

# Subpoena Law in NSW

*Domestic Violence – Apprehended Violence Order – No Evidence Offered  
ss222 – 229 Criminal Procedure Act (NSW) 1986*

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Witnesses fail to appear every day at courts across NSW and every Defence advocate needs to know how to respond and act in the best interest of the client. This article explains the procedure for serving a valid subpoena and the procedure if a witness fails to appear.

## The Typical Scenario

Let's say two mates get into an argument over the football. Things get out of hand, punches are thrown and one or both of them are arrested. The next day both men are sober and embarrassed and neither wants to pursue the matter. They tell the police it was all a misunderstanding and they don't wish to press charges.

The police inform them that they intend to pursue the matter regardless. They serve a Court Attendance Notice on one, now called the accused, and serve a subpoena on the other, now called the complainant. The complainant decides that he doesn't want to give evidence against a mate and so refuses to go to court in defiance of the subpoena.

## What Happens at the Hearing?

On the day of the hearing the matter is called and the complainant has not appeared, despite having been subpoenaed. The police make valiant efforts to locate him and bring him to court. This involves attempting to call him on his mobile phone and sending a police car to his home or workplace. At noon the magistrate returns from morning tea and the complainant is still not in attendance.

Without the complainant's evidence, the police case is likely to fail. So, the police now apply for a warrant to arrest the complainant and bring him before the court. Section 229(2) Criminal Procedure Act 1986 provides that the court can issue a warrant if satisfied:

- (a) the person named has not complied with the subpoena, and*
- (b) the service requirements were complied with and no just or reasonable excuse has been offered for the failure to comply.*

The police carry the burden of proving these two facts and Defence counsel should put them to proof. This means the informant has to give sworn evidence and be cross-examined as to who issued the subpoena, how it was served and how the witness was positively identified.

## Complied with the Subpoena?

The court needs to see the subpoena to confirm that it showed the correct date and the correct courthouse. Police members are able to issue and serve their own subpoenas and then file a copy at court afterward. But this second part is very rare indeed. The result is that the subpoena is usually not on the court file nor in the possession of the informant. Often, they will tender a statement of service without the actual subpoena attached.

Without the actual subpoena, Defence counsel will submit that the court cannot be satisfied that the witness has failed to comply. Furthermore, that depriving a person of their liberty should be a last resort. Finally, that it would be extraordinary to arrest the alleged victim in a domestic violence matter and would be likely to deter victims from reporting matters to police.

## Service Requirements

If the police are able to prove the details of the subpoena for the purpose of s229(2)(a), they then have to show that the subpoena was served in accordance with Part 3 of Chapter 4. Section 223 provides that subpoena must be served at least five business days before the day the witness must appear.

The Local Court Rules allow subpoenas to be served by post to the witness's residential address. If the subpoena is posted, then *s160 Evidence Act 1995* presumes the letter to have arrived on the fourth working day after it was posted.

These four days are in addition to the five business days required by the Criminal Procedure Act which makes a total of nine business days. So if the witness is to appear this coming Monday, then the subpoena must have been posted on or before Monday of the previous week (assuming no public holidays fall in between).

## Costs on Adjournment

It is highly unusual for the Local Court to issue a warrant to arrest the victim of a crime. In the absence of any evidence of willful contempt, it will normally be refused. Once a warrant is refused the police will seek an adjournment. The Defence will oppose this as the defendant is in court and paying his legal representatives and it would be oppressive to make him attend again and incur still greater expense.

If the adjournment is granted, then the Defence should seek costs under s216 Criminal Procedure Act. This application will be strengthened if the subpoena is not available or was not properly served.

I'm available every day if you require further assistance.

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