Do Judges Make Law?

Imagine that you are a judge and you have the choice of:

(a) following the law which would result in an unfair outcome, or

(b) deciding the case in a way that you think is fair but not in accordance with the law.

Which would you choose?

Judges have traditionally been very careful to emphasise that their role is not to make the law, merely to apply it.

But it is apparent that judges play a significant role in the development of law through the interpretation of both common law principles and legislative provisions.

When legislation is ambiguous or has gaps, judges must necessarily come to a decision as to how the law should be interpreted.

Precedent

When a higher court makes a decision, it is generally binding upon subsequent cases.

This is called “precedent”.

It also means that members of the judiciary in the District or Local courts must follow the decisions of higher courts such as the Supreme and High courts.

Those who support “literal” approaches to the law say that judges should use pure and rational logic to arrive at the ‘right’ conclusion; they should never ‘make the law’ but strictly uncover and apply it.

Those who support “purposive” approaches argue that a judge’s

task is to consider the purpose behind the provision or legal principle – which acknowledges that judges have an active role in developing the law.

Legal Rights

We certainly have a lot to be thankful for our common law, which is often a primary source for the protection of our rights.

Our Constitution contains few rights, but courts have consistently found and applied protections, particularly in criminal trials.

This includes the right to be considered innocent until proven guilty; and the fact that it is the job of the prosecution to prove your guilt – not your responsibility to prove your innocent etc.

But what should happen if judges take it too far?

Judicial Activism

Judicial activism is a term that is used disparagingly when judges are accused of taking things too far.

Judges have to decide according to the law, not what they would like the law to be.

A judgement should therefore read like a judgement on the law as applied to the facts of the case, not an opinion piece.

Judges who are accused of making decisions based on their own political or personal beliefs face the risk of being labelled as judicial activists.

According to one former High Court Justice Dyson Heydon, judges who don't like the constraints of the judiciary should get out and join a political party.

If judges were not bound by legislation, or earlier cases,

they would have far too much arbitrary power.

As we have a judiciary that is not elected, and difficult to fire, it makes sense that their power should not be unlimited.

This ensures that any judicial developments should be incremental and gradual.

However, having a judiciary that is too fettered can also be problematic.

Courts don't normally have to take great account of the financial and political consequences of their judgments.

And while judges can declare laws invalid, they cannot suggest new laws to replace them.

The current situation means that judges are often reactive – not proactive.

Community Values

One criticism often levelled at judges is that they are "out of touch" with the community and do not decide cases in line with community values.

It might surprise many people that the job of a judge is not to be 'in touch' with the community – or community standards or values.

Laws are supposed to be judged according to the law, not what radio commentators think should happen.

The criterion for defining cases is what the law says, not by reference to opinions about community values and standards.

There are multiple reasons for this.

Firstly, how would we decide 'community values'?

And who would decide them?

There are often conflicting opinions among members of the community, and divergent views should be seen as healthy in a democracy.

Secondly, deciding cases according to legislation means that they are decided according to the decisions of an elected government.

While it becomes apparent that judges often apply subjective interpretations to the law, they must do so cautiously.

And judges are certainly not free to deviate from the clear meaning of legislation simply because they do not agree with the result it may produce.

Can Police Breathalyse You on Your Own Property?

Under the Road Transport Act 2013 (Schedule 3, Clause 2(1)(e)), it is illegal for a police officer to conduct a breath test on a person's own property.

If they do so, the illegally obtained evidence of the reading is liable for exclusion in court.

If police believe you were driving while drunk and don't test you, they will have to either:

1. Press no charges against you at all, or

2. Charge you with a different offence, such as 'driving under the influence' which can be difficult for police to prove.

What if I have been breath tested on my own property and charged with drink driving (P.C.A.)?

There is an increasing public awareness about the fact that drink driving is considered to be a serious crime.

More than half of all drivers who are guilty of drink driving end up with a criminal record and have their licences disqualified.

But fortunately, a good traffic lawyer will often be able to get your case dropped or thrown out of court if you have been illegally breath-tested.

Since it is unlawful for police to require a person to submit to a breath test on their own property, the evidence of the blood alcohol reading will be inadmissible in court.

And without that evidence, there won't be much of a case against you at all.

And it may even be possible to get the charges withdrawn before the matter gets to a defended hearing.

To that end, either you or your lawyer can send police what are known as 'representations', which are letters formally requesting that they drop the case against you.

This will save you the stress of going to a court hearing, as well as being a cheaper alternative to fighting the case in court.

What about a parking space in an apartment block?

A dedicated car space will normally be classified as your property.

