# *WRITING REPS –*
# *10 "PRO- TIPS" for young players*

*Some important issues for criminal defence lawyers when preparing written submissions to prosecutors - such as representations to police, no-bill applications and other written charge negotiations*[1].

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WARNING!! Written reps are a HIGH-RISK activity for a criminal defence lawyer. Forewarning the prosecution of your client's defence deprives your client of their right to silence and the tactical advantage of defence secrecy. Revealing any of your client's instructions without explicit informed consent from your client would probably constitute a professional breach[2]

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**1. ALWAYS start with the end-game in mind!**

Good lawyers don't write reps in every matter. Indeed, there are many fine lawyers who rarely write reps. A great deal of caution should be exercised before a decision is made to send written reps.

Having said that, reps can be of great benefit to your client's interests, and should be considered an essential tool to be used in appropriate cases. In every case, consider the strategic benefits and risks of writing reps.

If you then take the decision to write reps always keep your purpose in mind and whether or not you are being realistic. You may be trying to achieve any of the following:

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[1] *A quick note on terminology: I will use the term "reps" as a general catch-all for written representations, submissions or charge negotiations to prosecutorial authorities. Specific kinds – such as no-bill applications to the Office of the Director of Public Prosecutions (ODPP) – will be singled out where appropriate*

[2] **Solicitors Rules - 2 – Confidentiality** *2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm, any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -2.1.1 the client authorises disclosure; 2.1.2 the practitioner is permitted or compelled by law to disclose; or 2.1.3 the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a felony.2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship between the practitioner and client.*

1. A no-bill application, or seeking the charge(s) be withdrawn by police;
2. Offering to plead to a lesser charge as an alternative;
3. Offering to plead to one or more charges, but negotiating to have other charges placed on a Form 1;
4. Negotiating amendments to the facts;
5. Negotiating to have a matter finalised in the Local or Children's Court, instead of District Court on indictment.

**2. ALWAYS start with the charge and the prosecution evidence as your guide**

*If you take away nothing else from this paper take away this point!!* In considering and preparing reps, ALWAYS ALWAYS start with a thorough review of each element of each charge, and all prosecution evidence to support each of these.

The most effective reps rely on this as their core, and many successful reps use this as the sole scope of their message.

**3. NEVER disclose your client's case or instructions**

There is no legal protection for any information included in defence submissions: section 131 of the *Evidence Act 1995* provides that evidence of settlement negotiations are not to be adduced into evidence BUT section 131(5) (b) *excludes* attempts to negotiate the settlement of a criminal proceeding (or and anticipated criminal proceeding).

In practice, there is nothing in the law to prevent a prosecutor from cross-examining your client about information that is in representations. It DOES happen, (although, thankfully, rarely) that a prosecutor can say *"but you told your solicitor…, didn't you?"* and then go on to use the letter from the solicitor as evidence of a prior inconsistent statement and/or admission. A defence lawyer's nightmare!

See also: the above warning about the requirement of confidentiality for solicitors.

Evidence of what a client said during an ERISP interview may be referred to, because it already constitutes part of the prosecution evidence, but this should be done with great caution. One reason for caution might be that there may be a future challenge to the admissibility of that interview.

Tactically, giving advance warning of the details of your defence is likely to give an advantage to the prosecution, and is also *highly unlikely* to have any kind of persuasive effect.

A good rule of thumb is when you find yourself writing *"My client instructs that…"* or *"I am instructed…",* you need to use that

backspace button and find a different way to express your message. A couple of handy phrases to put some more direct propositions is:

- *"Would you consider whether you would accept a plea to a charge of xyz in full satisfaction of this matter?"*
- *"Kindly consider whether you would accept a plea of guilty based on the attached proposed facts"*
- *"If my client were to instruct me to enter a plea of guilty to a charge of xyz, would you withdraw the charge of abc, and accept the plea of guilty to xyz in full satisfaction of this matter?"*

Of course, there is an argument that the above suggestions are thinly-veiled expressions of your client's instructions, and could still be used in cross-examination against your client. In the heat of a courtroom, one can only hope that these more abstract questions are harder to pin onto a witness than direct assertions of what a client has told their solicitor. Perhaps this is just further demonstration of the need to exercise great caution when deciding whether to write reps at all.

