Chapter 12
Conduct of pleas of guilty

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A. No diminished duty

12-1 No diminished duty

As a legal practitioner performing the role of a duty lawyer, you should remember that nothing diminishes the duties that you owe to the court and the client when performing that function.

B. Familiarity with legislation

12-2 Familiarity with legislation

As a duty lawyer, you need to be familiar with the *Criminal Code Act 1899* (Qld) provisions that you are more likely to encounter, and the *Penalties and Sentences Act 1992* (Qld). This chapter does not set out any specific provisions of the Code but does refer to them throughout the handbook, where relevant.

You also need a basic knowledge of the *Bail Act 1980* (Qld), *Youth Justice Act 1992* (Qld) and *Corrective Services Act 2000* (Qld). The relevant sections of these various Acts are contained in Carter's Criminal Code. You should always have a copy of Carter available when appearing in court.

You should also be familiar with the *Drugs Misuse Act 1986* (Qld), *Summary Offences Act 2005* (Qld), *Justices Act 1886* (Qld), *Regulatory Offences Act 1985* (Qld), *Police Powers and Responsibilities Act 2000* (Qld), *Transport Operations (Road Use Management) Act 1995* (Qld), *Weapons Act 1990* (Qld), and Commonwealth statutes dealing with the criminal law, such as the *Criminal Code Act 1995* (Cth) and *Crimes Act 1914* (Cth).

C. Deciding whether an offence can be dealt with summarily

12-3 Deciding whether an offence can be dealt with summarily

When a defendant instructs you to enter a guilty plea for an indictable offence, you must first ascertain whether the matter can be dealt with summarily. The question of a defence or prosecution election may also arise. The circumstances in which matters can be dealt with summarily are set out in Chapter 3-Magistrates courts and the Justices Act 1886 (Qld).

When the question does arise, advise the client of the consequences of each election, such as time delays with the presentation of indictments and the committal process.

D. Explaining court procedures

12-4 Explaining court procedures

After the substance of the charge or complaint has been read to the defendant, they must enter a plea of guilty to a charge of either an indictable offence to be dealt with summarily or a summary offence (Criminal Code, s 552I, and Justice Act, s 145).

In some magistrates courts, the personal entering of a plea is truncated, i.e. the duty lawyer indicates a plea and the magistrate confirms the plea with the defendant to prevent the later suggestion that the plea entered constitutes a miscarriage of justice (*Commissioner of Police v Warcon* [2011] QDC 28). As duty lawyer, you should insist that the defendant enter their own plea to comply with the procedural provisions.

E. Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time

12-5 Ensuring indictable offences proceeding summarily and simple offences are dealt with at appropriate time

A magistrate should not deal summarily with matters brought before the magistrates court until contemporaneous offences are dealt with on indictment in the higher courts. This way, as nearly as possible, any sentences received in the magistrates court will be served concurrently with sentences received in the higher court.

Leniency in a higher court can be a powerful submission for a more favourable sentence when a defendant pleads to contemporaneous charges in the magistrates court.

If a defendant has matters proceeding in both the magistrates court and higher courts, they can, once dealt with in the higher court, request of the court and police prosecutor that outstanding magistrates court matters be 'brought

on' for an earlier date, so they may be dealt with either by pleading guilty or requesting a date for hearing on a plea of not guilty.

Section 651 of the Criminal Code allows a district court or Supreme Court to hear and decide a summary offence if an indictment has been presented in that court. However, under s 651(2), '[t]he court must not hear and decide the summary offence unless—

a. the [district court or Supreme Court] considers it appropriate to do so; and
b. the accused person is represented by a legal practitioner; and
c. the Crown and the accused consent to the court so doing; and
d. the accused person states his or her intention of entering a plea of guilty to the charge; and
e. the complaint or bench charge sheet for the offence, or a copy, is before the court, whether or not returnable before another court'.

If the defendant wishes to have a summary offence dealt with under s 651, they must apply in writing to the clerk of the magistrates court, declaring that they intend to plead guilty (s 652). Once the summary offence has been transmitted, they will no longer be required to appear in the magistrates court.

Both the 'Supreme Court Practice Direction No. 5 of 2002' and 'District Court Practice Direction No. 3 of 2002' set out the specific details. In particular, the Director of Public Prosecutions must provide written consent and be satisfied that the summary charge has some connection to the indictable charge.

In *R v Tootoo* (2000) 115 A Crim R 90; [2000] QCA 312, the Court of Appeal confirmed that the only process available for a superior court to take summary matters into account on sentence is under s 651 of the Criminal Code (or s 189 of the Penalties and Sentences Act).

Under s 189 of the Penalties and Sentences Act, in a proper case, if a defendant is represented, pleads guilty and asks the court to take into account a list of offences, the court may take those offences into account in imposing a penalty. The prosecution must consent to those offences being proceeded with under this section.

