Section 58 Issues on Sentence in the Local Court

1. This paper is intended to assist defence lawyers in identifying and arguing section 58 issues in the Local Court.

2. Section 58 is important for both defence lawyers and prosecutors to be aware of.

3. From the perspective of a defence lawyer, a lack of awareness of section 58 can result in clients serving sentences of imprisonment that are contrary to law and go past any sentence of imprisonment that could lawfully have been imposed. It may also deprive a client of the opportunity to secure an extremely lenient sentence which may be lost when their existing sentence expires or the prosecution elects to have the matter dealt with on indictment.

4. From the perspective of a prosecutor, a failure to notice the application of section 58 can result in offenders escaping all or most of the sentence of imprisonment that they ought to receive where the need for an election is not identified and promptly made.

What is section 58?

5. The Local Court's jurisdiction on sentence is generally limited to no more than 2 years imprisonment for any one offence and no more than 5 years imprisonment for multiple offences.[1]

6. Section 58 of the *Crimes (Sentencing Procedure) Act 1986* effectively operates to limit the Local Court's power to impose consecutive sentences of imprisonment on already existing sentences if to do so would exceed a total continuous sentence of 5 years.

7. The policy reasons behind this are obvious. If section 58 did not exist then, by sentencing an offender on multiple occasions, the Local Court could effectively operate with no total sentencing limit at all. Most of the time section 58 operates in this way and presents no real issues.

8. The full text of section 58 is at the end of this paper.

What is a section 58 issue?

9. Occasionally, section 58 will operate to create what is commonly referred to as a 'section 58 issue'. This is where at sentence a Magistrate finds themselves being unable to impose a sentence of imprisonment that they consider to be warranted by operation of section 58. Sometimes the Magistrate may not be able to impose any meaningful sentence of imprisonment at all. The reason these issues arise is largely a result of the definition of an 'existing sentence' contained in section 58:

> '***existing sentence*** means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).'

[1] See *Criminal Procedure Act 1986* ss 267(2) and 268(1A); *Crimes (Sentencing Procedure) Act 1999* ss 53B and s 58.

10. The most common example of this is where a defendant has been charged while still on parole and has been immediately refused bail and brought before the court. The defendant may either have multiple overlapping sentences of imprisonment or have a single large sentence of imprisonment. Importantly, a sentence of imprisonment includes both the non-parole and the parole period as well as ICOs and Control Orders.[2] An existing sentence also includes sentences imposed in courts other than the Local Court.

11. 5 years from the date upon which the earliest chain of unbroken sentences begins will be the date that the Local Court cannot impose any consecutive sentence of imprisonment.

12. It should also be noted that section 58 does not limit the power of a Magistrate to impose a wholly concurrent sentence of imprisonment. If an offender has a substantial parole period left, then the Local Court is still able to impose any sentence of imprisonment that fits within that parole period.

13. The exceptions to the application of section 58 contained within 58(3) and 58(3A) should also be carefully considered in each case. Especially keeping in mind that the limitation provided by s 58(3) only operates if ss 58(3)(a) *and* 58(3)(b) apply.

Can the prosecution elect and the Magistrate commit the matter to the District Court to avoid a section 58 issue?

14. If the prosecutor in the matter does not notice the section 58 issue and elect, then it is unlikely to be identified until it is too late. Section 263 of the *Criminal Procedure Act 1986* prohibits an election from being made after either of the following two events:

> '(a) in the case of a plea of not guilty—the commencement of the taking of evidence for the prosecution in the summary trial,
>
> (b) in the case of a plea of guilty—the presentation of the facts relied on by the prosecution to prove the offence.'[3]

15. The practical effect of this is that the Magistrate is unlikely to have the criminal history needed to identify a section 58 issue until after the events in section 263 have already occurred.

Can the prosecution withdraw the charges and file an *ex officio* indictment?

16. There is nothing preventing the prosecution from withdrawing charges before they are finalised in the Local Court and filing an *ex officio* indictment even after the events contemplated by section 263(3) have occurred. Although not an authority on this point, the power to circumvent section 58 by filing *ex officio* seems to have been confirmed in *Johnston v Director of Public Prosecutions*.[4]

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[2] See *Crimes (Sentencing Procedure) Act 1999* ss 7(1) and s 58.
[3] *Criminal Procedure Act 1986* s 263(3).
[4] [2021] NSWSC 333 at [67].