And in these cases, it is not up to you to prove that the police breath tested you at your place of abode – it is the prosecution's job to prove that it was not.

If they can't prove this beyond reasonable doubt in court, then the breath test will have been unlawfully obtained.

In the 2002 case of DPP v Skewes, the defendant Rohan Skewes was accused of low-range drink driving.

As he was driving along his street, police flashed their lights at him, signalling him to stop.

He turned into the driveway of his apartment building and stopped his car there.

Police approached him on foot and directed him to undergo a breath test.

But police could not prove beyond reasonable doubt that they had requested the breath test outside his place of abode.

This meant that the requirement to submit to a breath analysis could not apply.

The case went all the way to the NSW Supreme court where the judge found in favour of Skewes.

He was acquitted and the DPP was ordered to pay his legal costs.

If I haven't been drinking, why would I refuse a breath test?

It would be extremely unfair to imply that anyone who refuses to allow police to act illegally must be guilty of an offence.

Even if you are certain that your blood alcohol concentration would not be anywhere near the legal limit, you may still want to refuse a breath test in order to protect your legal rights and deter police from acting beyond the law.

Complying with police who are acting illegally only sets a precedent for them to do so again.

If you have been breathalysed on your own property, or have

questions about what constitutes your property, it is best to contact an experienced traffic lawyer immediately.

Young People Committing Fewer Crimes in NSW?

Young people may be more law abiding than they were in the past, with NSW crime figures showing a decrease in arrest rates amongst this age group.

According to figures from the NSW Bureau of Crime Statistics and Research (BOCSAR), released in December 2014, the number of young people detained by police for offences including robbery, motor vehicle theft, property crime and assault has reduced.

Drop in rates of arrest

Vehicle theft has shown a significant decrease amongst younger people. Rates of arrest fell 68.6% between 1995 and 2012 for those in the 15 to 17 age bracket, and 70.1% for those aged between 18 and 20.

Arrest rates for robbery have also declined. Arrest rates for those aged between 21 and 24 fell between 1999 and 2012. For those aged 18 to 20, the rate declined between 2005 and 2012.

Arrests for serious assault also declined among 15 to 20-year-olds between 2008 and 2012, after peaking in 2008.

According to the figures, the overall arrest rate for 15 to 17-year-olds and 18 to 20-year-olds declined between 1998 and

2004, and the biggest falls in the rates of young people being detained by police appear to be in urban areas, with rural areas less impacted.

What is the relationship between age and crime?

Figures from BOCSAR and other research organisations show that different groups of people are more prone to committing certain types of crimes at different periods in their life. Younger people would appear to be more prone to becoming involved in certain types of criminal behaviour than older people. These are mainly vehicle theft, property offences like vandalism and graffiti, and serious assaults. The figures from BOCSAR show that there is an increased risk of offending from the age of 11 or 12 until the mid to late teens. After this, the rates drop off sharply until the mid twenties when they decline more gradually.

The spread of the offending rates varies slightly for different offences, with the average peak age for assault slightly higher than for other crimes. For older people aged between 25 and 34, the figures are far more stable over the previous decade than for younger people, remaining fairly steady with a gradual decrease in recent years.

Why are young people seemingly committing fewer crimes now?

A number of reasons have been suggested for the decrease in crime rates among those in their mid teens to mid 20s.

The decrease in crime rates for property crime can potentially be linked to a lack of new people being recruited into these types of crimes, possibly due to greater education and crime prevention measures. Other possibilities that have been mentioned include changes in the patterns of drug taking, especially heroin, which often leads to property crime and theft, and global economic changes.

It has also been suggested that technological advances have

led to increased security for vehicles and property, which could go some way to explaining the overall reduction for these types of crimes. More security means less opportunity, which means fewer young people are able to participate in these activities.

These possible reasons suggest that an even greater emphasis on education, especially about drugs, and an increased use of security technology could lead to even greater falls in youth crime in the future.

Detention rates also falling

As well as police figures showing a reduction in young people being arrested for certain offences, detention figures show a marked decrease in the number of children being held in detention across NSW. This is believed to be a result of policies implemented after a Royal Commission in 2008 revealed that children were being kept in detention unnecessarily and were being held on remand without charge because they weren't able to fulfil the conditions of bail.

Currently the number of children in detention in NSW is the lowest of any state, having decreased by more than 25% in the last five years. Many of this reduction is in children who are on remand, with more support being provided to help them find stable accommodation so that they can meet their bail conditions and be released back into the community. Unfortunately, Aboriginal children are still overrepresented in the system, with much of the decrease affecting non-Aboriginal children.

