Judicial Commission of New South Wales

JIRS Updates related to COVID-19

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This Newsletter contains a summary of legislation, case law and other material published on the Judicial Information Research System (JIRS) addressing changes to the administration of criminal justice as a result of the COVID-19 pandemic. Updates will be published as needed.

RECENT LEGISLATION

15/04/2020
Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020

Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020 — amends *Public Health Regulation* 2012 to enable offences under s 10 of the *Public Health Act* 2010 involving a breach of a Ministerial direction pursuant to the Public Health (COVID-19 Spitting and Coughing) Order 2020 or another offence committed within certain time period to be dealt with by way of penalty notice — commenced 9 April 2020 (LW 09.04.2020)

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation* 2020 amends the *Public Health Regulation* 2012 to enable certain offences under the *Public Health Act* 2010 (the Act) to be dealt with by way of penalty notice in response to the COVID-19 pandemic. The amendments commenced on 9 April 2020.

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation* inserted the *Public Health Act* offence under s 10 involving a breach of a Ministerial direction pursuant to the Public Health (COVID-19 Spitting and Coughing) Order 2020 (the order) (see Government Gazette No 77 of 9 April 2020) or another offence committed between 26 March 2020 and 25 March 2021, into Sch 4 of the *Public Health Regulation* so they may be dealt with by way of penalty notice.

Clause 5 of the order provides a person must not intentionally spit at or cough on a public official (which includes a health worker) in a way that would reasonably be likely to cause fear about the spread of COVID-19.

The penalty notice amount for an individual in relation to a breach of the order is $5000.

The penalty notice amount for an individual in relation to another breach of s 10 of the Act committed between 26 March 2020 and 25 March 2021 is $1,000, and for a corporation, $5,000. The Act otherwise provides for the maximum penalties associated with these offences.

Section 10 of the Act provides for an offence of not complying with ministerial direction.

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For up-to-date details regarding the Ministerial directions/orders in force, see NSW Legislation Notifications.

The *Public Health Amendment (COVID-19 Spitting and Coughing) Regulation* builds on the *Public Health Amendment (Penalty Notices) Regulation* 2020 which commenced on 25 March 2020.

07/04/2020

Crimes (Administration of Sentences) Amendment (COVID-19) Regulation 2020

***Crimes (Administration of Sentences) Amendment (COVID-19) Regulation* 2020 — creates new cl 330 in the *Crimes (Administration of Sentences) Regulation* 2014 — operates with new s 276 *Crimes (Administration of Sentences) Act* 1999 to prescribe classes of inmate eligible for possible release on parole during COVID-19 pandemic — classes of inmate are those with higher health risk and those to be released within 12 months, and must not be an "excluded inmate" — commenced 3 April 2020 (cl 2, LW 03.04.2020)**

The *Crimes (Administration of Sentences) Amendment (COVID-19) Regulation* 2020 amends the *Crimes (Administration of Sentences) Regulation* 2014 to prescribe classes of inmate eligible for possible release on parole during the COVID-19 pandemic. The amendment commenced on 3 April 2020.

It operates with the new s 276 of the *Crimes (Administration of Sentences) Act* 1999 (the Act) introduced by the *COVID-19 Legislation Amendment (Emergency Measures) Act* 2020 which commenced on 25 March 2020 enabling the Commissioner of Corrective Services to grant parole to certain inmates and prescribing those excluded from consideration for release under the section.

The new cl 330(1) prescribes the following classes of inmate as eligible for release to parole:

a) those whose health is at higher risk during the COVID-19 pandemic because of an existing medical condition or vulnerability;

b) those whose earliest possible release date is within 12 months,

other than an "excluded inmate" as defined in cl 330(3). The Commissioner must also not make such an order in relation to other classes of person listed in s 276(3) of the Act.

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Clause 330(2) provides the Commissioner must be satisfied the inmate does not pose an unacceptable risk to community safety (also see s 276(1)(b) of the Act which provides the Commissioner must also be satisfied that releasing the inmate on parole is reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic).

RECENT CASES

16/04/2020

Trial procedure — COVID-19 pandemic — adjournment application — *COVID-19 Legislation Amendment (Emergency Measures) Act* 2020 — *Evidence (Audio and Audio Visual Links Act* 1998, s 22C(3) & (4) — appearances via AVL — trial adjourned — trial in virtual courtroom impractical given technological difficulties — accused's right to a fair trial compromised — *R v Macdonald; R v E. Obeid; R v M. Obeid (No 11)* [2020] NSWSC 382

The joint judge-alone trial of the accused had been in progress for five weeks in the Supreme Court when it was adjourned for about two weeks for mention in response to the public health concerns associated with the COVID-19 pandemic.

In the interim, the Chief Justice directed that, consistent with then current public health advice, there would be no physical appearances in any criminal matters until further notice, save in exceptional circumstances and with his Honour's leave.

