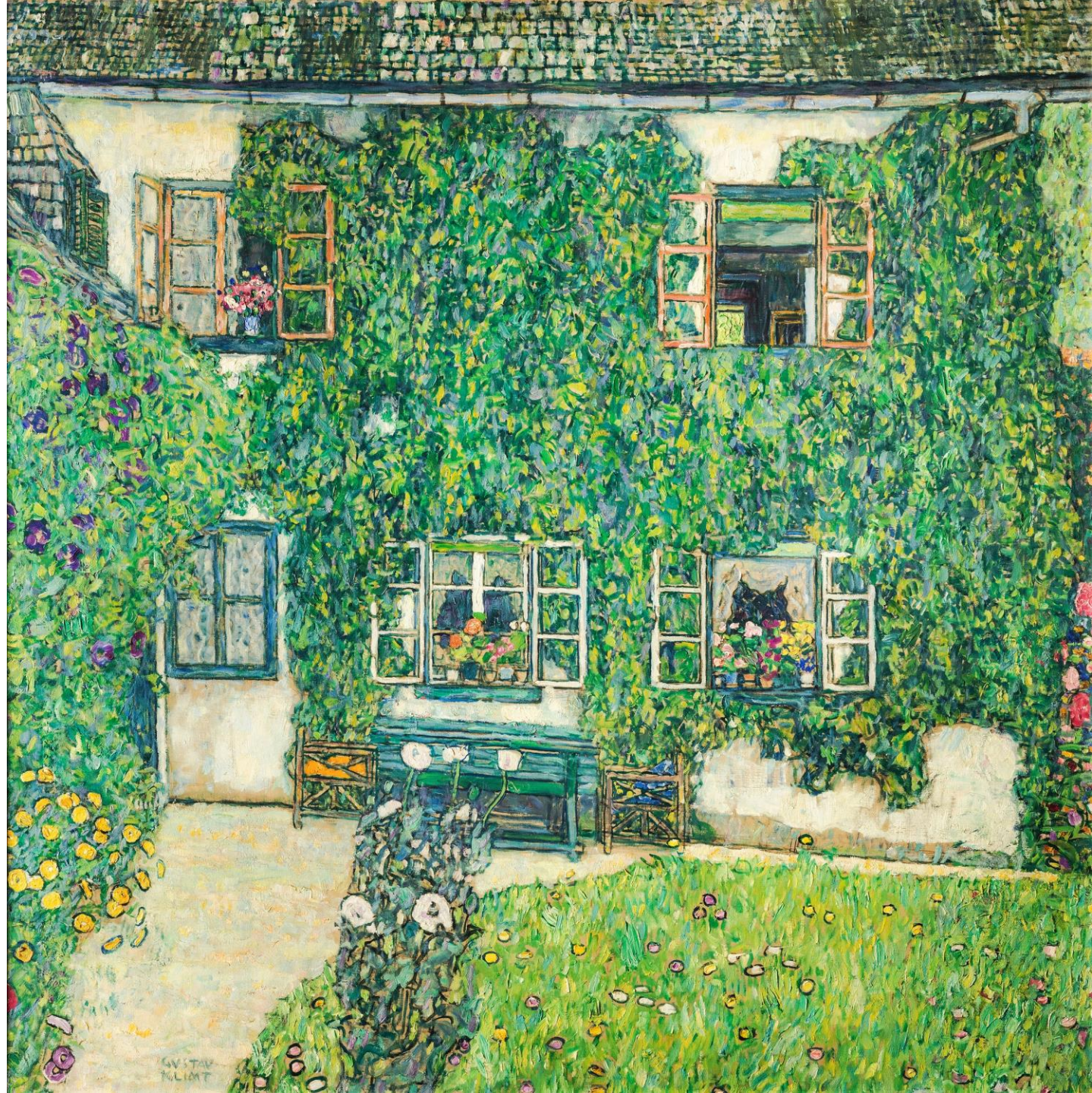


# Written submissions (and how to speak to them)

Presented by Ivan Vizintin

Barrister

7 Garfield Barwick Chambers







# **Why should you rely on written submissions?**

1. They assist the court
2. They establish your credibility
3. They assist you
4. They assist your opponent



# When should you rely on written submissions?

1. When you're ordered to
2. When you're required to
3. When they will assist you, the court or your opponent







# **Bad written submissions are:**

- Inflammatory
- Verbose
- Adjectival
- Devoid of argument
- Circular
- Inaccurate
- Qualified
- Bloated



