

# Service of the Police Brief

ss183 – 188 Criminal Procedure Act (NSW) 1986

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Last year Legal Aid assigned me a domestic violence matter at short notice. I attended the Local Court and informed the prosecutor that I didn't have the brief. He made some enquiries and informed me that the Brief Manager had not served the brief but he would be happy to give me a copy then and there. As a result, I was able to exclude the entirety of the police evidence for failing to comply with the service requirements and the charge was dismissed with an order that the police pay my costs.

Every advocate must understand the service provisions in order to properly represent their client. This article aims to assist practitioners appearing in the Local Court of NSW.

## Is a Brief Required?

No brief of evidence need be served for Penalty Notice offences including Goods in Custody, Offensive Conduct, Obstructing Traffic and Fail to Move On.<sup>1</sup> The regulations prescribe no brief is required for Drive Disqualified, Drink Driving, Drug Possession and summary offences for which there is a monetary penalty only.<sup>2</sup>

## If A Brief is Required

Section 183(3) Criminal Procedure Act provides that for Local Court matters:

*'The copy of the brief of evidence is to be served at least 14 days before the hearing of the evidence for the prosecution.'*

Section 188(1) makes this a mandatory requirement by providing:

*'The court must refuse to admit evidence sought to be adduced by the prosecutor in respect of an offence if, in relation to that evidence, this Division or any rules made under this Division have not been complied with by the prosecutor.'*

## Dispensing with the Service Requirement

These mandatory requirements can be dispensed with in three circumstances:

1. Where the Accused applies or consents,<sup>3</sup>
2. Where there are compelling reasons for not requiring service,<sup>4</sup> or
3. Where it could not reasonably be served on the accused person.<sup>5</sup>

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1 s187(5) Criminal Procedure Act (NSW) 1986

2 Clause 21 Criminal Procedure Regulation (NSW) 2010

3 s188(2) Criminal Procedure Act (NSW) 1986

4 187(1)(a) Criminal Procedure Act (NSW) 1986

5 187(1)(b) Criminal Procedure Act (NSW) 1986

# Application

The burden is on the police to prove 2 or 3. The defence should require the prosecutor to call the Officer-in-Charge to give sworn evidence as to:

1. What steps the police took to attempt to serve the brief,
2. The 'compelling reasons' or why the brief could 'not reasonably be served',
3. When he or she became aware of these facts.

In the present case, the OIC had prepared the brief and given it to the Brief Manager who simply forgot to serve it. I submitted that:

- the police carry the burden of showing compelling reasons,
- the reasons are not compelling,
- the Defendant is prejudiced because he couldn't prepare his or her defence, and
- the interests of justice weigh against dispensing with the service requirements.

## The Recorded Interview

Although the brief had not been served, the ERISP DVD had been handed to the defendant at the end of the interview. As such the DVD had been served and the prosecutor sought to tender it and rely on admissions made in the interview.

I objected to him tendering the DVD from the bar table. The DVD may have been served but the prosecutor did not have a witness through whom to tender it into evidence. The OIC was present in court and eager to give evidence of the interview but could not be called because his statement had not been served.

## Adjournments

If the court declines to dispense with the service requirements, then the police will seek to adjourn the hearing for 14 days so that they can comply. The defence will oppose this application and submit that the police commenced the proceedings, were aware of both the hearing date and their obligations to serve a brief, but have failed to provide 'compelling reasons' as to why they did not.

In addition, the accused has suffered considerable inconvenience to come to court and he has incurred legal expenses (even Legal Aid impose a \$75 co-contribution). So if an adjournment is granted then the defence should apply for a costs order under s216 Criminal Procedure Act for the costs thrown away.

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