

2024 Legal Aid Conference - 28 June 2024

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Introduction

1. This paper gratefully adopts the commentary and analysis of:
 - a. The paper written by Ms Sophie Anderson and Mr Ben Cochrane dated **June 2022, annexed** to this paper by way of **annexure 1**.
 - b. The checklist written by Legal Aid NSW, **annexed** to this paper by way of **annexure 2**.

Please read and consider the two annexures before reading the below.

2. This is a supplementary paper which aims to:
 - a. Provide guidance for the application of the *Costs in Criminal Cases Act 1967* (NSW) (**the Act**)
 - b. Provide guidance of the application of costs after the 18 August 2023 decision of *Rodden v R* [2023] NSWCCA 202 ("**Rodden**").¹ Specifically, this paper provides further analysis for paragraphs [42] to [44] - *What costs are Just and Reasonable?*
3. The Department of Communities and Justice had outlined *before* the appeal of the *Rodden* decision that a practical effect of it was that "*all Legal Aid NSW applications under the Costs in Criminal Cases Act 1967 (NSW)*" had been "*deferred pending the outcome of the appeal*".

¹ <https://www.caselaw.nsw.gov.au/decision/18a012c47f4ab3ecf1611a8b>

4. It is understood that, following the decision of the CCA in *Rodden*, consideration of Legal Aid NSW applications under the Act have **resumed** by the Department of Communities and Justice.

Rodden - Court of Criminal Appeal authority

5. As shall be seen, the decision at first instance for *Rodden* had important consequences for the Legal Aid Commission of New South Wales (the Commission) and the provision of legal aid in New South Wales.
6. The Commission applied to be joined as a party to both applications and, in the alternative, to intervene. Its joinder was not opposed. Ordinarily, multiple appellants in the same appeal should not be separately represented. Mr Rodden and the Commission made common cause and presented a consistent case without duplication. In all the circumstances, the Court of Appeal declined to join the Commission as a party but have received its submissions as an intervener.
7. The Commission plainly had a real interest in the matter involving, as it did, important questions of construction in relation to its constituent Act, as well as implications in relation to its financial position.
8. The relevant procedural history and factual background for the *Rodden* appeal are eloquently cited below:²
 - a. Mr Simon Rodden (the applicant) brought two applications arising from the decision (the decision) of Fagan J (the primary judge)³ to refuse his application for a costs certificate under section 2 of the *Costs in Criminal Cases Act 1967* (NSW) (**the Act**).
 - b. The applicant was acquitted of murder by a jury on 29 July 2022. He had been granted legal aid for his defence prior to the trial, obliging him to contribute of \$75 to his defence. He had also expended money on his defence prior to his grant of legal aid. Following his acquittal, the applicant applied for a costs certificate pursuant to section 2 of the *Act*.

² Headnote.

³ *R v Rodden (Costs)* [2022] NSWSC 1230.

- c. The primary judge declined the application for a costs certificate on two bases. First, his Honour held that no application could lie where an applicant was entirely legally aided and made no personal financial outlay in his or her own defence. Second, his Honour held that, even if a certificate could be granted where the acquitted applicant had made no personal financial outlay in his or her own defence, he would not have granted a certificate in any event as it would not have been unreasonable for a hypothetical prosecutor in possession of all the relevant facts to have instituted proceedings in this case.
- d. The first of the applications (2019/00181340), filed in the Court of Criminal Appeal, was for leave to appeal from the decision pursuant to section 5F of the *Criminal Appeal Act* 1912 (NSW). For this application to be competent, the decision must have been an “*interlocutory judgment or order given or made in the proceedings*” (in the language of s 5F(3) of the *Criminal Appeal Act*).
- e. The second application, brought by way of Amended Summons in the Court of Appeal (2023/109813), was for judicial review of the decision. This application was advanced in the alternative and on the basis that the decision was administrative in character, rather than judicial. This application sought relief pursuant to section 69 of the *Supreme Court Act* 1970 (NSW).
- f. To resolve the applications, the Court of Criminal Appeal and the Court of Appeal sat concurrently and identically constituted.
- g. There were three principal issues on appeal:
 - i. whether the Court of Criminal Appeal or the Court of Appeal (or neither, as submitted by the Crown) had jurisdiction to determine the challenge to the decision (the jurisdictional issue);
 - ii. whether, on its proper construction, the *Act* permitted the recovery of costs by completely legally aided defendants (the statutory construction issue); and
 - iii. whether it would have been unreasonable for a hypothetical prosecutor in possession of all the relevant facts to have instituted proceedings (the factual issue).

