COSTS APPLICATIONS BY CRIMINAL DEFENCE LAWYERS

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INTRODUCTION

1. The purpose of this paper is to provide a practical and succinct compendium of the law on costs in criminal and AVO proceedings as they arise in the Children's, Local and District Courts of NSW, including on appeal to the District Court.

2. Our target audience is public sector criminal defence lawyers, and private practitioners acting pursuant to grants of aid from the Legal Aid Commission of NSW or for the Aboriginal Legal Service. We have endeavoured to state the law as at June 2022.

3. The paper is in two parts.

    a. Part I covers the various statutory and common law sources of power to award costs. The main focus is recovery under the *Criminal Procedure Act* 1986 (CPA) and the *Costs in Criminal Cases Act* 1967 (CCCA), and addresses costs awarded at the end of a successful defence of criminal charges. We also briefly address costs on adjournment, *Mosely* costs orders, subpoena costs, bail, AVOs and the *Suitors Fund Act* 1951 (SFA).

    b. Part II is designed to be a more user-friendly resource, providing a Ready Reckoner for practitioners to glance at as a "quick guide". Additionally, we also seek to deal with the practicalities of seeking costs under either CPA or CCCA regimes, where the client is legally aided, by way of a Checklist generously provided by the Commission.

4. We gratefully acknowledge the research assistance of our recent PLT student Mr Scott Cleland. Any mistakes are our own.

PART I – THE POWER TO AWARD COSTS

Costs in Legal Aid and ALS Matters – Can you get them and should you try?

5. Costs can be an arid area of law, and of limited interest to public sector lawyers with a high-volume practice.

6. Further, it is sometimes the case that good relations with the bench or an opponent appears a dominant consideration, militating against the making of a costs application. That can be particularly true in regional areas where the bench or opponent are often the same individual, day after day.

7. On the other hand, where either police or a prosecutor have run a case unreasonably or improperly, and you have succeeded in the substantive proceedings, it can be a satisfying conclusion to the case to underline that point with a successful application for costs.

8. Bloody mindedness aside, there are powerful reasons to consider that you are obligated to make costs applications in appropriate cases.

9. In a private matter that obligation is an extension of your fiduciary duty to act in the best interests of the client. There may be occasions where the successful criminal litigant will instruct you not to bother trying to get your fees back for them, but they will be few.

10. In legally aided matters there is express statutory authority that the fact a litigant is so aided is irrelevant. Section 42 of the *Legal Aid Commission Act* 1979 provides as follows:

> *42 Discretion of court or tribunal as to costs*
> *A court or tribunal which may order the payment of costs in proceedings before it shall, where a legally assisted person is a party to any such proceedings, make an order as to costs in respect of the legally assisted person as if he or she were not a legally assisted person.*

11. And, it is an express provision of either your panel appointment or an individual grant, that you make application for costs where appropriate. See item 12.3 of the Quality Standards document on the Legal Aid NSW website, in the For Lawyers tab / Panels / Monitoring and Compliance. The Quality Standards are incorporated into all grants through the Panel Service Agreement.

12. It may not be irrelevant here to also note – for private practitioners acting pursuant to a grant of aid – that where applications are successful the fees paid by the commission to the practitioner will be subject to an 'uplift' fee, about that more later.

The ALS?

13. The situation with the ALS is a little different, though arguably shouldn't be. For starters there is no statutory equivalent to s42 of the *Legal Aid Commission Act*. That is important because the jurisdiction to order costs is fundamentally restitutionary.

14. The thinking goes generally, that if the client has not disbursed fees then, absent statutory intervention, there is no expense to be indemnified. See *Wang v Farkas* [2014] NSWCA 29; also *Police v Horsfield and Dowd* [2013] NSWLC 17.

15. Now for private solicitors and counsel acting directly, or being instructed, on behalf of an ALS client, you can readily protect yourself from an assertion that you have no retainer, by drawing up a retainer and forwarding it to the ALS. Just use a standard fee agreement adjusted to Legal Aid rates, or providing that rates will be in accordance with published Legal Aid Commission rates referable to the type of case.

16. However, in the ordinary case the ALS generally seeks no costs, in an endeavour to protect ALS clients from costs applications by prosecutors.

17. But that is not the last word. If you do have a significant issue with costs in an ALS matter, we suggest you contact a senior lawyer in that organisation for further direction.

<u>The Jurisdiction to award costs</u>

18. Almost exclusively the jurisdiction to award costs in criminal proceedings is conferred by statute, which modifies and limits underlying common law or equitable rights: *Director of Public Prosecutions v Deeks* (1994) 34 NSWLR 523.

19. There are residual heads of power in the superior courts which permit orders with respect to costs in particular discrete circumstances. These arise in subpoena proceedings and where adjournments and other delays are unreasonable. See the headings for Subpoenas and *Mosely* costs orders below.

20. Costs can also be awarded in criminal appeals to the District Court, and in AVO proceedings, each of which are dealt with discretely below. And the CPA also makes express provision for costs on adjournment, also treated as a separate topic below.

21. The principal two heads of statutory power in NSW criminal cases are the *Criminal Procedure Act* 1986 (CPA), and the *Costs in Criminal Cases Act* 1967 (CCCA). The CCCA has application in the Local and District Courts. The CPA costs provisions have no application to indictable proceedings in the District Court. Both acts provide for costs to be awarded on successful termination of the proceedings on behalf of the accused.

22. Noting that both acts apply to all proceedings in the Local and Children's Courts, it may often be wise to apply pursuant to both acts, in the alternative, when you are in the summary jurisdictions.

<u>Costs in The Childrens' Court</u>

23. The procedural rules of the Children's Court when sitting in its criminal jurisdiction are significantly supplemented by the *Criminal Procedure Act* 1986.

24. Section 27 of the *Children (Criminal Proceedings) Act* 1987 (CCPA) expressly adopts certain provisions of the CPA:

> *27 Application of Criminal Procedure Act 1986 and other Acts*
>
> *(1) Subject to Part 2 and to the rules of the Children's Court, any Act or other law relating to the functions of the Local Court or Magistrates or to criminal proceedings before them applies to—*
>
> *(a) the Children's Court, and*
>
> *(b) any criminal proceedings before the Children's Court.*
>
> *(2) In particular (and subject to Part 2 and to the rules of the Children's Court), the provisions of the Criminal Procedure Act 1986 that apply to the Local Court and any criminal proceedings before the Local Court apply to the Children's Court and any criminal proceedings before the Children's Court.*
>
> *(2A) Despite subsection (2), section 211A of the Criminal Procedure Act 1986 does not apply in respect of criminal proceedings before the Children's Court.*
>
> *(2B) Despite subsection (2) (and subject to Divisions 3, 3AA and 3A), Part 2 of Chapter 3 of the Criminal Procedure Act 1986 does not apply to indictable offences that are not serious children's indictable offences.*
>
> *Note—*
> *Part 2 of Chapter 3 of the Criminal Procedure Act 1986, which deals with committal proceedings, applies to serious children's indictable offences.*
>
> *(3) If this Part and any Act or other law applied by this section (other than the Bail Act 2013) are inconsistent, this Part shall prevail to the extent of the inconsistency.*

25. Nothing in Part 2 of the CCPA ousts the operation of the costs provisions in the CPA that we are concerned with in this paper.

26. Section 211A of the CPA provides for the imposition of a court costs levy. Section 27(2A) CCPA therefore does abrogate the operation of this CPA provision with respect to criminal proceedings before the Children's Court: Children don't pay the court costs levy.

27. The effect of s27(2B) of the CCPA is to permit all indictable offences excepting serious children's indictable offences to proceed summarily in the Children's Court. Effectively then:

    a. Summary and indictable offences proceed summarily in the Children's Court and so the costs provisions applicable to summary offences at ss212 to 218 apply, and

    b. Serious Children's Indictable Offences proceed as committal offences and the costs provisions applicable to committal proceedings at s116-120 apply.

PART I - **The *Criminal Procedure Act 1986 (NSW)***

Limits on the award of costs under the CPA generally

28. In what follows, the principal focus is on the power to award costs in summary proceedings pursuant to ss212-214. The key provision is s214, which provides limits on when costs may be awarded.

29. But before commencing it is worth noting that the terms of s214 are essentially identical to the limitations on costs in committal proceedings at s117 of the CPA and costs on appeal to the District Court at s70 of the *Crimes (Appeal and Review) Act* 2001 (CARA).

30. Because the limitations at subsections (a) to (d) are expressed in identical terms in each of these three provisions, authorities in one area are applicable to the others. So, rather than duplicate coverage of the test for an award of costs in summary, committal and appeal proceedings, we have collected the authorities below, all as referable to summary proceedings.

Committal Proceedings

31. The *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 wrought significant change to committal proceedings, introducing what we now know as the EAGP process. A major change was that the determination that a case should proceed to the District Court on indictment is not made by a Magistrate, but by a prosecutor certifying certain matters. The amendments all but killed off the notion of a committal hearing.

32. However, ss116 to 120 which deal with costs in committal proceedings remain unchanged from before the EAGP reforms. The limitation on circumstances where costs may be awarded is found at s117, as noted above, and is all but identical to s214. The section conferring power to award costs is at s116, and in the following terms (emphasis added):

> *116 When costs may be awarded to accused persons*
>
> *(1) A Magistrate may at the end of committal proceedings order that the prosecutor pay professional costs to the registrar, for payment to the accused person, if:*
>
> *(a) the accused person is discharged as to the subject-matter of the offence or the matter is withdrawn, or*
>
> *(b) the accused person is committed for trial or sentence for an indictable offence which is not the same as the indictable offence the subject of the court attendance notice.*
>
> *(2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.*
>
> *(3) The order must specify the amount of professional costs payable.*

(4) If the accused person is discharged, the order for costs may form part of the order discharging the accused person.

(5) In this section:

> ***professional costs*** *means costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a Magistrate.*

33. So, if an accused person is discharged with respect to a certain sequence, or a sequence is withdrawn, or if the person is committed for some charge other than that initially charged, then – subject to the usual limitations in s117 – an award of costs may be made.

34. We are aware of no decision on ss116-120 since the EAGP reforms. Anecdotally, not only are committals now largely a formality, but costs applications are seldom made. And yet the jurisdiction to award costs remains. Interestingly, the Local Court Bench book still lists committals as the first item in a list of circumstances where costs may be awarded:

> *At the end of a committal, costs to the defendant, where the matters are withdrawn, or where the defendant is committed for trial/ sentence for an indictable matter which is not the same as the offence the subject of the court attendance notice: s116*

35. We would respectfully suggest that there will remain situations in which a costs application ought properly be made in committal proceedings. Consider the following scenarios:

    a. Committal proceedings against your client are wholly withdrawn.

    b. Committal proceedings are withdrawn, and the case continues summarily in relation to an alternative version of the committal offence.

    c. Committal proceedings are withdrawn, but the case proceeds summarily with respect to some unrelated offence coincidentally charged on the same charge reference.

36. The question whether an accused is committed for trial or sentence upon a charge which is not the same as that the subject of a court attendance notice may be a nice one: What to do if the particulars are amended? This issue arose and received detailed consideration in *CDPP v Barnes* [2010] NSWSC 1040. That case turned on its facts and that would always be the case, but it will repay reading if you have to grapple with this issue.

37. While committals are now largely dead there is no reason why the costs powers in ss116 to 120 should be regarded as defunct. Where matters are withdrawn or dismissed because of unreasonable or other relevant conduct by the prosecutor, costs applications can and should be made, just as before.

Summary Proceedings

38. The most common application of the CPA to costs will be an application at the end of a successful defence under the provisions governing summary procedure. As noted above, the statutory provisions at ss213-4 are essentially the same as those that govern committal and appeal costs, and so we have collected cases on those provisions in the comments here on summary proceedings.

39. Sections 213 and 214 of the *CPA* provide:

> *213 When professional costs may be awarded to accused persons*
>
> *(1) A court may at the end of summary proceedings order that the prosecutor pay professional costs to the registrar of the court, for payment to the accused person, if the matter is dismissed or withdrawn.*
>
> *(2) The amount of professional costs is to be the amount that the Magistrate considers to be just and reasonable.*
>
> *(3) Without limiting the operation of subsection (1), a court may order that the prosecutor in summary proceedings pay professional costs if the matter is dismissed because—*
>
> *(a) the prosecutor fails to appear or both the prosecutor and the accused person fail to appear, or*
>
> *(b) the matter is withdrawn or the proceedings are for any reason invalid.*
>
> *(4) (Repealed)*
>
> *(5) The order must specify the amount of professional costs payable.*
>
> *214 Limit on award of professional costs to accused person against prosecutor acting in public capacity*
>
> *(1) Professional costs are not to be awarded in favour of an accused person in summary proceedings unless the court is satisfied as to any one or more of the following—*
>
> *(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,*
>
> *(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,*
>
> *(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,*
>
> *(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.*
>
> *(2) This section does not apply to the awarding of costs against a prosecutor acting in a private capacity.*

(3) An officer of an approved charitable organisation under the Prevention of Cruelty to Animals Act 1979 is taken not to be acting in a private capacity if the officer acts as the prosecutor in any proceedings under that Act or section 9 (1) of the Veterinary Practice Act 2003.

The Court *MAY* order costs

40. Clearly enough an order for costs is discretionary. On occasion a court may purport to dismiss an application – or perhaps grant it! – for reasons actually more capricious than properly discretionary. Practitioners ought to be alert to the risk of dismissive rulings and consider whether judicial review is an avenue of appeal.

