

Annexure K — Criminal practice guideline — Taking instructions from clients

Background

1. It is fundamental to the lawyer-client relationship that a lawyer must rely and act on the lawful, proper and competent instructions of their client ([ASCR rule 8](#)).

The function of taking a client's written instructions is three-fold:

It provides a concise summary of the allegations, advice given, options open to the client, potential consequences, and specific directions a client is providing as to how they wish their matter to progress.

The existence of written instructions will often remove the need for an appellate court to consider competing versions from applicants and their legal representatives (by way of oral evidence) about the circumstances and advice under which a plea is given. Some examples of cases in which the existence or absence of instructions was pivotal include:

[R v Williams \[2012\] QCA 139](#) at 33

[R v BCJ \[2012\] QCA 316](#) at 20

[R v Verall \[2012\] QCA 310](#) at 28, 29, 39 and 51

[R v McGrane \[2012\] QCA 29](#) at 30-32

[R v Nerbas \[2011\] QSC 41](#) at 30-31, 43

[R v Mamea \[2010\] QCA 127](#) at 8-10

[R v Bourke \[2009\] QDC 62](#)

[R v Gearn \[2004\] QCA 115](#) at 17

[R v Au \[2004\] QCA 330](#) at 22 and 26.

2. The process of executing the document assists the client to appreciate the significance of exercising their legal rights in making a choice as to how the matter will proceed.
3. It provides an independent record which can be provided to the client, or an appellate court or disciplinary body if the matter is later contested.

The Queensland Court of Appeal has explicitly recognised the importance of signed witnessed instructions on many occasions, including in [R v Allison \[2003\] QCA 125](#), when the court made the following observations:

"McMURDO P: All experienced practitioners in the criminal law recognise the wisdom of ensuring instructions, changes in instructions and especially instructions as to the plea are in writing and witnessed to avoid subsequent costly and distressing investigations such as those undertaken here...I emphasise that signed instructions properly witnessed by the barrister's instructing clerk would almost certainly have avoided this whole unfortunate exercise."

Professional and ethical obligations:

It will always be a matter for an individual lawyer/duty lawyer to decide the circumstances in which they are prepared to act on a client's instructions. It may be, as technology advances, that other options, including the use of tablets and digital signatures, become available. As it stands, lawyers/duty lawyers will need to assess the options discussed below.

While it is desirable to assist with the efficient progression of matters through the courts, lawyers/duty lawyers must never act in circumstances where they believe it is not appropriate to do so. Whether the matter is a duty lawyer plea, or a murder trial, the standard of competence that a member of the public is entitled to expect of a reasonably competent lawyer is the same. Time pressures or inexperience will not bear on the objective test as to what will amount to unsatisfactory professional conduct¹.

Where a grant of legal aid exists

The following options exist:

1. Best practice is taking written instructions face-to-face from the client which are signed by the client and witnessed by the lawyer².
2. Situations will arise where this is not possible. In these situations, lawyers should consider the alternatives below:
 - 2.1. Schedule a videoconference with the client. Fax the instructions to the client. Read through the instructions with the client and watch them sign the document. Request the document be faxed back to you.
 - If the client is being produced at the sentence, they can execute another document annexing the faxed instructions.
 - If the client is not being produced at the sentence, request they post the hard copy back to you. On receipt of the instructions, you can mark the document to indicate it is the same document you read through with the client in the videoconference.
 - 2.2. Send the written instructions to the prison. This will ensure legal professional privilege is maintained. A videoconference can then be scheduled for the client to go through the instructions. You can watch the client sign the document and request it be returned via pre-paid post. On receipt of the signed instructions, you can mark the document to indicate it is the same document you read through with the client in the videoconference.
 - 2.3. If a fax is unavailable, hold a videoconference with the client. Draft and read their instructions to them and advise them a copy will be sent to them. Send instructions in the post and hold a further

¹ [Legal Services Commissioner v Anderson \[2009\] LPT 1](#)

² A grant of legal aid for a higher court matter automatically includes 2 conference grants (at time of drafting worth \$165 each). A prison visit grant of \$177 is also available for higher court or summary matters on application.

videoconference to go through the instructions. Have the instructions returned as per point 2.2 above.

- 2.4. If you adopt step 2.3, and there is some reason you cannot schedule a second videoconference, ask the client to sign and return the instructions via pre-paid post. The client should not be asked to get the document witnessed. There are two reasons for this:
- a) The primary function of the witness in this situation is being a witness of the truth of the contents, that is, the client read and understood the document and received the advice as set out in the document — no lay person at the prison will be in a position to do this.
 - b) Given the lack of utility in having a witness, it is unadvisable to require the client show a privilege document to a third party and waive their privilege.

Duty Lawyer representation

1. Where the client is physically present, the duty lawyer must obtain the client's signed and witnessed instructions on the *Criminal law duty lawyer form* (duty lawyer form) unless circumstances exist which prevent the exchange of documents between the duty lawyer and the client. Where such circumstances exist, the duty lawyer should follow the procedure set out below as if the client were attending court via video link.
2. Where a client is attending court via a video link, the duty lawyer must adopt the following procedure:
 - 2.1. The duty lawyer must make contemporaneous notes recording the advice provided to the client and the instructions obtained from the client on the duty lawyer form and must complete all other relevant or necessary parts of the duty lawyer form.
 - 2.2. Where the client gives instructions that he/she wishes to enter a plea on a charge/s **and the duty lawyer is satisfied it is appropriate to deal with the matter in the absence of written instructions signed by the client**, the duty lawyer must:
 - a) explain to the client it is preferable the client have the opportunity to peruse the duty lawyer form and confirm his/her instructions by signature and that an adjournment of the matter will be required for that process to occur
 - b) explain to the client that if the client wishes to waive the opportunity to peruse and sign the duty lawyer form so as to have his/her matter dealt with as soon as possible, the client's instructions may, where practical, need to be confirmed by other means, such as an appropriate third party witness
 - c) record on the duty lawyer form and have the client verbally confirm:
 - i. if the instructions between the client and the duty lawyer are to be witnessed by a third party, that the client consents to the instructions being witnessed
 - ii. the client wishes to have their matter dealt with as soon as possible and therefore waives the opportunity to read and sign the written record of the client's instructions
 - iii. the client's instructions as to their plea

- d) sign the duty lawyer form and ensure the witness also signs the duty lawyer form (if the conversation is being witnessed)
- e) request the presiding magistrate ask the client how they plead to each charge, as required by s 145(1) of the *Justices Act 1886*, rather than having the lawyer enter pleas on the client's behalf.