

Pleas and traversals

Will Tuckey
Barrister
11th Floor Garfield Barwick Chambers
BA/LLB (Hons I), LLM¹

June 2018

¹ Alexandra White and Jane Sanders of the Shopfront Youth Legal Centre are acknowledged for their kind contribution of research material which has been incorporated in this paper.

1 TABLE OF CONTENTS

2	Pleas	3
2.1	Pleas of Not Guilty	3
2.2	Pleas of Guilty	3
2.2.1	Practitioners Obligations.....	4
2.3	Agreeing Facts.....	5
2.4	Consequences of a plea	7
3	Convenience Pleas.....	8
3.1	Can a practitioner act?	8
3.2	Consequences of a convenience plea	10
4	Withdrawing a Plea of Guilty.....	11
4.1	Types of applications	11
4.1.1	Summary Proceedings	11
4.1.2	Appeals from Local Court Sentences against Conviction.....	11
4.1.3	Matters Committed for Sentence	11
4.1.4	After Arraignment in Supreme Court and District Court	12
4.1.5	On appeal from a District or Supreme Court Sentence	12
4.1.6	Supreme Court Conviction Inquiry.....	12
4.2	The test: Miscarriage of Justice	12
4.3	Circumstances that may constitute a miscarriage of Justice	14
4.4	Circumstances that may not constitute a miscarriage of justice.....	16
4.4.1	Simply because the person claims they were innocent.....	16
4.4.2	Simply because the person had pleaded guilty for some reason other than guilt.....	16
4.5	Procedure in the Local And District Court	17
4.5.1	Appearance	17
4.5.2	Hearing.....	17
5	Summary	20

2 PLEAS

The term plea has a wide meaning when used in a legal setting, it can be an allegation made by, or on behalf of, a party to a legal suit, in support of his or her claim or defence. In criminal law it is the accused's answer to the charge against them.

The plea usually takes the form of 'guilty' or 'not guilty', and according to *Butterworths Australian Legal Dictionary*, this is known as 'a plea to the general issue.'

A person may also make a special plea in addition to or instead of the general plea (such as a plea of not guilty by mental illness, or a plea in bar – with which this paper will deal with very little).

2.1 PLEAS OF NOT GUILTY

A plea of not guilty is a declaration by the accused that they rely upon their presumption of innocence and it is for the state to prove their case against them. In *Griffiths v The Queen* Brennan, Dawson and Gaudron JJ said (at 79; 547-548; 167):

*A plea of not guilty puts all elements of the offence charged in issue.*²

In *Thomson v The King*:

*The mere theory that a plea of not guilty puts everything in issue is not enough for this purpose. The prosecution cannot credit the defence with fancy defences in order to rebut them at the outset with some damning piece of prejudice.*³

2.2 PLEAS OF GUILTY

A plea of guilty is a 'formal confession of the existence of every ingredient necessary to constitute the offence.'⁴ The plea of guilty admits all the elements of the offence charged but no more: *R v Maitland* [1963] SASR 332.⁵

In *Weston v The Queen* [2015] VSCA 354 (17 December 2015) Redlich JA at [109] said:

1 The basis of a plea on arraignment is that in open court an accused freely says what he is going to do; and the law attaches so much importance to a plea of guilty in open court that no further proof is required of the accused's guilt.

2 The plea of guilty constitutes an admission of all of the legal ingredients of the offence and is the most cogent admission of guilty that can be made. Its significance rests in part upon the high public interest in the finality of legal proceedings.

A plea of guilty must be unequivocal to be accepted by the court. In *Maxwell v The Queen* Dawson and McHugh JJ said (at 511; 7; 186):

² (1994) 69 ALKR 77; 76 A Crim R 164; 125 ALR 545 (HC) *Ross On Crime* [16.2105]

³ [1918] AC 221; [1918-19] All ER Rep 521; (1917) 13 CR App R 61 (HL) Lord Sumner said (at 232; 526; 78) *Ross On Crime* [16.2105]

⁴ *R v D'Orta-Ekenaike* [1998] 2 VR 140; (1997) 99 A Crim R 454 (CA) at 146-147; 462; citing *De Kruiff v Smith* [1971] VR 761 at 765; *R v Henry* [1917] VLR 525 at 526. *Ross On Crime* [16.2130]

⁵ *Butterworths Australian Legal Dictionary*, 'Guilty Plea', p 536.

*The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by the qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist upon pleading guilty.*⁶

Where it becomes apparent to a Court, for whatever reason, that the accused person's version of facts is inconsistent with the plea, the court should give the opportunity to withdraw the plea and if that does not occur and the accused person insists upon pleading guilty, the court should ignore the accused person's version.⁷

2.2.1 Practitioners Obligations

Defence practitioners have an obligation, unless circumstances warrant otherwise in the practitioner's considered opinion, to advise a client of matters that reduce penalty.

It is the duty of the advocate to advise the client generally about any plea to the charge: r 39(a). The advocate may, in an appropriate case, advise the client that a guilty plea is generally regarded by a court as a mitigating factor: r 40.⁸

Rule 39 and 40 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* [NSW] - Advocacy Rules - state:

39 Criminal pleas

It is the duty of a barrister representing a person charged with a criminal offence:

- (a) to advise the client generally about any plea to the charge, and*
- (b) to make clear that the client has the responsibility for and complete freedom of choosing the pleas to be entered.*

40 *For the purpose of fulfilling the duty in rule 39, a barrister may, in an appropriate case, advise the client in strong terms that the client is unlikely to escape conviction and that a plea of guilty is generally regarded by the court as a mitigating factor to the extent that the client is viewed by the court as co-operating in the criminal justice process.*

A plea of guilty is an admission to a criminal charge. Practitioners should take making an admission on behalf of their client very seriously.