It would appear that young people are committing fewer offences under criminal law than previously, although the reasons are not altogether clear. It seems most likely that a combination of factors is contributing to this decrease in young people being detained by police, and hopefully the trend will continue into the future.

When is negligence a crime: the difference between intent, recklessness and negligence?

Negligence usually belongs in the field of civil law, rather criminal law.

One reason for this is that most crimes require two elements: the physical act of committing the crime, as well as the mental element of intent.

And negligence is not usually enough to establish a mental element of intent.

There is a good reason for this: being convicted of a crime can have serious consequences, and a person should actually have intended to commit a wrong before they face those penalties.

The judges in one important drug importation case, He Kaw Teh v R, ruled that negligence should not ordinarily be enough to make a person liable for a crime.

For example, if someone has drugs planted on them when travelling, and nothing substantial arouses their suspicion, it would be unfair to convict them of drug importation or exportation just because the drugs are there and it would have been wise to check the bags before travelling.

If, on the other hand, the same traveller suspected that drugs were there but did not check, they could be liable on the basis that they were 'wilfully blind' or reckless, rather than

just negligent.

There are however, some exceptions – namely 'strict liability' and 'absolute liability' offences.

Perhaps the most commonly detected strict liability offences are drink driving and negligent driving.

Negligent driving is often punished by a fine and loss of demerit points, and does not always go through the courts.

If you receive a fine in the mail and a loss of points for negligent driving, you won't get a criminal record.

On the other hand, if you are taken to court for the same offence and found guilty, you may receive a criminal record unless you can convince the magistrate to give you a 'section 10 dismissal or conditional release order' – which means that you are guilty but no conviction is recorded.

Similarly, you do not have to intend to drive while over the legal limit in order to be found guilty of drink driving – the mere fact that you have a certain blood alcohol concentration is enough.

Another exception is manslaughter– a person will be liable if their negligence causes the death of another person, even if they did not intend to kill or cause grievous bodily harm to that persons.

The reasoning behind this law is that taking a human life is so serious that it makes sense that a higher level care must be exercised.
There must be a high disregard for life and safety of another person in order for a person's negligence to amount to manslaughter.
The difference between negligence and recklessness.

Negligence and recklessness, while often used interchangeably in everyday speech, have different meanings when it comes to

the law.
There is no definition of recklessness, but there was a spectrum with intent at the top end and negligence at the bottom, recklessness would fit somewhere in the middle.

So while it falls short of intent, it implies a more serious level of culpability than mere negligence.

And recklessness is most certainly an important part of criminal law.

Many offences in the NSW Crimes Act 1900 list recklessness as an essential ingredient, including 'recklessly causing grievous bodily harm' and 'reckless wounding'.

Recklessness for those offences requires the defendant to have recognised that their actions could cause result in harm, but went ahead anyway.

And under section 61HA (now superseded by section 61HE) of the NSW Crimes Act, being reckless about whether a person consents to sexual intercourse or not is enough for someone to be found guilty of sexual assault.

There are many other offences which have recklessness as an element (or may include recklessness as a possible element).

These include:

- Causing a dog to inflict actual or grievous bodily harm
- Injuring a child at time of birth
- Destroying or damaging property
- Obtaining money by deception
- Dealing with an instrument of crime
- Criminal defamation

If you have been charged with a crime that involves an element of negligence or recklessness and need more information, contact an experienced criminal lawyer who will be able to explain the charge, discuss any available defences and advise

you about the best way forward.

Downing Centre Court Gets a Much-Needed Upgrade

The Downing Centre Court is undergoing some much-needed redevelopment.

While the court will still be in session as usual, the lower ground level and the popular café are both undergoing renovations which will improve facilities.

The renovations will include a new court for hearing multi-accused cases, new hearing rooms, as well as new areas for court officers and jurors.

It will also house new Civil Registry Offices, and the judge's library will be relocated.

The redevelopment will cost $26.5 million and is expected to be completed by mid-2015.

The Downing Centre houses both Local and District courts and is the busiest court-complex in NSW.

Local courts across NSW hear hundreds of thousands of cases each year, and thousands of them are held in the Downing Centre.

In 2013, local courts across Australia determined 248,389 charges, according to the Bureau of Criminal Statistics and Research.

Many of these matters start in Downing Centre Local Court or nearby Central Local Court– even the initial stages of proceedings for serious charges like murder, sexual assault and commercial drug cases.

Those serious cases will ultimately progress to the District or Supreme court, where they will be finalised.

However, most cases are not so serious and will be concluded in the local court.

Some of the most common cases include drink driving, drug possession, common assaults and AVOs.

The Downing Centre courts and those contained in the attached John Maddison Tower deal with 60% of NSW state matters.