41. An award of costs in favour of an accused person is not to punish the prosecutor but to compensate the accused: *Latoudis v Casey* (1990) 170 CLR 534 [at 542 – 543].

What is Just and Reasonable

42. It is reasonable for the Crown to request and examine an itemised bill: *Achuthan v Coates* (1986) 6 NSWLR 472 at 475.

43. It is difficult to determine what is 'just' by having "a stab in the dark": *Hariz v DPP* [2020] NSWDC 394 at [40] (a decision by his Honour Judge Craig Smith SC), citing *Caltex Refining Co Pty Ltd v Maritime Services Board* (NSW) (1995) 36 NSWLR 552 at [7].

44. Judge Smith did however go on, observing, "That said, it is not impossible," and proceeded to make a finding awarding costs based on what he assessed as, "just," in the circumstances of a two day, "relatively straight forward" Local Court summary hearing, being a sum of $9000.00 and then $12,000 on the appeal before him.

Has the matter been dismissed or withdrawn?

45. The paradigm cases for withdrawal or dismissal are obvious: in the former the prosecutor will be granted leave to withdraw a charge and in the latter the court will dismiss the allegation at the conclusion of some hearing or application. But there are two other important observations to make.

46. First, many criminal cases will involve the joint trial of several separate allegations. Where one charge is dismissed and another proven, there is no statutory bar to an application for costs in respect only of the dismissed charge. The fact is that multiple charges are heard together as a matter of administrative convenience, but in fact each individual charge gives rise to its own 'proceeding'. See *V (A Child) v Constable Hedges* [2011] NSWSC 232 per McCallum J, where this issue was expressly considered [at 25-31].

47. A useful summary of the reasons in *V (A Child)* is contained in the related subsequent decision of HH Hidden J in *AB v Constable Hedges* [2013] NSWSC 814 [at 5]. In that case, the court declined costs on the traffic matters as it couldn't be shown that they were initiated without reasonable cause. Not so, however with the resist police charge.

48. If you do succeed in a costs application on some but not all charges, then in quantifying costs questions of discretion will loom large. It is difficult to offer more guidance as the range of circumstances that might arise on such an application is so broad. Noting that the order must be 'just and reasonable', some approach to identifying what disbursements – and how much preparation and court time – was spent litigating the charges subject to an award of costs, is likely to be accepted.

49. Section 213(3)(b) as amended also makes provision for proceedings that are, 'for any reason invalid'. This would be the applicable provision if you had a summary case dismissed because it had been filed out of time, or that failed at *prima facie* or because of a failure to aver an essential element of the offence.

Limits on the award of costs

50. The discretion to award costs is circumscribed by the matters set out in s214 of the CPA. That section contains four separate bases for an award of costs and are dealt with separately below.

Section 214 (1) (a) – Unreasonable or improper investigations

> *(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner,*

51. In order to satisfy section 214(1)(a), namely that the investigation into the offence was conducted in an unreasonable or improper manner, it is not necessary for the accused to prove that the investigation, "*fell grossly below optimum standards...To find the conduct of the investigation of a particular case was unreasonable does not necessarily impugn the general competence, far less, integrity, of those responsible for it*': *JD v DPP and Or*s [2000] NSWSC 1092 per Hidden J [at 31].

52. The Court may have regard to the failure to investigate or interview witnesses where the prosecution ultimately relies upon a particular witness but not others. Significantly this is so even if it is not known what the missing witness would have said. In this regard, the limitation at subsection 214(1)(c) is distinct from that at subsection (a), as Hodgson JA observed in *Cliftleigh Haulage Pty Ltd v Byron Shire Council* [2007] NSWCCA 13 [at 20-21]:

> *20 As regards s.70(1)(c), it could be said that a person seeking costs must identify a matter that the prosecution was or ought to have been aware of and that suggested that the appellant might not be guilty or that the proceedings should not have been brought. If the "matter" in question here is that there was a possible eye-witness, then it was not shown that this matter suggested that the appellant might not be guilty. If the "matter" in question is the evidence that that witness could give, although it could be said that the Council should have been aware of it, it was not shown that this evidence suggested that the appellant might not be guilty. Accordingly, in relation to s.70(1)(c), I do not think error by the primary judge was shown.*
>
> *21 However, in relation to s.70(1)(a), I do not think it is necessary for the person seeking costs in every case to show that an investigation conducted in a reasonable manner would have suggested that the appellant might not be guilty or that the proceedings ought not to be brought. If a prosecutor knows there are five eye-witnesses to an event, and interviews and calls only one of*

them, and the prosecution then fails, I think s.70(1)(a) may apply even if the person seeking costs does not prove what the other four witnesses would have said. Similarly, closer to this case, if the prosecutor knows there is an eye-witness to what happened, but does not interview this witness, and instead relies wholly on a circumstantial case, in my opinion s.70(1)(a) may be satisfied even if the person seeking costs does not prove what the eye-witness would have said.

53. In *De Varda v Constable Stengord (NSW Police)* [2011] NSWCA 868 Davies J [at 31] considered *Cliftleigh* and said of section 214(1)(a):

"*...therefore, that paragraph can be satisfied without proof of what an uncalled witness would have said. It is enough that, if the prosecution interviews or calls fewer than the available eye-witnesses, s214 (1) (a) may apply. A fortiori, if the witness who was not interviewed and called would have thrown a different perspective on the matter, the paragraph may apply*."

Section 214 (1) (b) – Proceedings initiated without reasonable cause or in bad faith, or conducted improperly

> *(b) that the proceedings were initiated without reasonable cause or in bad faith or were conducted by the prosecutor in an improper manner,*

54. A proceeding will be instituted without reasonable cause if it had no real prospect of success or was "doomed to failure": *Kanan v Australian Postal and Telecommunications Union* (1992) 43 IR 257 [at 265].

55. *Kanan* is also authority [at 264] that, *"If success depends upon the resolution in the applicant's favour of one or more arguable points of law, it is inappropriate to stigmatise the proceedings as being, 'without reasonable cause'.*

56. However, in *McMartin v Adams* [2005] NSWCIMC 183 costs were allowed where the point of law had no merit and the accused had pointed out as much to the prosecutor.

57. It is relevant to consider whether a prosecutor failed to investigate, or investigate properly, any relevant matter. This question includes those enquiries that should have been made and should be answered with reference to the quality of the evidence that the police had gathered, with an eye not only to the enquiries which had been made but also to those that should have been made": *JD v DPP and Or*s [2000] NSWSC 1092 per Hidden [at 28].

58. It is also relevant to section 214 (1) (b) that the Prosecution continues a prosecution of an accused other than in good faith, or by determining to, 'leave the matter to the Court to decide'.

59. Whilst cases on this point are rare, an example was recently provided in the decision of *Matthews v R* [2021] NSWDC 11 October 2021 before his Honour Williams J, where, on appeal (therefore pursuant to section 70 (1) (b) of the CARA), his Honour found this identical provision of, "bad faith" made out where, amongst other things, the investigating officer (a Detective Inspector) had:

a. Committed four criminal offences in obtaining statements;

b. Failed to supply material under subpoena;

c. Failed to follow police standard operating procedures (SOPS) in taking police statements from police witnesses; and

d. In unexplained circumstances, had questionably withdrawn charges against a primary witness for the Crown, inducing a statement against the appellant.

Section 214 (1)(c) – Unreasonable failure to investigate properly

> *(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter of which it was aware or ought reasonably to have been aware and which suggested either that the accused person might not be guilty or that, for any other reason, the proceedings should not have been brought,*

60. The Court may have regard to the failure to investigate or interview witnesses where the prosecution ultimately relies upon a particular witness but not others.

61. As noted above with respect to s214(1)(a), in *Cliftleigh Haulage Pty Ptd v Byron Shire Counci*l [2007] NSWCCA 13 Hodgson JA observed [at 20] that for subsection (c) (His Honour was there concerned with the appeal provision at s70 CARA), it will be necessary to show that there was an unreasonable failure to investigate and that the matter suggested that the accused might not be guilty.

62. Where a failure to investigate some matter or call an eyewitness constitutes the unreasonable failure you should rely on s214(1)(a) where you cannot prove what the missing witness would have said. And where you can prove it, and what they would have said tends to exonerate your client, then you can rely on s214(1)(a) or (c), but the more powerful submission might be under s214(1)(a).

63. In a prosecution relying upon circumstantial evidence, a failure to investigate other hypotheses reasonably consistent with innocence may be unreasonable: *Eslarn Hodings Pty Ltd v Tumut Shire Council (No 3)* [1999] NSWLEC 163 [at 10-11].

Section 214 (1)(d) – Exceptional circumstances

> *(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award professional costs.*

64. In *Halpin v Department of Gaming* [2007] NSWSC 815 Hall J said: "*the expression exceptional circumstances" is a broad one. Without it being necessary to define its outer limits, the question essentially is whether or not there was any relevant conduct by the prosecutor which would make it "just and reasonable" to award costs in favour of the plaintiff*."

65. In *Fosse v DPP* [1999] NSWSC 367 Woods CJ at CL considered that it meant that the Applicant had to establish, "...*something about the conduct of the proceedings...other than some matter mentioned in subs (a) (b) or (c) to make it just and reasonable for the plaintiff to have his costs*."

66. In *RB v DPP* [2015] NSWSC 248, Hidden J considered and restated the principles in reviewing a decision of a magistrate declining to award costs where the prosecution instituted proceedings and failed to take statements from relevant witnesses.

67. In *Australian Securities and Investment Commission v Farley* [2001] NSWSC 326 at [16] the court observed that while some of the other heads of s214 might relate to the conduct of the investigation, s214(1)(d) is concerned with the <u>proceedings</u>, that is , involving the substantive court case as opposed to the investigation.

<u>When to Apply</u>

68. Section 213 provides that, 'A court may at the end of summary proceedings order…costs'. There is nothing in the act to suggest that the costs application might be made at some later date – at which point presumably the case will be closed electronically and papers the filed.

69. There is limited support for the view that the application must be brought before the case is finally adjudicated on the day the charges are dismissed: *Trevitt v Police* [2012] NSWLC 4 per HH Buscombe LCM at [28]. That had also been the position under the *Justices Act* 1902*: Fosse v DPP* (1989) 16 NSWLR 540.

70. So, you should preserve your client's rights by announcing an intention to apply under the CPA at the conclusion of proceedings on the occasion when your client is acquitted. While some Magistrates might be inclined to call you on for the costs application on the spot, in our experience the proposal that the case be adjourned to be dealt with by written submissions, with or without the need for a hearing, is usually gratefully adopted.

<u>What Material to rely upon</u>

71. Often the court will be content to rely on the exhibits filed in the hearing proper – if there was one – and any oral evidence received, perhaps recorded in a transcript. But it is important to recognise that you - and the prosecutor – are entitled to tender additional material.

72. The NSW Benchbook recognises the right to procedural fairness to any party, including on the issue of costs and states:

> *Before making an order adverse to a party's interests, the court must give them an opportunity to be heard. This includes in relation to a party seeking costs in circumstances where the other party accepts (by their silence or otherwise) a costs order is appropriate: Safework NSW v Williams Timber Pty Ltd [2021] NSWCCA 233 at [<u>29</u>]–[<u>32</u>].*

73. While you could file a notice of motion, or an application, in our experience this is not routinely required. But you will need some evidence, and the simple way to

adduce it would be in an affidavit. You should include fee agreements or confirmation of grants of aid, (and cite s42 *Legal Aid Commission Act*) tax invoices including all disbursements, and any further relevant evidence such as communication with prosecutors, statements taken by you or your solicitor, but not adduced at hearing.

74. In Legal Aid matters DO NOT claim only what you claimed against the grant. You can and should seek to recover much more and details about this process are set out in Part II below.

75. Section 213(5) requires that, in summary proceedings, the order for costs specify the amount (Committal and appeal proceedings are different). A Local Court Magistrate may suggest a costs assessment, but to our knowledge there is no established regime for such assessments in the criminal jurisdiction. We recommend arguing for a lump sum as assessment takes time and costs money. If your bill explains well what you did, and what you did is just and reasonable, then you will be well placed.

76. Note also that the costs to which you are entitled; professional costs, are defined at s211, and include professional costs, disbursements and witness expenses.

Can an award of costs be made by consent?

77. In a word: "No."

78. *AB v Constable Hedges* [2013] NSWSC 814 reports the second outing in the Supreme Court of that litigation. After protracted summary proceedings including a costs application under the CPA, consent orders for the payment of an agreed sum of costs were sent to the court, but together with documents making clear that the consent was now purported to be withdrawn. In the Supreme Court the validity of any such consent was in issue.

79. Noting the strong opening words of s214 HH Hidden J observed [at 28] that while a prosecutor might concede that one of the discretionary criteria in ss214(a) to (d) was made out, the making of the order cannot be by consent and, '..*costs are not to be awarded…unless the court is satisfied*.'

Onus and standard of proof

80. The onus is on the Applicant to satisfy the court of one or more of the matters under s70(1): *Halpin v Dept of Gaming and* Racing [2007] NSWSC 815 at [43]. The decision as to whether to grant costs is a discretionary exercise. See also *Dong v Hughes* [at 29] brought under the old s 41A of the *Justices Act* 1902 which is authority that the standard of proof is civil, but note that the two cases rather disagree as to whether an application for costs is a civil action.