# Good written submissions are:

- Clear
- Concise
- Precise
- Accurate
- Well framed







# Framing

The most powerful tool in getting what we want



**“For sale: baby shoes,  
never worn”.**

Misattributed to Ernest Hemingway

**“I have eaten  
the plums  
that were in  
the icebox**

**and which  
you were probably  
saving  
for breakfast**

**Forgive me  
they were delicious  
so sweet  
and so cold”**

This Is Just to Say by William Carlos Williams



# Example 1: District Court Sentence

## Follow convention

- Identify the court and Case Number(s)

## Tips for your summary

- Summarise your argument
- Frame it appropriately – quotes can help
- What sentence should be imposed?

IN THE DISTRICT COURT  
OF NEW SOUTH WALES  
AT SYDNEY

Case no. 2023/00 [REDACTED]

REX

-v-  
[REDACTED]

## Offender's outline of submissions on sentence

### Summary

1. No penalty other than imprisonment is appropriate.
2. The offence falls at the mid-range of objective seriousness.
3. A generous finding of special circumstances should be made, given:
  - a. [REDACTED] institutionalisation.
  - b. [REDACTED] will require significant assistance in the community to manage his drug and alcohol issues and to treat his mental health.



# Example 1: District Court Sentence

## Tips for your summary

- Don't reference case law (unless you need to)
- Be concise (unless your argument is nuanced)
- Make appropriate concessions
- Be upfront, particularly for big asks

IN THE DISTRICT COURT  
OF NEW SOUTH WALES  
AT SYDNEY

Case no. 2021/00 [REDACTED]

REX

-v-  
[REDACTED]

## Outline of offender's submissions on sentence

### Summary

1. Courts have always regarded sexual intercourse without consent as a serious offence: *R v Russell* (unrep, 21/6/96, NSWCCA). In *R v Hartikainen* (unrep, 8/6/93, NSWCCA). A conviction for the offence will ordinarily result in a custodial sentence, but there may be unusual or exceptional circumstances in which a sentence other than a custodial sentence will be appropriate: *Sabapathy v R* [2008] NSWCCA 82, at [71].
2. The instant case unusual or exceptional for two reasons. Firstly, and with due regard to the impact of the offence on the victim, it lies at the lowest end of objective seriousness, given facts and circumstances in which it occurs. Secondly, [REDACTED] subjective case is rare and singular, [REDACTED] Consequently, the Court is asked to impose a sentence not commonly given for offences of sexual intercourse without consent: a Community Corrections Order.



# Example 1: District Court Sentence

## The offence and its objective seriousness

- How bad is it? Be realistic
- Incorporate the facts into your argument – don't recite them
- Make appropriate concessions
- Multiple offences? Use a table
- Don't forget the applicable penalties and any SNPP (I did!)
- Is there a guideline judgment?

## The offence and its objective seriousness

4. The offence lies below the mid-range of objective seriousness, given:

- a. [REDACTED] the victim because he believed it was necessary to do so to defend himself. Given the severity of the victim's injuries, his conduct was not a reasonable response in the circumstances as he perceived them.
- b. The victim's injury consisted of a 10 – 15cm jagged wound to the left side of his forehead. The injury was occasioned through one strike of a makeshift weapon.
- c. The offending was spontaneous; [REDACTED] attended [REDACTED] home to confront the victim about a dispute over money.

d. The affray that preceded the offending lasted one minute.

e. The offence occurred in a place the victim was residing, a place where he was entitled to feel safe.

