



NEW SOUTH WALES  
BAR ASSOCIATION

# READER / TUTOR GUIDELINES

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Reader/Tutor Guidelines  
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## A. Introduction

1. The Reading Program should be a mutually rewarding experience. Each tutor will have views about the best means of instructing readers and about matters requiring special attention. Different readers will have different requirements for supervision and guidance. The experience of reading has always varied according to the temperaments, personalities and inclinations of tutor and reader - most important is that there is effective and constructive instruction to achieve the twin aims of the Reading Program:
  - a. **Education and support:** to provide new barristers with an “apprenticeship” during which they have the benefit of the support and instruction necessary to assist them in starting a new career at the bar; and
  - b. **Quality assurance and public protection:** to supervise and assess new barristers during a period of restricted practice until they are certified by their tutor(s) as “fit” to practice without restriction.<sup>1</sup>.
2. This guide sets out the regulatory regime of the Reading Program (in Part B), then addresses the importance of reader/tutor communication and other aspects of the reading program. Finally, as an appendix, there is a suggested program of instruction addressing court procedures, etiquette, practice management and other issues.
3. This document is intended to provide a useful guide to assist tutors and readers in establishing and developing their relationship – a key aspect of which is that it be flexible, shaped by the individuals involved to best meet the needs of the reader. Expectations of the relationship must be realistic, having regard to the capacity of those involved. But equally, the importance of the Reading Program demands that sufficient time be allowed for appropriate supervision and support of each reader.

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<sup>1</sup> which are to be inferred from the regulations set out in Part B

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## B. Regulation of Reading Program

### Summary of features of the Reading Program

4. The key features of the Reading Program, drawn from the regulatory regime set out below, are that a barrister must complete a readership for a period of 12 months from the commencement of their practice at the bar, during which time:
  - a. the reader must be supervised by one or two junior counsel of at least seven years' call (subject to the discretionary approval of tutors between five and seven years' call);
  - b. the reader is expected to develop their skills both independently of and together with their tutor(s);
  - c. in the first six months of the reading period, the reader must undertake the civil and criminal reading requirements for a period of ten days in relation to each;
  - d. until the civil and criminal reading requirements are met, the reader may only appear unled with the prior approval of their tutor; and
  - e. the reader is not to accept direct access briefs without their tutor's written approval (subject to certain exceptions).
5. At the end of the reading year, tutors are expected (although not obliged) to certify the reader's fitness to practice without restriction if that be the case.

### Section 50 of the *Legal Profession Uniform Law (NSW)*

6. Section 50 of the *Legal Profession Uniform Law (NSW)* (**Uniform Law**) provides as follows:

*(1) It is a statutory condition of an Australian practising certificate granted in this jurisdiction, with a condition that the holder is authorised to engage in legal practice as or in the manner of a barrister only, that the holder must:*

*(a) undertake and complete to the satisfaction of the designated local regulatory authority a reading program (whether full-time or otherwise) specified in the Uniform Rules or otherwise approved by the designated local regulatory authority; and*

*(b) read for a period specified by the designated local regulatory authority<sup>(1)</sup> with a barrister who is—*

*(i) of a class or description specified in the Uniform Rules<sup>(2)</sup> or otherwise approved by the designated local regulatory authority; and*

*(ii) chosen by the holder; and*

*(c) comply with any other requirements specified by the designated local regulatory authority for the purposes of this paragraph.*

*(2) The designated local regulatory authority may impose a discretionary condition limiting the practising rights of a barrister referred to in subsection (1) until the statutory condition is complied with.*

*(3) The statutory condition, once satisfied, does not have to be complied with again unless the designated local regulatory authority otherwise directs.*

*(4) The designated local regulatory authority may exempt a person or class of persons from the statutory condition.*

*(5) The exemption may be given unconditionally or subject to any conditions that the designated local regulatory authority thinks appropriate.*

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## **Eligible Tutors: Bar Council Resolution of 25 February 2016**

7. On 25 February 2016, Bar Council resolved as follows:

1. *Resolve that the specified class of barrister approved by the Bar Council (as the designated local regulatory authority), for the purpose of section 50(1)(b(i) of the Legal Profession Uniform Law (NSW) (**Uniform Law**) (**Potential Tutors**) is a barrister who:*
  - a. *is a full-time practising New South Wales barrister, but need not be a member of The New South Wales Bar Association;*
  - b. *has continuously held a New South Wales barrister's practising certificate for not less than seven years, subject to 4. below;*
  - c. *has not been appointed senior counsel at the beginning of the reader's reading period;*
  - d. *has not had conditions imposed on his or her practising certificates pursuant to the Uniform Law or the Legal Profession Act 2004 within the past ten years (other than the standard conditions applying to readers, crown prosecutors, public defenders, parliamentary counsel and academics); and*
  - e. *is not within any of the following categories:*
    - the subject of an adverse finding by the Administrative Decisions Tribunal, NSW Civil and Administrative Tribunal or Supreme Court (**competent court or tribunal**);*
    - had practising certificate cancelled or suspended;*
    - had a finding of professional misconduct or unsatisfactory professional conduct made by a competent court or tribunal;*
    - otherwise been the subject of action is within the definition of **disciplinary action** in s 148 of the Legal Profession Uniform Law Application Act 2014 (there for the purposes of Part 12 of that Act) or s 576 of the Legal Profession Act 2004 (there for the purposes of Part 4.10 of that Act);*
    - been convicted of a **serious offence** as defined in the Uniform Law.*
  - f. *has attended a mandatory CPD session conducted by the Bar Association for Tutors*
2. *The Bar Council may dispense with, or relieve against, the requirements in 1d, e and f. in whole or in part.*
3. *The Bar Council delegates to the Bar Council Executive the authority to act on behalf of the Bar Council, in respect of this power to dispense with, or relieve against, the requirements in 1d, e and f.*
4. *The Bar Council delegates to the Executive Director the authority to act on behalf of the Bar Council, in consultation with the members of the Bar Council Executive, the Director, Professional Development and the Education Committee as the Executive Director believes appropriate, in respect of applications to be a tutor where the barrister has continuously held a NSW barrister's practising certificate more than five but less than seven years.*
5. *A reader may have more than one tutor, in which event the reader must nominate one as the certifying tutor. A barrister can only be the certifying tutor for one reader in each Bar Practice Course and cannot be the certifying tutor for two readers undertaking consecutive Bar Practice Courses. A barrister can be a second, or non-certifying, tutor for no more than two readers at any one time.*
6. *Noting the Practising Certificate Conditions for Readers, the Director, Professional Development will maintain a list of potential tutors for the information of potential readers.*