81. There is no requirement that the reason for dismissing the charge correlate with the reason for ordering costs, and the applicant may call evidence of matters which were not the subject of the proceedings themselves: *R v Hunt* [1999] NSWCCA 375 at [9]. The further reasons of Chief Justice Spigelman [at 10-13] import the inevitable

implication that a party may tender evidence on the application for costs, going to some basis for the award of costs not otherwise the subject of evidence in the substantive proceedings.

Costs on Adjournment – CPA ss216 and 118

82. The CPA provides for costs on adjournment where delay results from the unreasonable conduct of a party. Section 118 confers this jurisdiction in relation to committal proceedings whereas s216 applies to summary proceedings.

83. The *Crimes (Appeal and Review) Act* 2001 (CARA) has no provisions expressly dealing with costs on adjournment. However, s28 does provide that in determining an appeal the Court may exercise the powers of the Local Court, which would include the power to order costs on adjournment.

84. The CPA provisions are as follows:

118 Costs on adjournment

(1) A Magistrate may in any committal proceedings, at his or her discretion or on the application of the prosecutor or an accused person, order that one party pay costs if the matter is adjourned.

(2) An order may be made only if the Magistrate is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delay of the party against whom the order is made.

(3) An order may be made whatever the result of the proceedings.

216 Costs on adjournment

(1) A court may in any summary proceedings, at its discretion or on the application of a party, order that one party pay costs if the matter is adjourned.

(2) An order may be made only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

(3) The order must specify the amount of costs payable or may provide for the determination of the amount at the end of the proceedings.

(4) An order may be made whatever the result of the proceedings.

85. As is readily apparent, these orders are also discretionary, and you will need to prove both that you have incurred additional costs, and that the cause is the unreasonable conduct or delay of the other party.

86. *DG NSW Department of Industry & Investment v Mato Investments Pty Ltd & Ors (No 2)* [2010] NSWLEC 196 is a case for the straight forward application of s216, but in the unusual situation that costs were ordered not against the prosecutors, but as against several accused parties in favour of another.

87. The prosecutor was ready, but some of the co-accused were unrepresented, leading to the prosecution conceding that their status as unrepresented litigants might risk a miscarriage in the sense contemplated in *Dietrich v The Queen* (1992) 177 CLR 292. A certain Mr Coombes received the benefit of a s216 order against his co-accused for accommodation costs in Sydney and the costs associated with responding to their Notices of Motion seeking postponement of the trial.

88. *DPP v Benjamin Nagler* [2018] NSWSC 416 is a decision of his Honour Justice Hamill sitting in review of a Local Court decision. The case involved detailed consideration of whether certain digital recordings of statements were properly regarded as 'DVECs' and whether they had properly been served. Having determined that they had not been served the learned magistrate had ordered that the evidence in them be rejected [See paragraphs 5-32].

89. The central evidence in the DVECs having been ruled inadmissible the prosecutor sought an adjournment, which was refused: it is here that s216 becomes relevant. In seeking to support his application for an adjournment, the prosecutor in the Local Court had relied upon *DPP v West* [2000] NSWCA 103 [See *Nagler* at 33].

90. Having reviewed *DPP v West* Justice Hamill goes on [at 36] to note the more modern case management provisions, including the power to adjourn at s40 CPA and to award costs on such adjournment at s216 CPA. Implicit in the reasoning is recognition that at times adjournments will be required to permit the prosecution to properly present their case, and that the power at s216 allows the court to remedy any financial prejudice which otherwise would impact the accused person.

91. Another potentially useful case is *Police v Alcott* [2005] NSWLC 17. While a Local Court decision of persuasive value only, and having been decided in an AVO case at a time when the AVO legislation was contained at the end of the *Crimes Act* 1900 and imported operation of the costs provisions of the CPA, it nonetheless supports the conclusion that the Police failing to comply with case management directions for the service of material, leading to the adjournment of a 'show cause' determination in an AVO proceeding, is 'unreasonable'.

<u>*Mosely* Costs - Costs on Adjournment for the DC?</u>

92. There is no power such as CPA ss118 and 216 to order costs on adjournment in the District Court. But there is a power, in unusual circumstances, to make a *Mosely* order.

93. In *R v Mosely* (1992) 28 NSWLR 735 the NSW Court of Criminal Appeal had to unravel a convoluted set of circumstances. Mr Mosely was to stand trial on dangerous driving charges, but on the morning of trial, without prior notice, the prosecutor sought an adjournment because two police officers were unavailable. The first trial Judge purported to rely on s6 of the *District Court Act* 1973 to order an adjournment provided that the DPP pay Mr Mosely's costs thrown away.

94. The DPP brought the matter back on for trial before another District Court Judge, but having failed to pay the ordered costs. The second Judge then ordered a temporary stay of proceedings until such time as the costs order was paid.

95. Much later the DPP brought appeals to the CCA against both decisions. The CCA held that while s6 did not allow an adjournment on terms including payment of costs, there was power to order a temporary stay on such terms and that order should be

upheld, notwithstanding that the initial order purportedly under s6 had been made in error. Thus was born the *Mosely* order.

96. Because the initial s6 order was in error and the circumstances thus so unusual, the question whether *Mosely* be good law had been vexed. But the position is much more settled since *R v Fisher* [2003] NSWCCA 41.

97. Mr Fisher suffered two mistrials in an ASIC prosecution brought by the CDPP: the first due to Mr Fisher's illness as well as that of a juror, and the second due to a complication concerning a significant document.

98. Mr Fisher's co-accused had maintained a document highly relevant to the prosecution, which had been seized in a search by ASIC. He tried to recover it from ASIC via subpoena but it was not produced in response, or at trial. ASIC officers found and disclosed the document only after the jury had retired on verdict, leading to a discharge. The CDPP determined to call each accused on for a third trial.

99. Mr Fisher had been privately represented at the first two trials, including by silk in one, but had insufficient funds to retain such representation for a third trial. His lawyers wrote to the CDPP inviting them to pay his costs thrown away so as to meet this difficulty, but their entreaty was rebuffed.

100. Mr Fisher's lawyers then brought an application seeking orders that the costs thrown away be repaid, but without identifying a basis for those orders. The Judge at first instance declined. On appeal the unanimous CCA, with the lead decision from Simpson J supported in additional reasons by Santow JA, held that *Mosely* was good law, and the District Court had jurisdiction to order a temporary stay until costs thrown away were paid.

101. Simpson J also referred to a case of *R v Beeby* [1999] NSWCCA 30 in which the application failed because the accused had not sought to have the DPP undertake voluntarily to pay the costs as a condition of the grant of an adjournment. While Simpson J respectfully differs [at 30] and *Beeby* appears to have been superseded by *Fisher*, it might be wise nonetheless to at least orally seek such an undertaking when the DPP make their application for an adjournment.

102. Probably now more relevant as a footnote, given an express power to order costs on adjournment under the CPA, is the case of *Lenny Le Boursicot* (1994) 70 A Crim R 548. The circumstances were similar to those in *Mosely*, involving a late application for adjournment by the prosecution. The case turned on the *Justices Act* 1902 but also contains obiter suggesting that the Local Court may have sufficient inherent power to make an order for costs thrown away.

<u>Appeals to the District Court</u>

103. Pursuant to section 70 of the *Crimes (Appeal and Review) Act* 2001 (CARA) costs in appeals to the District Court are available only in limited circumstances, which are

identical to the limitations at s117 and s214 of the CPA. Section 70 provides as follows: -

70 Limit on costs awarded against public prosecutor

(1) Costs are not to be awarded in favour of an appellant whose conviction is set aside unless the appeal court is satisfied—

(a) that the investigation into the alleged offence was conducted in an unreasonable or improper manner, or

(b) that the proceedings in the Local Court were initiated without reasonable cause or in bad faith, or were conducted by the prosecutor in an improper manner, or

(c) that the prosecutor unreasonably failed to investigate (or to investigate properly) any relevant matter—

(i) that the prosecutor was or ought reasonably to have been aware of, and

(ii) that suggested that the appellant might not be guilty or that, for any other reason, the proceedings should not have been brought, or

(d) that, because of other exceptional circumstances relating to the conduct of the proceedings by the prosecutor, it is just and reasonable to award costs in favour of the appellant.

(2) This section does not apply to the awarding of costs against a respondent acting in a private capacity.

(3) For the purposes of subsection (2), an officer of an approved charitable organisation (within the meaning of the Prevention of Cruelty to Animals Act 1979) is taken not to be acting in a private capacity if the officer acts as the respondent in any appeal arising from proceedings under that Act or section 9 (1) of the Veterinary Practice Act 2003.

104. Oddly, the CARA does not provide an analogue to s116 or s213 of the CPA, conferring a positive power to award costs to a successful appellant, which power is then circumscribed by the limitations at ss117 and 214 respectively.

105. However, s28 of CARA relevantly provides that in determining an appeal, the District Court may exercise any function that the Local Court could have exercised in the original proceedings. Here is s28 in full:

28 Miscellaneous powers

(1) Without limiting its other powers, the District Court may do any one or more of the following—

(a) it may specify the proclaimed place (within the meaning of the District Court Act 1973) at which the hearing of an appeal or application for leave to appeal is to be heard or continued,

(b) it may specify the sitting at which the hearing of an appeal or application for leave to appeal is to be heard or continued,

(c) it may adjourn the hearing of an appeal or application for leave to appeal.

(2) In determining an appeal, the District Court may exercise any function that the Local Court could have exercised in the original Local Court proceedings.

(3) Subject to section 70, the District Court may make such order as to the costs to be paid by either party (including the Crown) as it thinks just.

106. While it is passing strange that s28 does not state as a precondition for the award of costs to a successful accused that they should have had the charge dismissed or withdrawn, it might be that some economy was aimed at by the drafter, and s28(3) deals compendiously with appeals by prosecutors and appellants.

107. In any event, s28(2) has the effect of importing both the operation of the summary provisions of the CPA, and the power to act in relation to the CCCA.

108. Section 72 of CARA requires that an appeal court that orders a respondent to pay costs must state a time within which the costs or other amount must be paid.

109. Note also that whereas s213(5) CPA requires the court to nominate the sum of a costs order in summary proceedings, pursuant to s28(3) CARA in appeal proceedings greater latitude is afforded the appeal Judge.

110. In *Dempsey v Director of Public Prosecutions* [2019] NSWCA 267 the Court of Appeal dealt with an application for costs following a successful conviction appeal from the Local Court.

111. The appeal Judge was satisfied as to matters specified in s70 of CARA and s214 of the CPA, and was satisfied that the prosecutor in the Local Court had unreasonably failed to investigate Ms Dempsey's claim of right to the monies she was accused of having obtained by deception, and accordingly made an order for costs to be paid, as agreed or assessed.

112. Costs assessors were appointed for both the Appellant and the DPP. The costs assessor for the DPP expressed the opinion that, in round figures, the fair and reasonable costs in relation to the District Court proceedings, including GST, amounted to $315,000. The Applicant's estimate was significantly higher. Ultimately the Appeal was upheld, being affected by jurisdictional error by reducing the award by 30% [at 42].

113. In characterising the task of assessing costs on Appeal, the Court of Appeal noted the different terms adopted in the legislation with respect to costs in the Local Court at first instance, and in the District Court on appeal [at 38]:

As indicated above, [6] the criterion for the Local Court costs is the amount the court considers "to be just and reasonable" and the criterion for the District Court costs is such order "as [the court] thinks just".

114. As such a District Court may well properly approach the tasks of assessing costs in the Local and District Courts as requiring slightly different considerations, though

they may overlap: it appears that the test in the District Court is not as stringent as the test in the Local Court.

115. As a footnote, we observe that costs potentially available in the District Court on conclusion of an appeal may not later be recovered in certain civil actions for damages: *State of New South Wales v Cuthbertson* [2018] NSWCA 320 at [63] – [67]; [144].

116. As part of the case, the plaintiff sought the costs of defending the proceedings in the criminal jurisdiction, including on Appeal to the District Court. One of the questions was whether the costs incurred were a natural and probable consequence of the tort of wrongful arrest. The Court held that they were not, when there was a statutory mechanism to seek costs in the criminal jurisdiction.

PART I - *Costs in Criminal Cases Act* 1967

117. Section 2, 3 and 3A of the *CCCA*, provide:

2 Certificate may be granted

(1) The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may—

(a) where, after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken, or

(b) where, on appeal, the conviction of the defendant is quashed and—

(i) the defendant is discharged as to the indictment upon which he or she was convicted, or

(ii) the information or complaint upon which the defendant was convicted is dismissed,

grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings.

(2) For the avoidance of doubt, a certificate may be granted in accordance with subsection (1) (a) following an acquittal or discharge of a defendant at any time during a trial, whether a hearing on the merits of the proceedings has occurred or not.

(3) In this section, trial, in relation to proceedings, includes a special hearing conducted under the Mental Health and Cognitive Impairment Forensic Provisions Act 2020 and also includes preliminary proceedings that form part of the trial, for example, a voir dire.

3 Form of certificate

(1) A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the certificate—

(a) if the prosecution had, before the proceedings were instituted, been in possession of evidence of all the relevant facts, it would not have been reasonable to institute the proceedings, and

(b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

(2) (Repealed)

3A Evidence of further relevant facts may be adduced

(1) For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the reference in section 3 (1) (a) to "all the relevant facts" is a reference to:

(a) the relevant facts established in the proceedings, and

(b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and

(c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:

(i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and

(ii) were not adduced in the proceedings.

