

Update Summary

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UPDATE 99

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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; Bail; Detention and questioning - NSW; Pre-arrest and post-arrest directions and searches; Identification material; Taking and using body samples; Body cavity searches; Young offenders; Mental illness and cognitive impairment; Pre-hearing procedures; Hearings; Hearings - conduct of defence; Hearing – conduct of prosecution; Hearings – witnesses; Hearing – role of judges and magistrates; Hearing – jury and verdicts; Sentencing - introduction and principles; Sentencing – procedure and fact finding; Sentencing – relevant factors; Sentencing options; Appeals – Local / District / Supreme and Court of Appeal; The end of appeals - inquiries, vice regal pardons and High Court appeals**

Key updates include:

Pre-arrest and post-arrest directions and searches

Kinds of personal searches – Strip search

The circumstances in which strip searches are unlawful were analysed in *Meredith v New South Wales (No 5)* [2025] NSWSC 1133. See [9.76].

Remedies – Damages arising from unlawful search

In *Meredith v New South Wales (No 5)* [2025] NSWSC 1133, damages were awarded for battery, assault, and false imprisonment after an illegal strip search. See [9.620].

Body cavity searches

Limits on body cavity or “internal” searches – NSW Police have no power to search body cavities

Strip search practices which unlawfully venture into the area of body cavity searches were reviewed in *Meredith v New South Wales (No 5)* [2025] NSWSC 1133. See [12.40].

Pre-hearing procedures

Priority steps to take – Court Practice Notes must be complied with

The District Court criminal trial process has been changed and the court has issued new Practice Notes relating to centralised post-committal processes and also the pre-recording of the evidence of child witnesses in child sexual assault cases and the important pre-trial “ground rules” hearings: [17.40], [17.50], [21.390]-[21.394]:

- District Court Criminal Practice Note 31 – Management of Proceedings under the Child Sexual Offence Evidence Program;
- District Court Criminal Practice Note 32 – Management of Criminal Proceedings listed in the Downing Centre;
- District Court Criminal Practice Note 33 – Management of Criminal Proceedings listed at Circuit Courts (being Courts without a Resident Judge).

Amendment of an indictment or charge – Power to amend a charge during a hearing

The difference between mere defect and fundamental failures in an indictment is explained in *Burton v The King* [2025] NSWCCA 89. See [17.780].

Judge-alone trial

In *R v Batak (No 67)* [2025] NSWSC 658, Yehia J summarised in 7 points the issues that the court must take into account when considering an application for a judge-alone trial. See [17.1460].

Bail

After charge and at the first court appearance – Practice Notes for state-wide AVL bail applications – Local and Children’s Courts

From early 2026, first bail appearances after arrest in NSW will mostly be by audio visual link (AVL): all adults appear by AVL, children appear in person on weekdays but by AVL on weekends, and weekend bail courts for both adults and juveniles are centralised with all participants able to appear by AVL under the relevant Practice Notes. See [3.225].

Hearings – witnesses

Advantages and disadvantages of giving evidence remotely

The challenges for judicial officers and jury members in assessing credibility of a witness giving evidence by audio-visual link (AVL) was extensively reviewed in *R v Walker* [2025] NSWCCA 62, complete with a lengthy bibliography. See [21.240].

Sentencing – introduction and principles

Sentencing procedure – Objective seriousness assessed

The process by which objective seriousness of an offence is calculated during sentencing proceedings was reviewed in *MacBlane v The King* [2025] NSWCCA 52. See [24.230].

Hearings – conduct of defence

Role of defence counsel – The accused’s right to access to a lawyer and confidential legal advice

The capacity of an inmate to access the courts and to instruct and retain lawyers can only be abrogated by express words in legislation: *Hamzy v Commissioner of Corrective Services* [2025] NSWSC 1023. See [19.15].

Arrest

Alternatives to arrest – Statutory alternatives to arrest

An officer must not initiate arrest proceedings unless the police officer is satisfied that it is reasonably necessary to arrest the person to achieve one or more of the purposes set out in s 99(1)(b) of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). This is a subjective test that depends upon the satisfaction of the officer and not on the objectively verifiable circumstances: *New South Wales v Dennis* [2025] NSWCA 118. See [1.1240].

Detention and questioning – NSW

Detention and questioning of the disadvantaged – Exercising and protecting the right to remain silent

In *R v Wrigley (No 2)* [2025] NSWSC 380, both the Electronic Recording of Interviews with Suspects (ERISP) and the body-worn video (BWV) were excluded because police failed to accord the accused the required protections: the ERISP was excluded due to a clear breach of Aboriginal Legal Service advice that he did not wish to be interviewed, and the BWV was excluded because he was not treated as a "protected suspect" and therefore not given the rights attached to that status. See [4.385].

Young offenders

Age of criminal responsibility – Raising the age of criminal responsibility to 12 or 14 years?

The age of criminal responsibility has been raised to 14 in the ACT and to 12 in Victoria, although plans to further increase Victoria's age of criminal responsibility to 14 have since been abandoned. See [13.130].

Mental illness and cognitive impairment

Defences – mental or cognitive impairment – NSW

A mental health defence may be available where drug use is also involved, unless the mental health issue was caused “solely” by drugs: *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) ss 4(3), 28; *Delaney v The King* [2025] NSWCCA 76. See [14.1660].

Indictable offences: Fitness to stand trial - Fitness to plead – NSW test

The court must be satisfied to a very high standard of satisfaction that the defendant would likely remain unfit to plead and stand trial over the following 12 months: *R v Bugmy* [2025] NSWSC 497. See [14.750].