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**Requirements of readers: Bar Council Resolution of 25 February 2016 – Bar Practice Course and readers’ practising certificates**

8. On 25 February 2016, Bar Council resolved that conditions be attached to readers’ practising certificates to the effect below, and adopted a Bar Practice Course policy which includes:

**Bar Practice Course Policy**

*3) In order to complete satisfactorily the Bar Practice Course a reader must, to the satisfaction of the Course Director and Director, Professional Development:*

- a) Punctually attend all sessions in the Bar Practice Course unless exempted or excused by prior arrangement.*
- b) Satisfactorily prepare written material, as prescribed during the course.*
- c) Satisfactorily prepare and present applications before the court for each of the practical sessions.*
- d) Satisfactorily conduct a series of discrete short hearings.*
- e) Satisfactorily perform an examination in chief of a witness and a cross examination of a witness in the advocacy sessions.*
- f) Satisfactorily conduct conferences with witnesses for the purposes of the final trial.*
- g) Satisfactorily prepare and present a case for hearing at the final trial.*

*4) Where the reader has failed satisfactorily to complete the Bar Practice Course the reader will be required to:*

- a) Complete such further assessment or assessments as prescribed by the Course Director and Director, Professional Development; and/or*
- b) Undertake all, or part, of the next Bar Practice Course.*

*5) The Bar Council may dispense with, or relieve against, compliance with any of the foregoing requirements, in whole or in part, either before or after the occasion for compliance arises.*

*6) FURTHER RESOLVED that the Bar Council delegate to the Executive Director the authority to act on behalf of the Bar Council, in consultation with the members of the Bar Council Executive and the Education Committee as the Executive Director believes appropriate, in respect of the matters noted above.*

**Practising Certificate Conditions for Readers**

*1. Reading Programme*

The holder of this certificate (‘the Reader’) must do the following:

- a. Read with at least one but not more than two barristers for not less than 12 months (the reading period). The Reader must choose each of these barristers from a list of potential tutors kept by Bar Council or a barrister who arranges to be added to that list of tutors (a barrister so chosen is a tutor). The reading period:
  - i) begins on the date this certificate is issued;
  - ii) may include the period of the Bar Practice Course; and
  - iii) ends when all tutors certify that the Holder is fit to practise without restriction;

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b. Complete the Bar Practice Course, to the satisfaction of Bar Council; or its delegate under the Bar Practice Course Policy

c. Within six months of commencing the reading period: i) participate with a leader in a total of at least 10 days of preparation, conferences and hearing(s) of criminal proceedings ('criminal reading') according to the requirements for criminal reading as approved by Bar Council; and ii) participate with a leader in a total of at least 10 days of preparation, conferences and hearing(s) of civil proceedings ('civil reading') according to the requirements for civil reading as approved by Bar Council;

d. Meet the requirements of the Bar Council's Continuing Professional Development program. For the purposes of these conditions a leader is defined as a barrister who is senior counsel or who has more than five years experience as a barrister and holds an unrestricted practising certificate.

### *2. Practice rights during and prior to satisfactorily completing the Bar Practice Course*

The Reader has no right of practice during the period of the Bar Practice Course. Prior to completing the Bar Practice Course to the satisfaction of Bar Council or its delegate under the Bar Practice Course policy:

- a. the Reader must not appear in any court or tribunal except if led by a barrister who holds a current practising certificate without readers restrictions; and
- b. the Reader may undertake opinion work for a solicitor, with the prior consent in writing of a tutor.

### *3. Reading with Tutor*

During the reading period, the Reader must do the following:

- a. Attend on the tutor(s), appear as an observer with the tutor(s) and comply with the reasonable directions of the tutor(s);
- b. Study diligently:
  - i) the art of advocacy;
  - ii) the general work and practice as a barrister, including drafting documents, advising clients and dealing with solicitors, clients, witnesses and the public; and
  - iii) the proper conduct and ethics of a barrister;
- c. Study under the tutor(s), including reading and discussing briefs with the tutor.

### *4. Practice rights after satisfactorily completing the Bar Practice Course but prior to the completion of both criminal and civil reading requirements*

After completing the Bar Practice Course to the satisfaction of Bar Council or its delegate under the Bar Practice Policy but prior to satisfactory completion of both the criminal and civil reading requirements:

- a. within six months of commencing reading the Reader may not appear in any court or tribunal except:
  - i) if led by a barrister who holds a current practising certificate without readers' restrictions, or
  - ii) with a tutor's approval for each such appearance.

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b. where the Reader has failed satisfactorily to complete their criminal and civil reading within six months of commencing reading (as required by condition 1(c)) the Reader:

- i) must apply to the Director, Professional Development for a formal extension of the Holder's civil and criminal reading period, and
- ii) may appear in any court or tribunal only with a tutor's prior written approval for each such appearance; or
- iii) if led by a barrister who holds a current practising certificate without readers' restrictions.

*5. Practice rights after satisfactory completion of both the Bar Practice Course and criminal and civil reading requirements*

After receipt of certification of the completion of both the Bar Practice Course and the criminal and civil reading requirements to the satisfaction of Bar Council, the Reader may appear in any court or tribunal without being led and, subject to condition 6, without a tutor's approval for the particular appearance.

*6. Direct client access restriction before completing the reading period*

The Reader must not during the reading period accept a brief from a person other than a solicitor without a tutor's written approval for the particular brief. Exception: This restriction does not apply if the Reader held an unrestricted solicitor's practising certificate immediately before being issued with this certificate, or in cases where the Reader is participating in the Duty Barrister Schemes conducted in the Local Court or the District Court.

**Certification Form**

9. At the end of the reading year, the reader's tutor, or if there are two tutors the "certifying tutor" (see [2] of Bar Council Resolution of 25 February 2016, quoted above) must complete a form to certify that the reader is fit to practice. The form requires the tutor to:
- a. indicate the frequency of contact during the reading year and, inter alia, the quality of the reader's chambers work, court preparation skills, and knowledge of the law; and
  - b. detail the level and type of instruction and supervision provided over the course of the year.

