

PRACTICE DIRECTION NO. 2 OF 2009

FAMILY VIOLENCE LIST

This Practice Direction takes effect from 30 May 2009 and replaces Practice Direction No. 2 of 2005 from that date.

1. Application

This Practice Direction sets out the procedures that are to be followed in, and applies to, those criminal proceedings that relate to offences characterised as “family violence”. The definition of a “family violence” offence is that used in the Protocols established under the Family Violence Intervention Program:

“A family violence offence is an offence that takes place within the context of such a relationship and which is an offence identified in Schedule 1 to the *Crimes Act 1900* or an offence against section 34 of the *Protection Orders Act 2001* [now section 90 of the *Domestic Violence and Protection Orders Act 2008*].”

1.1 Application to major cases

Major cases will be identified by the Court in consultation with the DPP and the defence. A major case is one that will require more than 3 days hearing, or involve significant pre-hearing arguments or rulings, or requires an extended timetable for the completion of the brief of evidence due to the nature and complexity of the case. Major cases may be identified at, or prior to, Family Violence Case Management Hearings (“FV Case Management Hearings”). Where major cases are identified prior to a FV Case Management Hearing the matter will still be allocated a FV Case Management Hearing date. Prior to the FV Case Management Hearing date the DPP will notify the Listing Coordinator of any likely major cases in the upcoming FV Case Management Hearing list. The Court

will then be in a position at the FV Case Management Hearing to allocate a specific Magistrate to separately case manage and hear those matters.

1.2 Application to defendants in custody

This Practice Direction applies to proceedings where the defendant has pleaded not guilty and is in custody. “In custody” cases are distinguished in that the timetable for the listing of the FV Case Management Hearing and brief delivery does not apply, and instead an appropriate timetable for case management will be determined in light of the need to determine these cases expeditiously.

1.3 Recording of outcomes at Family Violence List

The outcomes of the Family Violence List are to be recorded and statistics kept for the purpose of measuring responsiveness to, and effectiveness of, the specialist Family Violence list.

2 Enforcement of this Practice Direction

Practitioners should be aware of the powers available to Magistrates to award costs against parties in criminal matters and to order the payment of witness expenses. Magistrates may also dismiss informations. These powers may be employed to ensure that the requirements of this Practice Direction are adhered to.

3 Entering of a plea

3.1 First Mention

3.1.1 The DPP shall ensure that all charges that relate to family violence offences are appropriately identified as such when the charges are first brought before the court.

3.1.2 When a summons is served upon a defendant in person a statement of facts and an information sheet explaining the Court process shall accompany the summons. When defendants appear before the Court for the first time pursuant to a summons, charge or court attendance notice they or their legal representatives are to be provided by the DPP with a copy of the following:

- charge sheet(s)
- statement of facts
- criminal record.

If an adjournment is required to obtain legal advice a 3 week remand will be allowed. Before leaving Court the defendant will, unless legal representation has already been arranged, be referred to a representative of the ACT Legal Aid Office for the purpose of arranging advice and, if appropriate, representation.

3.1.3 Matters identified as family violence will be adjourned to a dedicated Family Violence list. Wednesday has been selected as the day upon which the designated Family Violence list magistrate will conduct both Family Violence mentions and case management hearings. The mentions list will commence at 9.30am and case management hearings will be set down at specific times, usually not before 2pm.

3.1.4 Matters in which a plea of guilty has been entered that require the preparation of a pre-sentence report may be adjourned to a specific time in the Family Violence list, usually not before 11.30am.

3.2 Representations

Any representations to be made by the defence to the DPP in respect of the continuation of the prosecution are to be made within 7 days of the first mention. If representations are made within that time frame the DPP is to indicate a decision in respect of those representations by or at the second mention. Any further adjournments for the consideration of representations will be at the discretion of the Court.

3.3 Second Mention

Before the second mention the prosecution is to serve on the defence a copy of the primary witness statement and any other documentary evidence that is available. The defendant's legal representative will be expected to be properly instructed by the second mention on all matters. Consultation should take place between the defence and the DPP before the second mention. Unless there are exceptional

circumstances on the second mention a defendant will be expected to indicate a plea. In order to obtain the greatest benefit from a plea of guilty such a plea should be entered at the first or second mention. Unless requested (for example, where a bail application is then to be made) the informant will not be required to attend the second mention.