(2) Where, on an application for a certificate under section 2 in relation to any proceedings, the defendant adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:

(a) order that leave be given to the prosecutor in those proceedings or, in the absence of the prosecutor, to any person authorised to represent the Minister on the application, to comment on the evidence of those further relevant facts, and

(b) if the Court, Judge or Magistrate think it desirable to do so after taking into consideration any such comments, order that leave be given to the prosecutor or to the person representing the Minister to examine any witness giving evidence for the applicant or to adduce evidence tending to show why the certificate applied for should not be granted and adjourn the application so that that evidence may be adduced.

(3) If, in response to an application for a certificate under section 2 in relation to any proceedings, the prosecutor or, in the absence of the prosecutor, any person authorised to represent the Minister on the application adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may—

(a) order that leave be given to the defendant to comment on the evidence of those relevant facts, and

(b) if the Court or Judge or Magistrate think it desirable to do so after taking into consideration any of those comments, order that leave be given to the defendant to examine any witness giving evidence for the prosecutor or that authorised person.

118. Applications pursuant to this Act, often take on a slightly less onerous test to those under the CPA; and in practice, Magistrates are often more likely to award costs pursuant to these provisions, because ultimately there is not as much to decide in terms of fault or quantum. They either sign the certificate, or they don't.

119. The task of deciding how much to pay is one made by the Director-General, after often exhausting requisitions to the successful party. But don't let that deter you!

120. In *R v Brown* [2016] NSWSC 176 Davies J noted [at 15] what Kirby P said in *Nadilo v DPP* (1995) 35 NSWLR 739 [at 743] in relation to the beneficial construction of its application to the party seeking a certificate:

The Costs in Criminal Cases Act 1967 (the Act) is reforming legislation with a beneficial purpose designed to confer valuable privileges upon persons who succeed in criminal prosecutions. The Act overcomes the normal rule that, by the Royal Prerogative and by the common law, the Crown neither seeks nor pays costs in criminal proceedings: see Attorney-General of Queensland v Holland (1912) 15 CLR 46 at 49; Latoudis v Casey (1990) 170 CLR 534 at 556; Ex parte Hivis; Re Michaelis (1933) 50 WN (NSW) 90 at 92; Acuthan v Coates (1986) 6 NSWLR 472 at 479.

The Act should therefore be given a beneficial construction. Its provisions should not be narrowly construed so as to defeat the achievement of the Act's general purposes. But those purposes must be derived (in circumstances of disputed interpretation) from the words in which parliament has expressed itself.

121. Like the CPA, an application for costs must be brought at the time of the discharge of the defendant or at the time of the dismissal of the information (in a summary hearing: see *Fosse v Director of Public Prosecutions (NSW)* (1989) 16 NSWLR 540). After that time, the magistrate will be functus officio and have no power to hear a costs application.

122. Essentially the test for a certificate is a three-stage process, in that the Court must:

a. **Step 1** - determine the relevant facts that have been proven
b. **Step 2** - determine, if the prosecution were in possession of evidence of the relevant facts, in this hypothetical situation whether it would not have been reasonable to institute proceedings?
c. **Step 3** - determine whether any act or omission of the defendant contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.

123. The starting point to be applied when considering an application under the Act has been articulated many times. In the case of *Pavy* (1997) 98 A Crim R 396 [at 399] the court (Hunt CJ at CL, Smart and Badgery-Parker JJ) observed:

"The primary test to be applied when deciding whether a certificate should be granted is to be found in the wording of s 3(1)(a): if the prosecution had been in possession of all the relevant evidence as it is now known before the proceedings had begun, would it have been reasonable to institute proceedings? The section calls for:-

".....a hypothetical exercise in the sense that the question is whether it would have been reasonable to prosecute at the time of the institution [of the proceedings] if the hypothetical prosecutor had possession of the evidence of all the relevant facts including those established even after the trial on [the] application (See Allerton v DPP (1991) 24 NSWLR 550; 53 A Crim R 33" per Blanch J in McFarlane (unreported, NSWSC, 12 August 1994)."

124. This analysis has been adopted in subsequent cases including by Smart AJ (Barr & James JJ agreeing) in *R v Groom* [2000] NSWCCA 538 at [8].

125. It is also important to note, that like the CPA, the onus is on the applicant for costs to satisfy the court of the criterion on the balance.

126. That onus is on showing it was not reasonable to institute the proceedings; the distinction often argued by the Crown is that it is not for them to establish, nor for the Court to conclude, that the institution of the proceedings, was, or would have been in the relevant circumstances, reasonable: *R v Manley* [2000] NSWCCA 196; (2000) 49 NSWLR 203 (at [15]) per Wood CJ at CL; *R v Johnston* [2000] NSWCCA 197 (heard concurrently with *Manley*) (at [17], [29]) per Simpson J (Wood CJ at CL agreeing).

<u>The "Reasonableness Test"</u>

127. The Court's assessment of 'all the relevant facts' is separate from the consideration of reasonableness. It is arguably a two-step process being the "all the relevant facts issue" and the second step being the "reasonableness issue." This includes the evidence in the successful accused person's case, and all relevant facts discovered before arrest, before the Hearing, after the Hearing or otherwise admitted by the Prosecution: *Allerton v DPP* (1991) 24 NSWLR 551 at 559 – 560].

128. This is not necessarily a finding or criticism by the court of the prosecution that it acted "unreasonably".

129. The prosecution can be expected to throw it back onto the applicant to satisfy the Court that it would not have been reasonable to institute the proceedings.

130. In *Chahal v Director of Public Prosecutions* [2008] NSWCA 152, Basten JA writing separately, but concurring with the majority decision, illustrates this process at [65]:

The fifth point, relevant to the present application, is that the definition of "all the relevant facts" in s 3A(1) should not distract attention from the test in s 3(1)(a), which hypothesises that the prosecution was in possession of "evidence" of all such facts. Despite the focus in s 3A(1) on facts which have been or are established, the section can only have a sensible operation if the court hearing the application is required to consider what appropriate judgment the prosecution should have made if it had had the evidence of those facts which was presented to the court. In other words, if the defendant establishes an alibi to the satisfaction of the court on the costs application,

that becomes a relevant fact and, for s 3(1) to operate, it must be the evidence presented to the court in support of the alibi which is the evidence to be considered on the hypothetical question.

131. The CCA decision of *Higgins v R* [2022] NSWCCA 149 is of note, and exemplifies this approach. The CCA held that, even though the historical sexual assault charges brought against the accused were unreasonable when considered with the definition of the *Criminal Appeal Act* 1912, that that didn't mean that the decision to prosecute in the first place was also unreasonable given all the "relevant facts".

132. Conversely, the successful accused applicant might argue that the test imposed by s2 casts an onerous obligation on the prosecution: it has been described as requiring the prosecution to have an omniscient crystal ball, with respect to evidence that may emerge at trial: *R v Dunne* (unreported, 17 May 1990) per Hunt J.

133. Sometimes what is required is less a crystal ball with which to predict a murky future, but a capacity to read the prosecution brief and rigorously apply certain principles of law and evidence to it.

134. Recently in the decision of *R v Hannah Quinn* (No 2) [2021] NSWSC 494, the Court considered a number of issues in relation to the Act. In that case, the Crown had doggedly pursued the Defendant on a charge of murder, and at the conclusion of the Crown case, Ms Quinn successfully sought a directed verdict of not guilty to the murder. She was found guilty of accessory after the fact to manslaughter.

135. The case supports the propositions that although the hypothetical prosecutor should not be attributed with the ability to predict what factual findings will be made or how the trial judge's discretion will be exercised, there may still be cases where the hypothetical prosecutor ought not to have attempted to tender evidence and where to do so constitutes an unreasonable exercise of the prosecutorial discretion for the purposes of the Act: at [147]; *R v Moore* [2015] NSWSC 1263 at [28]–[29].

136. *Quinn* is also an example of a case where costs were awarded in relation to a principle charge that was subject to a not guilty finding, even though the accused was guilty of the alternative, and had offered to plead to same at some previous juncture.

<u>The Mordaunt Considerations: *Mordaunt v DPP* [2007] NSWCA 121</u>

137. This decision is so ubiquitously quoted in the consideration of issues under the CCCA, that the summary of relevant principles set out by McColl JA [at 36] is worth reciting:

(a) The CCC Act is reforming legislation with a beneficial purpose designed to confer valuable privileges upon persons who succeed in criminal prosecutions; its provisions should not be narrowly construed so as to defeat the achievement of its general purposes: Nadilo v Director of Public Prosecutions (1995) 35 NSWLR 738 at 743 per Kirby P; see also Allerton v Director of Public Prosecutions (1991) 24 NSWLR 550 (at 559-560) per Kirby P, Meagher JA, Handley JA;

(b) The judicial officer dealing with an application for a certificate need not be the trial judge: R v Manley [2000] NSWCCA 196; (2000) 49 NSWLR 203 (at [61]) per Simpson J (Wood CJ at CL agreeing); Solomons v District Court of New South Wales per McHugh J (at [47], footnote 42);

however it is "always preferable for such an application to be made to the judicial officer determining the original proceedings on its merits, or to the Court of Criminal Appeal that hears and allows an appeal": Manley , per Wood CJ at CL (at [4]), per Sully J (at [49]);

(c) The "institution of proceedings" in s 3 refers to the time of arrest or charge not to some later stage such as committal for trial or the finding of a bill: Allerton (at 558);

(d) The applicant for a s 2 certificate bears the onus of showing it was not reasonable to institute the proceedings; it is not for the Crown to establish, nor for the Court to conclude, that the institution of the proceedings, was, or would have been in the relevant circumstances, reasonable: Manley (at [15]) per Wood CJ at CL; R v Johnston [2000] NSWCCA 197 (heard concurrently with Manley) (at [17], [29]) per Simpson J (Wood CJ at CL agreeing);

(e) The task of the court dealing with an application under the CCC Act is to ask the hypothetical question, whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted it would not have been reasonable to institute the proceedings: Allerton (at 559 – 560); the judicial officer considering an application must find what, within the Act, were "all the relevant facts" and assume the prosecution to have been "in possession of evidence of" all of them and must then determine whether, if the prosecution had been in possession of those facts before the proceedings were instituted, "it would not have been reasonable to institute [them]; an applicant for a certificate must succeed on both the "facts issue" and the "reasonableness issue": Treasurer in & for the State of New South Wales v Wade & Dukes (Court of Appeal, 16 June 1994, unreported, BC9402561) per Mahoney JA (with whom Handley and Powell JJA agreed); Ramskogler (at 134 – 135) per Kirby P;

(f) The hypothetical question is addressed to evidence of all of the relevant facts, whether discovered before arrest or before committal (if any); after committal and before trial; during the trial; or afterwards admitted under s 3A of the CCC Act; all of the relevant facts proved, whenever they became known to the prosecution and whether or not in evidence at the trial, must then be considered by the decision-maker: Allerton (at 559 – 560); Manley per Wood CJ at CL (at [9]); the relevant facts include those relevant to the offences charged and the threshold question posed by s 3(1)(a); other facts will also be relevant and admissible going, amongst other things, to the question posed by s 3(1)(b) and to the ultimate question whether, assuming that the court is of the opinion required to be specified, it should exercise its discretion under s 2: Gwozdecky v Director of Public Prosecutions (1992) 65 A Crim R 160 (at 164 – 165) per Sheller J (with whom Mahoney JA and Hope AJA agreed);

(g) Courts should not attempt to prescribe an exhaustive test of what constitutes unreasonableness for the institution of the proceedings within the meaning of s 3(1)(a): Fejsa v R (1995) 82 A Crim R 253 at 255; Manley per Wood CJ at CL (at [13] – [14], however the factors set out in (h) – (n) have been identified as germane;

(h) The reasonableness of a decision to institute proceedings is not based upon the test that prosecution agencies throughout Australia use as the discretionary test for continuing to prosecute, namely whether there is any reasonable prospect of conviction, nor is it governed by the test in s 41(6) of the Justices Act 1902[prior to its repeal] applied by magistrates, namely whether no reasonable jury would be likely to convict; the test cannot be a test of reasonable suspicion which might justify an arrest and it cannot be the test which determines whether the prosecution is malicious: R v McFarlane (Blanch J, 12 August 1994, unreported); app. Manley per Wood CJ at CL (at [12]), per Sully J (at [42]); Regina v Hatfield [2001] NSWSC 334; (2001) 126 A Crim R 169 per Simpson J; and adopted by Blanch AJ (with whom Spigelman CJ and Simpson J agreed) in Regina v Ahmad [2002] NSWCCA 282;

(i) The fact a prosecution may be launched where there is evidence to establish a prima facie case does not mean it is reasonable to launch a prosecution; there may be cases where there is contradictory evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence: McFarlane ; app. Manley per Wood CJ at CL (at [12]);

(k) The fact that a court concluded the evidence was insufficient to warrant a conviction is not necessarily indicative of unreasonableness: R v Williams; ex parte Williams [1970] 1 NSWR 81 (at 83) per Sugarman P (with whom O'Brien J agreed; cf Manning JA (at 85));

(l) The fact that a court enters a judgment of acquittal in favour of an accused does not mean that it was not reasonable to have prosecuted; sometimes that course is followed rather than to order a new trial if (for example) the accused has already served most of the sentence imposed upon him or her: Fejsa (at 255); cited with approval in Hatfield (at [9]) per Simpson J;

(m) Section 3 calls for an objective analysis of the whole of the relevant evidence, and particularly the extent to which there is any contradiction of expert evidence concerning central facts necessary to establish guilt, or inherent weakness in the prosecution case; matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of the line of unreasonableness, being matters quintessentially within the realm of the ultimate fact finder, whether it be Judge or Jury: Manley per Wood CJ at CL (at [14]); Johnston (at [26] [29]) per Simpson J (with whom Wood CJ at CL and Sully J agreed); it is not sufficient to establish the issue of unreasonableness in favour of an applicant for a certificate that, in the end, the question for the jury depended upon word against word; in a majority of such cases, it would be quite reasonable for the prosecution to allow those matters to be decided by the jury; it would be different where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit: R v Dunne (Hunt J, 17 May 1990, unreported);

(n) The mere fact that the Court of Criminal Appeal allows an appeal and enters a verdict of acquittal upon the "unsafe and unsatisfactory" ground, is not necessarily a touchstone for an exercise of the discretion in favour of the applicant: Manley per Wood CJ at CL (at [15]);

(o) In considering an application for a certificate it is relevant to have regard both to the information in the possession of the prosecuting authorities, and the conduct of the defendant, bearing in mind the essentially adversarial nature of a criminal prosecution and the tactical decisions that are legitimately a part of the process: Manley per Simpson J (at [76]) (Wood CJ at CL agreeing);

(p) Section 3(1)(b) recognises that tactical considerations and decisions are legitimate in the defence of criminal charges, and the potential value to an accused person of retaining the element of surprise in the confrontation of prosecution witnesses, or the presentation of the defence case; it will primarily be directed to omissions, for example cases in which defence material has been, for tactical or strategic or other reasons, withheld from the prosecution; it is also wide enough to encompass positive acts such as the (probably more unusual) case where the defence has deliberately in some way misled the prosecution; it is not in every case where defence evidence has been deliberately withheld from the prosecution that a court will consider that the omission to supply the material to the prosecution was not reasonable in the circumstances: Johnston (at [18]); see also Hatfield (at [12]).