- h. The Court (Bell CJ, Leeming JA, Beech-Jones JA) held, granting leave to appeal but **dismissing** the appeal:

As to the jurisdictional issue

- i. The function of granting or declining to grant a costs certificate is not of an administrative character but is an exercise of judicial power. The Court of Appeal has no supervisory jurisdiction over a judicial decision of a judge of a superior court: [60]-[73].
- ii. The “*order*” to dismiss the application was interlocutory: [78], [85].
- iii. The order to dismiss the application was one that was “*given or made in the proceedings*” “for the prosecution of [the] offender on indictment”, in the language of s 5F of the *Criminal Appeal Act 1912* (NSW) notwithstanding that the applicant had already been acquitted: [86], [97].
- iv. The Court of Criminal Appeal therefore had jurisdiction pursuant to s 5F of the *Criminal Appeal Act* to entertain an appeal from the decision, subject to the grant of leave: [97].

As to the statutory construction issue

- i. An entirely legally aided applicant can be granted a certificate under the *Act*: [110], [119].
- ii. The starting point on an application for a costs certificate should be consideration of the two matters set out in section 3(1) of the *Act*. If section 2 does confer a residual discretion to decline to grant a costs certificate, a certificate should ordinarily be granted given the beneficial purpose of the *Act*: [111], [117].

Gwozdecky v Director of Public Prosecutions (1992) 65 A Crim R 160; *R v Johnston* [2000] NSWCCA 197; *Mordaunt v Director of Public Prosecutions* [2007] NSWCA 121; (2007) 171 A Crim R 510, *cited*.

- iii. Section 4 of the *Act* should not be read in a way which limits the reach of the *Act*'s application: [122].

As to the factual issue

- i. No error was demonstrated in relation to the primary judge's finding that if, before the proceedings were instituted, the prosecution had been in possession of evidence of all the relevant facts then it would not have been unreasonable to institute the proceedings: [159].

Rodden - Case Analysis

9. This decision concerns to two separate applications. Both arise from a decision (the decision) of Fagan J to refuse the application of Mr Simon Rodden for a costs certificate under section 2 of the *Costs in Criminal Cases Act 1967* (NSW) (the Act): see *R v Rodden (Costs)* [2022] NSWSC 1230.
 - a. The first of the applications (2019/00181340), filed in the Court of Criminal Appeal, is for leave to appeal from the decision pursuant to s 5F of the *Criminal Appeal Act 1912* (NSW). For this application to be competent, the decision must have the character of an "interlocutory judgment or order given or made in the proceedings" (in the language of s 5F(3) of the Criminal Appeal Act) (the CCA proceeding). The Respondent to the s 5F application is the Crown.
 - b. The second application, brought by way of Amended Summons in the Court of Appeal (2023/109813), is for judicial review of the decision (the judicial review proceeding). This application is advanced in the alternative and on the basis that the decision was administrative in character, rather than judicial. This application seeks relief pursuant to section 69 of the *Supreme Court Act 1970* (NSW). The Respondents to the Amended Summons are the Director of Public Prosecutions (the Director) and the Supreme Court itself (it will not be necessary to consider the correctness of the joinder of the latter).
10. The NSWCCA (Bell CJ, Leeming and Beech-Jones JJ) found that the function carried out by Fagan J in declining to issue a certificate was not administrative but rather a **judicial power** that required an appeal to be heard in the criminal jurisdiction. The Court of Appeal lacked jurisdiction to quash his Honour's decision by a grant of certiorari: *Rodden* at [72].