The Certification Form provides an important indicator of the nature and scope of the supervision and instruction required of tutors – because the tutor must, at the end of the year, be in a position to certify that the reader is 'fit to practice as a barrister without restriction' or that additional reading should be undertaken.

**Bar Council's Expectation of Tutors (former NSW Barristers' Rule 112)**

10. The NSW Bar Council has a continuing expectation that tutors will (as was required under former NSW Barristers' Rule 112) assist their readers with all reasonable skill and diligence to comply with all the requirements imposed by conditions attached to the reader's practising certificate. In particular:
- a. to instruct the reader in:
    - i. the art of advocacy;

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- ii. barristers' work;
  - iii. the proper conduct of a barrister's practice; and
  - iv. the ethical standards required of a barrister, including the NSW Barristers' Rules;
- b. to set aside sufficient time to meet and speak with the reader regularly;
  - c. to make arrangements for the reader to attend the barrister in chambers to be shown and to assist in chamber work from time to time;
  - d. to make arrangements for the reader to appear with the barrister in court as an observer;
  - e. to ensure that the reader is attending to all necessary or appropriate courses of instruction arranged by the Bar Association; and
  - f. to introduce the reader to the barrister's colleagues.

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## C. Communication Between Reader/Tutor

### A discussion at the outset

11. Tutors and readers need to discuss their mutual expectations of the relationship from the outset. Areas that should be discussed include:
  - a. The reader's previous litigation/advocacy experience;
  - b. Expected regularity of contact by email and telephone and expected regularity of meetings and convenient meeting arrangements (see [17] below);
  - c. Any particular concerns the reader may have, or areas in which the reader feels he or she requires further development;
  - d. Having regard to (c) above, suggestions by the tutor for further development of the reader's skills;
  - e. Expectations in relation to assessment and feedback, including whether and how the tutor will assess the reader's performance in court;
  - f. Expectations as to work to be received from the Tutor, or those on the Tutor's Floor, along with expectations as to payment (see also further below);
  - g. Expectations as to behaviour/conduct in the course of practice, especially by reference to Bar Rule 123 and 125 (concerning the prohibition against engaging in conduct which constitutes discrimination, sexual harassment or workplace bullying) and, to the NSW Bar Association's Best Practice Guidelines;
  - h. The times that the tutor is most likely to be available to confer with the reader, including whether the tutor prefers not to be disturbed in the period immediately before going to court;
  - i. Should the reader feel free to join a conference already under way;
  - j. Whether the tutor will make a point of inviting the reader to court and conferences; and
  - k. The approach the tutor will take in the context of the other tutor, including how they will work with that other tutor.
12. A reader, particularly one with little or no previous experience, may expect to be given more time than the tutor has ever contemplated providing. Or, a new tutor may not appreciate how much time effective tutelage involves. This mismatch in expectations should be considered and resolved at the earliest possible time.
13. Again, in some cases the nature of the tutor's practice may not allow for the provision of instruction in a particular field of interest to the reader - another mismatch in expectations. In such cases tutors may be able to (and should) arrange for the reader to attend court with another barrister practising in that area.
14. These sorts of potential problem areas are more readily addressed if the reader has two tutors, which is recommended. However, if a reader does have two tutors it is suggested that the tutors also discuss with each other the role that each expects it will play. It may be that in some cases an introductory meeting between the reader and both tutors is appropriate.

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15. A key feature of the introductory meeting should be to outline the expectations of each of the tutors and reader. For the reader, this may include areas of practice that the reader is interested in developing, and any special concerns the reader has in relation to the development of his or her written or advocacy skills. For the tutor, this may include matters of ethics or professional practice that the tutor considers should form part of the reader's instruction. Raising these matters from the outset encourages the parties to develop a program for the readers' instruction that meets these expectations.
  16. Other matters upon which the reader may be seeking guidance at an early stage include:
    - a. Small business requirements, including having appropriate record systems to issue and track invoices, funds received and expenses incurred;
    - b. Financial arrangements, such as disclosure and billing requirements;
    - c. Ongoing continuing professional development requirements pursuant to the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015*;
    - d. The requirements imposed by the *Professional Standards Act 1994 (NSW)*; and
    - e. Identifying and making the most of opportunities to develop their profile and market their services.
  17. While being available to undertake work is particularly important during the reading year, it is important that practising barristers maintain work/life balance, personal relationships and outside interests, and also that they take some leave. The tutor should discuss these issues with the reader, to assist the reader to develop a strategy to manage the commitments of the reading year with personal commitments.
  18. A tutor may wish to consider whether his or her practice allows time to instruct effectively more than one reader at a time.

#### **A timetable to meet regularly**

19. Tutors ought to be accessible at mutually convenient times. The form of such communication may be by telephone and/or email but reasonably frequent meetings are essential.
20. Some tutors require that, unless they are out of chambers, the reader should attend at the tutor's chambers at a specified time each day. Others would regard that as a counsel of perfection and, in any event, as something not necessarily to be welcomed by the reader. But the danger is that unless regular meetings are held, the demands of everyday practice may tend to overtake the tutor's responsibilities. Accordingly, meetings at designated times each week will serve to concentrate both minds on the responsibilities of both parties.

#### **A time each day when the reader can consult the tutor**

21. Independently of the regular timetabled meetings, tutors may be willing for readers to raise discrete matters with them at any time, regardless of other pressures.
22. Often, however, pressures are such that, despite the best intentions, readers may be deterred from interrupting the tutor's work. The most convenient course may be for the tutor to nominate a time - perhaps at the very beginning and/or end of the day - when the reader is to be at liberty to approach the tutor for assistance.
23. There may be times when a reader requires special attention on an urgent basis – for example, when an ethical issue arises during a hearing. It is recommended that the tutor and reader discuss the tutor's availability to advise on such occasions, and where the reader may turn if the tutor is not available.

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### **Establish a procedure for the reader to read briefs**

24. It is expected that readers will attend upon their tutors to discuss briefs, attend conferences and accompany them to court.
25. If readers are to obtain the maximum benefit from conferences and attendance at court, they must be familiar with the nature of the particular case and have an opportunity to consider the legal, evidentiary and tactical questions that arise. For this reason, tutors ought make available to their reader the central documents comprising the brief (i.e. pleadings, submissions, evidence) for the reader to read.