4 Process following a not guilty plea

4.1 Allocation of a FV Case Management Hearing date

4.1.1 If a plea of not guilty is indicated the matter will be adjourned to a FV Case Management Hearing, usually to be held not earlier than 6 weeks from the date of the plea being entered. The Court may list the FV Case Management Hearing at anytime, usually not before 2.00pm on Wednesdays. All defendants will be required to attend and will usually be bailed to the FV Case Management Hearing date. Bail documentation will require attendance by the defendant half an hour before the allocated time.

4.1.2 In respect of “in custody” cases, an appropriate timetable for the FV Case Management Hearing will be determined in light of the need to determine these cases expeditiously.

4.2 Brief preparation

Within four weeks of the plea of not guilty being entered the AFP will prepare and deliver to the DPP a full brief of evidence. The brief is to comply with any agreement between the AFP and DPP about the preparation of briefs as well as any further agreed disclosure requirements. This timeline may be varied by the court upon application by the DPP or defence where the defendant is in custody, the matter is identified as a major matter or where there is otherwise good reason to do so.

4.3 Service of brief on defence

4.3.1 As soon as practicable after receipt of the brief, and in any event no later than 14 days before the Case Management Hearing, the DPP will serve a copy of

the brief on the defendant's legal representative. Where a defendant is not legally represented the brief will be made available for collection by the defendant at the office of the DPP.

4.3.2 The brief served on the defendant or his or her legal representative will be accompanied by a copy of the Magistrates Court Case Management Hearing Form which is Annexure C.

4.4 Early listing

Where a FV Case Management Hearing date has been set the DPP or defence may arrange with the Magistrates Court Listing Coordinator to bring the date for case management hearing forward, particularly where it is clear at an early stage that the case will resolve by either a plea of guilty or the DPP offering no evidence, or where an adjournment is required. Where a plea of guilty is foreshadowed the Court may remove the matter from the FV Case Management Hearing List and allocate it to a plea list.

4.5 Documents required for the FV Case Management Hearing

The DPP will file with the Court before the Family Violence Case Management Hearing copies of the statement of facts or other case summary and a witness list in respect of each matter.

5. The Family Violence Case Management Hearing

5.1 Preparation for the FV Case Management Hearing

5.1.1 No later than 48 hours before the FV Case Management Hearing, the defendant or his or her legal representative is to complete the Magistrates Court Case Management Hearing Form and return it to the DPP as provided for on the form.

5.1.2 By the time of the FV Case Management Hearing, any legal representative of the defence must be fully instructed. The defendant must be present at the FV Case Management Hearing, and if a defendant does not appear a warrant may issue for the defendant's arrest.

5.1.3 The representative of the DPP must have a sufficient understanding of the matter to provide information required by the Court and must have the authority necessary to effectively participate in the FV Case Management Hearing. Unless there are exceptional circumstances the informant should be present at the FV Case Management Hearing.

5.2 Discussion between the Defence and DPP

One of the purposes of the FV Case Management Hearing process is to ensure that appropriate and constructive negotiation take place between the defence and the DPP as to:

- the charges that will proceed at hearing;
- whether pleas will be entered to some or all of the charges;
- whether all the witnesses named in the brief will be required to give oral evidence;
- whether statements can be tendered by consent; and
- the issues actually in contest.

Discussion as to these matters is to take place between the parties **before** the FV Case Management Hearing and the Court will inquire of the parties as to these matters. It is recognised that discussion between the DPP and self represented defendants may only be of a limited nature.

5.3 The Family Violence Case Management Hearing

5.3.1 At the FV Case Management Hearing the presiding magistrate may:

- invite the DPP to elaborate upon the case summary if required;
- require the DPP to briefly outline the nature of the evidence to be called in relation to the charges;
- invite the defence to indicate what the issues in the case are and what, if any, pleas are offered in respect of the charges or any replacement charges;

- invite the defence to indicate to what extent, if any, the prosecution brief can be tendered;
- canvass with the DPP the acceptability of the pleas offered;
- require the parties to identify witnesses required at hearing; and
- establish the time required for the hearing.

5.3.2 In cases where an issue arises about the preparedness of the alleged victim to give evidence the Court may enquire of the prosecution of the measures:

- taken to ensure the alleged victim's safety; and
- to ensure the alleged victim's attendance to give evidence.