5. It is acknowledged that [REDACTED] role in the offending is greater than that of his co-offender, given that it was [REDACTED] who struck the victim and occasioned his injury.



# Example 1: District Court Sentence

## Subjectives to cover:

- Age (including youth)
- Family and relationships
- Education and employment
- Drug and alcohol use
- Criminal antecedents
- Physical and mental health
- Childhood deprivation (*Bugmy* factors)
- Remorse
- Character

## The offender

### Age as at sentence and age as at the offending

8. [REDACTED] is [REDACTED] years of age. He was [REDACTED] years of age at the time of the offence.

### Family and relationships

9. [REDACTED] is an indigenous man born in [REDACTED]. He grew up in many areas in NSW and Victoria [REDACTED] is the youngest of [REDACTED] children [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11. [REDACTED] was the victim of [REDACTED] both in the community and whilst in juvenile custody [REDACTED]

12. [REDACTED] has been in an on/off relationship [REDACTED]

[REDACTED]

[REDACTED]

### Education

13. [REDACTED] primary education was at [REDACTED]

[REDACTED]

[REDACTED]



# Example 1: District Court Sentence

## Other matters relevant to disposition

- Plea
- Remorse
- Pre-sentence custody
- Prospects of rehabilitation and likelihood of reoffending
- Hardship to others
- Comparative cases and sentencing statistics
- Victim Impact Statement
- Onerousness of custody
- Parity

## Other matters relevant to disposition

### *Plea*

31. [REDACTED] pleaded guilty in the Local Court of New South Wales following a case conference. A discount of 25% should be applied: s. 25D(2)(a) of the CSP Act.

### *Pre-sentence custody*

32. [REDACTED] spent 31 days on remand prior to being granted bail. His bail conditions are strict, requiring a chaperone.

### *Prospects of rehabilitation and likelihood of reoffending*

33. [REDACTED] was assessed by [REDACTED] as being placed in the moderate<sup>36</sup> category for his risk and needs, using an actuarial assessment tool used extensively throughout NSW Corrections,<sup>37</sup> should his criminogenic risk and needs not be addressed.<sup>38</sup>
34. [REDACTED] was assessed as a medium risk of reoffending by Community and Corrections.<sup>39</sup>
35. [REDACTED] main criminogenic needs are addressing [REDACTED] that any future treatment plan should focus on addressing his underlying symptomology, as it was considered the primary driver [REDACTED] and, ultimately, his offending.<sup>41</sup>
36. [REDACTED] has good prospects of rehabilitation given:
- a. [REDACTED] has gained considerable insight into his behaviour by completing multiple courses focusing on [REDACTED]
  - b. [REDACTED] has expressed that he is willing and able to undertake interventions. [REDACTED] [REDACTED] has demonstrated insight into his offending [REDACTED]



# Example 1: District Court Sentence

## Disposition

- Tie it all together
- CCOs and ICOs: suggest conditions
- What special circumstances do you rely on?
- Refer to appropriate case law and legislation (pre-sentence and ICOs, DV offences)

## Disposition

37. The instant case is one where an Intensive Corrections Order should be imposed. ■■■ would be assisted by conditions that address his criminogenic needs, including abstention from drugs and engaging in mental health treatment.
38. The Court must follow a three-stage process before directing that a sentence can be served by an Intensive Corrections Order: *R v Fangaloka* [2019] NSWCCA 173 at [44]. It is the process articulated by Howie J in *R v Zamagias* [2002] NSWCCA 17 (“*Zamagias*”).
39. The Court does not need to deviate from the process articulated in *Zamagias* in cases where there has been no pre-sentence custody. In cases of pre-sentence custody, the term of the Intensive Corrections may be reduced to enable the Intensive Corrections to commence on the day that sentence is imposed: *Mandranis v R* [2021] NSWCCA 97 at [61]; *Zheng v R* [2023] NSWCCA 64 at [298]. In determining the length of imprisonment, it is impermissible to deduct pre-sentence custody to circumvent the ceiling at which an Intensive Corrections Order becomes unavailable: *DG v R (No 1)* [2023] NSWCCA 320 at [22]–[25].
40. Community safety must be the Court’s paramount consideration when determining whether to make an Intensive Corrections Order: 66(1) CSP Act; *Stanley v DPP* [2023] HCA 3 at [72]; *Zheng v R* [2023] NSWCCA 64 at [277], [282]. Section 66(2) is premised upon the view that an offender’s risk of reoffending may be different depending upon how their sentence of imprisonment is served, and implicitly rejects any assumption that full-time detention of the offender will most effectively promote community safety: *Stanley v DPP* at [74].