The Downing Centre building has been around for a long time, but it wasn't always a courthouse.

Until 1980, it housed Mark Foys, which was one of the most upmarket department stores of it's day.

The store even had Australia's first escalator.

After Mark Foys closed its doors to shoppers, Grace Brothers occupied the premises briefly until 1982 when it relocated to the Pitt Street shopping precinct.

The building sat empty for three years before it was turned into the Downing Centre Courthouse Complex in 1985.

While the interior is undergoing renovations, the exterior will still retain the original Mark Foys floor tiles and façade.

And while renovations are happening, the courthouse will still be hearing cases.

The Downing Centre, located in the Sydney CBD, has seen many familiar faces over the years.

Last year we watched and waited to see what would be the outcome in Freya Newmans case, after she reportedly exposed the questionable scholarship granted to Frances Abbot, daughter of the Prime Minister.

Margaret Cunneen appeared there in proceedings relating to the allegation that she had abused her position, and in December 2014 former labour powerbroker Eddie Obeid appeared facing charges of misconduct in public office.

Man Haron Monis, the Sydney siege killer, unknown until the tragic events of last December, was no stranger to the Downing Centre.

He made several appearances there, including the time when he chained himself to the steps of as a protest against the war in Afghanistan.

He also faced the initial stages of sexual assault charges there.

Haron’s partner, accused of being involved in the murder of Haron’s ex-wife, had her bail revoked at the courthouse in December.

And in 2011, Judge Marcus Einfield was famously exposed for lying about his a speeding ticket.

Even the brother of Lara Bingle appeared at the Downing Centre a few years ago facing assault charges.

Downing Centre is sure to see more well-known personalities walk through its doors this year.

It is business as usual in the court complex, despite the ongoing renovations.

What is a Criminal Infringement Notice?

Committing a criminal offence doesn't always mean that you will be arrested, charged and taken to court.

It doesn't even mean that you will necessarily get a criminal record.

In recent years, police have been given the power to be 'judge, jury and executioner' in an increasing number of situations by with the ability to issue Criminal Infringement Notice (CINs), also known as 'on-the-spot fines'.

CINs mean that police spend less time on paperwork, and many would prefer to get a CIN than be dragged through the courts.

And if you pay a CIN you won't get a criminal conviction on your record.

Of course, not all offences can be dealt with by CINs.

In NSW, the following offences can be dealt with in this way:

1. Stealing (if the value of property or amount is under $300) – $300 fine

2. Offensive language – $150 fine

3. Offensive behaviour – $200 fine

4. Unlawful entry of a vehicle/board – $250 fine

5. Obstructing traffic – $200 fine

6. Goods in custody reasonably suspected of being stolen or

unlawfully obtains – $350 fine

7. Continuation of intoxicated and disorderly behaviour following a move on direction – $200

The CIN must be paid within 21 days or further penalties may apply.

All CINs are recorded on a computer system – which means that repeat offenders can be identified and will likely be taken to court for subsequent offences.

If you received a CIN after having your fingerprints taken, your payment of the fine will mean that your prints will be destroyed.

It is important to keep in mind that you are not obliged to pay a CIN – you can choose to take the matter to court, just like a speeding infringement.

But if you do so and are found guilty, you risk a conviction being entered on your criminal record.

How do police decide whether or not to give a CIN?

If police have a 'reasonable suspicion' that you have committed a relevant offence, they can choose to either issue you with a CIN or take you to court by giving you a Court Attendance Notice (CAN).

It is a matter of discretion, and police are supposed to take a number of factors into account when making that decision.

Relevant factors include the public interest – for example, if it's not worth the public expense of taking the case to court because it is so trivial the police may issue a CIN instead, especially if the court is likely to deal with it by way of a 'section 10 dismissal or conditional release order' anyway, which means without a conviction.

The attitude of the suspect, their age, their criminal history (or lack thereof) and even the fact that police have other duties to attend to at the time may also be taken into account.

On-the-spot fines mean that the offence is dealt with quickly and cheaply, both for police and the suspect.

But they have been criticised for giving police too much power because, in most cases, it allows them to have the final say about whether you are guilty or not.

This is because the vast majority of people won't be willing to incur the additional expense, time and risk of fighting the case in court – especially because they risk ending up with a criminal record.

The availability of CINs also means that police are far more likely to act upon extremely trivial offences, because they don't have to go back and complete paperwork, obtain statements or spend time at a court hearing.

CINs may also lead to the greater targeting of vulnerable groups such as the homeless, Middle Eastern youth and Indigenous people.