### **Frank and direct communication**

26. Communication difficulties can be minimised by tutors being open and direct with readers and, in particular, by explaining what to expect. For example, it may be appropriate for tutors to offer forthright criticism of their reader's paperwork or of the reader's approach to a particular problem. Tutors should make it clear that such criticism is intended to be helpful, and readers should accept it in that spirit.
27. If there are matters of concern to tutors - even on apparently trivial issues - they should not hesitate to raise them with the reader. Similarly, readers are encouraged to broach their own concerns about their work or professional relationship to tutors. Unresolved irritants are likely to worsen.

### **What if things go wrong?**

28. Difficulties may arise for many reasons; for example, the reader and tutor may have a personality clash. It is not expected that readers or tutors will complete the year if the experience will be unproductive or distressing to either party.
29. Should either party regard the difficulties in the tutor/reader relationship as substantial, the following avenues may be pursued to resolve these difficulties:
  1. Raise the issue directly with the reader/tutor;
  2. Raise the issue with the reader's second tutor for their advice and/or conciliation;
  3. Raise the issue with the clerk for their advice and/or conciliation;
  4. Raise the issue with the Head of Chambers or a senior member of the floor for their advice and/or conciliation;
  5. If either the reader or the tutor's floor has adopted the NSW Bar Association's Best Practice Guidelines (see section H), engage the procedures set out in the Model Grievance Best Practice Guideline; or
  6. Contact the Director, Professional Development of the NSW Bar Association.
30. If an issue arises during the course of the year which means that the tutor/reader relationship ought not to continue, it is important that the issue be addressed immediately and not at the end of the year. It is only fair to both reader and tutor that the reader have the opportunity to have another tutor and that the tutor not feel pressured to certify the reader, if to do so would compromise the tutor's integrity.
31. A barrister breaching Bar Rules 123 and 125 (relating to discrimination, harassment and bullying) may be found to have engaged in professional misconduct (section 298(b) of the Uniform Law). Importantly, where a reader or tutor is from a floor that has implemented the NSW Bar Association's Best Practice Guidelines, failure to follow those Guidelines can result in a breach of these Rules. In this context, it is important to note that the Guidelines prohibit discrimination, harassment and bullying in relation to employee, contractors,

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casuals, volunteers, students and/or trainees, whether engaged by the Floor or directly by Barristers on the Floor, as well as at Bar Association events and social functions. Situations involving allegations that could constitute discrimination, harassment and bullying require careful consideration that may warrant the advice of a senior barrister with expertise in discrimination, harassment and bullying.

32. If a situation should arise that may compromise the relationship, in addition to the avenues listed above, the following senior counsel have agreed to be available to discuss the matter confidentially, so that the issue may be resolved promptly:
- a. Michael Fordham SC;
  - b. Neil Williams SC;
  - c. Kylie Nomchong SC;
  - d. Dermot Ryan SC;
  - e. Tony Payne SC;
  - f. Julia Lonergan SC;
  - g. Eugene Romaniuk SC;
  - h. Hament Dhanji SC;
  - i. Dean Jordan SC;
  - j. Pat Griffin SC;
  - k. Ingmar Taylor SC; and
  - l. Kate Eastman SC.

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## D. Attending Court & Civil/Criminal Reading

33. An essential part of the Reading Program is that the reader attend court. This allows the reader invaluable opportunities to observe court craft, procedure and etiquette, and is reflected in the requirements for civil and criminal reading.
34. The reader's attendance at court should not necessarily be confined to the required period of civil or criminal reading. The reader should be encouraged to attend court with the tutor or with other barristers whenever the reader's practice permits.
35. Over the year, the reader will also attend court alone - mainly for directions and interlocutory hearings. Guidance from tutors is particularly valuable so the reader may prepare and appear effectively. Although the demands of practice may not always permit it, readers should aim to gather all necessary information about their appearances early so that discussions with tutors are fruitful, and not rushed. Any Court attendance requires preparation, but as a reader it requires more - and earlier - preparation; a reader can never be over-prepared.

### **Attending court with tutor**

36. The benefit to readers of attending court with tutors (which should be encouraged, if not mandatory, at every opportunity) will be increased greatly if the reader understands in advance not only the legal and factual issues in the case, but what the tutor proposes to do, and why. That is, the purpose of the hearing, the issues in dispute, and, where applicable, the approach the tutor plans to take with each witness, whether in chief or in cross-examination.
37. For the reader to understand and contribute to this discussion - as well as to then understand the way the dispute plays out in court - it is essential that the reader have had an opportunity to read the relevant papers in the matter - refer to [24]- [25] above.
38. The more the reader has read about the matter, and the more in-depth this discussion, the more the reader is likely to gain from the experience in court. Explanation after the event - although useful - is unlikely to teach the reader as much as contemporaneously following the proceedings with the benefit of prior discussions and an understanding of the strategy and tactics involved.
39. When attending court, tutors should, with the instructing solicitor's permission, announce their reader's appearance as a junior and encourage the reader to take an active role as such i.e. take detailed notes of proceedings, maintain the list of exhibits, locate documents or authorities as appropriate.
40. It may not always be possible for the reader to appear at the bar table. Where the reader is attending as an observer at the back of court, the tutor should ensure to make contact with the reader, explain the proceedings and take any questions.
41. Tutors can use civil and criminal reading as an opportunity to provide instructions on the role of an effective junior counsel.

### **Civil and Criminal reading**

42. The necessary requirements for civil and criminal reading are set out above. However, the value of attendance at court is significantly enhanced when the reader is fully immersed in the controversy, has read the necessary documents before attending court, and is able to discuss it afterwards. The reader will also benefit from

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attendance at conferences during adjournments and after court, where the instructing solicitor and client permit. Readers are encouraged to seek out such an arrangement for each day of their civil and criminal reading.

43. For those tutors and readers whose practice is largely in the civil jurisdiction, arrangements ought be made for criminal reading with appropriate counsel, and a reader would be wise to undertake this reading as early as possible in the reading year so that it does not conflict with offers of paid work which will come. It is suggested such criminal reading include one or two short trials or summary hearings; little will be learned from sitting through part of a long trial. It is generally preferable to do some of the reading with the prosecution and some with defence counsel. A reader should note all procedural matters, however trivial for example, when does the Crown announce his/her appearance and what does he/she say? When does the defence announce his/her appearance? During jury empanelment, what does the defence say about assisting the accused with their challenges, and when? Note also anything that the judge says at the beginning of the trial, and that the Crown says in opening, on issues of general application for example as to onus and standard of proof, function of the opening, role of the judge and jury.
44. Similar notes should be taken in the course of attendance at a civil proceeding, in particular, how did the plaintiff open the case? What did the defendant say in opening? How did the court deal with the evidence – in particular any objections.