# Example 1: District Court Sentence

## What do I say on my feet?

- Don't rehearse what you have written
- Correct any mistakes or errors
- Address your opponent's submissions and the cases they rely on
- Address any oral evidence
- Address any evidence filed or received late
- Address the difficult questions before they're asked
- Then ask the Judge whether they have questions



# Example 2: Local Court Bail Application

## Tips

- Keep it to a page
- It's only an outline
- Give yourself wriggle room
- Include proposed bail conditions
- The Magistrate knows the case law

IN THE LOCAL COURT  
OF NEW SOUTH WALES  
AT CENTRAL

Case no. 2021/00247924

REGINA

-v-

[REDACTED]

Application for grant of bail

Outline of submissions

### Section 74/Show cause

1. The applicant made an application for bail on 31 August 2021 at Central Local Court. This Court must refuse to hear this application unless there are ground for a further release application: s. 74(1) of the *Bail Act 2013* (NSW) ("the Act")
2. Material information relevant to the grant of bail is presented in this application that was not presented in the previous application, namely information regarding the accused's background, circumstances, and community ties: s. 74(3)(b) of the Act.
3. Given the offences charged, the applicant must show cause as to why his detention is not justified: s. 16B(1)(f) of the Act. The applicant relies on the information disclosed in the letter of his longstanding partner, [REDACTED] to satisfy the show cause requirement.

### Proposed bail conditions

1. To be of good behaviour.
2. To appear at [REDACTED] on 15 December 2021 and thereafter as required.
3. To live at [REDACTED]
4. To report to [REDACTED] once daily, every Monday, Tuesday, Wednesday, Thursday and Friday, Saturday and Sunday between the hours of 8:00 AM and 8:00 PM.
5. Not to have any contact in any way (including via a third party) with his co-accused, or any prosecution witness (except for police officers).
6. Not to apply for any new passport or travel document
7. Not to go within 100 metres of any point of departure from the Commonwealth of Australia or of New South Wales.
8. To use only one mobile telephone and to provide the officer in charge of the case the number of that phone, its IMEI number and user password for it within 24 hours of acquiring it or resuming possession following release.
9. Not to use any encrypted device or any means of communicating via encrypted applications.



# Example 2: Local Court Bail Application

## What do I say on my feet?

- Focus on your client's subjectives
- Focus on the bail proposal
- Focus on delay, particularly if its an EAGP matter
- Remember: the Magistrate will accept the Facts Sheet

### Show cause

1. The show cause requirement does not apply.

### Unacceptable risk

2. The applicant is 31 years of age. His criminal antecedents are for drug and driving offences, those offences not being serious in nature, by reason of the penalty imposed. The first time the applicant was charged with a criminal offence was 2017.
3. The applicant does not have a history of violence.
4. If granted bail, the applicant can reside with his parents at their home address.
5. In the absence of admissions, the recovery of a weapon or further contextual evidence, an intent to murder will be challenging to prove on the prosecution case as it currently stands. Similarly, as the offence was allegedly committed by two men acting in concert, the existence of a joint criminal enterprise will be challenging to prove in the absence of admissions, the recovery of a weapon or further contextual evidence, as on the prosecution brief, the prosecution cannot positively say which of the two men used a weapon to wound the complainant. These matters are relevant to what charge will ultimately be certified by the Director of Public Prosecutions.
6. Twenty-two brief items remain outstanding, including 12 police statements, 6 statements of ambulance paramedic, two witness statements and an expert statement regarding the injuries to the complainant.
7. The bail conditions proposed are akin to house arrest.
8. The brief contains large volumes of audio-visual material that the applicant will be required to examine, something that is easily facilitated if the applicant is in the community.