Whereas police may normally have to attend a court and prove the case before a Magistrate, CINs mean that it is extremely unlikely that the case will come before a court where police may be questioned, criticised and even ordered to pay the defendant's legal costs.

What if I contest my CIN?

If you are not guilty, you can choose to contest your CIN by electing to take it to court.

After filling out the back and sending the CIN to court, you will be sent a Court Attendance Notice telling you when and where you are required to attend court.

However, don’t automatically assume that going to court is your best bet even if you think that the CIN was unfair.

Before choosing to do so, always speak to a criminal defence lawyer – they will be able to explain what is likely to occur, including the potential costs, the timeframe and the likelihood of success.

Going to court may mean taking days off work, hiring a lawyer and still possibly being found guilty in court.

And again, you may risk a criminal record.

Of course, police will know this when they are issue you with the CIN.

If you wish to speak to an experienced criminal lawyer, there are several specialist criminal law firms that will be able to give you good advice about your options, the cost and the likelihood of success.

But be careful – be sure that your lawyer is willing to give you a fixed fee before you go ahead, otherwise your legal fees may spiral out of proportion and you may regret your decision to go to court over a CIN even if you ultimately win.

Facing Sexual Assault Charges? How to Survive Cross-Examination

Going to court can be scary at the best of times, but if you are facing a potentially serious matter like sexual assault charges, it can be even more daunting.

In many sexual assault cases, it will be beneficial for you, the defendant (or the 'accused'), to take the witness stand and tell your side of the story through questioning by your own lawyer, which is called examination-in-chief.

You will then be asked questions by the prosecuting lawyer, which is known as cross-examination.

The answers you give can make a significant difference to the eventual outcome of your case.

In sexual assault cases, the questions you are asked can be extremely personal and confronting.

The prosecution may try to make you angry or confuse you, or may suggest or imply that you acted in a certain way.

It's important to remain calm during questioning, and to answer truthfully.

Listen carefully to the question and only answer that question.

If you can't recall something, say so – nobody can remember everything.

If you aren't sure about something, say so – it's better than answering incorrectly.

The prosecutor is not allowed to ask you whatever they want, and there are certain rules governing what is considered to be inappropriate or appropriate types of questions.

If a prosecuting lawyer asks you a question that is not permitted, your lawyer can object.

If the objection is upheld, you won't have to answer and the prosecutor will have to find another question to ask.

Preparation is key

When it comes to surviving cross-examination, preparation is essential.

A good criminal lawyer will carefully explain the entire court process beforehand, and prepare you for the types of questions you might be asked during cross-examination.

They will also advise you about the prosecution's case, and what they are specifically looking to prove, so you can understand and avoid the pitfalls while explaining your side of the story calmly and honestly.

Here are a few things you should do to prepare for cross-examination when facing a sexual assault trial.

Learn about your charges

Make sure you understand the charges and what needs to be proved by the prosecution, as many convictions depend on specific legal principles being proven.

Terms like "aggravated" and "with intent" can be confusing and if you don't know what the prosecution is trying to prove it can be difficult to follow their line of questioning and present the facts of the matter in a way that will strengthen your defence and not play into the hands of the person questioning you.

It's also important if you are facing sexual assault charges that you fully understand certain terms that you are likely to hear in court, including "consent".

Sometimes, commonly used words have a slightly different meaning when used in the context of the law, so make sure your lawyer explains what these terms mean from a legal standpoint.

You should also carefully read through the witness statements in the prosecution case so that you are fully aware of the nature of the allegations against you.

If you have participated in a police interview, your lawyer will have taken you through the strengths and weaknesses of your answers.

He or she will almost certainly ask you to explain any unfavourable answers that you gave– you may even be asked to explain those answers by your own lawyer when you are giving testimony on the witness stand in order to repair some of the damage done.

Your lawyer will also normally take a ‘proof of evidence’ from you, which contains your complete side of the story.

Spend time with your lawyer

Your lawyer will be able to give you a ‘dress rehearsal’ of the testimony that you are likely to give on the witness stand.

He or she will also be able to ask you questions that are likely to be asked by the prosecuting lawyer.

This can prevent you being taken unawares by a difficult question, or answering inaccurately or becoming flustered.

When you are a defendant in a sexual assault case, the questions you are asked can be extremely personal and the prosecutor may try to get a reaction by asking deliberately provocative questions.

You should practice maintaining your composure, as your credibility will be enhanced if you answer questions calmly.

Losing your temper or getting angry is likely to damage your case, and remaining calm should be of ultimate importance, no matter how much the prosecution might try to provoke you.