Hearings – conduct of prosecution

Duty of disclosure – Disclosure of prosecution case

Failure to fully disclose material held by the prosecution may constitute a miscarriage of justice: *Brawn v The King* (2025) 99 ALJR 872; [2025] HCA 20. See [20.310] and [20.350].

Appeals – Local/District/Supreme and Court of Appeal

Review by Supreme Court of constitutional validity of criminal law

An application seeking an order that an Apprehended Personal Violence Order (APVO) was a burden on the implied right of political expression was dismissed: *Smith v Blanch* [2025] NSWCA 188. See [29.260] and [29.1010], [29.1050].

Hearings – jury and verdicts

Review of jury actions – Review of material irregularity exception to jury room secrecy

The Court of Criminal Appeal construed the “deceptively simple” s 73A provisions governing inquiries about jury behaviour in *Menon v The King* (2025) 117 NSWLR 136; [2025] NSWCCA 56. See [23.250].

Sentencing – procedure and fact finding

Sent – procedure, fact finding – Executive government interference with parole conditions

In *Cherry v Queensland* (2025) 99 ALJR 782; [2025] HCA 14, the “no body-no parole” legislation in Queensland, which gives the Parole Board power to refuse to hear parole applications after the non-parole period set by a court for a homicide offence has expired, was held not to interfere with the exercise of judicial power by the Supreme Court of Queensland. In Queensland, a person convicted of murder may be sentenced to life imprisonment but also receive a non-parole period. See [25.65].

Sentencing – relevant factors

Aggravating factors in sentencing – Children present at offending

If an offence was committed in the presence of a child, that may be taken into consideration as an aggravating factor in sentencing. Where police found drugs distributed throughout the home in which the offending drug dealer lived with his wife and two young children, it was held that the children had been exposed to the danger of coming into contact with the drugs even though there was no evidence that they had consumed the drugs: *Tsoumbanellis v The King* [2025] NSWCCA 107. See [27.1560].

Sentencing – options

Custodial sentences for Commonwealth offences – Non-parole period for combined NSW and Commonwealth sentences

Where a judge imposed a non-parole period of 71.4% of the head sentence after accumulating Commonwealth and NSW sentences, the Court of Criminal Appeal intervened: *Cook v The King* [2025] NSWCCA 96. See [28.470].

The end of appeals – inquiries, vice regal pardons and High Court appeals

Habeas corpus – Onus of proof

Habeas corpus cannot be used as a collateral attack on a conviction and sentence: *Fantakis v Governor of Macquarie Correctional Centre* [2025] NSWSC 996. See [31.760].

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Key updates include:

Search warrants (NSW)

Obtaining evidence in support of the application – Searching an electronic device or telephone – the “documents” to be searched for

In *Johnson v Commissioner of New South Wales Police* [2025] NSWSC 21, a search warrant authorising the seizure and search of a solicitor’s mobile telephone was held to be invalid. The Court observed that, given the vast amount of data stored on modern mobile devices, searching a solicitor’s telephone is analogous to conducting a general search of a solicitor’s office and all its files. Accordingly, a search warrant must specify with particularity the documents to be searched for and the specific offences to which they relate. See [6.1000], [6.1010], [6.1795], [6.1950], [6.1990].

Pre-arrest and post-arrest directions and searches

Police recording of exchanges with suspects – Body-worn videos

Legal representatives should be careful to ensure that inadmissible or prejudicial body-worn video (BWV) material is not admitted in evidence in proceedings: *Holmes v The King* [2024] NSWCCA 233. See [9.105].

Kinds of personal searches – Powers and guidelines for searching

. See [9.70].

Sentencing – procedure and fact finding

Taking offences into consideration in sentencing – Taking other offences into account in sentencing – Form 1

The role of Form 1 offences in sentencing was reviewed in *Roulstone v The King* [2025] NSWCCA 7 at [25.530].

Sentencing options

Sentences served in the community – Intensive correction orders (ICO) – ICO for Commonwealth offences – three-stage assessment for ICO

The interaction of State and Commonwealth laws regulating intensive correction orders (ICOs) was reviewed in *Vamadevan v The King* [2024] NSWCCA 223. See [28.805].

Sentencing – relevant factors

Age – young offenders – Sentencing 17-year-old offenders

Allowances must be made for a young offender’s cognitive, emotional, and/or psychological immaturity, and not merely their biological age: *TM v The King* [2023] NSWCCA 185. See [27.130].

Young offenders

Custodial sentence –Maximum custodial sentences and aggregate sentences

The Children’s Court may impose cumulative sentences of up to three years; however, the maximum period for an aggregate sentence is two years: *PD v Director of Public Prosecutions (NSW)* [2025] NSWSC 16. See [13.1630].

Choice of law when sentencing juveniles in New South Wales – The “legislative mosaic” in sentencing and appeals

The complexity of the sentence appeal process from the Children’s Court was considered in *PD v Director of Public Prosecutions (NSW)* [2025] NSWSC 16 at [13.1420].

Hearings – role of judges and magistrates

Judicial misconduct – Judicial immunity and the Judge Vasta case

Judges of both superior and inferior courts are immune from civil suit: *Queensland v Stradford* (2025) 99 ALJ 396; [2025] HCA 3. See [22.980].

Identification material

Lie detectors

The 3,000-year history of “lie detectors” demonstrates their unreliability. See [10.800].