Shortly before the mention date, the Court convened for a "test run" of facilities for the proceedings to recommence in a "virtual courtroom" via a web link to the courtroom with a view to the joint trial resuming shortly after. During the "test run" it became clear the system did not easily cope with the appearance of all six counsel, and each of the solicitors instructing respective counsel. There were further issues for Mr Macdonald's counsel, who was instructed directly. The Court expressed concerns as to how witnesses would give evidence via the audio-visual link (AVL) and be cross-examined when the Court Book exceeded 7500 pages and an additional 79 documents were marked for identification.

Before the trial was due to recommence, the *COVID-19 Legislation Amendment (Emergency Measures) Act* 2020 commenced. Relevantly, it amended the *Evidence (Audio and Audio Visual Links) Act* 1998 allowing the Court to direct that witnesses and the accused attend proceedings by AVL. Pursuant to s 22C(3) and (4) of that Act, the Crown applied for appearances by AVL or, in the alternative, for counsel and solicitors to physically appear and for others to appear by AVL.

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On the morning of the day the trial was to recommence, the Court could not convene as none of the parties were able to connect to the virtual courtroom. That afternoon counsel, instructing solicitors, and the accused all appeared from various places (including in some cases, their homes) but throughout the proceedings, one or more of the parties repeatedly "dropped out", necessitating telephone communication with them so they could "dial back in". Occasionally counsel were difficult to hear and submissions were fractured or time delayed. The integrity of the transcript suffered.

During the hearing of the Crown's application, the parties were advised the Chief Justice had refused leave for the trial to resume in the alternative manner proposed by the Crown. The Director of Public Prosecutions tried, unsuccessfully, to make arrangements for a "witness hub" at an external location for the giving of evidence by AVL.

The trial was adjourned and was to resume in the virtual courtroom but difficulties with the technology continued although efforts were being made to address and resolve what had become, by that time, systemic technological problems throughout the court.

Mr Macdonald then applied to adjourn the trial to a date to be fixed because of the ongoing practical difficulties his counsel faced in continuing to represent him as a direct access client. The Crown opposed the application. Counsel for the other accused neither consented to, nor opposed, the application.

The Court (Fullerton J) allowed the application and adjourned the trial for four months.

The accused are entitled to a fair trial which includes, necessarily, fair process and procedures. A trial of the accused in a virtual courtroom is impractical and the accused's right to a fair trial would be at risk if it continued at this time, subject as it is to the current health and safety regime imposed under the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 under s 7 of the *Public Health Act* 2010, and the Chief Justice's direction that there be no physical appearances in trial proceedings:

It is not assumed there will be an easing of the current social distancing restrictions over the next few months, or that there will be any necessary improvement in the Court's capacity to conduct adversarial criminal trial proceedings. It is hoped, however, that by adjourning the trial until August 2020 it may be able to resume with all counsel appearing personally, albeit within a courtroom that preserves the need for social distancing, with the accused having the option of appearing via AVL and with witnesses having that option on an application being made under the *Evidence (Audio and Audio Visual Links) Act*, assuming the facilities are available to allow that to occur and that they can be utilised to practical effect.

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06/04/2020

***Bail Act* 2013, ss 16A, 16B, 17, 18, 19 — release application — serious domestic violence assaults — evidence concerning effect of COVID-19 pandemic on criminal justice and prison systems — pandemic relevant to assessing bail concerns under s 18, show cause requirement under s 16B and unacceptable risk test in s 19 — applicant released on strict conditional bail — *Rakielbakhour v DPP* [2020] NSWSC 323**

The applicant was charged with assault and assault occasioning actual bodily harm. Police attended his home after neighbours reported his wife (the alleged victim) crying for help, and found the alleged victim with injuries to her face. The applicant denied the offences. The alleged victim indicated she would not give evidence in court, and gave an account of the incident exculpating the applicant.

The applicant made a release application, in support of which he tendered evidence concerning the COVID-19 pandemic (novel corona virus) and its impact on the criminal justice and prison systems in New South Wales. The Prosecutor tendered two memoranda by the Chief Magistrate (see Chief Magistrate's Memorandum Covid-19 arrangements No.7; Chief Magistrate's Additional Memo (Clarification)).

The Court (Hamill J) granted bail subject to various conditions, including house arrest.

The strength of the case against the applicant is questionable given the alleged victim has indicated she will not give evidence against him. The bail concerns raised by the prosecution are able to be mitigated by imposing strict conditions. Accordingly, the concerns arising under s 17 of the *Bail Act* 2013 are not unacceptable risks for the purpose of s 19. In making that determination it is kept in mind that the alleged victim's failure to co-operate with police may be indicative of the psychology of a victim of intimate partner violence a matter militating against the grant of bail.