Refresh your memory

Sexual assault cases can take a long time to reach a trial,

and by the time you take the witness stand a lengthy period of time might have elapsed.

Over time it’s easy to forget specific details, which can lead to inconsistencies in your story and weaken your defence.

If you are a bit hazy on details, or even if you think you can remember everything, it’s a good idea to read through the transcript of your police interview and/or your proof of evidence.

The prosecution lawyer may try to catch you out by saying something that is inconsistent with your interview (or with other evidence in the case) as a way to allege that you are lying, so it’s important that you give all the details correctly and as best as you can remember them.

And again, if you can’t recall or are unsure of something, say so – don’t just guess.

Practice listening and only answering what you’re asked

While you are being cross-examined by the prosecution lawyer remember to listen carefully to each question and only answer the questions you are asked, without giving any more information.

It can be tempting to elaborate on answers, especially if you’re nervous, but make sure you listen very carefully to the question and only answer what you are specifically being asked.

It is a good idea to practice this with your lawyer beforehand as many times we automatically answer questions that haven’t actually been asked.

Providing more information than needed could lead you to damage your case without realising, so it’s very important that you get used to this concept before you take the stand.

To be effective as a witness it's important that you understand the charges and evidence you are facing and what strengths and weaknesses exist in the prosecution's case.

It's also important that you are aware of the strategy your defence is going to take so you can make sure that you don't inadvertently undermine it out of nerves.

Practice and preparation are essential if you want to present a favourable image to the court and give yourself the best possible chance of a positive outcome.

Sexual assault charges can lead to serious consequences, so make sure you take them seriously.

Working with your lawyer and taking their advice can help the process seem less daunting and improve your chances of getting a good outcome.

What can I do to Increase the Chance of Getting Bail? A Quick Guide for Friends and Relatives

If your loved-one has been arrested and charged with a criminal offence in NSW, the police will usually have the first say as to whether or not they should be granted bail.

If the police grant them bail, they will be released back into the community until their next court date.

However, if police refuse to grant bail, they will be held in

custody until they can be brought before a court – which must occur as soon as practicable, which is usually the same afternoon or the next morning.

Having someone close to you in custody can be a distressing experience.

However, there are things you can do to assist them in getting bail.

Residence letters

One factor that the court will consider is whether there is an appropriate place for your loved-one to reside at while they are out of custody.

They may be granted bail to their own home, or to a family member or friend's house.

If they wish to be bailed to a family member or friend's home such as your own, it can be useful for you to write a letter to the court confirming that you are happy to have them live with you.

Their lawyer can hand the letter to the Magistrate or Judge in court to be read when determining their bail application.

This letter should be addressed to the Presiding Magistrate if the bail application is being heard in the Local Court; or the Presiding Judge if it is being heard in the District Court.

If your friend or family member is appealing a bail application to the Supreme Court, it is normally best for your loved-one's lawyer to help prepare an 'affidavit' (a sworn statement) to hand-up to the Supreme Court Justice (judge).

In the Local and District Court, the letter should begin with a sentence or two detailing who you are, how you know the person who is applying for bail, how long you have known them for, as well as your address and contact details.

You can then include anything in their letter that will demonstrate that your home is an appropriate place for them to live.

Things which you may wish to include are:

- That you are aware of the charges against them;
- The names and ages of anyone else who lives at the property, and how they are related to you;
- What you do for a living, and how often you expect to be home;
- Details of the nearest police station and how far away it is;
- Whether you can accompany them to the police station if they are required to report to police as part of their bail conditions;
- Whether you can accompany them to court;
- A statement or undertaking that you will report to police if they breach any of their bail conditions;
- Any other positive factors that will demonstrate how you will support them in sticking to their bail conditions, such as curfews or staying away from a particular area;
- Whether you have any prior criminal convictions, and if so, how long ago they were and what they were for, and
- Whether you are an 'undischarged bankrupt'.

All letters handed up in court must be typed or neatly written, signed and dated.

If the bail application is to be made in the Supreme Court, your loved-one's lawyer can see you in conference and put the information in the form of an affidavit.

Support letters

Another form of documentation which may assist your loved one's bail application is a support letter.

A support letter is similar to a character reference in that

it demonstrates that your loved-one is a responsible person who is likely to turn up to court when required, and who will stick to any bail conditions imposed by the court.

It should also include any information as to how you will support him or her if they are released back into the community.

A support letter may be written by a family member, friend or work colleague.

Again, the letter should always commence with a short paragraph about who you are, how you know the bail applicant, and how long you have known them for.

