier, summary offences are mainly dealt with by a magistrate in a Local Court without a jury. The magistrate makes decisions on the relevant facts and law. This means that he or she determines both whether or not a person is guilty as charged, and if appropriate, imposes a penalty. Proceedings in Children's Courts are similar to proceedings that take place in Local Courts.

Guilty plea If the accused person pleads guilty, the magistrate asks the police prosecutor to outline the facts of the case and to provide details of any prior convictions. The defence lawyer can make submissions to the magistrate for an appropriate penalty and can call witnesses to testify to the accused person's good character in support of these submissions. When satisfied that the evidence of guilt is sufficient, the magistrate will convict the person and impose a penalty. Seventy-seven percent of criminal matters heard summarily in Local Courts proceed by way of a guilty plea.³ (This figure includes indictable offences heard summarily).

Not guilty plea If an accused person pleads not guilty, the hearing begins with the police prosecutor calling witnesses for the prosecution. These witnesses can be questioned (cross-examined) by the defence after giving evidence for the prosecution.

When the case for the prosecution is complete, the magistrate has to decide whether sufficient evidence has been presented in support of the charge, to justify continuing the case against the accused person. If he or she decides that there is insufficient evidence, the charge is dismissed. If the magistrate decides that there is sufficient evidence, the defence has then to present its case. After this the magistrate considers all the evidence and has to decide whether the commission of the offence by the accused person has been proved beyond reasonable doubt. If he or she decides that the offence is so proved, the person is convicted and sentencing follows.

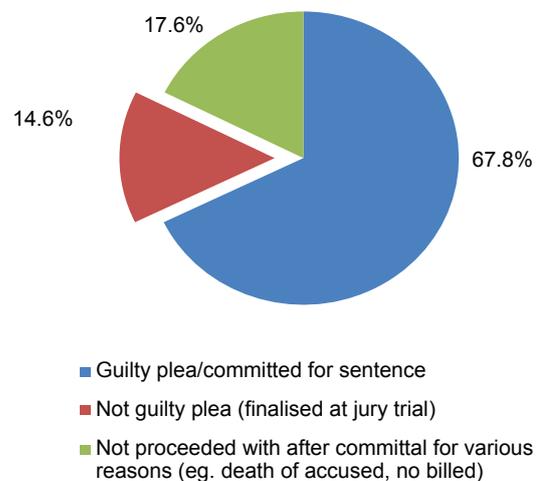
COURT PROCEDURE FOR INDICTABLE OFFENCES

Committal hearing When a person is charged with an indictable offence, a preliminary hearing, known as a committal hearing, is conducted in a Local Court by a magistrate. The purpose of the committal hearing is to determine whether there is sufficient evidence to justify sending the accused person to stand trial before a judge and jury in the District or Supreme Court.

The prosecution is called upon to produce evidence and witnesses. The defence may also call witnesses and give evidence. If the magistrate considers the prosecution evidence insufficient, the case will be dismissed. Where the magistrate decides there is sufficient evidence the person is committed to stand trial before a judge and jury.

An accused person can enter a guilty plea at the committal hearing. If the magistrate accepts the plea and is satisfied that there is a sufficient case against the accused, the person will

Figure 3. Higher Court appearances after committal



be committed to the District or Supreme Court for sentencing. A person committed to a higher court for sentencing can, however, change their plea to not guilty. If a person does this, he or she still has a right to trial by jury.

A person committed to stand trial can decide to plead guilty once the matter goes before the higher courts. No jury is then required and the matter proceeds to sentencing. Figure 3 shows that the majority of matters committed for trial or sentence to the higher courts proceed as guilty plea/sentencing matters (67.8%).⁴

Trial by jury Where a person committed for trial continues to plead not guilty, a jury trial is held. As indicated in Figure 3, only a small proportion (14.6%) of matters committed to the higher courts are finalised at a jury trial.

The original information which commenced proceedings in the Local Court is replaced by an indictment presented by the crown prosecutor in the name of the Director of Public Prosecutions. An indictment is a statement of the charge or charges the accused person is alleged to have committed.

The prosecution is first to present its case. Usually the same witnesses who were called at the committal hearing will be called at the trial. The defence case follows. The accused person does not have to give evidence but can remain silent or deliver a statement 'from the dock' (the accused's sitting place during the trial). The crown prosecutor is not permitted to cross-examine the accused on the dock statement.