### **The readers' court craft**

45. By the end of the reading year, tutors should have a good idea of their readers' progress and abilities with regard to chamber work. However, without having actually seen their court appearances, tutors will have no idea of the readers' practical advocacy skills. Even those readers who have previous experience in advocacy will benefit enormously from practical advice and encouragement from their tutor occasionally accompanying them to court.
46. For those readers with little or no previous court experience, the tutors' obligation in this regard becomes obvious. Just as the reader must see the tutor in court in order to learn from him or her, mere discussion of the readers' court appearances before or afterwards cannot replace the benefit of the tutor's first hand observations.

### **Preparing for any court appearance**

47. Although the demands of practice may not always permit it, readers should aim to gather all necessary information about their appearances early so that discussions with tutors are not immediately before the event. Preferably, this should be days in advance, so that arrangements can be made to meet and discuss the matters with tutors. A harried call from a mobile phone in a crowded elevator is unlikely to avert an impending disaster, assuming that you are able to speak to the person you are calling. Any Court attendance requires preparation, but as a reader it requires more and earlier preparation: a reader can never be over-prepared.

### **Directions Hearings**

48. A particularly common form of work for readers is appearing at directions hearings. To ensure the reader is able to suitably represent the client's interests and assist the court, readers are encouraged obtain the following information from the solicitor or barrister asking him/her to appear:

1. *Who do we appear for?*
2. *Who appears on the other side?*
3. *What is the case about?*
4. *What orders do we seek?*

5. *What orders does the other side seek?*
6. *What is in dispute in relation to the orders?*
7. *What court/list is it in? and is there a relevant practice note or unwritten practice of that list/judge?*
8. *Does the court have power to make the orders we seek? (ie does the Registrar?)*
9. *Check the relevant practice note.*
10. *Check the court list to confirm where is the matter listed.*
11. *If you are attending to take a hearing date, be sure to know:*
  - a. *How long the hearing is estimated to take?*
  - b. *How many witnesses for your side – who are the experts and what is expertise?*
  - c. *Available dates for counsel, solicitor, and witnesses.*
12. *When was the matter last in court and what orders were made?*
13. *Has there been compliance by both sides with the orders?*
14. *If there has been non-compliance, what was it and why? Is either side complaining about non-compliance?*
15. *How many times has the matter previously been listed for directions?*
16. *Is there a history of default? If so, be prepared for criticism from the court and possibly unwillingness to make consent orders. Court may also required evidence of explanation for default this time?*
17. *Is affidavit material required? If so, has it been served? is it admissible?*

49. Directions hearings can be important to the outcome of proceedings, particularly if the proceedings have reached a stage where there is a history of non-compliance with Court orders, or a dispute as to orders concerning evidence, particulars or pleadings. Often a tutor can provide valuable guidance about the approach to be taken to a particular directions hearing, particularly if the reader is able to advise their tutor of the above-listed considerations, so the tutor can detect the likely approach a Court will take, the nature of the arguments likely to be raised by the opposing party, and the most effective approach to achieve the client's objective.

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## E. Junior Work and Devilling

### **Preparation of drafts of pleadings, affidavits or advices**

50. A critical part of reading is instruction and practice in the settling of pleadings, affidavits and other litigious documents, in the preparation of written advices, and in 'devilling' generally. It may not be practicable for the reader to prepare a draft in every case, but subject to this limitation it is desirable for the reader to prepare a first draft of some of the pleadings, affidavits and advices which the tutor is briefed to settle or give. Encouragement to undertake legal research in the preparation of advices and in preparation for the tutor's court appearances should be the order of the day.
51. The fact that both tutor and reader are contemporaneously concentrating on the same matters means that the reader's draft can be most efficiently assessed by the tutor. It is one thing for readers to be told how to draft something as a theoretical exercise: it is quite another for them to compare their own draft in connection with a current brief with the work of their tutor on the same matter, and to have the benefit of their tutor's comments on the draft. It may be of assistance for readers to maintain diary notes of work exercises undertaken together with a summary of their tutor's comments.
52. Review and correction of a reader's draft should be accompanied by discussion of it. The reader will benefit from the comparison of his or her work with the tutor's where the tutor explains why changes are made and the tutor's approach to the legal problem at hand.

### **Devilling: establish guidelines for payment (if any)**

53. Sometimes there are different expectations, as between tutors and readers, as to when, if at all, payment will be made for work performed by readers (i.e. devilling). This can create tension in the relationship. No rigid rule can be laid down. Readers are not unpaid research assistants. On the other hand, readers must not expect to be paid for all the work that they undertake for their tutors. Whatever approach is adopted, it is better that reader and tutor understand and accept the ground rules at the outset.
54. In respect of some work which the tutor gives the reader to do, he or she could do it more satisfactorily and in half the time. The work is often given for the reader's benefit, not for that of the tutors. An expectation of payment for all work undertaken will only lead to a 'drying up' of the opportunities to learn from doing work. Often a balance may be struck; that is, instances where the reader will not charge of all of the time taken to complete the work, but nevertheless, it is important that the reader be remunerated for work that is of volume.

### **Challenges of junior work**

55. Traditionally, readers are warned that income in the first year or two may not be high because of the nature of the work available. New barristers are naturally anxious to begin to earn a good income at the earliest possible opportunity.
56. Tutors ought have a frank discussion with their readers as to the likely opportunities, which will arise during the year for the reader to be briefed as the tutor's junior.
57. Tutors ought also keep a general eye on the nature of work the reader is undertaking to ensure it is at an appropriate level. By way of example, a reader may be particularly vulnerable to the lucrative offer of a brief to undertake the task of document discovery. This may take up months, if not all, of the reading year. While it is cost effective for a firm to employ a junior barrister rather than a solicitor for this task, this type of work is not, in the long term, helpful in developing advocacy skills or a practice. It may preclude opportunities for a variety of court experiences and can result in lack of contact between tutor and reader.