Other information may include:

- Evidence of their good character or any positive traits – for example, how they have helped care for their children or examples of any community activities that they may have engaged in;
- If the letter is being written by an employer, anything that would indicate that they have a strong work ethic, or, where possible, details of any future employment that may be available.
- How you will support your friend or family member in the community – for example, by helping them find work, getting them involved in programs that may assist them, meeting with them regularly, or assisting them in obtaining medical care.
- That you are confident that they will stick to their bail conditions.

A support letter should never make any statements about the actual offence or court proceedings, or whether or not you believe the applicant is innocent or guilty.

Once again, if the application is being made in the Supreme Court your loved-one’s lawyer can take the necessary

information from you during a conference and include it in your affidavit.

Surety

A Surety is a person who agrees to pay or forfeit an amount of money or property (called ‘security’) if their loved-one (the ‘bail applicant’) does not turn up to court when required.

A bail applicant may wish to act as their own surety, which means that they will lose their own money if they do not show up to court.

Alternatively, a family member or friend may wish to put up money on their behalf.

There is no designated amount that should be put up, however generally, the more serious the offence, the larger the amount needed.

If you wish to use money as security for your loved one’s bail, you must prove that you have the agreed amount in your bank account – in other words, you cannot agree to put up money that you don’t have or which you will obtain in the future.

Alternatively, you may wish to use your home, property or land as security.

In these cases, you will only be able to put up the ‘equity’ in that property; in other words, the value of the property less any mortgages or other debts.

To use real estate as security, you will normally need to obtain a copy of the title deed, a property valuation and a recent mortgage statement.

Your security may be ‘secured’ or ‘unsecured’.

It is secured if you need to actually deposit the money before

your loved-one is released.

It is unsecured if you agree to forfeit the money if your loved-one breaches bail.

To act as a surety, you will need to be an ‘acceptable person’; which normally means that you must not have any previous convictions or be an undischarged bankrupt.

If your loved-one is granted bail, you will often need to complete an ‘acceptable person information form’ at the court registry after the bail application is heard in court.

Rehabilitation

If your loved-one has a drug or alcohol problem, you or their lawyer can increase the chances of bail by helping to enrol them into a rehabilitation program; whether residential (live-in) or outpatient (non live-in).

An acceptance letter from the relevant centre or program will need to be handed-up during the bail application.

Acceptance into rehabilitation can help to persuade the court that your loved-one is intent on addressing any underlying conditions, and is unlikely to offend while on bail, which are relevant consideration.

Participation in the program may be a condition of their bail.

Getting a good lawyer

A well-prepared and persuasively-argued bail application can mean the difference between, on the one hand, getting out of custody and, on the other, remaining there for weeks, months or more.

Being out of custody has several benefits, apart from the obvious benefit of being free.

It can allow a person to get help to overcome any underlying

drug or alcohol problems, to maintain gainful employment, to pay bills and to prepare for their defence.

You normally only get ‘one shot at bail’ in the Local or District Court, which means that its essential to put your strongest foot forward.

It’s therefore vital to engage criminal defence lawyers with vast experience and proven success in achieving bail for their clients – even in difficult circumstances.

At Sydney Criminal Lawyers®, our defence team has many years of experience in achieving bail for our clients – from the Local to the Supreme Court.

We regularly achieve bail in even the most difficult cases – including large commercial drug cases, serious assault cases, firearms cases and even homicide cases.

Our highly-respected Senior Lawyers will thoroughly prepare your loved-one’s bail application and persuasively present it in court.

And all for a fixed-fee of $1650 inclusive of GST for Local or District Court bail applications, and $2750 inclusive of GST for Supreme Court bail application.

So call us anytime for a free consultation and let us get your loved-one out of custody.

Begging as a Criminal Offence: Why is this being Reintroduced in Australia?

Historically, begging and vagrancy were crimes, and homeless people who begged for money were seen as a form of social parasite.

In some periods throughout history, begging was only acceptable for disabled people – while for able bodied paupers, societies answer was the dreaded workhouse, still alive in popular consciousness largely thanks to the tale of Oliver Twist.

And while the oppression of homeless beggars is something that may seem more suited to Dickens' dark tale set in 19th century Britain, did you know that begging is illegal in some parts of 21st Century Australia?

Begging is a crime in the Victoria; and police have actually seized the coins of beggars in Melbourne.

According to Victorian law, "begging or gathering alms" is a criminal offence punishable by 12 months imprisonment.

And since profiting from ill-gotten gain is also prohibited, beggars have had their cash confiscated as 'proceeds of crime'.

Some Victorian homeless have been issued fines for not only begging, but travelling on trains without tickets.

Unbelievably, some had fines adding up to amounts well into the tens of thousands of dollars – a disincentive for many to ever settle into more stable accommodation, explains Kristen Hilton from the Legal Clinic in Melbourne.