(q) Delay in foreshadowing and making the application may be relevant to the exercise of the discretion whether to grant a certificate: Manley , per Wood CJ at CL (at [6]), Sully J (at [49]), Simpson J (at [80]); Johnston, [2000] per Sully J (at [10]);

(r) Before a certificate is granted, the judge must have formed an opinion specifying the matters in s 3(1)(a) and (b), and must also exercise the residual discretion, contemplated by s 2, to grant a

certificate: Ramskogler (at 140) per Handley JA; (at 142) per Sheller JA; cf Solomons v District Court of New South Wales (at [50]) per McHugh J.

138. What follows is that, when you are making an application for a certificate, you should set out what you argue are "all the relevant facts" hypothetically assumed for the purposes of s3 (a) of the Act, relying upon the factual matrix of your case that brings you within the purview of the section. Take into account the non-exhaustive, but very helpful list above.

<u>Can you get a certificate where you don't win on everything?</u>

139. Even if you don't think you can get costs for all the counts on the CAN or indictment, that shouldn't deter you from making the application. This includes where you may have lost on some things but not others. Sometimes that's a difficult call, but other times it will be obvious to you. If you are in the lucky later category, here are some useful things to think about.

140. In *DAO v R* (No 3) [2016] NSWCCA 282 the CCA unanimously held that a certificate under the Act could be granted in respect of some counts, but not others.

141. The case had a difficult history as recounted by HH Meagher JA [at 2-4], involving conviction on some counts at a trial of a 23 count indictment involving four complainants, but a successful appeal to the CCA in which convictions relating to all were quashed, verdicts of acquittal entered in relation to two complainants and retrials ordered in relation to the other two complainants' allegations [at 4].

142. The application for costs in *DAO* was made to the CCA in its jurisdiction to grant a certificate following the determination on appeal, but in relation only to those Counts relating to two complainants, the subject of verdicts of acquittal on appeal [at 5].

143. Justice Meagher found that it was proper to grant a certificate in relation to some counts on indictment but not others, and directed that a certificate issue in relation to one of the two complainants the subject of application, but not the other. His Honour Justice Hall agreed, and joined in that order [at 102].

144. Justice Fagan published a dissenting judgment, finding that it had been reasonable to prosecute the accused in relation even to those complaints the subject of a certificate in the Judgment of Meagher JA and Hall J. But, his Honour Fagan J expressly endorsed the reasoning of Meagher JA in relation to the question whether a certificate could issue in relation to some but not all counts on indictment [at 104].

145. It follows that there is binding and unanimous CCA support for the proposition that the applicant for a certificate may seek to recover in relation to some but not all counts proceeding on indictment.

146. *DAO (No 3)* also describes the distinction between "evidentiary facts" and ultimate facts" at [43]:

Those facts may also be described as evidentiary facts so as to distinguish them from the ultimate facts that must be proved to establish the elements of the offence charged. This distinction is referred to by Dixon J in Blair v Curran *(1939) 62 CLR 464 at 532. See also* Cornwell v The Queen *(2007) 231 CLR 260; [2007] HCA 12 at [170] (Kirby J).*

Cases specifically as to the credibility of a complainant

147. *Field v DPP [2010] 2010 NSWDC* – In this case the Crown case depended on the reliability and truthfulness of a witness who by the end of the trial was 'very substantially lacking in credit'.

148. In *R v CPR [2009] NSWDC* 219 the Court concluded that in assessing the evidence of the complainant, reliability of her evidence and the extent to which that evidence could convince any reasonable jury of the essential elements of each of the charges beyond reasonable doubt.

149. *JC v DPP [2009] NSWDC 424* – the complainant's evidence ended 'substantially without credit' in a trial for a number of counts of sexual intercourse without consent.

150. In *R v Cardona [2002] NSWSC 823* at [22] the Court found that the complainant's evidence "could not withstand scrutiny" to the extent that the Crown case had been "dealt a mortal blow" by its close. Hidden J concluded that this was truly a case "where the word upon which the Crown case depended had been demonstrated to be one which was very substantially lacking in credit".

151. In *Regina v Hatfield* [2001] NSWSC 334 Justice Simpson stated at [14] that 'very substantially lacking in credit' meant:

"...so substantially lacking in credit that it was unreasonable for the Crown to have relied upon it; and that, without reliance upon their evidence, it would have been unreasonable for the Crown to have brought the prosecution."

152. Later, Justice Simpson noted that the above definition must be expressed by giving appropriate regard to the assessment of credibility as at the time of the application, i.e, at the conclusion of all the evidence and stated:

"[14] *... I accept also, that, if it be demonstrated that, with the benefit of hindsight, the evidence of those witnesses was so substantially lacking in credit as to make it unreasonable for the Crown to rely on it, then, imputing knowledge of that lack of credibility retrospectively to the Crown, it would not have been reasonable to initiate the proceedings."*

153. Further, in concluding that the application for costs was to be refused, Justice Simpson placed weight on two other factors when answering this question – the seriousness of the allegation, and the strength of the corroborative material:

"[51] ... Removing the double negative, and putting the conclusion in plain language that nevertheless properly reflects the exercise I am to perform, and the conclusion I have reached, I am satisfied that, even if the prosecution had, before the proceedings were instituted, been in possession of all the relevant facts, it would nevertheless have been reasonable to institute the

proceedings. Indeed, having regard to the seriousness of the allegation, and the strength of the corroborative material, I am of the view that to fail to institute the proceeding would have left the prosecution open to criticism."

154. In *AB v DPP* [2014] NSWCCA 122 the Court concluded that the test in *Mordaunt* should not be seen as an inflexible rule, nor a test that must be applied when assessing applications for costs in such applications where the credibility of a witness is key. It reiterates that the Court should not be unnecessarily restricted when it is being asked to make an evaluation of evidence and relevant facts in such applications:

" [62] ... The observations in Mordaunt were not intended to lay down binding principles governing the making of the evaluative judgment required by ss 2 and 3 of the Act. McColl JA was at pains to say that there can be no exhaustive test of unreasonableness and that a great range of matters may be relevant to the determination required on an application for a costs certificate (at [36(g)]). The latter part of sub-para [36(m)] of her Honour's judgment merely makes the point that ordinarily it would not be considered unreasonable for a prosecution to be instituted if the outcome depends upon the jury resolving a conflict between the evidence of the complainant and the accused. Sub-paragraph [36(m)] makes the further point that the position would be different if the Crown case depended on the evidence of a witness who had been demonstrated to be very substantially lacking in credit. Perhaps it may have been clearer if sub-para [36(m)] had used the word "might" instead of "would". However, I do not understand the court to have intended to lay down an inflexible rule to be applied whenever a key witness is shown to have been substantially lacking in credit." (underlining added)

155. In *R v Wellington & Dessaix* [2020] NSWDC 716, His Honour Judge Priestley SC went through relevant considerations regarding a complainant, "substantially lacking in credit." He also considered the provisions in s3 (a) and also where there is disentitling conduct by the accused pursuant addressing section 3 (b) – though ultimately determining that that was not prohibitive in the case.

156. Ms Wellington and Mr Dessaix faced trial on an amended indictment alleging common assault against Ms Wellington, assault occasioning actual bodily harm jointly, and in the alternative to that charge, a charge of assault occasioning actual bodily harm solely against Mr Dessaix. The complainant was a Mr Melbourne. The trial proceeded as a judge alone trial and the Crown failed based on the lack of credibility of the complainant.

157. Interestingly, this case touched upon the issue of enlivening jurisdiction of the court to determine a Costs Application of any kind. This is a salient reminder to all practitioners who appear in these kind of applications, particularly in the District Court – that in order to establish jurisdiction of the District Court, the accused needs to be Arraigned. The reason for this was due to authority that if there had been no arraignment the Court had no power to make an order under the CCCA; see *R v Derley* [2015] NSWDC.

158. Given the amendments to the Indictment in Wellington, the accused sought to be arraigned on the initial Indictment to protect her position in relation to the

subsequent findings; and amendments to the Indictment that was ultimately proceeded upon at Trial.

159. Ultimately a credit case, though slightly different from the strict "word on word" matter, His Honour referred to the helpful analysis in *Ortiz v R* [2020] NSWDC 721 by Mahony DCJ. At [35] His Honour decided the matter favourably to the applicant:

> *I am satisfied that had the prosecution, before the proceedings were instituted, been in possession of all of the relevant facts, it would not have been reasonable in this case to institute the proceedings, given there were manifest deficiencies in the complainant's evidence, and very substantial issues relating to the complainant's credit clearly highlighted in that available evidence. Consonant with the prosecutor's duty of fairness to the accused, the decision to prosecute could not be made reasonable merely because it was a "word on word" case. Here, there were telling reasons on the evidence available to the hypothetical prosecutor that there were very substantial issues of credit likely to be decided adverse to the complainant by any jury.*

<u>Procedure and Practical Matters</u>

160. The result of a successful application under the CCCA is quite different to that under a CPA claim. Under the CPA the Local Court Magistrate, or District Court Judge on a CARA Appeal, can order payment of a lump sum.

161. Under the CCCA your application is no more than for a certificate, in which the presiding Magistrate or Judge will certify that yours is a suitable matter for an award of costs because it was unreasonable to prosecute, and no action on the part of the accused contributed to that decision.

162. Practically, you should prepare a draft certificate so you can hand it up if you succeed on the application. Then have the judicial officer sign, and the registry seal, the certificate. A template CCCA Certificate is attached as Appendix I.

163. Once you have the signed and sealed certificate it is up to you to send it, together with your claim for costs, to the Director General of the Department of Attorney General seeking payment of costs.

164. We suggest a polite and formal letter in which you:

a. Identify precisely the proceedings, where and before whom they terminated;

b. Attach the signed and sealed certificate;

c. Attach a copy of your retainer, or grant of aid;

d. Attach your bills, itemising work items and disbursements, and set out a total amount claimed, and

e. Politely submit that your rate of fees is reasonable with respect to your general expertise and practice.

165. It might also be useful to add in any comment you can make, or evidence you can provide, which supports the justice of your claim, and any anomalous feature of the costs you seek. Remember, this letter is an exercise in written advocacy.

Subpoenas

166. Notwithstanding that third parties may intervene in criminal proceedings, at considerable cost to a criminal accused, there does not appear to be jurisdiction for a court to award costs to the accused person with respect to any costs incurred in that process *per se*, whether the intervention be unreasonable or not.

167. A distinct but related issue arose in *Commissioner of Police v Fandakis* [2001] NSWSC 586. There, during committal proceedings, a police officer subject to cross examination sought the protection of s130 of the *Evidence Act* 1995, on the basis of a public interest immunity for matters of state, leading to delay and the intervention of a third part appearing – apparently – on behalf of the officer.

168. After some considerable delay, the accused person sought and was awarded costs, from which order the police appealed to the Supreme Court. Her Honour Simpson J considered a number of arguments advanced in support of the learned trial magistrate's order, but in the end concluded that there was no grant of power to so order to be found in statute, and nor did arguments based on *R v Mosely* (1992) 28 NSWLR 735 assist.

169. In *R v Obeid* [2018] NSWSC 1024 Mr Obeid caused a subpoena to issue to Kepco, a company involved in coal developments in the Bylong Valley, which activities were associated with the allegations of misconduct in public office faced by Mr Obeid and his co-accused. The subpoena sought documents in some 13 categories and was cast in wide terms. Kepco intervened seeking to have the subpoena set aside. Kepco then sought to recover their costs in relation to the subpoena issue.

170. In a lengthy judgment exploring the inherent powers of the Supreme Court and inferior courts HH Beech-Jones J concludes that there is no power to order costs to the third party intervener in the criminal proceedings, but that costs of complying with the subpoena – which were here substantial – can be awarded.

171. We are not aware of any authority that a criminal court can award costs to anyone, let alone the accused, for costs associated with litigation concerning a subpoena. However, if costs are ultimately awarded upon the case being dismissed or withdrawn, then a claim for costs under the CPA of CCCA could well include the costs of the subpoena portion the litigation.