5.3.3 There may be cases where it is reasonable to adjourn the first FV Case Management Hearing in order to ensure that case management issues are properly addressed prior to a case being listed for hearing. Where the case has been prepared but the parties have been unable to confirm instructions or discuss the issues the Court may stand the matter over to a later time in the same FV Case Management Hearing list in order for the taking of instructions or for discussions to take place.

5.3.4 If a plea of guilty is entered at the FV Case Management Hearing the Court may deal with the matter immediately or adjourn the matter to another time or date. Where the sentence of the matter is adjourned the magistrate conducting the FV Case Management Hearing may consider the matter not to be part-heard in relation to the sentence.

5.3.5 Pleas of guilty entered at the FV Case Management Hearing will usually attract a lesser discount on sentence than a plea entered at an earlier time.

5.4 Identification of 'transferable hearings'

5.4.1 If at the FV Case Management Hearing a hearing date is set, the Court will seek an indication from the prosecutor as to whether the particular case is a 'transferable hearing'. A 'transferable hearing' is one that can be earmarked by the Court, following consultation with the DPP and the defence as being suitable to be moved from an existing hearing list to another list on short notice without significant disruption to the running of the case by either the prosecution or the

defence. The purpose of the transfer at late notice by the Court is to allow a more efficient use of Court resources allocated to particular hearing lists when matters in those lists collapse on or shortly before the allocated hearing day.

5.4.2 Upon attending the FV Case Management Hearing the prosecutor will have already identified the matter as ‘transferable’ based on:

- the less serious nature of the charge;
- an estimated length of hearing of 3 hours or less;
- the small number of witnesses who will not require proofing; and
- a straightforward factual dispute.

Consideration will also be given to the desirability of a prosecutor from the Family Violence team conducting the hearing.

6. Indictable charges

6.1 Consent

Where the charge against the defendant is indictable but may be heard summarily with the consent of the defendant, the defendant will be required to indicate his or her consent at the FV Case Management Hearing, including any adjourned case management hearing. Where prosecution consent is required for a charge to be heard summarily the giving or withholding of that consent must be indicated at the FV Case Management Hearing.

6.2 Applications to examine/ cross-examine witnesses

6.2.1 Where the charge against the defendant is indictable and cannot be heard summarily, or where the defendant intends to not consent to the charge being heard summarily, and the defendant wishes to apply to cross-examine a witness at committal, the defendant or his or her legal representative is to complete, serve upon the DPP and lodge with the Court an Application to Cross-Examine a Witness in the form of Annexure B no later than 48 hours before the FV Case Management Hearing.

6.2.2 Where the prosecution wishes to cross-examine a witness in committal proceedings it will complete, serve upon the defendant or his or her legal representative, and lodge with the Court an Application to Cross-Examine a Witness in the form of Annexure B:

- in the case of a charge that cannot be heard summarily - not later than 48 hours before the Case Management Hearing; and
- in any other case - immediately following the defendant declining to consent to the charge being heard summarily.

This provision does not preclude the prosecution making an application under s.38 of the Evidence Act 1995 during the course of a committal hearing.

6.2.3 Where the prosecution wishes to apply for a prosecution witness to give evidence in person at a committal hearing it will complete an Application to Examine a Witness in the form of Annexure A to this Practice Direction:

- in the case of a charge that cannot be heard summarily - not later than 48 hours before the FV Case Management Hearing; and
- in any other case - at the FV Case Management Hearing, following the defendant declining to consent to the charge being heard summarily.

6.2.4 Wherever possible, applications under paragraphs 6.2.1, 6.2.2 and 6.2.3 will be heard and determined at the FV Case Management Hearing. If that is not possible, the application may be adjourned to another date. Where appropriate the matter may be referred to the Magistrate allocated to hear the committal proceedings.

7. Pre-hearing procedures

7.1 Following the FV Case Management Hearing and as soon as possible, the parties are to continue to endeavour to resolve matters before the hearing. If there is an occurrence that will significantly affect the hearing they must notify the Court as soon as is practicable and no later than 48 hours before the hearing. Failure to do so without reasonable excuse will be relevant to any application for costs or the awarding of witness expenses.

7.2 Any application to withdraw consent to summary disposal pursuant to s.375A of the Crimes Act 1900 must be made not less than 14 days before the hearing. Unreasonable failure to comply with this provision may result in a costs order being made.