In *R v Balchin* (1974) 9 SASR 64 (CCA) the court said in a joint judgment (at 67):

[I]t could well constitute a breach of professional duty to an accused person if his counsel without specific authority to do so, should make any admission which could

⁶ (1996) 184 CLR 501; 87 A Crim R 180; 135 ALR 1 in *Ross on Crime* [16.2135]

⁷ Howie and Johnson, *Annotated Criminal Legislation New South Wales*, 2016-2017 Edition at [2-3 193.1] – citing various authorities

⁸ *Sentencing Bench Book*, [1-210] accessed 4/5/2017.

*be detrimental to the interests of the accused, or which otherwise might have the effect of depriving him of a fair trial.*⁹

In *R v Birks* (1990) 19 NSWLR 677; 48 A Crim R 385 Lusher J said (at 702; 409):

*[I]n a criminal trial an admission, and a waiver is in the nature of an admission, can only be made by an accused on the advice of counsel, sensibly and usually in writing, which is difficult to obtain or give in the run of a vigorous cross-examination. Lastly, an accused cannot be required to make an admission or even to consider one.*¹⁰

Distilling these principles and vast experience C Craigie SC, when he was a public defender wrote:

*Let there be no doubt that your client instructs you, not merely that the client wants a guilty plea but is in fact guilty - see **R v Turner** [1970] 2 QB 321. This principle applies whether the plea has arisen from initial instructions or has arisen as a consequence of the client abandoning early instructions of innocence. To this end, a signed confirmation of instructions to plead, preferably reciting the elements of the offence as applied to the facts, is desirable. The important matters are that guilt is plainly conceded either on the basis of what the client concedes specifically and knows or [particularly in the case of the all too common “I don’t remember” instruction] concedes as being the undoubted and provable truth, even if not remembered by the client.*¹¹

2.3 AGREEING FACTS

While a plea of guilty admits the elements of a charge, it does not admit the non-essential ingredients of an offence.¹² In *GAS v The Queen* (2004) 217 CLR 198 at [30] the full bench of the High Court said:

In the case of a plea of guilty, any facts beyond what is necessarily involved as an element of the offence must be proved by evidence, or admitted formally (as in an agreed statement of facts), or informally (as occurred in the present case by a statement of facts from the bar table which was not contradicted). There may be significant limitations as to a judge’s capacity to find potentially relevant facts in a given case.

In *R v Crowley* [2004] NSWCCA 256 at [46], Smart AJ said:

*Agreed facts should always be carefully checked by all parties and their legal representatives, and especially by counsel for an offender. This should not be perfunctory.*¹³

In *Loury v R* [2010] NSWCCA 158 the CCA found that a miscarriage of justice had occurred in circumstances where an accused was not properly advised in relation to his pleas of guilty and the

⁹ *Ross on Crime* [3.8730]

¹⁰ *Ross on Crime* [3.8730]

¹¹ C. Craigie SC (Revised by Chrissa Loukas), ‘Tactical Plea Making in the Superior Courts’ a paper originally written 1998 and updated in 2009, accessed online:

http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_tactical_plea_making_sup_courts.aspx

¹² *Sentencing Bench Book*, [1-450] accessed 5/5/2017.

¹³ *Sentencing Bench Book*, [1-460] accessed 5/5/2017.

agreed statement of facts. Hodgeson JA expressed concern regarding the statement of agreed facts that appeared to be at odds with an appellant's instructions:

2 The agreed statement of facts on the basis of which the appellant was sentenced differed in very substantial respects from the account given by the appellant in his interview with police. An important issue in the appeal was whether the appellant understood this, and nevertheless gave his consent to the use of that statement.

3 [The accused's solicitor] gave evidence to the effect that the appellant was aware of the content of the agreed statement of facts, and gave instructions that his case go forward on the basis of that agreed statement of facts. However, nowhere [The accused's solicitor's] evidence does he identify any occasion when he went through the agreed statement of facts with the appellant or drew his attention to the significant differences from the police interview, or even gave the appellant a copy of the agreed statement and asked him to read and consider it. If any of these things had happened, I would have expected [the accused's solicitor] to advert to this in his evidence. The fact that he did not do so, in my opinion, strongly supports the appellant's evidence that he was not aware of the content of the agreed statement of facts, and that he did not appreciate that he was to be sentenced on the basis of that agreed statement.

Whealy J at [107] referred to the same situation:

I came to the clear view that, at no time, had the appellant been shown the Agreed Statement of Facts. At no time were they ever explained to him. [The accused's solicitor], of course, insisted that they were. It is significant, however, that [The accused's solicitor] was unable to produce notes of any conference that he had ever had with the appellant or his brother. He was unable to produce any written statement made by the appellant. Indeed, the appellant claimed that he had never provided any written statement either to his solicitor or his barrister. There were no written instructions to plead and there was no suggestion that the Agreed Statement of Facts had ever been read over or signed by either of the brothers.