17. In *Johnston*, the Local Court Magistrate's decision to commit a matter after a plea of guilty and the presentation of the facts was found to be in error. The Magistrate had found that an election was made when it was internally communicated to the prosecutor despite not being communicated to the Local Court or the defendant. The Supreme Court found that an election is not made for the purposes of section 263 until it is made orally to the Local Court or by filing a written notice consistent with the regulations. The Magistrate had therefore accepted an election after the events contemplated by section 263 and was in error. However, the Supreme Court dismissed the appeal against the Magistrate's decision regardless as an *ex officio* indictment had already been filed. [5]

18. It is an open question whether an *ex officio* indictment filed in these circumstances could amount to an abuse of process[6] and would depend on the specific facts of each case.

Can the prosecution elect after a sentence has already been imposed?

19. Once a sentence has been imposed then the Local Court is *functus officio*.[7] In any subsequently initiated proceedings for the same offence, including an *ex officio* indictment, the defendant could enter a plea in bar of *autrefois convict*[8] and have the matter dismissed.

20. There is one potential exception to this rule where the defendant was dealt with in their absence under section 196.[9] In those circumstances it is possible that the prosecution may be able to file a section 4 application to annul the sentence and conviction, effectively rolling back the matter to a point where they can still elect. This seems unlikely and is discussed in more detail later.

What if a sentence contrary to section 58 has already been imposed?

21. Section 43 of the *Crimes (Sentencing Procedure) Act 1999* allows a court to reopen sentencing proceedings to correct an error. A request to re-list the matter before the Local Court to correct the error should be the first step taken. The registry will usually try to list the matter before the Magistrate that imposed the sentence originally, although this is not required.

22. If the Magistrate refuses to correct the error, then the next step is to file a severity appeal to the District Court. When hearing a severity appeal the District Court is bound by section 58 as well and will need to impose a sentence that does not exceed its limits.[10]

23. If the section 58 error is not identified until after the matter has been finalised in the District Court on appeal, the District Court can still reopen the proceedings pursuant to section 43 to correct the error as well.

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[5] *Johnston v Director of Public Prosecutions* [2021] NSWSC 333 at [61] to [68].
[6] *Johnston v Director of Public Prosecutions* [2021] NSWSC 333 [69].
[7] See *DPP v Edwards* [2012] VSCA 293.
[8] See *Criminal Procedure Act 1986* s 156 and 206; *R v Stone* [2005] NSWCCA 344.
[9] *Criminal Procedure Act 1986*.
[10] *Crimes (Appeal and Review) Act 2001* s 71.

24. In the highly unlikely event that all these steps fail then judicial review in the Supreme Court will be the next step.

What if a defendant has been convicted in their absence?

25. Section 196 of the *Criminal Procedure Act 1986* gives the Local Court the power to hear and determine a matter in the absence of an accused should they fail to appear before the court when required. Almost invariably when a matter proceeds under section 196 the CAN will be handed up and all of the charges proven with no further evidence.

26. At first glance it may seem that matters dealt with under section 196 do not involve the occurrence of any of the events contemplated by section 263[11] and the prosecution are still free to elect afterwards. A closer inspection of the surrounding provisions to section 196 makes it clear this is not the case.

27. Section 198 states that an accused person is taken to have pleaded not guilty if they are absent and have not lodged a written plea of guilty:

> '198 Absent accused person taken to have pleaded not guilty
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> An accused person in proceedings who is absent from the proceedings and who has not lodged a written plea of guilty in accordance with section 182 is taken to have pleaded not guilty.'[12]

28. This means that, in any event, by the time a matter comes for sentence subsequent to being dealt with pursuant to section 196 the accused has either pleaded guilty or will be taken to have pleaded not guilty and have been convicted by operation of section 198. The result of this is that one of the events contemplated by section 263 will inevitably have occurred.

Can the prosecution file a section 4 application to annul the conviction and then elect?

29. Section 4 of the *Crimes (Appeal and Review) Act 2001* allows both the prosecution and the defendant to apply to the Local Court to annul a conviction or sentence provided it was imposed in the defendant's absence.

30. This section is almost exclusively used by defendants who have failed to appear at the Local Court for one reason or another and who wish to plead not guilty or seek a more lenient sentence. Although it is highly unusual for a prosecutor to seek an annulment, it is clear from the legislation that this option is available and would most likely allow the prosecution to elect if the section 4 is granted.

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[11] *Criminal Procedure Act 1986*.
[12] *Criminal Procedure Act 1986* s 198.

31. The test for the granting of an annulment application by the prosecutor requires the court to be satisfied that there is 'just cause' for doing so.[13] The prosecution will usually be presented with the difficulty that the annulment is sought due to their own failure to elect in a timely manner.

What if the defendant was serving a sentence of imprisonment but their prior sentence expires before they are sentenced for the fresh offence?

32. If, on the date of sentence, the defendant is not currently serving a sentence of imprisonment and has no time in custody referable to the offence for sentence then there will clearly be no section 58 issue.