# Example 3: S. 22B Detention Application

## Tips

- Remind the bench of the law and how to apply it
- Make appropriate concessions
- Refer to the evidence you have filed
- Include JIRS statistics
- Serve your submissions on your opponent – scare them away!

IN THE LOCAL COURT  
OF NEW SOUTH WALES  
AT THE DOWNING CENTRE

Case no. 2021/ [REDACTED]

REGINA

-v- [REDACTED]

Detention application pursuant to s. 22B(1)(b) of the *Bail Act 2013* (NSW)

Outline of submissions by the offender

## Summary

1. On 21 July 2022, [REDACTED] will enter a plea of guilty to one count of sexual intercourse without consent. The court will then hear a detention application filed by the Director of Public Prosecutions (“DPP”) and determine whether [REDACTED] bail will be refused.
2. [REDACTED] submits that bail should be continued, for the reasons below.

## Relevant law

3. An application pursuant to section 22B (“22B”) of the *Bail Act 2013* (NSW) (“Bail Act”) involves the consideration of several tests.
4. Section 22B provides:

**22B Limitation regarding bail during period following conviction and before sentencing for certain offences**

(1) During the period following conviction and before sentencing for an offence for which the accused person will be sentenced to imprisonment to be served by full-time detention, a court—



# Example 3: S. 22B Detention Application

## Tips

- Special circumstances: less ≠ more (but put your best points first)
- What are the immediate consequences of imprisonment?

## What do I say on my feet?

- Address the elephant in the room
- Don't accept disingenuous submissions

### Special and exceptional circumstances

21. Notwithstanding the above, if the Court is satisfied that [REDACTED] will be sentenced to imprisonment to be served by full-time detention, [REDACTED] relies on the following factors or features in establishing special or exceptional circumstances:
- a. [REDACTED] vulnerability in a custodial setting, by reason of [REDACTED]
    - i. Relative youth.  
[REDACTED]
    - iii. Physical ailment.
  - b. [REDACTED] continued compliance with the conditions of her bail (and in particular, in circumstances in which [REDACTED] is aware of the possibility that [REDACTED] will be remanded into custody)
  - c. [REDACTED] need to remain in the community to:
    - i. Receive medical treatment
    - ii. Provide care and support to [REDACTED] partners.
  - d. The fact that [REDACTED] does not pose an unacceptable risk
  - e. The way COVID 19 would affect [REDACTED] custodial experience, including:
    - i. Limiting [REDACTED] access to her legal representatives.
    - ii. Limiting [REDACTED] contact with her partners and family.

### Unacceptable risk

22. If the Court is satisfied that [REDACTED] has established that special or exceptional circumstances exist that justify continuing [REDACTED] bail, or if the Court is satisfied that [REDACTED] will not be sentenced to imprisonment to be served by full-time detention, the Court will then turn to consider whether [REDACTED] is an unacceptable risk.
23. Where an applicant establishes special or exceptional circumstances, it is likely that the same material will also succeed in satisfying the unacceptable risk test: *El-Hilli and Melville v R* [2015] NSWCCA 146. Hamill J at [13], Simpson J and Davies J agreeing.
24. In contending that the prosecution have not satisfied the Court that [REDACTED] is an unacceptable risk, [REDACTED] point the factors or features in paragraph 17, and in particular, the fact that [REDACTED] has been compliant with the terms of [REDACTED] conditional bail since [REDACTED] being the day of [REDACTED] arrest.