11. Further, and contrary to Crown's submission, the Court found the order dismissing Mr Rodden's costs application was an interlocutory order made in criminal proceedings within the meaning of s 5F of the *Criminal Appeal Act 1912*.

The primary judge's reasons

12. Following acquittal and prior to the hearing of the Notice of Motion, the primary judge expressed a preliminary view that he was "extremely doubtful" a certificate could be granted to an accused person who had been acquitted and whose defence had been fully funded by legal aid.
13. Ultimately, his Honour did not deviate from that preliminary view.
14. The primary judge began his reasons by setting out the relevant provisions of the Costs Act and noting Mr Rodden had received a grant of legal aid pursuant to s. 34 of the LAC Act which was not the subject to any condition requiring the applicant to make a financial contribution to his own defence.
15. Having recognised the statutory task to be applied in s. 3(1)(a)-(b) of the Costs Act, his Honour noted:

"The Court is not required to determine how the Director-General should deal with the application under s 4 that would follow upon the grant of a certificate. However, it is strikingly incongruous that the certificate is being sought by the Commission in order to pursue payment out of public funds of the amount of costs incurred on behalf Mr Rodden, where those costs have already been publicly funded. As can be seen from s 63 of the *Legal Aid Commission Act*, the money in the Legal Aid Fund that has been drawn upon by the Commission to pay for Mr Rodden's defence is supplied mainly from the State's general revenue. The machinery of the *Costs in Criminal Cases Act* is being invoked in this case to obtain from public funds, a second time, the one outlay of defence costs."

16. According to the primary judge, there was a fundamental flaw in Mr Rodden's application (and indeed every costs application by a person whose defence is funded by a grant of legal aid):

"These considerations warrant an examination of s 4 of the *Costs in Criminal Cases Act* to ascertain whether it is the intention of Parliament that the Court should hear and determine a claim, in substance by the Legal Aid Commission although in the name of the successful defendant, in such circumstances. **The issue of a**

certificate, if subsequently acted upon by the Director-General, would merely lead to churning of funds between public accounts. Given that end result, litigation of the issues under s 3 upon which the grant or refusal of a certificate depends, concerning whether prosecution of the charge was reasonable, appears to be a misallocation of the public resources of the Legal Aid Commission, the Director of Public Prosecutions and the Court. For reasons that follow, I do not consider that the Court's discretion under s 2 of the Costs in Criminal Cases Act should be exercised to issue a certificate in these circumstances. That conclusion follows from my interpretation of s 4, in which the Act prescribes how the Director-General must respond to an application for payment out of the Consolidated Fund."

17. The significance the primary judge's reasoning was recognised by the CCA:

The effect of this reasoning was to foreclose a positive exercise of discretion in favour of the grant of a certificate in respect of any and all applications made for or on behalf of a recipient of legal aid who is acquitted and who was fully funded in his or her defence: *Rodden* at [50].

18. It might be noted that this conclusion – that an applicant who was fully funded by legal aid did not, could not and would never have any liability in respect of costs, and therefore that the statutory officer referred to in s. 4 of the Costs Act *could never* exercise their discretion to award costs – was not one contended for by the Crown.