In *Dowling v R* [2017] NSWCCA 98 Adamson J, with whom Leeming JA and Wilson J agreed, said:

[31] The facts on the basis of which an offender is sentenced must generally be either proved to the requisite standard, admitted or agreed: The Queen v Olbrich (1999) 199 CLR 270; [1999] HCA 54; Weininger v The Queen (2003) 212 CLR 629; [2003] HCA 14; GAS v The Queen; SJK v The Queen (2004) 217 CLR 198; [2004] HCA 22 at [30]. It is preferable that the facts be signed by the offender before sentence in order to indicate his or her agreement to the facts. However, where this course is not taken, the agreement can be indicated to the Court by the conduct of counsel for the person who stands to be sentenced.

[32] In the present case, I regard the applicant as being bound by the conduct of his counsel: see also CL v R [2014] NSWCCA 196 at [43]-[44] per Adamson J (Hoeben CJ at CL and Fullerton J agreeing). An agreement as to the facts commonly forms the basis for sentencing following a plea of guilty. I do not discern any basis on which the statement of facts ought not to have been accepted by the sentencing judge, or on which their correctness ought to be revisited on this application. The applicant did not give evidence at the sentence hearing which cast any doubt on the correctness of the agreed facts. Nor is there any basis for supposing that he was not fully consulted about

their content by his legal representatives: cf. R v Crowley [2004] NSWCCA 256. In the circumstances of the present case, there having been no query raised by the sentencing judge as to the facts of the offences, the sentencing judge was both entitled and obliged to sentence on the basis of the facts tendered by the Crown without objection.

Because of the above matters, it is the writer's opinion that when obtaining a client's agreement to facts, a legal practitioner should read the facts to the client initialling each paragraph and ask the client to sign every page (a sophisticated client may not need the facts to be read to them). This copy of the facts should be retained by the client's legal practitioner with any other signed instructions.

On a side note, it is the writer's opinion the tender copy of an agreed set of facts should be signed by an accused person's legal practitioner and not by the accused themselves as is often insisted upon by prosecuting authorities. This becomes of importance where facts are admitted as a matter of convenience (see below). If an accused person signs a set of agreed facts and the basis of signing is not made clear (i.e. an agreement for the purposes of the proceedings versus a true admission) the facts might be used against them in future or other proceedings. (Note the analogous provision in the *Evidence Act*, s191, requires only signing by a person's Australian legal practitioner and limits the use of the agreement to the proceedings.)

2.4 CONSEQUENCES OF A PLEA

In taking instructions relating to a plea a practitioner must advise a client as to the consequences of that plea. In relation to a plea of guilty the practitioner may need to advise a client of the following consequences:

1. Sentencing procedure and law (including maximum penalties, standard non-parole periods, sentencing options);
2. Consequences of a finding of guilt and or conviction (future employment, employment related disciplinary proceedings, firearms, travel, spent convictions, family law proceedings, working with children's checks etc);
3. Consequences in relation to future proceedings – the plea *may* be used as an admission of guilt in future proceedings against co-accused and/or form the basis of future tendency arguments;
4. Statutory consequences – driving disqualification, sexual offender registers, high risk sexual and violent offender orders, firearms prohibition orders;
5. Publicity (advice should be given regarding any potential order for suppression – even if there is no hope of such an order); and,
6. Financial consequences – court costs and victims compensation.

3 CONVENIENCE PLEAS¹⁴

It is clear from authorities such as *Meissner v R* (1995) 184 CLR 132 that a ‘person’ can plead guilty to a charge whether they believed themselves to be guilty or not. It is inferred that this extends to admitting or agreeing to facts.

In *Meissner v R* (1995) 184 CLR 132 that a ‘person’ can plead guilty to a charge whether or not they believed themselves to be guilty In *Meissner*, the majority (at 141) said:

A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty.

In *Meissner*, Dawson J at (157) recognised this fact:

It is true that a person may plead guilty upon grounds which extend beyond that person’s belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.

In *Loury v Regina* [2010] NSWCCA 158 per Whealy J (Kirby J and Hodgson JA agreeing) the court said:

*99 What also emerges from the authorities is that a plea of guilty may be entered for reasons other than a belief in one’s own guilt. As noted by Dawson J in **Meissner v The Queen** (1995) 184 CLR 132, the accused person’s exercise of free choice may “extend beyond that person’s belief in his guilt” and includes situations such as the avoidance of worry or inconvenience, the protection of one’s family and even “the hope of obtaining a more lenient sentence than [the accused] would if convicted after a plea of not guilty” (at 157).*

3.1 CAN A PRACTITIONER ACT?

Whilst it is clear from the Courts that a person can plead guilty to an offence for a multitude of reasons there has been some controversy over whether a legal practitioner can assist them in such a path.

There is a tension between a practitioner’s duty to the Court to act honestly and with candour and their duty to follow their client’s instructions.

It may be thought that this controversy has been laid to rest by the introduction of Rule 41 of the Advocate’s rules which permits an advocate to continue to act in such circumstances. Rule 41 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* [NSW] Advocacy rules states:

41 *Where a barrister is informed that the client denies committing the offence charged but insists on pleading guilty to the charge, the barrister:*

¹⁴ This section touches upon the topic of convenience pleas which are dealt with in much better detail in a 2011 paper by Ben Bickford of the Aboriginal Legal Service entitled ‘convenience pleas’.