Bail

172. Much as you might sometimes find a prosecutor's position in relation to bail 'unreasonable', you cannot have costs if you successfully defend even a 'frivolous' detention application: *DPP v Donaczy* [2007] NSWSC 923. There is just no power to award costs in the *Bail Act* 2013, as there was none in the 1978 Act.

173. Now, if you do manage to defend the case, either entirely or at least with respect to all charges to which bail attached, you might well then seek to recover the costs of the bail application(s) as part of a claim for costs under either the CPA or the CCCA. The question would become whether recovery was 'just and reasonable' for the CPA claim, and would be a matter for the discretion of the DG of the AG Department in a CCCA claim.

AVOs

174. Costs can be awarded in AVO proceedings to either the applicant or defendant pursuant to ss99 and 99A of the *Crimes (Domestic and Personal Violence) Act* 2007.

175. Costs are available on adjournment, whatever the outcome, and are provided for in terms analogous to ss118 and 216 of the CPA.

176. Note that *Police v Alcott* [2005] NSWLC 17 was an AVO case involving costs thrown away due to delay resulting from Police failing to comply with case management provision for service of material. Costs on adjournment are provided for at s99(5) to (8).

177. Costs at the conclusion of proceedings are set about with limitations a little like the limitations imposed at ss117 and 214 of the CPA. But the limitations are quite different, distinguish between applicants who are 'protected persons' and police officers, and in the case of police are very restrictive.

178. Whilst the provisions might at first appear fairly simple, the legislation is actually not that straight forward. But there are a handful of cases which clearly set out the way in which the relevant provisions are to be read, and interpreted.

179. Since 3 December 2016, costs under the Act provided for in section 99 which states:

99 Costs

(1) In this section—

professional costs means costs relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court (but not court fees payable to a court).

(2) Costs, other than professional costs, are not to be awarded in apprehended violence order proceedings.

(3) A court may, subject to section 99A, award professional costs in apprehended violence order proceedings to the applicant for the order or decision concerned or the defendant in accordance with this section.

(4) If professional costs are awarded against a person under this section, the costs must be paid by the person to the registrar of the court, for payment to—

(a) the defendant, in the case of costs awarded against an applicant, or

(b) the applicant, in the case of costs awarded against a defendant.

(5) A court may make an order as to professional costs at the end of apprehended violence order proceedings or following the adjournment of the proceedings.

(6) An order as to professional costs may be made following the adjournment of the proceedings only if the court is satisfied that the other party has incurred additional costs because of the unreasonable conduct or delays of the party against whom the order is made.

(7) An order as to professional costs made following the adjournment of proceedings may be made whatever the result of the proceedings and may provide for the determination of the amount at the end of the proceedings.

(8) An order as to professional costs may specify the amount of any professional costs payable or may specify that it is to be the amount as agreed or assessed.

(9) The State is to indemnify a police officer, who acts in his or her capacity as a police officer in apprehended violence order proceedings, for any professional costs awarded against the police officer personally.

(10) This section applies to apprehended violence order proceedings, including apprehended violence order proceedings conducted in the absence of one or more of the parties.

180. There are, however, limitations on an award of Costs which are found in s99A:

99A Limitations on professional costs being awarded

(1) A court cannot, in apprehended violence order proceedings, award professional costs against an applicant who is a protected person in respect of the order unless satisfied that the application was frivolous or vexatious.

(2) A court cannot, in apprehended domestic violence order proceedings, award professional costs against an applicant who is a police officer unless satisfied that—

(a) the applicant made the application knowing it contained matter that was false or misleading in a material particular, or

(b) the applicant has deviated from the reasonable case management of the proceedings so significantly as to be inexcusable.

(3) The mere fact that a protected person does any one or more of the following in relation to apprehended domestic violence order proceedings does not give rise to a ground to award costs against an applicant who is a police officer and who made the application in good faith—

(a) indicating that he or she will give unfavourable evidence,

(b) indicating that he or she does not want an apprehended domestic violence order or that he or she has no fears,

(c) giving unfavourable evidence or failing to attend to give evidence.

(4) This section has effect despite section 99 or any other provision of this or any other Act or law.

(5) In this section—

apprehended domestic violence order proceedings *means proceedings under this Act in relation to an apprehended domestic violence order or an application for an apprehended domestic violence order.*

professional costs *has the same meaning as in section 99.*

Historical Decisions of note

181. The essential cases you need to have in your toolkit are as follows:

a. Where the application is made privately: *Garde v Dowd* [2011] NSWCA 115 (11 May 2011);

b. Where the application is made against police: *Constable Redman v Willcocks* [2010] NSWSC 1268.

182. *Garde v Dowd* [2011] NSWCA 115 (11 May 2011) involved an application made by the losing party in the Local Court, and on Appeal to the District Court.

183. Importantly, this decision considered the legislation that was in force in 2011 prior to amendment on 3 December 2016 to reflect the law above. No doubt that was due in part to the Court re-iterating those comments made by Justice Davies in *Redman* about the construction of the previous s99, when he stated at [19]:

"*The incorporation of parts of the Criminal Procedure Act into s99 results in the provisions of s 99 and the provisions of Division 4 sitting very uneasily together."*

184. Notwithstanding those changes, which appear to have been incorporated to overcome some of the difficulties faced in *Garde*, it is still interesting to consider the relevant principles.

185. The Applicant on the Appeal was Mr Dowd, who was the loser in the Local & District Court proceedings. In the Supreme Court, he was arguing that the Magistrate in the Local Court only had power to make an order for costs by way of specifying an amount of costs payable (a fixed sum) rather than an order for costs to be paid, as agreed or assessed (an unquantified costs order).

186. Basten JA, with whom McColl and Giles JA agreed, dismissed the application, making a further order for costs against Mr Dowd. In so doing, his Honour Basten JA comprehensively reviewed the law in relation to the making of costs orders under the act as it was in 2011.

187. Firstly, the court considers where the power is derived from to Appeal an order for the making of costs. That power comes from section 84(2)(b) *Crimes (Domestic and Personal Violence) Act 2007* which invokes Part 2 of the *Crimes (Appeal and Review) Act* 2001: s84 (3) (a) in the same way a conviction Appeal is made from the Local Court. Note that any appeal pursuant to section 84 does not stay the Order made in the Local Court: s85.

188. An Appeal against a costs order is usually heard by a rehearing of the evidence in the Local Court: s18 *Crimes (Appeal and Review) Act* 2001, however the Court states that such an Appeal is in effect as if it is an appeal against sentence pursuant to s18 *Crimes (Appeal and Review) Act* 2001.

189. Importantly, if fresh evidence is required to be called, leave must be granted pursuant to section 18 (2) of CARA, which will usually require an Affidavit explaining why any "fresh evidence" was not available, or called in the lower court proceedings.

190. Can you appeal the refusal of a costs application? The short answer is yes given the above provisions.

191. All Appeals in relation to costs orders will be determined pursuant to section 20 of CARA.

What are professional costs?

192. In *Wang v Farkas* [2014] NSWCA 29, another decision by Basten JA, some neighbours from Point Piper got into an ugly dispute that lead to a hearing which took 24 days in the Local Court over 3 years, and then 6 days in the District Court before His Honour Judge North.

193. His Honour North DCJ ultimately dismissed the Appeal, upholding the orders in the Local Court, including a costs order in favour of Mr Farkas. The Local Court order was in the sum of $278,993.00, including $22,315.00 for disbursements.

194. The main component of the costs was for the time spent by the respondent, Mr Farkas – himself a lawyer – representing himself. He also represented himself in the District Court and Supreme Court proceedings.

195. The Court of Appeal ultimately set aside the judgment of the District Court, substituting an order that an order in the amount of $22 315 be paid as arising from the Local Court proceedings, and set aside the costs of the District Court proceedings.

196. Professional costs can include fees paid to lawyers, but cannot include time spent by a litigant in person, even if they are a lawyer.

197. Since *Wang v Farkas* the High Court held in *Bell Lawyers Pty Ltd v Pentelow* [2019] HCA 29 that a self-represented lawyer acting for themselves could not be compensated for skill expended in litigation.

198. However, *Spencer v Coshott* [2021] NSWCA 235 distinguished *Bell*, where the legal entity providing the representation in that case – an incorporated legal practice – was legally distinct from the client (unattractive a conclusion as that was: The 'client' was the sole director of the incorporated legal practice!) and awarded costs.

The *Suitors' Fund Act 1951 No 3.*

199. The Suitors' Fund is a financial account established and administered by the Attorney General's Department pursuant to this short and somewhat arcane enactment. A tithe on court fees is redirected into the account each month to create a fund for the payment of certain costs sought by litigants in both criminal and civil proceedings, in state and federal courts.

200. A criminal accused seeking to access the fund will generally need to bring their case with the terms of either section 6, dealing with appeals, or section 6A which deals with incomplete proceedings. Section 6C permits the Director General of the Attorney General's Department a broad discretion to award no more than $10,000 in certain residual circumstances not otherwise covered by the act.

Appeals

201. Section 6 is a lengthy and confusing example of the drafter's art. We set it out here in full because very often your application will turn solely on a proper construction of the Act alone. Noting that we are here concerned with common legally aided litigation in the Local, Children's and District Courts, we have added emphasis as follows:

6 Costs of certain appeals

(1) If an appeal against the decision of a court:

(a) to the Supreme Court on a question of law or fact, or

(b) to the High Court from a decision of the Supreme Court on a question of law,

succeeds, the Supreme Court may, on application, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1A) Where an appeal against the decision of a court to the Industrial Relations Commission of New South Wales or to the District Court of New South Wales on a question of law succeeds, that Commission or Court, as the case may be, may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1AA) Where an appeal under section 56A of the Land and Environment Court Act 1979 to the Land and Environment Court on a question of law succeeds, that Court may, upon application made in that behalf, grant to the respondent to the appeal or to any one or more of several respondents to the appeal an indemnity certificate in respect of the appeal.

(1B) For the purposes of this section, a taxing officer of a court shall, when acting as such a taxing officer, be deemed to be exercising the jurisdiction of a court of first instance.

(2) Where a respondent to an appeal has been granted an indemnity certificate, the certificate shall entitle the respondent to be paid from the Fund:

(a) an amount equal to the appellant's costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted, ordered to be paid and actually paid by the respondent: Provided that where the Director-General is satisfied that the respondent is unable through lack of means to pay the whole of those costs or part thereof or that payment of those costs or part thereof would cause the respondent undue hardship, or where those costs or part thereof have not been paid by the respondent and the Director-General is satisfied that the respondent cannot be found after such strict inquiry and search as the Director-General may require or that the respondent unreasonably refuses or neglects to pay them, the Director-General may, if so requested by the appellant or the respondent, direct in writing that an amount equal to those costs or to the part of those costs not already paid by the respondent be paid from the Fund for and on behalf of the respondent to the appellant and thereupon the appellant shall be entitled to payment from the Fund in accordance with the direction and the Fund shall be discharged from liability to the respondent in respect of those costs to the extent of the amount paid in accordance with the direction,

(b) fifty per centum or such other percentage as may be prescribed (at the time when the indemnity certificate is granted) in lieu thereof by the Governor by proclamation published in the Gazette of the amount payable from the Fund pursuant to paragraph (a) or, where no amount is so payable, an amount equal to the costs of:

(i) the appeal in respect of which the certificate was granted, and also

(ii) where that appeal is an appeal in a sequence of appeals, any appeal or appeals in the sequence that preceded the appeal in respect of which the certificate was granted, as taxed, incurred by the respondent and not ordered to be paid by any other party: Provided that where an amount is payable from the Fund pursuant to paragraph (a), but the Director-General directs that the costs of the appeal or appeals referred to in subparagraph (i) or in subparagraphs (i) and (ii) incurred by the respondent and not ordered to be paid by any other party be taxed at the instance of the respondent or those costs are, without such a direction, taxed at the instance of the respondent, the amount payable from the Fund under this paragraph shall be the amount equal to those costs as so taxed, and

(c) where the costs referred to in paragraph (b) are taxed at the instance of the respondent, an amount equal to the costs incurred by the respondent in having those costs taxed.

202. As is clear, the quantum of any costs to be paid from the fund becomes very complicated where an indemnity certificate is granted to the respondent to a successful appeal. We don't propose to try and unravel this knot here.

203. It is sufficient for our purposes that you recognize that if the prosecutor appeals a decision of a Local or District Court, and then succeeds on that appeal, your client may be entitled to a certificate.

204. Even so, the circumstances where you might expect to receive the benefit of an indemnity certificate appear vanishingly small. One example is *R v King* [2003] NSWCCA 399 involving a prosecution appeal pursuant to s5F of the Criminal appeal Act 1912 from the grant of a permanent stay in the District Court. While the certificate was there granted, Spigelman CJ observed that such was not, nor should it be, other than exceptional [at 104].

205. Last, note *R v Hookham* (1993) 32 NSWLR 345. In this case Priestley JA considered [at 346] the exercise of the discretion granted by s6, and noted that it will turn on the reason the Court below erred. Where defence counsel, now respondent to the successful appeal, has contributed to the error, then the discretion may be exercised against them.