If the defendant wants unrelated summary matters taken into account on sentence in a superior court, and those summary matters are unrelated to matters on an indictment, they may be able to apply to the Office of the Director of Public Prosecutions to have a 's 189 of the *Penalties and Sentences Act* schedule' prepared that contains those summary offences.

F. Fines—time to pay

12-6 Fines—time to pay

If a court imposes a fine, the defendant (and duty lawyer) will have to consider the question of seeking time to pay the fine. The defendant's personal circumstances will be relevant in fixing this period.

If a defendant is already serving or about to commence a jail term (e.g. on a contemporaneous plea), you must carefully consider the question of seeking time to pay. Under s 182A of the Penalties and Sentences Act, a court can order a person to serve up to 14 days' imprisonment for non-payment of each penalty unit or part thereof.

Section 182A of the Penalties and Sentences Act permits the court to determine the length of custody by reference to the 'cut-out rate', as defined in the *State Penalties Enforcement Act 1999* (Qld). The offender must serve this term cumulatively with any term they are already serving or have been sentenced to serve, unless the court orders otherwise.

You can apply for a default period to be served concurrently but the court is unlikely to grant it. The defendant may prefer to serve a default period at the end of their sentence rather than be released and possibly re-arrested for not paying the fine.

12-7 Offender levies imposed under s 179C

The offender levy is an administrative fee which is applied to any offender (other than a child) sentenced in the Supreme Court, district court or magistrates court whether or not a conviction is recorded.

The levy applies to all offences except an offence under the Bail Act, ss 29 or 33.

The prescribed amount is—
(a) if the sentence is imposed by the Supreme Court or district court—$300; or
(b) if the sentence is imposed by a magistrates court—$100.

The court can not take the levy into account in relation to the sentence it imposes: s 9 (7A) of the Penalties and Sentences Act.

The levy can be registered with State Penalties Enforcement Register: s 179E.

G. Multiple charges—defended and undefended

12-8 Multiple charges—defended and undefended

If a defendant has multiple charges, and intends to plead guilty to some charges and proceed to trial on others, they should ensure that the charges on which guilty pleas are being entered are remanded for mention at the end of any trial relating to the other offences. This will preserve an argument for concurrent sentences.

H. Appearing for co-accused

12-9 Appearing for co-accused

You should read the prosecution material before seeing any defendants who are co-accused. Assess whether you are likely to receive conflicting instructions.

It is possible for you to appear for more than one co-accused if their instructions do not conflict. If you take instructions from more than one co-accused and find that their instructions conflict, you cannot ethically continue to act for any co-accused.

If conflict is a possibility but you have already taken instructions from one co-accused, you may continue to act for that co-accused.

If you are concerned about your ability to continue to act for any co-accused, consult the rules relating to ethical conduct under the *Legal Profession Act 2007* (Qld).

I. Ensuring instructions fit the charge

12-10 Ensuring instructions fit the charge

Many people who appear on the first date before a criminal court wish to plead guilty, to 'get the matter over and done with'. In many cases, while they wish to plead guilty, they deny committing the offence. In these circumstances, you may continue to act but should advise the defendant of the consequences, including the loss of right to appeal against conviction and that submissions in mitigation will be made on the basis that they are guilty.

You should receive written instructions from the defendant before proceeding. These should include the advice that you have given and confirmation that the defendant is pleading guilty to the facts as alleged by the prosecution.

If a defendant disputes certain factual issues or you believe that a lesser charge should be substituted based on what the defendant has advised, you should engage in a case conference with the prosecution to resolve those issues. Note: If you agree on a charge substitution, an adjournment is likely.

12-11 Changing plea from not guilty to guilty

Sometimes a defendant who has previously denied the charges will change their instructions from not guilty to guilty. You are not required to withdraw or refuse to act further for the defendant in this case. However, to be prudent, you should obtain written authorisation, signed by the defendant, for you to enter the guilty plea. Preferably, you should allow the defendant to enter their own plea before the court. You may then continue to act by making appropriate submissions on the evidence as may be relevant to the question of penalty.

J. Previous convictions

12-12 Previous convictions

A defendant's criminal history will usually be disclosed among the prosecution material. You must take instructions about the accuracy of the history disclosed.

If they are not admitted, the prosecution must then prove the convictions. This could result in the prosecution applying for adjournment.

K. No duty to disclose previous convictions

12-13 No duty to disclose previous convictions

Previously, if a defendant told a duty lawyer about convictions that were not alleged by the prosecutor, neither defendant nor duty lawyer was obligated to tell the court about these additional convictions.

However, the Australian Solicitors Conduct Rules state: 'A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact'.

You must be careful that you do not fall short of this rule if the prosecution does not allege a criminal history where one exists if the failure amounts to an *obvious error* by the prosecution. An example would where the officer appearing for the prosecution does not locate a history hidden on a file.

Note: Contrast this situation to where there the parties have an agreement not to admit evidence of criminal history.