After all the evidence has been presented, the judge sums up the case for the jury which then retires to consider its verdict. If a guilty verdict is returned the judge considers and imposes a penalty. Notice that in a jury trial it is the jury and not the judge which determines questions of fact and decides if the person charged is guilty.

'Summary-indictable' offences As discussed earlier, a large number of indictable offences can be dealt with summarily in the Local Court. The hearing commences as a committal hearing. When the case for the prosecution has been completed, the magistrate has to decide whether the case can be dealt with summarily. In doing so the magistrate has to consider the seriousness of the offence, the maximum penalty which the offence attracts and the fact that the magistrate is limited to imposing a maximum sentence of two years imprisonment for one offence. If the magistrate decides to deal with the matter summarily and the accused person consents, the matter proceeds as for a summary offence.

OTHER PROCEDURES

Appeals A person who is found guilty by a magistrate can appeal against that conviction, and any sentence imposed, to the District Court. The appeal is by way of rehearing, so that the matter can be heard afresh as if the magistrate had never dealt with it. New witnesses can be called by both the prosecution and the person who is appealing. The judge will redetermine the question of guilt and the appropriate penalty. There is no further appeal against the conviction or sentence imposed. As a general rule, the prosecution cannot appeal against a magistrate's finding that the person is not guilty, or against the sentence imposed.

An appeal against a jury's verdict of guilty, or a sentence imposed by a judge, is heard by the Court of Criminal Appeal. The appeal is not a rehearing, but is to determine whether any errors occurred in the trial, or in the sentence imposed by the judge.

The Director of Public Prosecutions or the Attorney General can appeal against the leniency of a sentence imposed by a judge, but there is no appeal by the prosecution against a jury's verdict of not guilty.

An appeal can be taken against the decision of the Court of Criminal Appeal to the High Court of Australia, but usually only where a question of law that is of general and public importance is raised by the case.

No bills After a person has been committed by a magistrate to the Supreme or District Court to be dealt with for an indictable offence, a decision must still be made by the prosecution whether to continue with the proceedings for the offence charged.

The Director of Public Prosecutions and the Attorney General both have power to decide that there should be no further proceedings taken against a person, either for a particular charge or for any offence. This is called a decision to 'no bill'. The reasons for the decision not to continue a prosecution can vary but matters taken into consideration include:

- the attitude of the victim to the continuation of the prosecution;
- the death or disappearance of key witnesses;

- lack of evidence to support a conviction;
- the age or health of the accused or a witness.

An application to the Director of Public Prosecutions for a 'no bill' can be made by the defence or the crown prosecutor.

'Ex officio' indictments Where a magistrate has decided not to commit a person for trial, the Director of Public Prosecutions or the Attorney General can still proceed with the prosecution by filing an indictment which will commence proceedings in the Supreme or District Court. This is called an 'ex officio' indictment.

This procedure is not used very often, but may occur because new evidence has been discovered since the magistrate held the committal hearing.

Indemnities An indemnity is an immunity against prosecution granted by the Attorney General to a person who has participated in an offence. In exchange, the person granted an indemnity is required to give evidence against another accused person. Indemnities are only granted in exceptional cases and in recommending indemnity, the prosecution needs to consider amongst other things, how essential the evidence of the person is to secure the conviction and whether the interests of justice can be served by the indemnity.

NOTES

- 1 Source: Local Courts, Public Prosecutions Office, Court of Criminal Appeal Registry, High Court Registry.
- 2 NSW Bureau of Crime Statistics and Research, Court Statistics 1986 (1987).
- 3 Ibid.
- 4 NSW Bureau of Crime Statistics and Research, Court Statistics 1983 (1985).

FURTHER READING

Bartley, R. (1979) *The Court is Open*. Petty Publishing Co.

Redfern Legal Centre. (1986) *The law handbook*. Redfern Legal Centre Publishing.

OTHER TITLES IN THIS SERIES

No. 1 Trends in serious crime in NSW (June 1987)

No. 2 Bail in NSW (June 1987)

No. 3 Heroin use and crime (June 1987)

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Figure 4. The criminal prosecution process