8. Applications for bail or variations

Generally, contested applications for bail or for the variation of bail conditions should **not** be made during the Family Violence list, either in the mentions list or the case management hearing. Any such application may be made in the A list following the appropriate 48 hours notice to the other party and upon arrangement with the Listing Coordinator. However applications that are by consent may be dealt with in the Family Violence list. Other applications may only be dealt with in the Family Violence list in exceptional cases and at the discretion of the presiding Magistrate.

9. Hearing lists

9.1 Movement of ‘transferable hearings’

If shortly before, or on the listed hearing date, the Court determines there is a need to move a transferable hearing into a different list, the Listing Coordinator will consult with the DPP and defendant’s legal practitioner. Where a hearing is transferred to a new prosecutor on the day of the hearing the Court will allow some time to enable the prosecutor to prepare the matter. The Court will not move a hearing out of one list and into another where a defendant’s legal practitioner or a witness has other matters remaining in the original hearing list.

9.2 Hearings that are listed but not finalised

9.2.1 Hearings that are listed in a hearing list but not reached may be allocated a fresh date or may continue on the Court’s next sitting date at the convenience of the Court. Practitioners involved in hearings that commence but do not finish on the allocated hearing date should expect that the hearing will continue on the next date convenient to the Court which may be the following day, and should be in a position to make arrangements for that continuation.

9.2.2 Where it is necessary to adjourn to another date a hearing matter that does not commence on the date allocated, the Court will ordinarily adjourn the matter for hearing before the same Magistrate originally allocated to hear the matter.

Dated 21 May 2009

By direction of the Chief Magistrate and Magistrates

R J Cahill

Chief Magistrate

Annexure A

Section 90AA Magistrates Court Act 1930

APPLICATION TO TAKE EVIDENCE IN CHIEF IN PERSON

SECTION A

Charge numbers:

Defendant's name:

Defendant's Solicitor:
(if applicable)

Name of witness:

SECTION B

Why will the interests of justice not be satisfied if the witness's evidence in chief is not given at the hearing?

DATE:

On behalf of the DPP/Informant

Note: This Application may be lodged by emailing it to mclistings@act.gov.au or by fax to 02 6205 4857.

Annexure B

Section 90AB Magistrates Court Act 1930

**APPLICATION TO CROSS-EXAMINE A WITNESS IN
COMMITTAL PROCEEDINGS**

(A separate application is to be completed for each witness)

SECTION A

Charge numbers:

Defendant's name:

Defendant's Solicitor:
(if applicable)

Name of witness:

Name of party applying:

SECTION B

Identify the issues to which the proposed questioning of the witness relates.

SECTION C

Why is the evidence of the witness relevant to the issue?

SECTION D

Explain why the evidence disclosed by the prosecution does not address the issue.

SECTION E

Identify the purpose and general nature of the questions to be put to the witness to address the issue.

SECTION F

Identify why the interests of justice cannot adequately be satisfied by leaving cross-examination of the witness about the issue to the trial.

DATE:
.....
Counsel/ Solicitor/ Defendant / DPP

Note: This Application may be lodged by emailing it to mclistings@act.gov.au or by fax to 02 6205 4857.

INDICTABLE CHARGES WHICH CANNOT BE HEARD SUMMARILY OR WHERE THE DEFENDANT DOES NOT INTEND TO CONSENT TO SUMMARY HEARING.

Any application to cross-examine a witness at committal proceedings must be made in the form of the Application to Cross-Examine Witness available on the Court's website at www.courts.act.gov.au/ (follow the links to the Magistrates Court) **at least 48 hours before** the CMH. Follow the directions on the form to lodge the application with the Court. See Practice Direction No. 1 of 2009.

Where the committal is to proceed on the basis of the tender of the prosecution brief of evidence, will there be submissions by the defence? Yes / No

Signed
Defendant/ defendant's legal representative

DEFENDANTS PLEASE NOTE

Once completed this document must be returned to the office of the DPP at least 48 hours before the Case Management Hearing.

It may be:

Hand delivered to the office of the DPP at Reserve Bank Building, Knowles Place Canberra; or

Faxed to ACT DPP on: **(02) 6207 5428**; or

Emailed to ACT DPP at the following address:
dppCMH@act.gov.au