The Court of Criminal Appeal's reasons

19. Mr Rodden's appeal contended that, inter alia, the primary judge erred in the following two ways:
- a. In finding that the construction of s 4 of the Costs in Criminal Cases Act 1967 (NSW) and construction of s 42 of the Legal Aid Commission Act 1979 (NSW) did not permit the granting of a certificate where the applicant is legally aided; and
 - b. In taking into account the method by which payment would be made by the Director-General to the Legal Aid Commission and failing to take into account public policy considerations

20. Having examined the primary judge's reasoning, the Court explained, at [109], that the primary judge was driven by policy questions that had been expressed in "strong terms"; for example:
- a. "litigation of the issues under s 3 upon which the grant or refusal of a certificate depends, concerning whether prosecution of the charge was reasonable, appears to be a misallocation of the public resources of the Legal Aid Commission, the Director of Public Prosecutions and the Court";
 - b. An application for a costs certificate by an applicant who has been fully funded by Legal Aid represents "a massive waste of public expenditure upon a form of proceeding that was never envisaged when the Costs in Criminal Cases Act was passed"; and
 - c. "all that can be achieved by these applications is the movement of money between public accounts, which could be done by executive direction rather than by involving statutory bodies in litigation against each other".
21. The Court determined that the primary judge's opinion concerning the construction of the Act and the LAC Act was "unnecessary and, in our respectful opinion, wrong...": *Rodden* at [110].
22. It was unnecessary because the primary judge was not satisfied that the prosecution of the applicant was unreasonable within the meaning of s. 3(1)(a). In the circumstances, there was no reason to consider whether to exercise his discretion against the grant of a certificate.
23. It was wrong because the primary judge proceeded upon the *flawed assumption* that an applicant who had been "full-funded" by the LAC could never be out of pocket, or made liable to make a payment to the LAC:

*In short, his Honour wrongly assumed that, because the applicant had been "fully funded" by the Commission, the applicant could never be out of pocket, or made legally liable to make a payment to the Commission, in respect of the costs that had been incurred in furtherance of his defence. **This flawed assumption** carried through to his Honour's statement that "it does not appear to be open to the Director-General to form an opinion that "the making of a payment to the applicant is justified" where the applicant, Mr Rodden, has himself incurred no costs." A powerful discretionary reason for the Director-General to exercise his discretion favourably would be if the Commission had exercised its powers to require the applicant to*

make a contribution up until the whole of the amount of costs incurred in his defence. It was premature of the primary judge to speculate as to what was open to the Director-General. That would all depend upon the circumstances at a time which necessarily post-dated the grant of a certificate pursuant to s 2 of the Costs Act. Rodden [125].

24. In concluding that two of the grounds of appeal had been made out, the Court targeted the language deployed by Fagan J:

[132] To the extent that his Honour sought to support his analysis by recourse to arguments based in public policy, including those highlighted at [109] above, again we disagree with his Honour's viewpoint. **Even if it were ever appropriate for a judge to express the view that a statutory scheme “appears to be a misallocation of the public resources of the Legal Aid Commission, the Director of Public Prosecutions and the Court” and to entail “a massive waste of public expenditure”, the role of the Court in forming an opinion as to the matters referred to in s 3 of the Costs Act makes eminent common sense.** The existence of a judicial opinion as to those matters supplies the gateway to an award of costs. That the ultimate decision as to whether a costs award is made is vested in the Director-General was and is a matter for the legislature.

[133] **Nor, with respect, is the view that what is entailed in a Costs Act exercise is simply “the movement of money between public accounts” either accurate** or reflective of the fact that the Commission is constituted a corporation under s 6 of the LAC Act with a Board and Chief Executive Officer (ss 14-17), there is a separate Legal Aid Fund (s 62) with attendant statutory obligations in relation to payment into and out of that Fund (ss 63, 64) and that, by s 67 of the LAC Act, the Commission is required, on or before 31 May in each year, to prepare estimates of its income and expenditure for the following financial year.

[134] Further, given the salutary effect of an adverse costs order referred to by McHugh J in *Oshlack*, **the making of an award of costs following a successful application pursuant to the Costs Act achieves rather more than simply a movement of moneys or “churning of funds between public accounts”**, as his Honour described it.