Incomplete proceedings

206. Section 6A is another lengthy provision. We again reproduce it, adding emphasis with a focus on our interest here:

> *6A Costs of proceedings not completed by reason of death of judge etc*
>
> *(1) Where on or after the day on which Her Majesty's assent to the Suitors' Fund (Amendment) Act 1959 is signified:*
>
> *(a) any civil or criminal proceedings are rendered abortive by the death or protracted illness of the judge or magistrate before whom the proceedings were had,*
>
> *(a1) any civil or criminal proceedings are rendered abortive for the purposes of this paragraph by section 46A (Appeal against damages may be heard by 2 Judges) of the Supreme Court Act 1970 or section 6AA (Appeal against sentence may be heard by 2 judges) of the Criminal Appeal Act 1912, because the judges who heard the proceedings were divided in opinion as to the decision determining the proceedings,*
>
> *(b) an appeal on a question of law against the conviction of a person (in this section referred to as the appellant) convicted on indictment is upheld and a new trial is ordered, or*
>
> *(c) the hearing of any civil or criminal proceedings is discontinued and a new trial ordered by the presiding judge or magistrate for a reason not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default, in the case of civil proceedings, of all or of any one or more of the parties thereto or their counsel or attorneys, or, in the case of criminal proceedings, of the accused or the accused's counsel or attorney, and the presiding judge or magistrate grants a certificate (which certificate the presiding judge or magistrate is hereby authorised to grant):*
>
> *(i) in the case of civil proceedings—to any party thereto stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury, where the proceedings were with a jury, or to the act, neglect or default of all or of any one or more of the parties to the proceedings or their counsel or attorneys, or*
>
> *(ii) in the case of criminal proceedings—to the accused stating the reason why the proceedings were discontinued and a new trial ordered and that the reason was not attributable in any way to disagreement on the part of the jury or to the act, neglect or default of the accused or the accused's counsel or attorney,*
>
> *and any party to the civil proceedings or the accused in the criminal proceedings or the appellant, as the case may be, incurs additional costs (in this section referred to as additional costs) by reason of the new trial that is had as a consequence of the proceedings being so rendered abortive or as a consequence of the order for a new trial, as the case may be, then the Director-General may, upon application made in that behalf, authorise the payment from the Fund to the party or the accused or the appellant, as the case may be, of the costs (in this section referred to as original costs), or such part thereof as the Director-General may determine, incurred by the*

party or the accused or the appellant, as the case may be, in the proceedings before they were so rendered abortive or the conviction was quashed or the hearing of the proceedings was so discontinued, as the case may be.

(1A) Where, in the opinion of the Director-General:

(a) the Director-General would, but for this subsection, not be entitled to authorise payment of an amount to a person under subsection (1) because that person incurred neither original costs nor additional costs by reason only of the fact that that person was a legally assisted person, and

(b) that person would have incurred original costs and additional costs had that person not been a legally assisted person,

subsection (1) shall apply to and in respect of that person as if that person had not been a legally assisted person and as if that person had incurred such original costs and additional costs as the Director-General determines:

Provided that the Director-General may, in lieu of authorising payment under that subsection of an amount to that person, authorise payment of that amount to such person or persons as in the Director-General's opinion is or are entitled to receive payment thereof.

(1B) If an application has been made under subsection (1) in respect of proceedings rendered abortive, or a new trial ordered, after the commencement of the Suitors' Fund (Amendment) Act 1987, the amount payable under that subsection to any one person shall, in respect of that application, not exceed:

(a) $10,000, or

(b) such other amount as may be prescribed (at the time when the proceedings were rendered abortive or the new trial was ordered).

(2) No amount shall be paid from the Fund under this section to:

(a) the Crown,

(b) a corporation that has a paid-up share capital of two hundred thousand dollars or more, or

(c) a corporation that does not have such a paid-up share capital but that, within the meaning of section 50 of the Corporations Act 2001 of the Commonwealth, is related to a body corporate that has such a paid-up share capital, unless the proceedings were rendered abortive or the new trial was ordered (as referred to in subsection (1)) before the commencement of the Legal Assistance and Suitors' Fund (Amendment) Act 1970.

207. There are then three circumstances in a criminal case where a certificate might be sought:

a. The case is aborted because of the death or protracted illness of the Judge or Magistrate;

b. A re-trial is ordered in the District Court on Indictment, following a successful conviction appeal;

c. A trial (in the Supreme, District, Local or Children's Courts, with or without a jury) aborts, and a new trial is ordered, for some reason NOT attributable either to jury disagreement (so no certificate for hung juries) or the fault of the accused person or their lawyers.

208. Subsection 1A covers the position where the accused person is legally aided, and section 1B effectively caps the sum of any certificate at $10,000.

Practical matters

209. By far the most common encounter with the suitors fund will be in a trial which miscarries because the jury is dismissed before retiring on verdict. In such cases the DPP often takes very little interest in an application for a suitors fund certificate, and a court will be prepared to grant one provided you can make clear that the case falls within the act.

210. Section 6A(1)(c)(ii) requires that the certificate certify certain matters, namely:

a. Why the proceedings were discontinued, and a new trial ordered, and

b. That such discontinuance was not in any way attributable to jury disagreement, or the neglect or default of the accused person or their lawyers.

211. A sample Suitors Fund Certificate is to be found in Annexure II.

PART II – **Practical Tips**

212. Part II is designed to be a more user-friendly and practical resource, providing a Ready Reckoner for busy practitioners to glance at. This is in landscape format, so will be attached as a second document and not to this paper.

213. Additionally, we address the practicalities of seeking costs under either CPA or CCCA regimes where the client is legally aided, by way of a Checklist generously provided by the Commission.

CRIMINAL COSTS RECOVERY CHECKLISTS

Criminal Procedure Act

☐ Apply for costs immediately after acquittal or dismissal of proceedings and make it easy for the bench by handing up a schedule of costs incurred that you have previously prepared.

☐ Ask the Court for an order that the costs be paid to Legal Aid NSW.

☐ Obtain signed s45 Authority from client.

☐ Assigned practitioners can claim on Grants Online invoices for the costs and disbursements incurred in the usual manner. Select "YES" when asked if it is the final claim on the file and on the invoice, and you will be prompted to RECORD FILE OUTCOME.

Select "YES" to the question "Was your client awarded costs?" In the text box that appears you should enter details such as:

Costs award v police payable to Legal Aid 27/7/12 $1650. Please pay uplift on costs claimed.

OR

Costs award v DPP $5000, client authority attached, please pay at 80%
You can then SUBMIT the File Outcome attaching a copy of the client's Authority and complete your costs claim. The Legal Costs Recovery Solicitor will identify the matter and arrange payment of the uplift.

Suitors' Fund Act

☐ Obtain **Stamped** and **Sealed** Certificate from Judge or their Associate.

☐ Obtain signed s45 Authority from client.

☐ Send *original* Certificate, Authority and explanation of reasons for issue of Certificate to the Legal Costs Recovery Solicitor.

☐ Apply for another extension if due to the abandonment of trial the trial days granted are insufficient to conclude the hearing.
214.

Costs in Criminal Cases Act

☐ Obtain **Stamped** and **Sealed** Certificate from Judge or their Associate.

☐ Obtain signed s45 Authority from client.

☐ Send *original* Certificate and Authority to the Grants Costs Solicitor, along with a **paper tax invoice** for the entirety of the proceedings with fees calculated at 175% of the scale. Copies of receipts for all disbursements should be submitted, along with details of any pre-trial proceedings and any period of private legal representation.

☐ The Legal Costs Recovery Solicitor will process further extensions to allow payment of the 75% uplift provided under the Legal Aid NSW fee scale.

Other Costs Orders - If costs are awarded to the legally aided client in other circumstances:

☐ Prepare a schedule of costs to be sought. This may include costs of earlier proceedings.

☐ When costs are awarded, attempt to reach agreement with the prosecution so that orders can be made (i) for a specific amount of costs and (ii) that those costs be paid to Legal Aid NSW by a set date.

☐ If costs can't be agreed, ask the Court to make an order for a specific amount anyway. You can try arguing that (i) you have attempted to resolve the costs figure with the prosecution, (ii) that the costs being sought are fixed under the Legal Aid NSW fee scales and (iii) if costs are not fixed Legal Aid NSW resources will be tied up with costs negotiations rather than their core work.

☐ Obtain signed s45 Authority from client.

☐ Send the Authority to the Legal Costs Recovery Solicitor along with details of the costs order – Legal Aid NSW may need additional information about the work done on the matter to calculate the appropriate costs uplift or if costs negotiations with the DPP have not succeeded.

☐ The Legal Costs Recovery Solicitor will process further extensions if required to allow payment of an uplift.

Costs Enquiries – Sonya Chidiac, Legal Costs Recovery Solicitor

Appendix I

COSTS IN CRIMINAL CASES ACT 1967

IN THE DISTRICT COURT
OF NEW SOUTH WALES
(CRIMINAL JURISDICTION)
AT ######

Matter Number. ######

R

v

######

CERTIFICATE UNDER SECTIONS 2 AND 3 OF

THE *COSTS IN CRIMINAL CASES ACT 1967*

Whereas at the Local Court of New South Wales at [place] on [date] [Applicant's name] appeared in respect of a charge/information of Breach AVO (x 2) H [number].

And whereas on the [date] the charges were dismissed.

Pursuant to the provisions of section 3 of the *Costs in Criminal Cases Act* 1967, I grant to the said [name] this certificate relating to the above mentioned charge/information.

Pursuant to the provisions of section 3 of the Act, I certify that in my opinion:

a) if the prosecution had, before the proceedings were instituted been in the possession of all the relevant facts, it would not have been reasonable to institute the proceedings; and

b) that any act or omission of the defendant that contributed, or might have contributed, to the institution or continuation of proceedings was reasonable in the circumstances.

I certify that I made no order for costs against the informant, prosecutor or complainant.

Dated at [day] this [date]

.....
NAME OF JUDICIAL OFFICER
Judge/Magistrate

Dated: DATE

Appendix II

SUITORS FUND ACT 1951

IN THE DISTRICT COURT
OF NEW SOUTH WALES
(CRIMINAL JURISDICTION)
AT ######

Matter Number. ######

R

v

######

CERTIFICATE UNDER SECTION 6A(1)(c) OF THE *SUITORS FUND ACT* 1951

WHEREAS subsection 1(c) of section 6A of the *Suitors Fund Act* 1951, provides that where the hearing of any proceedings is discontinued and a new trial ordered for a reason not attributable in any way to disagreement on the part of the jury, or to the act, neglect or default of the accused or his counsel or attorney, the presiding judge may grant to the accused a certificate stating the reason why the proceedings were discontinued and that the reason was not attributable in any way to disagreement on the part of the jury, or to the act, neglect or default of the accused or his counsel or attorney:

AND WHEREAS the trial of ACCUSED which commenced on ####### was discontinued on #### because of REASON TRIAL ABORTED and that the reason was not in any way attributable to the act, neglect or default of the accused, his counsel or attorney,

THIS CERTIFICATE is granted to ACCUSED, the accused in the trial in the above matter.

.....
NAME OF JUDICIAL OFFICER
Judge/Magistrate

Dated: DATE

Quick Check, Ready Reckoner Costs Guide

Costs Quick Reckoner	*Criminal Procedure Act 1986*	*Costs in Criminal Cases Act 1967*
Case Withdrawn/Abandoned/Acquittal	**YES applies**	**YES applies**
Invalid Proceedings?	**YES applies** Lacking elements of the offence = no jurisdiction Authority: *DPP v Cakici* [2006] NSWSC 454 at [38]; & *NSW Police v Pepper* [2016] NSWLC 15 where Can statute barred by s179 CPA	*Mordaunt v DPP* [2007] NSWCA 121 "Obj review of a Prosecution where Defendant acquitted, discharged or conviction quashed, whether it was reasonable that proceedings in 1st place"
Summary Hearing	*s213(1)*	*s2(1)* summary or indictable offence
Committal	*s116(1)*	*s2* - However, not following a discharge at committal, there being no "trial" within the meaning of the Act: *DPP v Howard* (2005) 64 NSWLR 139
Who was the Prosecutor?	State or Commonwealth DPP or anyone who institutes or is responsible for conduct of Prosecution and includes informant	State Only Not in Commonwealth matters
Application Made at the Time of Withdrawal or Acquittal	**YES it should be** *Fosse v DPP* [1999] NSWSC 367 *Trevitt v Police* [2012] NSWLC 4	*R v Manley* [2000] NSWCCA 196 *Distinguished need for immediate application*
Partial Costs	**YES** Where some charges withdrawn/ acquitted *V (a child) v Cons. J. Hedges* [2011] NSWSC 232 Applicant	**YES** *DAO v R* (No 3) [2016] NSWCCA 282 where costs awarded in some CAN's but not others
Onus of Proof	On applicant *Dong v Hughes* [2005] NSWSC 184 Balance of Probabilities	On applicant *Section 3(1)* *Mordaunt v DPP* [2007] NSWSCA 121 *Higgins v R (No.2)* [2022] NSWSCCA 82 at [11] Balance of Probabilities
Criteria for Award	*s117 (a)-(d)* Committal *s214 (a) - (d)* Summary Hearing *R v Hunt* [1999] NSWCCA 375	*Section 2* **BUT** No **Order** for Costs - *R v McFarlane* (unrep, 12/8/94, NSWSC) per Blanch J, *Allerton v Director of Public Prosecutions (NSW)* (1991) 24 NSWLR 550 at [559]-[560]

		cited with approval in *Beatson v R* [2015] NSWSCCA 17 at [10]. **The test:** 1. **Step 1** - determine the relevant facts that have been proven 2. **Step 2** - determine, if the prosecution were in possession of evidence of the relevant facts, in this hypothetical situation whether it would not have been reasonable to institute proceedings? 3. **Step 3** - determine whether any act or omission of the defendant contributed, or might have contributed, to the institution or continuation of the proceedings was reasonable in the circumstances.
Costs on Adjournment	*s118* Committal *s216* Summary Hearing **BUT TEST IS** "...Unreasonable conduct or delay of party against who order made" *Police v Ben Alcott* [2005] NSWLC 17 (No complete police brief at hearing)	**N/ A**
Certificate Required	**N/A**	Signed by Magistrate no amount nominated
Is the Amount to be Specified	*ss 213(5); 215(3) & 116(3)* ***requires*** specific amount	No - Certificate is a Recommendation to the Director-General
Other	Be prepared to run a full hearing on the Costs issue which may include a hearing of the investigation undertaken; reasons for suspicion of the offender; evidence of witnesses.	Can use information not just in Hearing = Reps or conversations with Crown re plea bargain See: *Chahal v OPP* (2008] NSWCA 152 Relevant Facts include those before ' arrest, before & after committal and trial *Allerton v DPP (1991)* 24 NWSLR 550