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58. It is suggested that the tutor raise with their reader at an early opportunity common challenges which arise in undertaking junior work – particularly for readers, including but not limited to:
- a. how to deal with last minute ‘flick’ briefs eg District Court strike out application;
  - b. settling disputes and drafting consent orders;
  - c. undertaking pro bono work and/or duty barrister work;
  - d. the care required in undertaking direct access work;
  - e. dealing with absent solicitors in witness conferences / at court;
  - f. juggling multiple mentions in different courts; and
  - g. chasing payment.

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## F. Program of Instruction

59. Many tutors take the view that there are certain texts and materials that every new barrister should be reading during the year of reading, regardless of previous studies of the subject. A tutor might compile a list of leading authorities on basic topics (such as certain rules of evidence, the setting aside of subpoenas, legal professional privilege), which should be read. The list of authorities and topics will doubtless depend on the views and fields of practice of the tutor and the reader.
60. Such readings may provide the basis for a program of instruction, of particular value in the first few months of the reading year. An example of such a program of instruction appears as an **Appendix** to these Guidelines, although of course, ultimately the tutor and reader must together determine whether it is essential or desirable that they follow this or a similar program of instruction, having regard to the aims of the reading program.

## G. Behaviour at the Bar

61. All barristers are expected to treat their colleagues at the bar with professionalism, dignity and courtesy.
62. If for some reason that expectation is not being met within the reader/tutor relationship, the relationship may deteriorate. It is best to raise any issues early before they escalate and affect the long-term relationship between reader and tutor. As discussed above at [29], there are a variety of avenues available to both a reader and tutor to address any issues that may arise in the relationship. The path chosen will largely depend on the nature and circumstances of the issue.
63. Readers and tutors are reminded that Rule 123 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* provides that a barrister must not, in the course of practice, engage in conduct which constitutes discrimination, sexual harassment or workplace bullying. A breach of these rules may constitute unsatisfactory professional conduct or professional misconduct (s. 298 of the *Legal Profession Uniform Law 2015 (NSW)*).
64. For the purposes of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*:
  - ‘discrimination’ is “discrimination as defined under the applicable state, territory or federal anti-discrimination or human rights legislation and includes all forms of unlawful discrimination”. This includes all forms of discrimination under the New South Wales *Anti-Discrimination Act 1977* and Federal *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004*, the *Australian Human Rights Commission Act 1986* and the *Fair Work Act 2009*. This includes discrimination on the grounds of pregnancy, sex, family responsibilities, disability and/or carers’ responsibilities.
  - ‘sexual harassment’ is “sexual harassment as defined under the applicable state, territory or federal anti-discrimination or human rights legislation”. This includes all forms of discrimination under the New South Wales *Anti-Discrimination Act 1977* and Federal *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004*, the *Australian Human Rights Commission Act 1986* and the *Fair Work Act 2009*.
  - ‘Workplace bullying’ is defined as “unreasonable behaviour that could reasonably be expected to intimidate, degrade, humiliate, isolate, alienate, or cause serious offence to a person working in a workplace”.

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65. Some floors have adopted the NSW Bar Association’s Best Practice Guidelines to assist in achieving compliance with Rule 123. The Guidelines are as follows (available at <http://www.nswbar.asn.au/for-members/bpg>):
- (a) Model Harassment, Discrimination, Vilification and Victimisation Best Practice Guideline;
  - (b) Model Bullying Best Practice Guideline;
  - (c) Model Parental and Other Extended Leave Best Practice Guideline;
  - (d) Model Grievance Handling Procedure.
66. These Best Practice Guidelines apply to readers as well as floor members of those floors that have adopted them. They also apply to floor employees, contractors, casuals, volunteers, students and/or trainees, whether engaged by the Floor or directly by Barristers on the Floor, as well as clients and “other visitors” to the Floor<sup>2</sup>. The NSW Bar Association encourages floors to adopt the Guidelines. A list of floors that have to date adopted the Guidelines can be found on the NSW Bar Association’s website (also at <http://www.nswbar.asn.au/for-members/bpg>).
67. It is important to note the following matters in relation to the Guidelines.
- a. The Guidelines create very specific obligations, including the obligation to ensure compliance with the Guidelines<sup>3</sup>.
  - b. Failure to properly adhere to the Guidelines may result in a finding that Rule 123 has been breached and may amount to professional misconduct and/or unsatisfactory professional conduct<sup>4</sup>.
  - c. If the reader or tutor is part of a Floor that has adopted the Guidelines, the Guidelines will apply to their relationship, even if the other person is from a different floor.
  - d. There are positive obligations on readers and/or tutors as member/s of the Floor adopting the Guidelines to inform people coming onto the floor about the Guidelines; provide appropriate training and information about the operation and effect of the Guidelines; and regularly remind people about the Guidelines<sup>5</sup>.
  - e. The Guidelines state that discrimination, harassment and workplace bullying “*will not be tolerated*”<sup>6</sup> and that “*members and licensees of this Floor, and workers engaged by and on this Floor, have a responsibility to help maintain a workplace free from all forms of*” discrimination, harassment and workplace bullying. The effect of these provisions in the Guidelines is to make individuals (including readers and tutors) liable for taking reasonable steps to prevent others from engaging in discrimination, harassment and workplace bullying.<sup>8</sup>
  - f. In particular, the Grievance Guidelines require barristers on Floors adopting the Guidelines to be “proactive” in addressing issues when they arise and “*not rely on a complaint being made*”<sup>9</sup>. Further they must not victimise someone making a complaint<sup>10</sup>. This means that complainants ought not be punished

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<sup>2</sup> See Clause 1 of the “[Model Harassment, Discrimination, Vilification and Victimisation Best Practice Guideline](#)” (“Discrimination Guidelines”) found at < [http://www.nswbar.asn.au/docs/webdocs/bpg\\_harassment\\_210820152.pdf](http://www.nswbar.asn.au/docs/webdocs/bpg_harassment_210820152.pdf) > and Clauses 1 “Model Bullying Best Practice Guideline” at <[http://www.nswbar.asn.au/docs/webdocs/bpg\\_bullying\\_21082015.pdf](http://www.nswbar.asn.au/docs/webdocs/bpg_bullying_21082015.pdf) >.

<sup>3</sup> See Clause 14 of the “Discrimination Guidelines” and Clause 17 “Model Bullying Best Practice Guideline”.