Some key takeaways

25. In the ordinary course, it is not the function of judges considering whether to grant a certificate under s 2 to consider the matters raised by section 4 including the quantification of costs and the extent to which the applicant for the certificate is obliged to pay costs or has been or will be reimbursed for the costs. Those are matters for the Director-General: *Rodden* at [117].
26. Adverse costs orders (and the possibility of them) play an important role in litigation. Although principally intended to be compensatory, the very possibility of an adverse costs order focuses the mind of the moving party in commencing the proceedings or laying charges: see *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11 at [68] per McHugh J. Although more difficult to obtain in criminal proceedings because of the gateway imposed by s 3(1), the Costs Act represented a significant departure from the common law position that there was to be no recovery of costs in criminal proceedings. **Irresponsible and unreasonable prosecutorial decisions may be sanctioned by an adverse order as to costs.** The construction of the Act favoured by the primary judge removes this salutary potential aspect of its operation in what will be a not insignificant number of criminal trials where an accused is fully funded by legal aid: *Rodden* at [118]
27. There is no obvious reason why the expression “costs incurred in the proceedings” should be so confined and not extend to or include “costs incurred in the proceedings by *or on behalf of* the person who has been acquitted”. **After all, it is not uncommon for a litigant to have his or her costs paid for or undertaken to be paid for on his or her behalf, whether by an employer, trade union, insurer, family member or supporter:** cf. *Wentworth v Rogers* (2006) 66 NSWLR 474; [2006] NSWCA 145 at [104]. **That will not ordinarily result in the denial of an award of costs.** Indeed, in many cases, the detail of a party’s funding arrangements will be entirely unknown to the Court and the other side: *Rodden* at [121].

Just and Reasonable

28. Section 2 of the Costs in Criminal Cases Act 1967 (NSW) (“**the Act**”) relevantly provides:

2 Certificate may be granted

(1) *The Court or Judge or Magistrate in any proceedings relating to any offence, whether punishable summarily or upon indictment, may:*

(a) *where, after the commencement of a trial in the proceedings, a defendant is acquitted or discharged in relation to the offence concerned, or a direction is given by the Director of Public Prosecutions that no further proceedings be taken, or*

...

grant to that defendant a certificate under this Act, specifying the matters referred to in section 3 and relating to those proceedings.

(2) *For the avoidance of doubt, a certificate may be granted in accordance with subsection (1)(a) following an acquittal or discharge of a defendant at any time during a trial, whether a hearing on the merits of the proceedings has occurred or not.*

...

29. The form of the certificate is provided in section 3 of the Act:

3 Form of Certificate

(1) *A certificate granted under this Act shall specify that, in the opinion of the Court or Judge or Magistrate granting the*

Certificate:

(a) *if the prosecution had, before the proceedings were instituted, been in possession of all the relevant facts, it would not have been reasonable to institute the proceedings, and*

(b) *that any act or omission of the defendant that contributed, or might have contributed, to the institution of or continuation of the proceedings was reasonable in the circumstances.*

30. The task of the court, when dealing with an application under section 2 of the Act, is to ask the question, whether, if the prosecution had evidence of all the relevant facts immediately before the proceedings were instituted, it would not have been reasonable to institute the proceedings: *Allerton v Director of Public Prosecutions* (1991) 24 NSWLR 550 at [pp 559-60].

31. This task is to be viewed with the benefit of hindsight (the omniscient crystal ball) looking at the evidence at the time of the acquittal or discontinuance and not at the time that the criminal proceedings were commenced: *R v Pavy* (1997) 98 A Crim R 396.