- (a) must advise the client to the effect that by pleading guilty, the client will be admitting guilt to all the world in respect of all the elements of the charge,*
- (b) must advise the client that matters submitted in mitigation after a plea of guilty must be consistent with admitting guilt in respect of all of the elements of the offence,*
- (c) must be satisfied that after receiving proper advice the client is making a free and informed choice to plead guilty, and*
- (d) may otherwise continue to represent the client.*

This rule seems to have been a recognition of the widespread nature and permissibility of so called 'convenience pleas.' In *R v Allison* (2003) 138 A Crim R 378 (Qld CA) Jerrard JA giving the leading judgment said (at 385 [26]):

[E]xperience shows that some people charged with serious offences (and particularly offences of incest or indecently dealing with children) wish both to maintain to their lawyers that they are actually innocent, and also to plead guilty. In those circumstances it is imperative that these lawyers ensure that no plea be taken until (written) instructions have been obtained in which the person charged describes a wish or willingness to plead guilty, and an understanding that by so doing, he or she will be admitting guilt. If those instructions are obtained and adhered to a lawyer may properly appear on the plea.¹⁵

It is therefore noted that a legal practitioner can continue to act for a person who wishes to enter a plea of guilty to an offence they did not commit if they comply with rule 41 and obtain written instructions.

It is the writer's opinion that a practitioner should advise any client against pleading guilty to any criminal offence or admitting any 'fact' that they do not truly accept.

This advice may seem contradictory in circumstances where the practitioner must also advise the client of the inevitability of conviction, the utilitarian value of a plea, the advantages of a 'plea deal'. There are two main reasons for this opinion:

1. It is not in a guilty client's interests to deny their guilty to their lawyers in private but admit it in public. Further, a guilty client may seek to shift responsibility upon a practitioner by denying guilt behind closed doors but admitting it to the court (there is no limit to the number of clients who speak of matters on their record in the following terms: 'my lawyer made me plead guilty'). It is in the legal interests (if not personal interests) of a person to fully admit guilt if they are in fact guilty because of the consequences of a plea of guilty.
2. An innocent person has a right to a trial and as a matter of law they cannot, and should not, be punished for maintaining their innocence.

¹⁵ (2003) 138 A Crim R 378 (Qld CA) – *Ross on Crime* [3.8640]

3.2 CONSEQUENCES OF A CONVENIENCE PLEA

Whilst a plea of convenience may avoid the risk of a trial, secure negotiated set of charges or fact sheet and preserve utilitarian discount, it can have several negative consequences that a practitioner must be aware of:

1. A client who pleads guilty or admits facts other than from a genuine belief in guilt may be unable to give evidence on sentence – the risk that their disagreement with guilt, victim blaming or disagreeing with facts may produce the appearance of a lack of contrition and remorse;
2. The client may make statements to a probation officer in preparation of a pre-sentence report or other assessment that deny the offending and are used to argue that the person lacks insight, contrition or remorse. The section 'Attitude to the Offence' is common to pre-sentence reports and clients are rarely sophisticated enough to tell probation officers that they have entered pleas based on principles of convenience;
3. Psychological and psychiatric assessments obtained by the offender's representative may either carry statements of contrition and remorse that may mislead a court if tendered by the offender's representative who knows that the offender denies the offence or carry statements inconsistent with pleas or agreed fact which may lead the court to reject the professional's opinion or find that the offender lacks contrition and remorse;
4. The client may be confronted by evidence of their past plea in future matters where tendency, coincidence or context is argued by the prosecution as if it is a true admission of guilt;
5. The client may find it difficult to obtain parole, participate successfully in sexual offender programs (note 'denier's programs' or be subject to ongoing (high risk) detention and supervision orders as a result of denying the offences despite their plea of guilty; and,
6. The client will be hamstrung on sentence in two directions –
 - a. The client's lawyer will not be able to present to court matters in mitigation inconsistent with the plea (or facts) – i.e. won't be able to submit in mitigation that the offender is not actually guilty of the offence and therefore should be treated more leniently, and
 - b. The client's lawyer will not be able to ask for a finding of contrition and remorse, acceptance of responsibility, recognition of the wrongfulness of their way etc where they know that the client denies actually having offended.

4 WITHDRAWING A PLEA OF GUILTY

An application to withdraw a plea of guilty may be made to a sentencing Court prior to the finalisation of the sentencing matter or to an appeal Court on an appeal against conviction where a plea of guilty was entered in the local court: *R v Chiron* [2018] 1 NSWLR 218.

In the title to this paper and common parlance this can be referred to as 'traversing a plea' which generally means cutting across it.

4.1 TYPES OF APPLICATIONS

Applications to withdraw a plea of guilty can be made at various stages in proceeding. The following is a non-exhaustive list of situations practitioners are likely to encounter:

4.1.1 Summary Proceedings

In summary proceedings, the relevant law for withdrawing a plea of guilty is contained in ss 193 and 207 of the *Criminal Procedure Act 1986* (NSW). Section 193 provides:

193 Procedure if offence admitted

(1) If the accused person pleads guilty, and does not show sufficient cause why he or she should not be convicted or not have an order made against him or her, the court must convict the accused person or make the order accordingly.

(2) This section does not apply if the court does not accept the accused person's guilty plea."