<sup>4</sup> See Clause 8 of the “Discrimination Guidelines” and Clause 10 “Model Bullying Best Practice Guideline”.

<sup>5</sup> As per Clause 21 of the “Discrimination Guidelines” and Clause 24 of the “Model Bullying Best Practice Guideline”.

<sup>6</sup> Clause 11 of the “Discrimination Guidelines” and Clause 14 of the “Model Bullying Best Practice Guideline”.

<sup>7</sup> Clause 12 of the “Discrimination Guidelines” and Clause 15 of the “Model Bullying Best Practice Guideline”.

<sup>8</sup> See in particular Clause 14a of the Grievance Guideline in relation to the appointment and identification of a Floor Contact Person (found at [http://www.nswbar.asn.au/docs/webdocs/bpg\\_grievance\\_21082015.pdf](http://www.nswbar.asn.au/docs/webdocs/bpg_grievance_21082015.pdf)).

<sup>9</sup> Clause 20 of the Grievance Guideline.

<sup>10</sup> Clause 21 of the Grievance Guideline.

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if they make a complaint and those subject to the Guidelines cannot sit on their hands when they see bullying occurring - even if no complaint is made.

68. Regardless of whether a floor has adopted the NSW Bar Association's Best Practice Guidelines, if a reader or tutor experiences discrimination, sexual harassment or workplace bullying, they are encouraged to raise the matter informally via a pathway set out at [29] above or formally with the NSW Bar Association to have the matter resolved.
69. It is also important to note that the *Work Health and Safety Act 2011 (NSW)* ("WHSA"), also applies to Barristers' workplaces. That law requires that "reasonably practicable" steps be taken to address identified risks to health and safety<sup>11</sup>. In this context, instances of discrimination, harassment and bullying, once raised, are 'risks' within the meaning of the WHSA<sup>12</sup>. As such, it is important that the WHSA is taken into account when dealing with complaints of this kind, as well as more prosaic instances of risks to work, health and safety (such as trip risks, fire drills and the like).

## H. Conclusion

70. At the end of the twelve month reading period, and if all other requirements of reading have been satisfactorily completed, tutors are required to complete a form of certification.
71. It is hoped that these guidelines will assist readers and tutors establish and maintain a productive relationship which ultimately enables the tutor to comfortably certify their reader as qualified to practice as a barrister without restriction.

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<sup>11</sup> See section 17 of the *Work Health and Safety Act 2011 (NSW)* ("WHSA"), which is expressed in terms of either *eliminating* risks, or where that is not possible reducing risks as far as is "reasonably practicable".

<sup>12</sup> Although, obviously not all risks will fall within the definition of discrimination, harassment and bullying.

## Appendix: Suggested Early Reading Program of Instruction

### Introduction:

1. The program set out below is intended as a resource for those who may appreciate a pro-forma structure for the early weeks of the reading year. The program sets out the range of issues to be addressed at regular meetings, covering:
  - a. aspects of practice organization and management (eg how to deal with solicitors and barristers, and how to handle conferences);
  - b. “traps for young players” (eg the need to consider all possible causes of action when pleading, the need to identify the evidence to call/tender, the issues you need to cover in cross examination); and
  - c. practical skills and several legal issues that can arise in any kind of proceeding, such as the rule in *Jones v Dunkel*.
2. This program envisages that the tutor and reader will meet at least twice a week for three months, usually for about 30 minutes. Arranging these weekly meetings is the reader’s responsibility. Either may vary the time at short notice if exigencies require, but if it is postponed, the reader must make arrangements for another that week. If it is a “horror week” for either, the meetings can be postponed to the next week, but not for longer.
3. Once this program of instruction is completed, the frequency of meetings is to be determined between readers and tutors, with the readers continuing to bear the responsibility for making arrangements.

### Background Reading/Watching:

4. Before starting the reading year, you should endeavour to read:
  - “Advocacy” lecture delivered by Murray Gleeson QC in (1998) 17 *Aust Bar Rev* 9-13;
  - *Evidence and Advocacy* by A Wells (1987) Law Book Company;
  - *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan A. Garner (2008);
  - *Effective Written Advocacy* by Andrew Goodman (2<sup>nd</sup> ed) Wildy Simmonds and Hill Publishing;
5. watch the Staircase: [www.docurama.com/docurama/staircase-the/](http://www.docurama.com/docurama/staircase-the/) (particularly those in criminal practice)

### Week 1

#### (a) *Finances and Fees Books*

Keep a separate account through which ALL income is banked, and nothing but income; establish a practice of putting money aside to meet tax liability; keep a file of receipts for all deductible expenses; retain an accountant early. Determine how you will keep track of time spent on work, invoices rendered and when paid (silq or otherwise).

(b) *Fee disclosure*

Timely provision of fee agreements; content of fee agreements;

(c) *Directions hearings / mentions*

Preparing for and attending directions hearings and mentions – see [48] of the Guide (above) for list of key information to obtain before any directions hearing.

(d) *Behaviour in Chambers*

Rule 123 and (if appropriate) the Best Practice Guidelines.

**Week 2**

(a) *Relations with solicitors.*

- Role is to be helpful eg draft the schedule to the subpoena yourself rather than directing a sole practitioner to "issue a subpoena for x documents"; communications in court; reporting on outcome of hearing;
- don't take more than one brief for a day unless you have a sound basis for being confident that they won't be called on at the same time in different courts.
- Getting on panels – eg Legalaid; Crown Solicitors Office; Commonwealth DPP.

(b) *Dealing with Legal Aid* - including Costs and offences under the Legal Aid Act

(c) *Interlocutory hearings/Notices of Motion*

What is the underlying dispute? What interlocutory orders are sought (injunction, stay, etc)? what is the other side's position? What evidence has been served? Is it admissible? Is it sufficient to support the application? Identify key authorities. Draft short written submissions (to hand up, or as speaking notes).

**Week 3**

(a) *Relations with other barristers and attending court.*

- Clarify whether discussions are "counsel to counsel" before quoting in writing or to a court; if uncertain whether you have properly understood an agreed matter that you are relating to the court, acknowledge your uncertainty, eg by saying "my friend will correct me if I have misunderstood this".
- Always deliver deving and drafts on time, or warn as soon as it is apparent you will be late; when brought in as junior, master the paper before spending much time on the law.
- NEVER be late for court; check the list first thing in the morning.