32. In *Ramskogler v The Director of Public Prosecutions* (1995) 82 A Crim R, 128 Kirby P, with whom other members of the Court of Appeal agreed,⁴ indicated that a judge considering an application for a certificate under section 2 and section 3 of the Act should divide his or her task into two categories, being the 'facts' aspect and the 'reasonableness' aspect:

[28] ...the judgement of Mahoney JA in The Treasurer in and for the State of New South Wales v Way and Anor (Court of Appeal, unreported, 16 June 1994; NSWJB 50) at paragraph 2 makes it clear that, in deciding whether to issue a certificate under the Act, a judge must make two findings with respect to section 3(1). First, the judge must determine what Mahoney JA describes as the 'facts issue'. That is, the judge must determine what were, within the trial, 'all the relevant facts.' Secondly, the judge must decide the 'reasonableness issue'. He or she must determine whether, if it had known all the facts, the prosecution would have been acting 'reasonably' in bringing the proceedings. These considerations require that some care be taken in considering the two steps mandated by Parliament.

⁴ *Rodden v R* [2023] NSWCCA 202 at [62]

THE FACTS ISSUE

33. The task of the Court dealing with an application under the Act is, firstly, to address the facts issue.

34. The relevant facts need to be identified and isolated.

35. In *R v Tooës* [2008] NSWSC 291 the meaning of “*all the relevant facts*” was considered with reference to the judgement in *R v Williams* (1970) NSWLR 81, where it was stated per Studdert AJ at [5]:

*I draw attention in particular to the phrase: ‘been in possession of evidence of all the relevant facts’ and the emphasis which I have supplied is, I think, the emphasis with which the phrase must be read. This imports that there were relevant facts, evidence of which was not in the possession of the prosecution before the institution of the proceedings. **What relevant facts?***

Not ‘all’ the relevant facts in any literal or absolute sense; omniscience is not to be attributed to the prosecution in the hypothetical inquiry which, I agree with Mr Bowie, is required. ‘All the relevant facts’ means, in my opinion, all the relevant facts as they finally emerge at the trial; the facts in the prosecution’s case but, as well, the facts in the accused’s case as those emerged from the cross-examination of the prosecution’s witnesses or from evidence called by the accused. That seems to me to be the nature of the hypothetical inquiry which is called for by s.3(1)(a). Suppose that prosecution before the proceedings were instituted had been in possession of evidence of the relevant facts in the accused’s case as well as those in its own – suppose it had been in possession of evidence of all the relevant facts and not merely of evidence of the relevant facts in its own case – would it have been reasonable to institute the proceedings?

36. When considering the ‘facts issue,’ an applicant can adduce evidence of matters that were not before the court at the hearing, pursuant to s.3A of the Act which provides:

3A Evidence of further relevant facts may be adduced

(1) *For the purpose of determining whether or not to grant a certificate under section 2 in relation to any proceedings, the*

reference in section 3(1)(a) to “all relevant facts” is a reference to:

- (a) the relevant facts established in the proceedings, and*
 - (b) any relevant facts that the defendant has, on the application for the certificate, established to the satisfaction of the Court or Judge or Magistrate, and*
 - (c) any relevant facts that the prosecutor, or in the absence of the prosecutor, any person authorised to represent the Minister on the application, has established to the satisfaction of the Court or Judge or Magistrate that:*
 - (i) relate to evidence that was in the possession of the prosecutor at the time that the decision to institute proceedings was made, and*
 - (ii) were not adduced in the proceedings.*
- (2) Where, on an application for a certificate under section 2 in relation to any proceedings, the defendant adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:*
- (a) order that leave be given to the prosecutor in those proceedings or, in the absence of the prosecutor, to any person authorised to represent the Minister on the application, to comment on the evidence of those further relevant facts, and*
 - (b) if the Court, Judge or Magistrate think it desirable to do so after taking into consideration any such comments, order that leave be given to the prosecutor or to the person representing the Minister to examine any witnesses giving evidence for the applicant or to adduce any evidence tending to show why the certificate applied for should not be granted and adjourn the application so that that evidence may be adduced.*

