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Update Summary

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CRIMINAL PROCEDURE (NSW)

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COMMENTARY

In this update, Bev Schurr incorporates new material and updates existing commentary relating to **Arrest; Charging; Bail; Detention and questioning; Search warrants; Telephone interception and surveillance; Pre-arrest and post-arrest directions and searches; Young offenders; Mental illness and cognitive impairment; Pre-hearing procedures; Hearings; Sentencing; Appeals**

Key updates include:

Bail

Juvenile bail limited unless “high degree of confidence” they will not commit a serious indictable offence while on bail

In *R v TW* [2024] NSWSC 1504, Rothman J noted that s 22C of the *Bail Act 2013* (NSW) requires the courts to deal more stringently with young offenders than offenders over the age of 18 and questioned the validity of s 22C if it conflicts with the principles of equal justice. See [3.45].

Where an adult accused must show cause why their detention is not justified

A person released to bail on a “show cause” offence must be subject to electronic monitoring unless the bail authority is satisfied “sufficient reasons exist, in the interests of justice, to justify not imposing the condition”: *Bail Act 2013* (NSW), s 28B. Electronic monitoring provided by private agencies must meet minimum standards: *Bail Act 2013* (NSW), s 30A; *Bail Regulation 2021* (NSW), reg 31G. See [3.40].

Video link applications for bail – Right to appear in court at first appearance

Arrangements for centralized NSW-wide bail courts on weekends and holidays are discussed at [3.250] and [3.420].

Detention and questioning – NSW

“Unofficial” and “preliminary” questioning – body-worn video and other situations

Otherwise inadmissible evidence which is unfairly prejudicial to the accused contained in a body-worn video may, if admitted by consent, still lead to a miscarriage of justice: *Holmes v The King* [2024] NSWCCA 233 at [139].

Telephone interception and surveillance devices

Interception without a warrant – Other data contained in mobile phone apps

Police can mine a lot of information from mobile phones of accused, including location and evidence of movement from the “Health” data, but is it admissible: *R v Youseff (No 2)* [2024] NSWSC 1260.

Pre-arrest and post-arrest directions and searches

Kinds of personal searches – Ordinary search – Strip search

With the NSW Policing Activity Tool, the NSW Bureau of Crime Statistics and Research (BOCSAR) now provides a centralised register of the incidence of the exercise of police powers to undertake personal and strip searches, and who they are searching. See [9.43], [9.74], [9.76].

Pre-hearing procedures

View of crime scene - Application for a view

The process of applying to the court for a view of the crime site, and ancillary orders relating to recording and the presence of the media: *R v Diallo (No 8)* [2024] NSWSC 979. See [17.2615].

Hearings

Open court – General rule

A court may exclude a member of the public, in this case the father of the accused, from entering the court or the court precincts if there is concern for the welfare of witnesses in the proceedings: *R v Rajapakse (No 2)* [2024] NSWSC 1227. See [18.30].

Presence of the accused – Accused must be in NSW

An accused may appear in court in person, or by audio visual link (AVL) from any part of NSW, including a prison: *Evidence (Audio and Audio Visual Links) Act 1998* (NSW). In some minor matters the Local Court may deal with a charge via a written plea of guilty: *Criminal Procedure Act 1986* (NSW), s 182. If the accused is located outside NSW, an arrest warrant may be issued to bring them to court. If the accused is in a prison outside NSW, they must be brought into NSW either by extradition or via the *Prisoner (Interstate Transfer) Act 1982* (NSW). There is no legislative basis for permitting a person in custody in another state to enter a plea of guilty or not guilty via AVL, expeditious and efficient as that process may be: *R v Johnson* [2024] NSWDC 452 per Bennet SC ADCJ. See [18.310].

Hearings – witnesses

Witnesses giving evidence from outside the court room – Opposing an application that a witness give evidence via audio visual link

In *Rooney v AGL Energy Ltd (No 2)* [2020] FCA 942, the grounds for opposing an application that a witness give evidence by AVL are reviewed. See [121.280].

Hearings – role of judges and magistrates

Judgment and decisions - Judicial “cut and paste” of submissions

In *Atanaskovic Hartnell Corporate Services Pty Ltd v Kelly* [2024] FCAFC 137, it is reviewed how much unacknowledged "cut and paste" copying of submissions of the advocate for one party into the judicial officer's "Reasons for Decision" is too much and therefore reveals a failure to perform the judicial function. See [22.830].

Sentencing – relevant factors

Aggravating factors in sentencing – Domestic violence - generally

In *R v Stephens* [2024] NSWCCA 170, Chen J emphasised the need for deterrence when sentencing for domestic violence-related offences. See [27.1575].

Sentencing options

Custodial sentences for both NSW and Commonwealth offences

For an example of undertaking the always complicated task of imposing custodial sentences for both NSW and Commonwealth offences see *Beck v The King* [2024] NSWCCA 201. See [28.460].