# Example 4: Response to tendency notice

## Tips

- Is the notice properly drafted? See *R v Zhang* (2005) 158 A Crim R 504, *R v AN* [2000] NSWCCA 372, *Evidence Regulation 2020* (NSW)
- Include the tendencies sought to be proved
- Election
- Make appropriate concessions
- Notice issues are cured by S. 100/an adjournment

## Accused's response to prosecutor's tendency notice

### Summary

1. The accused is charged with one contravention of s. 66DA of the *Crimes Act* 1900 (NSW), namely sexual touching a child under 10 years of age.
2. The prosecutor has given notice of an intention to adduce tendency evidence pursuant to s. 97(1) of the *Evidence Act 1995* (NSW) ("the Act").
3. The tendencies sought to be proved are:<sup>1</sup>
  - a. The accused's tendency to have a particular state of mind, namely, his sexual interest in boys aged 10 years and under; and
  - b. His tendency to act on it, namely, to sexually touch the complainant and TO whilst he was alone with them at the premises where he resided.
4. The accused concedes that:
  - a. The evidence relied upon is relevant to proof of those tendencies – that is, the evidence could rationally affect (directly or indirectly) the assessment of the probability of whether the accused sexually touched the complainant, as required by s. 55 of the Act.
  - b. Reasonable notice has been given, as required by s. 97(1)(a) of the Act.
  - c. The tendencies have significant probative value, as required by s. 97(1)(b) of the Act.<sup>2</sup>
5. The accused contends that the probative value of the evidence is not outweighed by its prejudicial effect. Consequently, the tendency evidence should not be admitted.



# Example 4: Response to tendency notice

## Tips

- Summarise the facts
- What are the issues?
- Remind the bench of the case law (it's always developing)
- Onus under s. 101(2) rests on the prosecutor
- No room for ss. 135 and 137 after ss. 97 and 101 have been applied: *R v Ngatikaura* (2006) 161 A Crim R 329
- **What do I say on my feet?**
- Address your opponent's submissions
- Illustrate the way the evidence will be (mis)used

## Relevant factual background

6. The complainant has made three sets of representations about the accused's alleged misconduct:

[REDACTED]

[REDACTED]

[REDACTED]

## Issue for the hearing

7. The issue for the hearing will be whether the accused sexually touched the complainant.

## The probative value of its evidence is not outweighed by its prejudicial effect

8. Section 101 of the Act provides:

### 101 Further restrictions on tendency evidence and coincidence evidence adduced by prosecution

- (1) This section only applies in a criminal proceeding and so applies in addition to sections 97 and 98.
  - (2) Tendency evidence about a defendant, or coincidence evidence about a defendant, that is adduced by the prosecution cannot be used against the defendant unless the probative value of the evidence outweighs the danger of unfair prejudice to the defendant.
  - (3) This section does not apply to tendency evidence that the prosecution adduces to explain or contradict tendency evidence adduced by the defendant.
  - (4) This section does not apply to coincidence evidence that the prosecution adduces to explain or contradict coincidence evidence adduced by the defendant.
9. In *Hughes v The Queen* (2017) 2563 CLR 338, Kiefel CJ, Bell, Keane and Edleman JJ held at [17]:

In criminal proceedings in which the prosecution seeks to adduce tendency evidence about the accused, s 101(2) of the Evidence Act imposes a further restriction on admissibility: the evidence cannot be used against the accused unless its probative value substantially outweighs any prejudicial effect that it may have on the accused. The reception of tendency evidence in a criminal trial may occasion prejudice in a number of ways. **The jury may fail to allow**



# Useful resources:

- Bench Books and Handbooks:  
(<https://www.judcom.nsw.gov.au/bench-books-resources>)
- PD's website:  
(<https://publicdefenders.nsw.gov.au/resources-and-papers.html>)
- Legal Aid's Criminal law resources and tools:  
(<https://www.legalaid.nsw.gov.au/for-lawyers/resources-and-tools/criminal-law-resources-and-tools>)
- Criminal CPD (<https://criminalcpd.net.au/>)





# Thanks!

Any questions, email me at [iv@7gbc.com.au](mailto:iv@7gbc.com.au)