33. If, on the date of sentence, the defendant is not currently serving a sentence of imprisonment but has spent time in custody in relation to the offence for sentence then that time spent in custody must be taken into account.[14] The ordinary approach to taking into account time spent in custody is to backdate the commencement date of the sentence proportionately. Where this may present a section 58 issue is if the backdate brings the new sentence of imprisonment back to a point where it overlaps with a previous sentence of imprisonment. The judicial discussion on this does not clearly point to a single conclusion.

34. In *Stoneham v Direction of Public Prosecutions (NSW)*[15] Ierace J found that:

> 'The correct interpretation of s 58 is that it operates if, at the time the Local Court looks to "*impose a new sentence*", there is an existing sentence; its application is not determined by whether there is an existing sentence at the time that the new sentence commences.'[16]

35. The decision in *Stoneham* did not turn on this point but rather the decision of the Magistrate to adjourn the proceedings to avoid the application of section 58.[17] The plaintiff in *Stoneham* argued that such an interpretation would defeat the legislative intent of section 58 by allowing the court to routinely avoid its effect.[18] Nonetheless, the passage above suggests that if a defendant comes before a court to be sentenced and is not at the time serving a sentence of imprisonment then the Local Court can impose a new sentence without any section 58 issue. This will be so even if, backdating on account of time in custody, the defendant will serve continuous unbroken sentences of imprisonment exceeding a total of 5 years.

36. It is important to note that the comments in *Stoneham* are obiter as the case was decided on a separate issue and lower courts may not consider themselves to be bound by it. Indeed, shortly after *Stoneham* was decided the District Court in *Perrin v R*[19] seems to have considered and distinguished the comments by Ierace J in *Stoneham.*

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[13] *Crimes (Appeal and Review) Act 2001* ss 8(1).
[14] *Crimes (Sentencing Procedure) Act 1999* ss 24(a).
[15] [2021] NSWSC 735.
[16] *Stoneham v Direction of Public Prosecutions (NSW)* [2021] NSWSC 735 at [30].
[17] *Stoneham v Direction of Public Prosecutions (NSW)* [2021] NSWSC 735 at [31].
[18] *Stoneham v Direction of Public Prosecutions (NSW)* [2021] NSWSC 735 [19] to [26].
[19] [2021] NSWDC 408.

37. In *Perrin v R* [2021] NSWDC 408, Haesler SC DCJ rejected the DPP's argument, relying on *Stoneham*, that section 58 only applies where there is an unexpired sentence at the time the new sentence is imposed:

> 'As the Director now wants me to interpret the section - as long as the new sentence is imposed after the earlier sentences have expired s 58 could not be invoked. The difficulty I have with that interpretation is that it would be contrary to the words of, and defeat, the clearly expressed purpose of the section.'[20]
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> …
>
> 'That is not what Justice Ierace intended; as his Honour implicitly made clear by his reference to "in the context of this matter." Magistrate McGowan applied orthodox sentencing principle. The result was a total sentence as accumulated of just under 5 years 11 months. That the new sentence would end more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began and thus infringed s 58.'[21]
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> …
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> 'Reading s 58(4) into s 58(1) in the context of this sentencing exercise –
>
> > The [District Court on appeal] may not impose a new sentence of imprisonment to be served … partly concurrently and partly consecutively with [any unbroken sequence of expired sentences] if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.'[22]

38. It appears the District Court in *Perrin* took a more purposive approach to interpreting section 58 than the strictly literal approach taken in *Stoneham*.

39. *Stoneham* has the advantage of being a Supreme Court authority, although the comments on the question of when section 58 is engaged are obiter. *Perrin* has the advantage of being decided on the point in question but the disadvantage of being a District Court decision and therefore not a binding authority.[23]

40. It is hard to know which interpretation will ultimately be authoritatively preferred. Practically, this means there is substantial benefit in a defendant getting to sentence quickly whilst still serving a sentence to avoid the dilemma identified in *Perrin* and *Stoneham*.

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[20] *Perrin v R* [2021] NSWDC 408 at [81].
[21] *Perrin v R* [2021] NSWDC 408 at [86].
[22] *Perrin v R* [2021] NSWDC 408 at [94].
[23] *Valentine v Eid* (1992) 27 NSWLR 615.

What if the Prosecutor or the Magistrate try to adjourn the proceedings to avoid section 58?

41. In *Stoneham*, the Magistrate adjourned sentence proceedings expressly for the purpose of avoiding the effect of section 58.

42. Ierace J in *Stoneham* found the following in relation to the Magistrate's approach:

> 'I am of the opinion that Gibson LCM fell into judicial error in his judgment of 28 August 2020. The decision to adjourn the sentence proceeding part-heard to a date after 2 October 2020, in order to defeat the legislative intention that was apparent in s 58, was not a valid exercise of legislative power. While one can readily appreciate his Honour's concern in view of the disparity between the period that the plaintiff had spent in custody exclusively on these matters and his view of the sentence that they warranted taking all relevant matters into account, he was nevertheless required to exercise his sentencing discretion within the bounds of s 58.'[24]

43. It follows that any other departure from the usual sentencing practices to avoid the operation of section 58 will also likely be in error.