SATISFYING THE CRITERIA UNDER THE CRIMINAL PROCEDURE ACT

Section 214	*Established Case Law*	Recent Case Law
(A) Investigation Conducted Unreasonable or Proper Manner	*JD v DPP* [2000] NSWSC 1092 Hidden J SIWOC – Expert evidence showed problems with interview of the victim. *De Varda v Cons Stengold* (NSW Police) [2011] NSWSC 868 Uncalled witness could have thrown light on determination for the Court this may apply. **<u>Circumstantial Cases</u>** *Eslarn Holdings Pty Ltd v Tumult Shire Council* (No. 3) [1999] NSWLEC 163 Failure to Investigate other Reasonable Hypothesis	*Hariz v NSW DPP* [2020] NSWDC 394 Uncalled witness could have thrown light on determination for the Court
(B) Proceedings Initiated W/O Reasonable Cause, Bad Faith or Improper Manner	*Canceri v Taylor* [1994] 1 IRCR 120 upon apparent facts at time institute there was no substantial prospects of success – objective fact. *JD v DPP* [2000] NSWSC 1092 Hidden J "reference to quality of evidence that police gathered including those statements/investigations made and not made …" *R v Boyd* (1984) 2 DCR 372 (NZ) Accused police so prosecution continued to be decided by court.	*V (a child) v Cons J Hedges* [2011] Prosecutor evidence honest and reliable; *prima facie* case, difficult to succeed.
(C) Unreasonably Fail to Investigate (or properly) Matter Ought Reasonably to Know Show Accused not guilty or Prosecution not brought	*Southon & Ors v Gordon Plath* [2010] NSWCCA No entitlement because one expert trumps and/or prosecutor's evidence undermined in XXN *Cliftleigh Haulage Pty Ltd v Byron Shire Council* [2007] NSWCCA 13 Failure to interview eyewitness; not enough, no idea what they say so Court cannot decide if helpful. *NSW Department of Primary Industries v Adler and Ors* [2013] LCM Failure to identify Native Title Defence as identified by defendants honest and reasonable mistake of fact	*Hariz v NSW DPP* [2020] NSWDC 394 Police failed to interview witnesses; shows that the investigation into the offence was conducted in an unreasonable or improper manner; that the prosecution unreasonably failed to investigate (or to investigate properly) a matter that the prosecution ought to have been aware of; that suggested that the appellant might not be guilty, or that, the proceedings should not have been brought.

(D) Exceptional Circumstances Conduct of the Prosecutor	*Halpin v Department of Gaming* [2007] NSWSC 'Exc circs' = broad but means any relevant conduct by prosecutor. Making it just and reasonable to award costs *Fosse v DPP* [1999] Resolved in Defendant's favour not enough – must be something about conduct *NSW Dept of Primary Industries v Adler and Ors* [2013] Facts: Abalone fishing delay; failure to investigate; Withdrawal at 11th hour; test case; Expert def. evidence - all exceptional reasons why costs should be awarded	*Kogarah City Council v El Khouri* [2014] NSWLEC 196 The prosecutor ran its case at the trial without adducing evidence proving the elements of the offence. It was this conduct of the proceedings by the prosecutor that the Magistrate found was the exceptional circumstance.
Residual Discretion	Costs can be awarded by discretion for successful Defendant or against unsuccessful Defendant regardless of whether the above is satisfied.	*Barry Fairlie v Mag Sterland* [2004] NSWSC 1001 Off language case = Independent witness contradicted police. If statement provided, then Prosecution may have been reconsidered. No costs awarded

QUANTUM: JUST AND REASONABLE?

Professional Fees and Disbursements	Legal Aid Rates Crime	Private	DPP Rates or Attorney General Rates	Legal Aid in House Rates (Applies to ALS)
Legislation: *Criminal Procedure Act 1986*	*s116(2) CPA Committal Hearings;* *s213(2), s215(1) (a) CPA Summary Hearing*	*s116(2) CPA Committal Hearings;* *s213(2), s215(1) (a) CPA Summary Hearing*	**N/A**	*s116(2) CPA Committal Hearings;* *s213(2), s215(1) (a) CPA Summary Hearing*
Hourly Rate	$170 - $255 + GST **Legal practitioner (Solicitors & Counsel)** Where a costs order is made, fees will be paid at 175% of the hourly rate ***but*** *only where those costs are recovered under statute* Seehttps://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/state-matters for rates for solicitors and counsel & lump sum fees	Market considerations: See: *NSW Crime Commission v Heal & Fleming* (1991) 24 NSWLR116		
Disbursements Paid	Out of pocket including fax, postage, photocopy, conduct money and process fees	Yes, with receipts.		As required and costs substantiated
Disbursements Not Paid	Overheads, secretarial, legal and admin assistance		Overheads, secretarial, legal and admin assistance	
Claim at Rate	Full rate *s42 Legal Aid Commission Act* 1979 *R v Carrick* [2003] NSWSC 313	Professional rates in accordance with costs agreements.	$224.00 p/h	$288.75 p/h or 175% of $150 p/h +GST

HOW RATES DECIDED

	NSW Crime Commission v Wong (UNREP) SC June (1998)
Solicitors	$170.00 up to $850 per day (5hr day) including GST
Junior Council	$1650.00 per hearing – including Conference and preparation or $255.00 P/H Max $1275 P/D (5hr day) including GST
Senior Council	$1625.00 per day including conference and preparation $325.00 P/H Max $1625 P/D (5hr day) including GST

SATISFYING THE CRITERIA IN THE COSTS IN CRIMINAL CASES ACT
"LOOKING INTO THE OMNISICIENT CRYSTAL BALL"

Section	Case Law
Section 3	*R v Johnston* [2000] NSWCCA 197 (Simpson J) **The Relevant Test:** *I. Evaluate all evidence emerged at Trial/Hearing;* *II. Assume all evidence available to Prosecutor. before charge;* *III. Determine if the Prosecutor has all facts & evidence, would it be reasonable to charge?* IV. *Where not reasonable - whether an act or omission by Accused contributed to charge or continuation of proceedings*
	R v Dunne (1994) Hunt J Magistrate must put themselves in a hypothetical place of a prosecutor possessed of all information and knowledge about facts, either at Trial or on the Application, and decide whether, it was reasonable to prosecute. Where accused could make facts known, but did not, Magistrate must decide if that act or omission was reasonable in the circumstances.
Relevant Facts	*Allerton v DPP* (1991) 24 NSWLR 550 Includes those before arrest; before committal and after; before Trial/Hearing and after. Can also include reps; No Bill Application; statements by accused; and negotiations with the crown.
Before Charge	When criminal system put in motion; arrest, motion and summons.

Reasonableness	*Allerton v DPP* (Supra) '… if Prosecution has evidence of all relevant facts immediately before proceedings it wouldn't be reasonable to institute.'
What is that?	**NOT** a finding of criticism of the Prosecution *Fesja* (1995) 82 A Crim R253 No strict rule but see Blanch J in *McFariane* (Unrep, SC, 12 Aug 94 i.e., not reasonable to commence proceedings simply because the following: • Reasonable grounds to suspect crime, thereby arrest ok • Reasonable prospects of conviction • Mag. Satisfied as to the test to commit accused • *Prima facie* case exists • Prosecution may be unreasonable where evidence favouring the accused overwhelmingly strong • Not unreasonable because appeal orders acquittal **Discredited Witness**: Manley says matter for Tribunal therefore no issue unless case depends on witness substantially lacking credit: see *Dunne; R v Pratt* [2006] NSWDC 48. Policy considerations rejected; e.g., Justice seen to be done v significant weakness in case not enough *R v Padovan* [2012] NSWSC 204.
Less Onerous than *CPA*	*Cumberland v DPP* (1996) AOABH charge: accused acquitted p- but test applied by Mag. Similar to *CPA* too high therefore assumption that *CCCA* easier test.
s3(1)(b) Conduct of the Defendant	*R v Dunne* (1990) Hunt J: intended to get Defendant's to disclose. If it contributed to charge or continuation of, was the conduct in the circumstances? *R v Johnston* [2000] NSWCCA 1976 Simpson J: Legislature has recognized tactical evaluation are legitimate by defense and recognized the value of element of surprise against prosecution witness.

CHECKLIST FOR PRACTITIONERS

	Legally Aided Matters (Applies to ALS)	Private Matters
Who is Payable?	Apply for costs and have these payable to the Legal Aid Commission **– Not the Client**	Apply for costs and have these payable to the client Provide Bill of Costs provided to client
Legislation	Are *Criminal Procedure Act* Costs likely; if so, preferable as fixed costs sum made by Magistrate	Are *Criminal Procedure Act* Costs likely; if so, preferable as fixed costs sum made by Mag.
Tip	Make submissions before providing costs incurred or bill	Make submissions before providing estimate of costs
Obtain Client Authority	*Section 45* authority from client	Advise client of potential additional costs to run costs application; if successful, recoverable.
Apply/Hand Up	Apply for additional grant to cover for extra day in court/argument	Hand up authority from client to receive funds from court registry to trust account
Evidence	Obtain affidavit from costs assessor	Obtain affidavit from costs assessor
Rates	Decide 175% uplift or 80% of professional fees (I.e, Day Rate = $2000 but attend 1hr only so LAC = $150.00 P/H) = $150.00 x 175% = $262.50 or 80% $2000.00 = $1600.00 If under *Costs in Criminal Cases Act* LAC will write to AG's; provide all disbursement receipts	Costs will be paid by prosecutor to register award under *Criminal Procedure Act* If under *Costs in Criminal Cases Act* You will need to write to Attorney Generals' Department and provide all disbursement receipts Rate: $224.00 P/H
Payment	Send original costs certificate to Solicitor Gants Division LAC Go to grants online Claim under grants any grants in advance provided. Below is a list of key contacts in the Grants Division of Legal Aid NSW. You can contact any of these people if you have queries about legal aid applications, grants of legal aid or payments.	Pay back to client any fees held in trust or paid to date covered under the award of costs

Online	**Grants Online** Select YES in record file outcome – Was client awarded costs?	Apply to Registry to have costs paid into trust account or general as per authority from client
Legal Aid	***Costs Division: (the Gurus on everything costs)*** Sonya.Chidiac@legalaid.nsw.gov.au **T:** (02) 9219 5665 Danielle.Roth@legalaid.nsw.gov.au; mary.whitehead@legalaid.nsw.gov.au Aideen.Mcgarrigle@legalaid.nsw.gov.au	

COSTS IN AVO PROCEEDINGS

	Legislation	Case Law
Against the Police	**NO** **UNLESS** *Section 99(4) Crimes (Domestic and Personal Violence) Act 2007* satisfied officer made application knowing it contained matter that was false or misleading in a material matter Original legislation intended to 'protect police from costs orders when they initiate AVO complaint in good faith.' (Second reading speech)	However, consider the section, "never intended to provide immunity to the police" *Constable Redman v Willcocks* [2010] NSWSC 1268 'The sub-section was never intended to provide an immunity, and does not provide an immunity, to a police officer except for the bringing of the proceedings. It was not intended to protect, nor does it protect, the police officer from his conduct of the proceedings. If that was so, for example, inexcusable breaches of case management orders would not be able to be visited with costs orders despite the clear words of s 214(1)(b) or (d).' para [36] Davies J
Does the *Criminal Procedure Act* Apply?	**YES** Even though AVO proceedings are not criminal proceedings; *Section 212 CPA*	*Constable Redman v Willcocks* [2010] NSWSC 1268 Davies J
Against Private Party (Applicant or Defendant)	**YES** But against an unsuccessful application the Defendant must satisfy *Section 99 (3)* applies Issue of Substantive Application being frivolous or vexatious	*Wang v Farkas* [2014] NSWCA 29 *Mahmoud v Sutherland* [2012) NSWCA 306 (26/9/12) (Barrett JA) Must establish *Section 99 (3)* Decision of lower court magistrate Heilpern Construct of *s99 Garde v Dowd* [2011) NSWCA 115 (Basten JA) at [15] "The statutory scheme with respect to costs orders in relation to proceedings under the *2007 Act* is undesirably complex." Construct of *s99 (1)* *Cunningham v Cunningham* [2012] NSWSC 849 (Button J)
Specified or Fixed Amount	**YES** BUT see *Section 353 Legal Profession Act 2004 (NSW)* regarding ability to have costs assessed	*Garde v Dowd* [2011) NSWCA 115 (Basten JA) at [30] - issue unresolved as to whether LPA applies