Section 207 provides:

207 Power to set aside conviction or order before sentence

(1) An accused person may, at any time after conviction or an order has been made against the accused person and before the summary proceedings are finally disposed of, apply to the court to change the accused person's plea from guilty to not guilty and to have the conviction or order set aside.

(2) The court may set aside the conviction or order made against the accused person and proceed to determine the matter on the basis of the plea of not guilty.

4.1.2 Appeals from Local Court Sentences against Conviction

Section 12 of the *Crimes (Appeal and Review) Act 2001* allows a person who pleaded guilty in the local court and has been sentenced by the Local Court to appeal against the conviction to the District Court 'with leave' of that Court.

If leave is granted, the District Court may set aside the conviction, dismiss the appeal or, set aside the conviction and remit the matter to the original Local Court for redetermination in accordance with any directions of the District Court (s20(1)).

4.1.3 Matters Committed for Sentence

Where a plea of guilty is entered in the Local Court and a matter is committed to the District or Supreme Court for sentence, s106 of the *Criminal Procedure Act 1986* provides that the accused person can change their plea and the Court must direct that the person be put on trial. The person is

then taken to have been committed for trial.¹⁶ Section 106 ceases to apply once a client is arraigned in a higher court and formally enters a plea of guilty.

4.1.4 After Arraignment in Supreme Court and District Court

Once an accused person has pleaded guilty to an offence in the District or Supreme Court on arraignment, that plea may only be withdrawn by leave of the Court. An application to withdraw a plea of guilty may occur at any time up until sentenced is passed: *Frodsham v O’Gorman* [1979] 1 NSWLR 683. The rules of the District and Supreme Court may govern the form of an application to withdraw a plea (usually a notice of motion with affidavit(s) in support).

If leave is granted, the Court would ordinarily then order a trial.

4.1.5 On appeal from a District or Supreme Court Sentence

A person who pleads guilty to an offence in the District or Supreme Court and is sentenced may appeal against their conviction to the Court of Criminal Appeal under the *Criminal Appeal Act* 1912 either as of right or requiring leave (depending on whether the appeal is based on: a question of law, fact or mixed fact and law or upon certification by the Judge of the court of trial that it is a fit case for appeal (s5)). Depending on the circumstances, the Court might dismiss the appeal, enter a verdict of acquittal or order a new trial in the originating court.

4.1.6 Supreme Court Conviction Inquiry

Under s78 of the *Crimes (Appeal and Review) Act* 2001, a convicted person (whether after trial or a plea of guilty) may make an application to the Supreme Court for an inquiry into their conviction. An inquiry may be granted if it ‘appears that there is doubt or a question as to the convicted person’s guilt.’ After such an application, the Court may direct that the inquiry into the conviction be conducted by a judicial officer or may refer the whole case to the Court of Criminal Appeal to be dealt with as an appeal under the *Criminal Appeal Act* 1912 (s79).

4.2 THE TEST: MISCARRIAGE OF JUSTICE¹⁷

Whether upon an application for leave to withdraw a plea, or leave to appeal or upon a conviction appeal, the starting point for determining whether the application should be successful is whether a miscarriage of justice has occurred or would occur should the sentence proceed or stand. The burden for showing that such a miscarriage of justice has or would occur is upon the applicant. These principles were made clear in *R v Boag* (199) 73 A Crim R 35 per Hunt CJ at CL (with McInerney and James JJ agreeing) (at 36):

In stating the test to be applied in determining whether the applicant should be permitted to withdraw his plea of guilty, the judge correctly said that such a course should be allowed where it has been shown that a miscarriage of justice has occurred. The judge also correctly said that the applicant bore the onus of showing the existence of that miscarriage.

In *R v Sagiv* (1986) 22 A Crim R 73, Lee J (McInerney and Campbell JJ agreeing), made the following observations at 80-81:

¹⁶ Note s104 may apply to offences carrying life imprisonment.

¹⁷ These principles are set out in *Mao v DPP* (NSW) [2016] NSWSC 946.

The substantial general proposition which emerges from these cases is that it is a matter for the discretion of the judge presiding as to whether a plea of guilty should be permitted to be withdrawn and that each case must be looked at in regard to its own facts and a decision made whether justice requires that that course be taken.

It is clear that in the case of mistake or other circumstances affecting the integrity of the plea as an admission of guilt the court should readily grant leave. But if the plea has been entered in full knowledge of all the facts and intentionally as a plea to the charge which is made, the court is plainly entitled to exercise its discretion against a withdrawal of the plea. The law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as an admission of all the legal ingredients of the offence... and as the most cogent admission of guilt that can be made, for the court is prepared to act upon it and proceed to conviction or final disposition of the proceedings.

In *R v Liberti* (1991) 55 A Crim R 120 at 121 – 122, Kirby P said:

*... Courts approach attempts at trial or an appeal in effect to change a plea of guilty or to assert a want of understanding of what was involved in such a plea with **caution bordering on circumspection**. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal ingredients of the offence...*

In *R v Sewell* [2001] NSWCCA 299, Smart AJ (Heydon JA and Simpson J agreeing) at [39] stated:

An accused seeking leave to withdraw a plea of guilty prior to conviction must establish a good and substantial reason for the Court taking that course. The cases reveal many specific examples of when an accused is permitted to withdraw his plea of guilty prior to conviction and I have mentioned some of them. The categories are not closed. The general statement that an accused must show that a miscarriage of justice will occur if he is not given leave to withdraw his plea of guilty or that an accused must show that it is in the interests of justice that leave be granted provide a useful principle against which to evaluate new categories or new factual situations.