L. When adjournment may be advisable

12-14 When adjournment may be advisable

In certain circumstances, even though the defendant is entering a guilty plea of guilty, you should still seek to adjourn the matter to when the court has more time to hear the matter. You should advise the court if a plea will be lengthy or complicated so the magistrate can decide whether to adjourn the matter to another court.

In Brisbane Courts 1 and 3, if a matter is estimated to take 20 minutes or more, it is adjourned to Court 20.

In Brisbane, care should be taken when adjourning matters to courts where no duty lawyer appears. If the magistrate refuses to deal with the matter and adjourns it for a lengthy plea in a court not serviced by a duty lawyer, advise the defendant to obtain legal representation or apply for legal aid to ensure they continue to be represented.

M. Explaining effect of conviction

12-15 Explaining effect of conviction

If a defendant with no previous criminal convictions informs you that they wish to plead guilty to an offence, explain to them that this course of action may, by the end of the proceedings, result in a criminal conviction against their name. This conviction could affect future employment prospects or restrict travel to certain countries. The defendant must understand the consequences of a conviction recording.

12-16 Effects of conviction on applicants and employees

If a defendant is employed and at risk of having a conviction recorded, advise them that this could occur and that they could seek an adjournment to obtain further advice from an employee group, union or employer about the consequences of a conviction recording. It is not possible to set out any rule relating to all employers.

N. Explaining options for court on sentencing

12-17 Explaining options for court on sentencing

If a defendant is pleading guilty, you should explain the options that are open to the court on sentence. An experienced solicitor can usually assess reasonably accurately the type of sentence to be expected but the defendant should be fully aware of what could happen.

If an imprisonment term is highly likely, advise the defendant accordingly. If a submission is to be put to the court or a particular type of sentence, obtain full instructions beforehand, particularly where the consent of the defendant is required, e.g. probation or community service.

Similarly, explain to the defendant that, if a fine is imposed, they can apply for a fine option order or the fine may be referred to the State Penalty Enforcement Registry for collection.

12-18 Restitution

In any offence where damage has been occasioned, you should ask the prosecutor for details of the restitution sought before court, and obtain the defendant's detailed instructions about the amount of restitution sought and their capacity to pay. The magistrate may impose a default provision, resulting in the defendant being jailed if they cannot pay the restitution within the time allowed. The court can refer the collection of restitution to the State Penalty Enforcement Registry. A fine option order is not available on orders to pay restitution, and default imprisonment periods for non-payment of restitution are cumulative with any other sentence, unless the court orders otherwise.

O. Obtaining full instructions

12-19 Obtaining full instructions

Although, as a duty lawyer, you are faced with time constraints, you must obtain instructions that are as detailed as possible in the circumstances. Always obtain instructions about the defendant's age, background, antecedents, employment history and prospects. Also, always obtain instructions about the commission of the offence and look carefully for any mitigating factors.

P. Facts on sentence

12-20 Facts on sentence

Under s 132C of the *Evidence Act 1977* (Qld), the court may act upon an allegation of fact that is admitted or not challenged. However, if a particular allegation of fact is not admitted or is challenged, the court may act upon the allegation of fact if satisfied that the allegation is true.

This applies to any sentencing proceeding, and applies equally to allegations of fact raised by both the prosecution and defence.

If an allegation of fact that is contested is advanced in favour of a defendant, the court may need to adjourn to call evidence supporting the allegation of fact.

Q. Penalties and Sentences Act sentencing guidelines

12-21 Penalties and Sentences Act sentencing guidelines

You should be familiar with the sentencing guidelines in s 9 of the Penalties and Sentences Act (see Chapter 15).

R. Being as concise as possible

12-22 Being as concise as possible

When making a submission in the magistrates court, you should always be as concise as possible. Magistrates invariably have many matters to deal with and are conscious of the limited time they have to hear matters. Make your points quickly and precisely. A repetitious duty lawyer may do a defendant a disservice.

S. Suggesting available options

12-23 Suggesting available options

As duty lawyer, you should venture a submission on penalty. For example, the defendant may, through age and antecedents, be a candidate for probation. In these circumstances, you should suggest probation to the court as a possible sentencing option.

Note: Section 9(2)(a)(i) of the Penalties and Sentences Act states that imprisonment should be imposed only as a last resort.

12-24 Drivers licence disqualification as additional punishment

Be aware that, apart from the mandatory disqualification provisions in the Transport Operations (Road Use Management) Act (s 86), if an offender is convicted of an offence in connection with or arising out of them driving a motor vehicle, the court may order that the licence be disqualified absolutely or for a period after considering the nature of the offence and the circumstances in which it was committed (Penalties and Sentences Act, s 187).

T. Procedures after court

12-25 Procedures after court

If a defendant is sentenced in a way that results in error or is manifestly excessive, you should contact them after court and advise them of their rights to appeal to the district court under s 222 of the Justices Act.

In appropriate cases consideration should be given to making an application for appeal bail. Instructions from the client should also be sought.