To do so may mean becoming vulnerable to a sheriff turning up on their door to seize their property or have them ordered before a court.

By contrast, begging is not illegal in NSW.

Even though it is not against the law here, beggars are amongst the most vulnerable groups in society, often living on the streets with drug addictions and/or mental illnesses.

The homeless can be discriminated against in other ways by the law, even if begging in states like NSW is not illegal.

Police can also take advantage of 'drunk and disorderly' rules introduced in 2011, ostensibly brought in to deal with alcohol-fuelled violence.

Under these laws, police can tell a person to 'move on' if their conduct is:

- Likely to cause injury to any other person
- Likely to cause damage to property
- Likely to give rise to a risk in public safety, or
- Is disorderly

The laws tend to be more heavily enforced against Aborigines, youth, mentally ill and the homeless.

Over 40% of all fines issued for the offence were for people fitting into one or more of those categories, despite only making up a small proportion of the population.

Drunk and disorderly orders allow police to direct intoxicated people to leave an area – and they also make it an offence to be in any other public area within the next six hours.

Such laws present particular problems for homeless people, who don't have anywhere but the street to go.

So why has there been a recent push to further penalise the

vulnerable?

Although begging has been legal in Western Australia since 2004, councillors in Perth have been pushing the state government to outlaw begging once again.

Councillors argued that criminalising begging would act as a disincentive as well as address the aggressive behaviour of a minority of beggars.

Police have even claimed a link between beggars and drug cartels, and that their power to regulate such conduct has been hampered since the legalisation of begging in the state.

Social commentators have chimed into the debate, stating that charity workers are just as annoying and aggressive, and expressing a preference for walk-up NGOs to be banned instead.

Earlier this year, the Victorian police were upset about tap and go card frauds leading to a drain on police resources, but surely it is an even more questionable use of police powers to be confiscating a few coins from a homeless person under the guise of 'proceeds of crime.'

What do you think: should begging be considered a crime?

Is Community Service an Effective Punishment?

Community service orders (CSOs) are available for both State and Commonwealth criminal offences.

Under the Crimes (Sentencing and Procedure) Act, they can involve up to 500 hours of work in the community.

The kind of work you are given will depend on what is available in your community and what you are best suited to.

They are relatively recent category of penalty, having grown in usage since their introduction in the 1960s.

The types of offences punishable by CSOs have rapidly expanded over the past two decades or so.

Currently, in order to be eligible for a CSO you must have committed a crime that is punishable by a prison sentence, and you must not be considered a risk to the community.

They can also be given as punishment for unpaid fines.

You may have seen that international celebrities including Paris Hilton and Lindsay Lohan in the United States, and Boy George in the United Kingdom, have been required to perform community service.

But have you ever wondered just how effective community service is, and whether it is just a lenient punishment that achieves very little?

How does it compare to sending people to prison?

Research has shown that prison is not very effective in terms of deterring people from committing new crimes.

Not only that, according to an Australian Institute of Criminology study, community service is far more economical than imprisonment, which is very expensive.

Community Service works as a punishment by depriving a person of their time and liberty.

And in terms of rehabilitation, CSOs are often successful in helping young offenders rehabilitate and integrate back into society.

The programs give young people the chance to build connections

with business and people in their community.

In fact, there is evidence to suggest that community service is more effective than another kind of punishment, according to one 2013 Bureau of Crime Statistics and Research study (BOCSAR).

The BOCSAR study compared the reoffending rates of defendants given good behaviour bonds to those given CSOs.

Those who are given CSOs were found to have a slightly lower rate of reoffending than those who received given a bond – yet more than six times the amount of people received bonds than CSOs.

The number of CSOs has been decreasing since 1994, and the prevalence of good behaviour bonds has been rising.

The Director of BOSCAR, Don Weatherburn, believes that although the difference in reoffending rates may be small, the difference is probably larger than what the figures suggest.

This is because not all those who reoffended are caught, as much crime goes undetected or unsolved.

This means that large differences in the rates of offending can still only show a small percentage difference in the reoffending habits of those who received a CSO versus a good behaviour bond.

CSOs are not a slap on the wrist: they come with a criminal record and breaches are treated very seriously.

In fact, any breach can lead to the CSO being revoked and a sentence of imprisonment being imposed.

And if an offence is committed during a CSO, the fact that the offender was on CSO at the time will be treated as an aggravating factor – which could lead to a harsher sentence than would normally be imposed.

To learn more about other criminal penalties, offences and information about the criminal justice system, visit our regularly updated blog.