

# The Form 1 Procedure

*Sections 31 – 35 Crimes (Sentencing Procedure) Act (NSW) 1999*

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Last year I represented a client charged with deemed supply of methylamphetamine and possession of various other drugs. I persuaded the police to accept a plea of guilty to the supply charge and place the possession charges on a Form 1. As a result, my client was only convicted of the one offence and walked out of court on a bond.

The Form 1 procedure is a sentencing option that can be employed by defence lawyers to reduce the sentence imposed upon clients charged with multiple offences. Unfortunately, it is under used because many advocates are unaware of its existence or how to employ it. This article seeks assist practitioners appearing in the Local Court of NSW.

## The Procedure

Under the Procedure, the offender is able to plead guilty to one principal charge and have additional charges placed on a 'Form 1'. At sentencing, the court may take into account the further offences with which the offender has been charged but not convicted.<sup>1</sup> The admitted offence(s) will be taken into account with the principal offence but only if the court considers it appropriate to do so.<sup>2</sup>

So the client is technically only convicted of the one offence, has only one conviction on their record and can make a fresh start without the threat of further proceedings for the additional offences.

## The Three Step Process

All three participants – the prosecutor, the offender and the court – must agree to the Procedure. In the sentencing proceedings for the Principal offence, the prosecutor may file in court a list of additional offences with which the offender has been charged but not convicted.<sup>3</sup>

The offender must then indicate that he or she wants the court to take these additional offences into account when dealing with the principal offence.<sup>4</sup> A copy of the list of additional charges, as filed, is given to the offender and must be signed both by the offender and the prosecutor.<sup>5</sup>

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<sup>1</sup> s32 Crimes (Sentencing Procedure) Act 1999

<sup>2</sup> s33(2)(b) Crimes (Sentencing Procedure) Act 1999

<sup>3</sup> s32(1) Crimes (Sentencing Procedure) Act 1999

<sup>4</sup> s32(1) Crimes (Sentencing Procedure) Act 1999

<sup>5</sup> s32(3) & (4) Crimes (Sentencing Procedure) Act 1999

Section 33(1) then requires the court to ask the offender:

*“whether the offender wants the court to take any further offences into account in dealing with the offender for the principal offence”.*

If the offender agrees, then the court may take a further offence into account in dealing with the offender for the principal offence, but only if, in all of the circumstances, the court considers it appropriate to do so.<sup>6</sup>

## The Rational for the Procedure

In the guideline judgment,<sup>7</sup> Spigelman CJ noted two distinct but consistent rationales for the procedure of taking matters into account on a Form 1 at [62]–[65]:

- 1. It promotes the objective of rehabilitation by providing an opportunity for an offender to emerge with a “clean slate” following sentencing for the principal offence.*
- 2. There is utilitarian value in the admission of guilt which saves resources utilised in further investigation by law enforcement agencies.*

*The effect of including offences on a Form 1 is to give them a significantly lower prominence in the sentencing process, affording an obvious advantage and a greater incentive to admit guilt.*<sup>8</sup>

## The Bottom Up Approach

The offender is not punished for the matters on the Form One. The effect of putting matters on the Form One is that the offences are given a 'significantly lower salience in the sentencing process'.<sup>9</sup> However, where there are matters on a Form One, the court can give more weight to personal deterrence and retribution.<sup>10</sup>

The court endorsed the “bottom up” approach in *R v Timmis*.<sup>11</sup> This approach focuses on the sentence that is appropriate for the principal offence. The essence of the process is to impose a longer sentence, or to alter the nature of the sentence, that would have been imposed if the primary sentence had stood alone. This sentence is then increased by reason of the Form 1 offences for which guilt has been admitted.

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<sup>6</sup> s33(2) (b) Crimes (Sentencing Procedure) Act 1999

<sup>7</sup> Attorney General’s Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 No 1 of 2002 (2002) 56 NSWLR 146

<sup>8</sup> Ibid. per Spigelman CJ at [66]

<sup>9</sup> Ibid. per Spigelman at [66]

<sup>10</sup> Ibid. at [42]

<sup>11</sup> *R v Timmis* [2003] NSWCCA 158. See also *Abbas v R* (2013) 231 A Crim R 413 at [15]

However, any penalty imposed on the offender for the principal offence must not exceed the maximum penalty that the court could have imposed for the principal offence had the further offence not been taken into account.<sup>12</sup>

## Driving Offences

The Form 1 Procedure is particularly advantageous for traffic offenders because many traffic offences incur demerit points or an automatic statutory disqualification. If a charge of Drive Whilst Disqualified is placed on a Form 1, then the offender will avoid the conviction and automatic disqualification.

## The Clean Slate

If a further offence is taken into account, no proceedings may be taken or continued in respect of the further offence unless the conviction for the principal offence is quashed or set aside.<sup>13</sup> The offender is not convicted of the offence(s) taken into account.<sup>14</sup>

An admission of guilt for the purposes of the Form 1 Procedure is not admissible in evidence in further criminal proceedings in relation to any such offence, or any other offence specified in the list of additional charges.<sup>15</sup>

In any criminal proceedings, where reference may be made to, or evidence given about, the fact that the offender was convicted of the principal offence, reference may also lawfully be made to, or evidence given about, the fact that a further offence was taken into account in imposing a penalty for the principal offence.<sup>16</sup>

The fact that an offence was taken into account under Part 3 Division 3 may be proved in the same manner as the conviction for the principal offence: s 35(6).

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<sup>12</sup> s33 (3) Crimes (Sentencing Procedure) Act 1999

<sup>13</sup> s35(1)(a) & (b) Crimes (Sentencing Procedure) Act 1999

<sup>14</sup> s35(4) Crimes (Sentencing Procedure) Act 1999

<sup>15</sup> s35(3) Crimes (Sentencing Procedure) Act 1999

<sup>16</sup> s35(5) Crimes (Sentencing Procedure) Act 1999