In *Ishac v R* [2011] NSWCCA 117, McColl JA (RS Hulme and Hislop JJ agreeing) stated at [30]:

Any miscarriage of justice is to be found in the circumstances in which the applicant came to enter his plea. The question in a case where the applicant seeks to challenge a conviction following a plea of guilty is not guilt or innocence as such, but the integrity of the plea.

R v Kouroumalos [2000] NSWCCA 453 where Wood CJ at CL (Studdert and Whealy JJ agreeing) at [19] said:

What is required for an exercise of the relevant discretion is the identification of some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt or that otherwise the integrity of the plea is bona fide in question.

In *R v Khan* [2002] NSWCCA 521, Giles JA (Sully and Dowd JJ agreeing) at [28] stated:

Putting aside cases where on the admitted facts the accused could not in law have been convicted of the offence charged, R v Davies also shows that the fact the accused

can point to some doubt about his guilt, absent the plea of guilty, does not mean that leave to withdraw the plea will be granted.

4.3 CIRCUMSTANCES THAT MAY CONSTITUTE A MISCARRIAGE OF JUSTICE

Circumstances that might constitute a miscarriage of justice are not subject to a definitive list.

The following, non-exclusive list has been adapted from Harrison AsJ's Summary in *Mao v DPP (NSW)* [2016] NSWSC 946 (see also *R v Hura* (2001) 121 A Crim R 472; [2001] NSWCCA 61):

- Where the appellant 'did not appreciate the nature of the charge to which the plea was entered': *Ferrer-Esis* (1991) 55 A Crim R 231 at 233.
- Where the plea was not 'a free and voluntary confession': *Chiron* [1980] 1 NSWLR 218 at 220D-E.
- The 'plea was not really attributable to a genuine consciousness of guilt': *Murphy* [1965] VR 187 at 191.
- Where there was 'mistake or other circumstances affecting the integrity of the plea as an admission of guilt': *Sagiv* (at 80).
- Where the 'plea was induced by threats or other impropriety when the appellant would not otherwise have pleaded guilty ... some circumstance which indicates that the plea of guilty was not really attributable to a genuine consciousness of guilt': *Concotta* (unreported, Court of Criminal Appeal, NSW, 1 November 1995).
- The 'plea of guilty must either be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt': *Maxwell* (at 511).
- If 'the person who entered the plea was not in possession of all of the facts and did not entertain a genuine consciousness of guilt': *Davies* (unreported, Court of Criminal Appeal, NSW, No 60418 of 1992, 16 December 1993); see also *Ganderton* (unreported, Court of Criminal Appeal, NSW, No 60364 of 1998, 17 September 1998) and *Favero* [1999] NSWCCA 320.
- Where failure of the appellant to appreciate the nature of the charge and difficulties with an interpreter: *Iral* [1999] NSWCCA 368
- Where the advice of trial counsel to enter the plea was held to be imprudent and inappropriate thus occasioning a miscarriage of justice: *Wilkes* (2001) 122 A Crim R 310
- Where senior counsel's inappropriate advice on the applicant's ability to challenge a relevant matter of fact occasioned a miscarriage of injustice: *McLean* (2001) 121 A Crim R 484
- Where counsel placed improper pressure upon the accused: *KCH* (2001) 124 A Crim R 233, *Bercheru* [2001] NSWCCA 102 and *Toro-Martinez* (2000) 114 A Crim R 533.

Additionally (summarised in *Lawson*):¹⁸

- Where, in offering a plea, an accused did not appreciate the nature of the charges or did not intend to admit his or her guilt, or where the applicant, on the admitted facts, would not in law have been convicted of the offences charged.
- A court may also go behind a plea of guilty where the plea is entered after a trial judge has erroneously decided to admit evidence that would be fatal to the defence, or

¹⁸ See *Lawson v The Queen* [2011] NSWCCA 44 (22 March 2011) at [32] citing *R v Kouroumalous* [2000] NSWCCA 453 per Wood CJ at CL (with Studdert and Whealy JJ Agreeing).

- Where an accused person is induced by threats from a fellow accused or police officer to plead guilty where otherwise he or she would have pleaded not guilty: *R v Murphy* (1965) VR 187 at 190.

Example 1 – defence not disavowed in facts

In *Liberti* (1991) 55 A Crim R 120 the Court of Criminal Appeal considered a situation in which an agreed statement of facts contained an undisputed defence to the charge. Mr Liberti was charged with a deemed supply of prohibited drugs. It was recorded in his fact sheet that he had intended to return the drugs to their owner (which established a *Carey* defence – possession for a purpose otherwise than for supply). The court recognised that it had a power to uphold a conviction appeal after a plea of guilty in circumstances where:

1. The appellant did not appreciate the nature of the charges or did not intend to admit that he was guilty of them or,
2. that the appellant, upon the admitted facts, could not in law have been convicted of the offence charged: see esp *Caroso* (1988) 49 SASR 465 at 489; 37 A Crim R 1 at 26.

In upholding the appeal and ordering a new trial, the court commented:

An accused person will not always know the legal consequences of the facts to which he pleads guilty. He or she is normally entitled, where represented, to look to the lawyers to explain those facts for their legal significance. Ultimately, the accused is entitled to look to the court before which he or she comes to offer protection from a conviction which is not, in law, sustained by the facts.