Ethical considerations

44. Frequently the reason why a section 58 issue arises is because the prosecutor is unaware of section 58 or has not turned their mind to it. The overwhelming majority of Local Court matters are handled by police prosecutors who are not usually lawyers and have large caseloads. It is easy to see how section 58 issues can go unnoticed until it is too late.

45. The question then arises as to the ethics of a lawyer capitalising on the apparent mistake of the police for the benefit of their client.

46. Notably, ASCR[25] Rule 30 states:

> '30.1 A solicitor must not take unfair advantage of the obvious error of another solicitor or other person, if to do so would obtain for a client a benefit which has no supportable foundation in law or fact.'

47. Although some decisions by the prosecution can seem mysterious, it cannot be said that a decision not to elect is an 'obvious error'. It also cannot be said that the advantage offered by section 58 to a defendant 'has no supportable foundation in law or fact'. As is apparent from the cases that have been discussed, the advantage offered by section 58 is well founded and no criticism of the defendants or their representatives in relying on section 58 has been suggested.

48. It is a matter for the prosecution to decide when to elect and that could include considerations that are unknown to the defendant, their lawyer, or the court. A lawyer for the defendant is not obliged to query that decision. It also seems unethical for a lawyer to arm the prosecution with

[24] *Stoneham v Direction of Public Prosecutions (NSW)* [2021] NSWSC 735 at [31].
[25] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

information that may be used to maximise the sentence that can be imposed against their own client.[26] There is no reason why the defendant and their lawyer cannot remain silent on the issue of section 58 until after the events in section 263 have passed in order to guarantee its benefit. The court should be directed to section 58 shortly after the events in section 263 pass to ensure that it does not fall into appealable error.

49. ASCR Rule 7.2 must also be considered:

> '7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the matter.'

50. This imposes an obligation on solicitors to advise their clients that they can plead guilty or not guilty and any advantages to doing so. It follows that solicitors must inform their clients of the utilitarian discount they may get on sentence as well as the effect of section 58 if it applies.

51. In relation to Barristers, rule 38 states:

> '38 A barrister must (unless circumstances warrant otherwise in the barrister's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty), if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.'[27]

52. There is nothing unethical about a solicitor or barrister advising their client of the potential application of section 58. Indeed, it would be unethical to deliberately withhold this information from a client. If the client chooses to instruct their lawyer to enter a plea of guilty to take advantage of a lenient sentence offered by section 58, then there is nothing unethical about the lawyer acting on those instructions.[28] Written instructions should always be obtained where appropriate. This is especially so where a 'convenience plea'[29] is entered to take advantage of a section 58 issue.

Joseph Healy

Solicitor

Aboriginal Legal Service

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[26] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* rr 4.1.1 and 4.1.3.
[27] *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 38.
[28] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 8.1.
[29] See 'Convenience Pleas' by Benjamin Bickford, Aboriginal Legal Service, 2011.

58 Limitation on consecutive sentences imposed by Local Court

(1) The Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.

(2) Any period for which an existing sentence has been extended under this or any other Act is to be disregarded for the purposes of this section.

(3) This section does not apply if—

(a) the new sentence relates to—

(i) an offence involving an escape from lawful custody, or

(ii) an offence involving an assault or other offence against the person, being an offence committed (while the offender was a convicted inmate) against a correctional officer or (while the offender was a person subject to control) against a juvenile justice officer, and

(b) either—

(i) the existing sentence (or, if more than one, any of them) was imposed by a court other than the Local Court or the Children's Court, or

(ii) the existing sentence (or, if more than one, each of them) was imposed by the Local Court or the Children's Court and the date on which the new sentence would end is not more than 5 years and 6 months after the date on which the existing sentence (or, if more than one, the first of them) began.

(3A) In addition, this section does not apply if the new sentence relates to an offence against the regulations under the *Crimes (Administration of Sentences) Act 1999*) involving—

(a) introducing or supplying (or attempting to introduce or supply) a drug, alcohol or other substance prohibited by those regulations into a place of detention, or

(b) introducing or supplying (or attempting to introduce or supply) syringes into a place of detention, or

(c) possessing an offensive weapon or instrument within the meaning of the *Crimes Act 1900*,

or

(d) possessing a mobile phone, a mobile phone SIM card or mobile phone charger (or any part of these).

(4) In this section—

existing sentence means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).

sentence of imprisonment includes an order referred to in section 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987*.