The evidence tendered and the Chief Magistrate's memoranda in respect of the COVID-19 pandemic suggest:

- gaols and similar institutions are particularly susceptible to the rapid spread of the virus and it is difficult to enforce the restrictions currently being encouraged in the community;
- there have been no confirmed cases of COVID-19 amongst inmates inside NSW prisons at this stage, however health workers in the prison system have tested positive for the virus;
- inmates are currently subject to more onerous conditions of incarceration — personal visits have been suspended and inmates are kept in their cells for longer periods;

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- many criminal cases are being adjourned;
- inmates are expected to have increased anxiety waiting in gaol because the virus can spread so quickly;
- the number of reported cases are rising exponentially;
- the NSW parliament has passed emergency legislation (*COVID-19 Legislation Amendment (Emergency Measures) Act* 2020) which includes allowing the Commissioner to grant early parole reflecting the seriousness of the current medical crisis;
- the new court procedures under the emergency legislation such as "virtual courts" and the suspension of jury trials will create delays and backlogs.

These are matters properly to be taken into account and are relevant to a number of factors in s 18 of the *Bail Act* when assessing bail concerns including: s 18(1)(m) (the need for the person to be free for any other lawful reason, for example, to protect themselves from infection and support their family); s 18(1)(h) (the length of time a person will remain in custody); s 18(1)(l) (the need for the accused to prepare for their appearance in court or obtain legal advice, for example, all legal visits are currently conducted by video link); and s 18(1)(k) (any special vulnerability the accused person has, with Aboriginal and Torres Strait Islanders being particularly susceptible to the virus).

Similar observations about the current crisis were made in the Victorian bail applications of *Re Broes* [2020] VSC 128 and *Re Tong* [2020] VSC 141. Allowing for the fact that, unlike Victoria, the applicant in this case does not need to establish exceptional circumstances to justify the grant of bail, the observations in *Re Broes* at [35]–[42] remain relevant to considerations applying under the New South Wales bail provision. Depending on the circumstances, the COVID-19 pandemic will be relevant to the show cause requirement under ss 16A-16B of the *Bail Act*, and in other cases, such as this, it will be relevant to the factors under s 18.

02/04/2020

Procedure — *Criminal Appeal Act 1912*, s 5F(3) — appeal against decision refusing counsel leave to withdraw and to vacate trial — judge erred by failing to address whether trial unfair if accused unrepresented — accused not at fault for lack of representation — *Dietrich v The Queen* (1992) 177 CLR 292 applied — *Kahil v R* [2020] NSWCCA 56

The applicant and his co-accused were charged with conspiracy to import a commercial quantity of a border controlled precursor contrary to ss 11.5(1) and 307.11(1) of the *Criminal Code* (Cth). On the 7th day of the trial (which was, as a result of various delays, two weeks from the day the trial commenced), the applicant's counsel applied for leave (with the

support of the Crown) to withdraw, and to discharge the jury on the basis he needed to self-isolate to prevent possible contraction of COVID-19 due to his age (69), compromised immunity and proximity to the applicant and his instructing solicitor who exhibited flu-like symptoms.

The trial judge refused the application. Counsel withdrew and the judge suggested that counsel's instructing solicitor (who had never run a jury trial) continue acting on behalf of the applicant. The applicant sought leave to appeal pursuant to s 5F(3) of the *Criminal Appeal Act* 1912.

The Court (Adamson J; Harrison J agreeing with additional reasons; Button J agreeing with both) allowed the appeal, and ordered the jury be discharged and the trial vacated. The proceedings were remitted to the District Court.

The judge erred by failing to address whether the trial was likely to be unfair if the applicant were forced on unrepresented. Thus, his Honour's discretion to grant or refuse an adjournment miscarried.

The application for discharge of the jury and vacation of the trial was made *after* the applicant's trial counsel was first refused leave to withdraw. In these circumstances, the trial judge was bound to treat the applicant as unrepresented. The solicitor instructing could not reasonably have been expected to continue the trial and the withdrawal of counsel left the applicant, through no fault of his own, without adequate representation.

The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented; *Dietrich v The Queen* (1992) 177 CLR 292 at 311.
This *dictum* applies not only to circumstances where an accused is unrepresented because he or she is unable to afford legal representation, but also where an accused's legal representative is unable to attend for a reason which is not the fault or responsibility of the accused; *Decision Restricted* [2020] NSWCCA 8 at [31].

Harrison J (Button J agreeing): The single and simple issue that confronted his Honour was whether it was in the interests of justice to require an accused person, in a criminal trial then running before him and a jury, to continue in the trial without counsel of his choice. The decision of the applicant's trial counsel was neither generated nor encouraged by the applicant who suddenly and without fault found himself unrepresented in criminal proceedings of a most serious kind. His right to competent representation at his trial should never have been subverted or compromised by the desire to keep his trial on foot.