*As to the lawyers who represented Mr Liberti both before the magistrate and before Judge Ford, there was read before the Court today without objection an affidavit by Ms Janelle Ford, solicitor. She had the earlier carriage of these proceedings. It was she who appeared on Mr Liberti's behalf before Judge Ford to offer the pleas. She deposed to the fact that, at the time of the pleas of guilty before Judge Ford, she was unaware of the then unreported decision in *Carey*. Although no evidence was placed before the Court relating to the state of knowledge of the representative appearing for Mr Liberti when the matter was before the committing magistrate, I am prepared to infer that it was of no different quality than that of which Ms Ford gives evidence.*

Beyond the duty of the accused's lawyers, there is a duty in the court receiving the proceedings pursuant to s 51.A of the Justices Act 1902 (NSW) to ensure that the accused may properly be convicted on the facts in respect of which the accused is charged: see s 51.A(1)(d)(i) of that Act. This duty fell upon Judge Ford. It is a duty which must be taken seriously, as the Parliament intended. Ultimately, its application must be assured by this Court. (Per Kirby P)

Example 2 – erroneous legal advice

In *Jimenez v R* [2017] NSWCCA 1 the accused person pleaded guilty to a charge of possessing (Child) pornography in the Local Court. He was fined \$6,600 and then sought leave to appeal his conviction to the District Court, which was refused. The accused then brought an application under s78 of the *Crimes (Appeal and Review) Act 2001* (NSW) for an enquiry into his conviction. This application was considered by Justice Garling in the Supreme Court who found that there was a doubt or a question as to the applicant's guilt and 'the erroneous approach of the applicant solicitor in providing advice to the applicant as to whether or not it was in his interest to plead guilty to the offence.' The supreme court, under s78, then referred the matter to the Court of Criminal Appeal. Mr Jimenez's solicitor, the

Local Court and District Court all considered that an element of the offence of possessing child pornography was that the images depicted a person under the age of 18, where as, in fact, the element required a person to be under the age of 16. Justice Adams concluded:

It seems certain that the appellant was advised, for the purposes of the proceedings and, in particular, the plea, that the offence was committed if the images were of a child aged less than 18 years. The admission of fact, therefore, actually implicit in his plea was that the child was under the age of 18 years. In my view, the plea could not be regarded as an admission that the child was under the age of 16 years. It must follow "that the plea of guilty was not really attributable to a genuine consciousness of guilt": R v Boag (1994) 73 A Crim R 35 at [2]; R v Thalari [2009] NSWCCA 170. The submissions of the Crown, therefore, to the effect that the appellant had in substance otherwise admitted that the images were those of a girl under the age of 16 years, is not to the point.

4.4 CIRCUMSTANCES THAT MAY NOT CONSTITUTE A MISCARRIAGE OF JUSTICE

4.4.1 Simply because the person claims they were innocent

In *Loury v Regina* [2010] NSWCCA 158 per Whealy J (Kirby J and Hodgson JA agreeing):

97 The principles of law relevant to this appeal are not in dispute and were not contested by counsel. The Court has power to hear an appeal notwithstanding that the appellant pleaded guilty before the sentencing court. It will allow the appeal where a miscarriage of justice may have occurred (R v Chiron [1980] 1 NSWLR 218).

*98 In determining whether a miscarriage of justice has occurred, Giles JA (with whom Hislop J and Rothman J concurred) examined the circumstances where a plea has been entered in **R v Rae (No 2)** (2005) 157 A Crim R 182. The ultimate question was not, his Honour stated, the guilt or innocence of the accused person, but rather the integrity of the plea itself (at 188). As Giles JA notes in the later judgment of **Sabapathy v The Queen** [2008] NSWCCA 82 at [14], there will be no miscarriage of justice where the court acts upon a plea of guilty "entered in the exercise of a free choice in what the accused believes to be his interests at the time" and "where there is a genuine consciousness of guilt". Similarly, Hulme J stated in **Woods v The Queen** (2008) 184 A Crim R 108 at 116, not only must it be shown that the person entering the plea did not entertain a "genuine consciousness of guilt" but also that there must be "some factor demonstrated going to the integrity of the plea."*

4.4.2 Simply because the person had pleaded guilty for some reason other than guilt

In *Meissner v R* (1995) 184 CLR 132 that a 'person' can plead guilty to a charge whether or not they believed themselves to be guilty In *Meissner*, the majority (at 141) said:

A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A Court will act on a plea of guilty when it is entered in open Court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of free choice in the interests

of the person entering the plea. There is no miscarriage of justice if a Court does act on such a plea, even if the person entering it is not in truth guilty of the offence.

Further Dawson J at (157) in Meissner recognised that a plea entered for reasons of convenience as opposed of guilty would not be set aside:

It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred.

Loury v Regina [2010] NSWCCA 158 per Whealy J (Kirby J and Hodgson JA agreeing):

Howie J made clear in Wong v Director of Public Prosecutions (NSW) (2005) 155 A Crim R 37 at [33], there will be no miscarriage of justice in situations where a plea of guilty has been entered for the purpose of gaining some perceived advantage, despite maintaining one's innocence, so long as the plea was entered in the exercise of a person's free choice or in his or her own interests.