Even though there is no formal legal protection for criminal charge negotiations, it is still a good idea to include a *"without prejudice"* type disclaimer at the top of the document. A phrase I've amalgamated from other people's letters over the years is *"Without prejudice or admission, save as to costs".* These kinds of disclaimers may have little weight, but will not do any harm either, and there is always the possibility that the magistrate and/or prosecutor do not know about section 131(5)(b) of the *Evidence Act* !

**4. ALWAYS ensure your efforts are in line with your client's instructions.**

Although you shouldn't disclose your instructions, it is important that you are very clear about whether in fact your client will go along with what is proposed in your reps.

Apart from saving you unnecessary effort, this is important for your professional reputation and for an effective retainer with your client. It is good practice to get clear instructions from the client about their agreement to the sending of reps, the general thrust of those reps, and clear agreement to any proposed facts.

There will be occasions where a client changes their mind between their agreement to send reps and the day they will be required to formally enter pleas in accordance with them, but thorough conferencing and instructions should minimise these occasions. In the event a client changes their mind, this may raise ethical issues and possibly a conflict – a topic beyond the scope of this paper.

**5. ALWAYS consider whether you may be helping the prosecution to fix the gaps in their evidence**

Thorough reps that point out all the weaknesses in the prosecution case are excellent in a no-bill application where those gaps cannot be

fixed. However, pointing out the weaknesses may also lead to further investigations which transform a weak prosecution case into a strong one.

An example of "unfixable" gaps might be conflicting eyewitness statements where all witnesses have provided a statement and there is no objective evidence such as CCTV footage.

An example of "fixable" gaps would be pointing out the absence of DNA on certain seized items, only to find that by the trial commencement, those items have now been sent off to DAL, analysed, and found to contain damning DNA evidence.

There are two schools of thought about forewarning the prosecution about fixable gaps in their case – some see this as a total no-no, whereas others take the view that it is better to get the worst evidence as early as possible. This is a reminder that the end-game is always to be kept in mind, and all risks and benefits should be considered before sending reps.

At the very least, if you are considering forewarning the prosecution about holes in their evidence, and there is a risk they could fill those holes, you should conference your client and get their explicit instructions about the risks of strengthening the prosecution case. Let your client decide if they want to take the risk, fully informed about the possible consequences of their choice.

## 6. ALWAYS keep in mind the PROSECUTORS GUIDELINES

For NSW Police and the ODPP, the relevant guidelines are the ODPP Prosecutor's guidelines, available on the ODPP website. These guidelines make useful reading, and there are gems hidden in unlikely places.

As a starting point, make sure you're aware of:

Part 4 – The Decision to Prosecute;
Part 6 – Settling Charges;
Part 7 – Discontinuing Prosecutions;
Part 8 – Elections;
Part 9 – Finding Bills;
Part 20 – Charge negotiations, agreed Facts and Form 1;

Also, where relevant:

Part 21 – Young offenders;
Part 22 – Mental Health;
Appendix E – Protocol for reviewing DV offences.

The Commonwealth DPP has their own set of guidelines available on their website.

Reference to the specific relevant part of the guidelines is a good practice, but avoid quoting huge tracts of their own guidelines at them.

## 7. ALWAYS assume your prosecutor is lazy

Make the job of the reader as easy as possible. Use the language of their prosecutorial guidelines in your reps. Make sure that any statements you refer to are well-referenced. Ensure you have covered their concerns, such as whether the criminality of the offence is adequately addressed within you proposal, and you're not asking the impossible. Your aim is to be effectively writing their report to their manager for them!

## 8. ALWAYS make your writing persuasive

A whole topic in itself, but at the heart of effective reps is effective communication. Some important factors of persuasive writing:

### A. Know your audience – professional courtesy

Establishing a good working relationship with the prosecutor who will consider the reps is a great starting point. In dealing with the ODPP, there is still plenty of scope to have an informal telephone conversation about possible outcomes before writing the reps, depending on the individual solicitor's attitude. Having said that, just because a particular individual is immovable should not dissuade you from sending compelling reps because they can have benefits at sentence including a discount for willingness to plead to the charge that is ultimately found proven, and also because the Crown Prosecutor when they are finally assigned a matter for trial may be won over by your reps sent months ago before committal

### B. Know your audience – Institutional constraints

Understand how the bureaucracy will handle your reps. If your reps are to police, you will need to address them to the Local Area Commander (LAC), who will then send them back down to the Officer-in-Charge (OIC). As a matter of practice, it is often a good idea to send a copy of the police reps to LAC, the OIC and the police prosecutors at the relevant court.