(b) *Rule in Browne v Dunne*

- Read and discuss Cross on Evidence especially *re Allied Pastoral. Ghazal v GIO* (1992) 29 NSWLR 36 at 344 - 345; *J McPhee v ACCC* (2000) 172 ALR 532 para 103 104.
- Consider - what is the rule? Is it a rule of law? What are the consequences of not complying? What are the different ways of complying?
- Undesirability of "I put it to you that ....", preferability of other forms such as "could it be that".
- Need to identify matters to put to opposing witnesses before going to court, and to check before sitting down that you have complied.

#### Week 4

(a) *Conferences with clients and witnesses.*

Have a solicitor present when advising a client on prospects, taking instructions on a significant issue in the litigation, especially eg settlement, inconsistencies in a prior account, or when seeing a client or witness in custody. Use the pre trial conference to ask non leading questions to elicit the client's or witness' account, (rather than reciting the affidavit or statement back to the witness).

(b) *Rule in Jones v Dunkel.*

- Read and discuss *Lek* 43 FCR 100 at 1224; *Fabre v Arenales* (1992) 27 NSWLR 437.
- Consider - What is the rule? What are its limits? Inference must already be available; must be a basis for expecting that the party would call the witness; witness' absence must be unexplained.

#### Week 5

*Preparing a case.*

- Check the beginning and end of the observations on receipt of a brief - identify and diarise any deadlines. Appoint a conference about 2 - 3 weeks after receipt of the brief to discuss with solicitor.
- Prepare a rough chronology when reading the brief, and keep a work list of things to follow up. If settling a pleading, prepare an advice on evidence at the same time to cross check that you have not pleaded matters that are impossible to prove. If preparing a judicial review application, do a first draft of submissions at the same time, and follow up with solicitor any evidence that you refer to that isn't yet on.
- Keep a folder for documents you are likely to need in court and essential documents such as pleadings and submissions. Keep documents you need to tender, or cases and legislation you need to hand up, in plastic sleeves, and check that it is empty before you sit down.
- Prepare a one page list of each fact you need to prove, and where that evidence is.
- Specific considerations in preparing for a jury trial.

## Week 6

### Civil practice: fraud etc

- (a) *Criminal convictions in civil proceedings*. Read and discuss *Saffron* 30 FCR 578; *General Medical Council v Spackman* [1943] AC 627.
- (b) *Allegations of criminal or other serious misconduct in civil proceedings*. Read and discuss *Rejfeke* 112 CLR 517; *Briginshaw* 60 CLR 336 at 368; *Neat Holdings v Karajam* (1992) 110 ALR 449.
- (c) *pleading fraud*. The requirements of UCPR15.3 and 15.4.

### Criminal practice: charges

- (a) *Requesting/furnishing further and better particulars of charge - Kirk v Industrial Relations Commission* (NSW) (2010) 239 CLR 531
- (b) *Duplicity/ Indictments - Johnson v Miller* (1937) 59 CLR 467
- (c) *Representations to the DPP/CDPP - charge bargaining*
- (d) *Separate trial applications - including tendency/concoction*

## Week 7

### (a) *Examination in Chief*

- How to ask the questions in chief.
- Identify the witness' strong points of recollection in conference. Use those in evidence as a framework, and "back fill" the details around them.

### (b) *Objections*

Preparing lists of objections and arguing objections

## Week 8

### (a) *Cross Examination*

- Read the "unarmed combat" chapter in Colman, *Cross Examination a Practical Handbook* (Juta and Co, Capetown, 1973)
- Review the cross examination chapter from a good advocacy textbook before beginning preparation of a major cross examination.
- How to prepare for cross examination, including "laying the groundwork" to effectively cross examine on documents.

### (b) *Re Examination*

- Limits of re-examination.
- Effective re-examination.

## **Week 9**

### Civil practice

- (a) *Appeals* – de novo/rehearing/question of law/*House v R* error
- (b) *Points not taken below*. Read and discuss *Water Board v Moustakas* (1998) 180 CLR 491; *Metwally v University of Wollongong* (1985) 60 ALR 68.

### Criminal practice

- (a) *Preparing advices on merits of appeal for Legal Aid*
- (b) *Appeals to the District Court*. Consider requirements of *Crimes (Appeals and Review) Act*
- (c) *Re-hearings*. Read and discuss *Chahara v The Queen* (2006) 162 A Crim R 64 at 69 -72; *Gianoutsos v Glykis* (2006) 162 A Crim R 39 at 44-45
- (d) *Credit on appeal - Fox v Percy* (2003) 21 CLR 118; *DPP v Burns* [2010] NSWCA 265

## **Week 10**

- (a) *Legal professional privilege*.

Identify the basis upon which privilege may apply to documents produced prior to the final hearing. Explain the difference between joint privilege and common interest privilege, and the scope of each.

- (b) *other privileges*

- When and how does the privilege against self incrimination arise, and what is the procedure for a certificate to be issued? (s.128 *Evidence Act*).
- *Sexual assault communication privilege* (including seeking leave to issue subpoena)
- When can material of settlement negotiations be relied upon in court? (s.131 *Evidence Act* )

- (c) *Issuing and setting aside subpoenas*.

The four stages of subpoenas. 1: Compliance - oppression and collateral purpose. 2: production - legal professional privilege and public interest immunity. 3: access - legitimate forensic purpose, 'on the cards' and confidentiality. 4: tender.

## Week 11

### Civil practice

#### *(a) Costs.*

- How to make an offer of compromise under the UCPR.
- How to make a *Calderbank* offer.
- Costs arguments.

#### *(b) Stay of proceedings*

Read and discuss *Bryant v Commonwealth Bank* (1996) 134 ALR 460.

### Criminal practice

#### *(a) Costs.*

- Costs in criminal cases
- Suitors Fund
- Costs arguments.

#### *(b) Stay of proceedings*

## Week 12

### *(a) appearing as a junior*

- Role in preparation and during hearing.
- "Assume your leader walks under a bus" rule – preparing for the unexpected

### *(b) general professional responsibilities*

- Compliance with ss.56 - 60 of the *Civil Procedure Act*, including in a case which has gone off the rails.
- NSW Barristers' Rules 79 (guilty client) and 82 – 94 (prosecutors duties)