- (3) *If, in response to an application for a certificate under section 2 in relation to any proceedings, the prosecutor or, in the absence of the prosecutor, any person authorised to represent the Minister on the application adduces evidence to establish further relevant facts that were not established in those proceedings, the Court or Judge or Magistrate to which or to whom the application is made may:*
- (a) *Order that leave be given to the defendant to comment on the evidence of those relevant facts, and*
 - (b) *If the Court or Judge or Magistrate thinks it desirable to do so after taking into consideration any of those comment, order that leave be given to the defendant to examine any witness given evidence for the prosecutor or that authorised person.*

37. An example of ‘further relevant facts’ is the material contained in the court file or correspondence from the defence to the prosecution making a submission that, having regard to the weaknesses in the prosecution case, the case should be ‘no-billed’ or otherwise discontinued.

38. Such evidence would not ordinarily be before the court during committal proceedings or a trial.

39. Such evidence may also include evidence disclosed as part of the brief of evidence but either not relied on by the Crown or ruled inadmissible during the trial.

THE REASONABLENESS ISSUE

40. In *Solomons v District Court of New South Wales* [2002] HCA 47, the High Court confirmed that the onus is on the applicant to prove that, in light of evidence now available, it would not have been reasonable to institute proceedings.

41. In *R v Pavy* (1997) 98 A Crim R 396 the Court of Criminal Appeal stated the following in relation to reasonableness:

The primary test to be applied is whether a certificate (pursuant to section 2 of [the Act]) should be granted is to be found in the wording of s.3(1)(a): if the prosecution had been in possession of all the relevant evidence as it

is now known before the proceedings had begun, would it have been reasonable to institute proceedings?

*The section calls for: “A hypothetical exercise in the sense that the question of whether it would have been **reasonable to prosecute** at the time of [the] institution [of the proceedings] if the hypothetical prosecutor had possession of evidence of all the relevant facts including those established even after the trial and on [the] application. The ‘institution of proceedings’ refers to the time of arrest or charge, not some later stage such as committal for trial or finding of a bill”*

42. *R v Cardona* [2002] NSWSC 823, the following was said of s.3(1)(b) of the Act, per Hidden J:

A helpful summary of authorities on the approach to that question is to be found in the judgment of Simpson J in R v Hatfield [2001] NSWSC 334 and paragraphs 8-11. Although reference was made in submissions to material in possession of the Crown prior to trial, it is sufficient for present purposes to consider whether it would have been reasonable for the prosecution to have instituted the proceedings in the light of evidence as it emerged at the trial. As Hunt J (as he then was) put it in R v Dunne (unreported, 17 May 1990), I must ‘Put myself in the hypothetical place of the prosecution possessed of knowledge of all the facts which have now become apparent,’ examining the matter with the knowledge gained from such an omniscient crystal ball, it follows that the grant of a certificate would involve no reflection upon the conduct of those having responsibility for the prosecution.

43. Accordingly, on the reasoning in *Cardona* and *Pavy*, the court must determine whether or not, with the benefit of hindsight or “*the omniscient crystal ball*,” it would not have been reasonable for the police to charge the former accused at the time he was in fact charged.

44. The reasonableness of a decision to institute proceedings is not based upon the test typically used by prosecuting agencies throughout Australia as a discretionary test for instituting or continuing to prosecute, namely, that a reasonable jury would be likely to convict. The test cannot be a test of reasonable suspicion, which might justify an arrest, and it cannot be the test that determines whether a prosecution is malicious.

45. The question of whether or not the proceedings were initiated without reasonable cause has to be answered by reference to the quality of the evidence which the police had gathered, with an eye not only to enquiries which had been made but also those which should have been made: *DJ v Director of Public Prosecutions* [2000] NSWSC 1092, per Hidden J.

46. In *R v Dunne* (unreported, NSWSC 17 May 1990), Hunt J said the following:

As I understand the provision of s.3, I have to put myself in the hypothetical place of the prosecution possessed of knowledge of all of the facts which have now become apparent, either at trial or by way of additional evidence in the application, and I have to determine whether, with the knowledge gained from such an omniscient crystal ball it would have been unreasonable to institute the prosecution.