Reps to police should be written with the assumption that your audience is not a lawyer. The plainer the language, the better, and, although referencing prosecution guidelines and case law may help, a general principle is to keep police reps short and to the point, steering clear of discretionary factors. In writing to police, it is a good idea to aim for a single page with a very simple request, and no more than two pages for anything more complex.

The ODPP has internal rules about how no-bill applications are handled, including a distinction based on the seriousness of the matter. Matters with maximum penalties of 25y or more

will need to go up to the Director's office, but less serious matters can be handled lower down the hierarchy. It is extremely useful to know in advance exactly how your reps will be handled, and it doesn't hurt to ask the solicitor-with-carriage what their delegation is and what the likely internal process would be.

As a general rule, the Commonwealth DPP (CWDPP) has a much more formal approach to handling reps and negotiations than the state ODPP. Solicitors from the CWDPP are not permitted to suggest resolutions to defence, and will only respond when directly approached. The CWDPP seems to be a more rigid organisation with very strong hierarchies and a tendency to elect on matters more frequently than the ODPP. Beware the big differences between the seriousness of CW strictly indictable matters, and the different applicable case law.

The intricacies of how each prosecutorial body handles reps is beyond the scope of this paper… but the above information is to demonstrate the importance of knowing in advance how your reps are likely to be received. In particular, you may not want to lock in a "no" too early when the prosecutor with carriage will be bound by a decision from a higher authority – fettering the later discretion of that subordinate prosecutor.

## C. Persuasive writing – format and style

Be mindful that your reader is a human being and all the complexities this entails. Make the reps as readable as possible both visually and in your use of language.

Clear, consistent formatting with large headings and subheadings can assist a tired prosecutor to quickly absorb the messages of your reps.

Plain language is always a good starting point, even when addressing a senior lawyer. Use legal jargon only as necessary and use excerpts from cases as appropriate, in short meaningful bursts.

## D. Persuasive writing – good letter writing

Good letter writing principles should be applied. A helpful framework is to start with the reason you are writing the letter, followed by the discussion of why this is a reasonable request, and finish with the expectation of what you want the writer to do. Eg: I am writing this letter because I am asking you to consider withdrawing the charge. The charge cannot be made out on the available evidence for the following reasons:… I await your decision regarding withdrawing the charge.

### E. Persuasive writing – logical argument

Each proposition you make should be supported by evidence. The main focus of your letter should be the prosecution case, but some of the supporting evidence for a proposition might include quotes from cases, 2nd reading speeches and sentencing statistics.

If including discretionary factors, such as your client's youth, prior good character, ill health or otherwise, make sure these are supported by evidence as much as possible, but be conscious of the need to minimise disclosure of your client's instructions.

### F. Persuasive writing – write it as if you are arguing it in court

This is a good rule of thumb to find your voice or tone. Work out what your closing submissions at trial would be on the topic, and work back from that. Keep the language in a more conversational style, but formal, as would be appropriate in a courtroom.

## 9. DON'T forget the facts!

As much as possible ensure that the facts are clearly settled with a plea negotiation. If there are only a couple of very simple amendments needed to the police facts, these can be referred to as *"in paragraph one, delete the sentence commencing "The accused then kicked…."".* A handy alternative option is to draft up an "alternative" set of facts, using as much agreed material from the brief as possible, with your own version tucked in amongst it, and possibly have contentious parts highlighted somehow, for easy consideration of the prosecutor, with a non-highlighted identical version to be handed up.

## 10. ALWAYS have a plan B in case your reps are unsuccessful

Be prepared in advance for your reps to fail. Ensure you are fully instructed about which course to take in that event. Hopefully, if you've planned and executed your reps well, they will do no harm, and may indeed have laid an important foundation for the conduct of further proceedings.

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**Rosie Lambert, September 2012**

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