4.5 PROCEDURE IN THE LOCAL AND DISTRICT COURT

4.5.1 Appearance

It is generally the case that the solicitor or firm of solicitors who entered the plea of guilty in dispute will have a conflict of interests in relation to traversal proceedings and accordingly will be unable to continue to act.

That said, there may be limited circumstances in which a practitioner may remain in the matters at least for a short while. The matter may be resolved by consent with the Prosecutor or the Court may accept a practitioner's word if there has been a clear error on their part.

It also behoves upon a practitioner not to panic at the first sign that their client may wish to change their mind about their plea. Except, perhaps, where the client alleges serious misconduct or incompetence by the solicitor, there is nothing wrong with reminding the client about their previous decision to plead guilty, the existence of their signed instructions, the utilitarian discount and the difficulties in traversing a plea.

4.5.2 Hearing

In the Local Court the 'withdrawing a plea' procedure usually begins with a change in represented and a new representative indicating to the Court that the matter should be adjourned for a hearing to withdraw the plea of guilty previously entered.

It is usual that the court will fix a date for hearing with orders for filing and/or serving evidence to be relied upon. The procedure in the District Court is similar but may be commenced by a notice of motion attaching an affidavit in support.

The applicant for the pleas to be withdrawn bears the onus of showing that circumstances exist entitling them to withdraw the plea.

It is desirable, if not correct, for evidence to be given by way of affidavit with the deponents available for cross-examination.

Depending on the issue said to constitute the grounds for withdrawing the plea of guilty, the applicant's evidence may consist of an affidavit from the applicant and the applicant's legal representatives up to the time the plea was entered.

The previous solicitor will require a waiver of confidentiality from the client prior to writing an affidavit, discussing the case or releasing their file. They may refuse to provide an affidavit at all, in which case, their attendance will be required at Court (by subpoena if necessary).

Technically the applicant's previous solicitor may be a witness for the prosecutor if their evidence is at odds with the applicant's. It may still, however, fall to the applicant to arrange for the previous solicitor's evidence or attendance at court if their application is to succeed. The applicant bears onus of demonstrating that a miscarriage of justice has occurred. The Courts may view any evidence of the applicant that could be contradicted or confirmed by the previous solicitor with great circumspect if the previous solicitor has not been called to contradict or confirm that evidence.

Hikala v Constable Elliott; Treloar v Constable Elliott [2016] NSWSC 81, dealt with an application to withdraw a plea of guilty that was improperly dealt with by the Learned Magistrate in the Local Court.

In that case the applicants entered pleas of guilty to certain charges while represented by a solicitor. Some months later the applicants appeared represented by new solicitors and applied to withdraw the pleas of guilty previously entered. The applicants claimed they had been pressured into the pleas by the previous solicitor.

On the date for hearing of the traversal Brown LCM accepted affidavits of the applicant and the applicant's previous solicitor. The applicants made their claims of inappropriate pressure in their affidavits. The previous solicitor denied any such pressure. The legal representatives applied to cross-examine the previous solicitor and Brown LCM refused this request saying that such matters are 'normally dealt with by way of affidavit alone'. Brown LCM then disqualified himself from hearing the matter further and a similar application was made to Knight LCM which was also refused to allow the applicants to cross-examine the deponent.

Button J in an appeal to the Supreme Court set aside the orders of the magistrates and made the following comments on the procedure to be adopted in such applications:

Speaking more generally with regard to principle, if there is a dispute about an important question of fact, and contradictory affidavits or written statements are relied upon by the opposing parties, then each party must have the opportunity to cross-examine the deponents that support the case of his or her opponent, except in very unusual circumstances. Our system of justice does not operate by way of determinations of issues of credibility based upon analysis of documents; perhaps that statement applies with even more force to our system of criminal justice.

Turning specifically to disputed applications to withdraw a plea of guilty, I respectfully think that it is not the case that such matters are commonly dealt with on the papers. To the contrary, my experience is that the resolution of the vast majority of such matters requires the calling of oral evidence, because of the general principle I have set out above.

As well as that, Howie J spoke in Wong v DPP [2005] NSWSC 129; (2005) 155 A Crim R 37 of the same need when his Honour said at [18]:

But where the resolution of the application depends upon the magistrate forming a view as to the integrity of a plea of guilty as an acknowledgment or confession of guilt, and where that matter can only be resolved by forming a view as to the defendant's knowledge and understanding of the effect of a plea of guilty or by determining the circumstances in which the plea was given, there is no room for short cuts or informality. There may be cases where the objective facts make it plain that a doubt must arise about the integrity of the plea, but that would be an exceptional state of affairs.

5 SUMMARY

Entering a plea of guilty or admitting a fact on behalf of a client in criminal proceedings is a task that should not be undertaken lightly.

The principles and discussion set out above aim to guide practitioners in relation to proper standards to be exercised when taking instructions as to a plea from a client to ensure that they do not contribute to a miscarriage of justice.

The principles relating to withdrawing and/or traversing a plea of guilty prior to sentence or on appeal are important both to inform a practitioner's practice when taking instructions to enter a plea of guilty and assisting clients who have wrongly entered pleas of guilty and seek to withdraw them.

Attached to this paper is an example set of written instructions that could be used in criminal proceedings. It is meant, by no means, as a template and each set of instructions must be detailed and specifically suited to the case at hand – but it may be a starting point.