47. The fact that a prosecution may be launched where there is evidence to establish a *prima facie* case does not mean that it is reasonable to launch a prosecution; there may be cases where there is contrary evidence and where it is reasonable to expect a prosecutor to make some evaluation of that evidence. Moreover, section 3 calls for an objective analysis of the whole of the relevant evidence, particularly, consideration of whether or not there is an inherent weakness in the prosecution case, including matters of judgment concerning credibility: *R v Manley* (2000) 112 A Crim R 570, per Wood CJ at CL, at [14].

48. *R v Manley* was followed in *R v DJY* [2012] NSWDC 59, where Berman SC DCJ stated at [15]:

This matter I think is finely balanced, but even given the difficulties that have been identified with the credibility of the complainant it was always ultimately going to be a question as to whether she would appear as credible, her demeanour was a matter of great importance and as Wood CJ at CL observed, matters of judgment concerning credibility, demeanour and the like are likely to fall on the other side of unreasonableness, being matters quintessentially within the realm of the trier of fact, whether it be judge or jury.

49. His Honour held that while there were matters contradictory to the complainant's account, which might give a hypothetical prosecutor some pause and some cause of concern, there were explanations for those contradictory matters which were themselves not inherently unbelievable. His Honour declined the application to grant a certificate under the Act.

Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)

50. A consideration of the relevant duties, extracted from the *Legal Profession Uniform Conduct (Barristers) Rules 2015 (NSW)* may be of assistance:

Prosecutor's duties

...

89 *A prosecutor must call as part of the prosecution's case all witnesses:*

(a) *whose testimony is admissible and necessary for the presentation of all of the relevant circumstances, or*

(b) *whose testimony provides reasonable grounds for the prosecutor to believe that it could provide admissible evidence relevant to any matter in issue, unless:*

...

(iv) *the prosecutor believes on reasonable grounds that the testimony of a particular witness is plainly untruthful or is plainly unreliable, or*

...

90 *The prosecutor must inform the opponent as soon as practicable of the identity of any witness whom the prosecutor intends not to call on any ground within rule 89 (ii), (iii), (iv) or (v), together with the grounds on which the prosecutor has reached that decision, unless the interests of justice would be harmed if those grounds were revealed to the opponent.*

50. Although dealing with a witness not called by the prosecution, the relationship between the asserted or apparent unreliability or otherwise and the prosecutor's assessment of same was discussed in *R v Kneebone* [1999] NSWCCA 279 by James J, at [49]-[50]:

Since both experience and logic confirm that merely because a witness' evidence is inconsistent with or contradicts other evidence, it need not be

untrue, it is necessary that a prosecutor whose decision is under examination be able to point to identifiable factors which can justify a decision not to call a material witness on the ground of unreliability: see Apostilides (supra, at 576); DPP Guidelines (supra), at least if the suggestion of attempting to obtain an improper tactical advantage is to be avoided. It is therefore necessary for the prosecutor to take appropriate steps, including, where necessary interviewing witnesses to be able to form the opinion. In reaching a view as to reliability, it is clear that it is not an adequate basis to conclude that the witness is unreliable, merely because the witness' account does not accord with some case theory which is attractive to the prosecutor.

51. Citing *R v Apostilides* (1984) 154 CLR 563, in *Kneebone*, Smart AJ summarised a number of principals relevant to the calling of witness and said the following, at [102]:

*...(f) The prosecutor's judgment must be based on more than a feeling or intuition. **There must be identifiable factors pointing to unreliability or lack of belief in the proposed evidence of the witness.** It is not enough that the prosecutor considers that the evidence may be unreliable. Suspicion, scepticism and errors on subsidiary matters will not suffice. The attention of the prosecutor should be on matters of substance and even on these there may be significant differences between the witnesses. It is for the jury to resolve these...*