The Shopfront

YOUTH LEGAL CENTRE

Witnesses – your legal rights and obligations

1 Who is a witness?

A witness is someone who can provide helpful information and facts in a court case.

This fact sheet is mainly about criminal cases and apprehended violence order (AVO) applications.

A witness could be a victim of a crime, an eyewitness, or someone else with information that is relevant to the case.

The defendant (accused person) can also be a witness, but their rights are different from other witnesses. ***If you are a suspect or defendant, most of this fact sheet does not apply to you***.

As a witness, you can be asked to give a statement to police and/or to give evidence in court. If you are asked to do this, it is helpful to know something about your legal rights and obligations.

Most of the information in this fact sheet is aimed at witnesses in *criminal* cases.

2 If you are a suspect or a defendant

If the police think you have committed an offence, you are a *suspect*. If you have been charged with an offence, you are a *defendant* (or *accused*).

As a suspect, you usually have the *right to silence.* This means you don't have to say anything, make a statement or answer any questions (although sometimes you might have to give your name and address, or some other basic information).

The right to silence also applies after you have been charged. If you are the defendant, you can choose whether or not to give evidence in your case.

If you are a suspect or defendant, most of this fact sheet does not apply to you. See our fact sheets on *Police powers and your rights* and *Acting as a support person at the police station* for more details.

3 Making a statement to the police

3.1 Do I have to make a statement?

Usually, if you are a potential witness, you don't have to make a statement.

However, there are some situations when you *must give information* to the police, including:

(a) Providing your name and address to the police

If the police suspect on reasonable grounds that you might be able to assist in the investigation of a "serious indictable offence" because you were at or near the place where the offence occurred, they may ask for your name and address.

If you don't provide these details on request (or you give false or misleading information) without a reasonable excuse, this is an offence and you may be fined up to $220.

A "*serious indictable offence*" is an offence with a maximum prison sentence of 5 years or more. This would include offences such as stealing (even something of low value like a chocolate bar), property damage, assault occasioning actual bodily harm or supplying a prohibited drug. It would *not* include offences like common assault, offensive language, drug possession, or most traffic offences.

(b) Traffic accidents and offences

If you are the owner or the driver (or, in some situations, even a passenger) of a vehicle involved in a crash or an offence, there is some information that you have to give to the police. See our *Traffic fact sheets* for more information.

(c) Concealing a serious offence

If you know or believe that someone else has committed a "*serious indictable offence*" (an offence with a maximum prison sentence of 5 years or more - see (a) above), you could get into trouble for not telling the police about it.

You may be guilty of an offence if:

- you are aged 18 or over; and
- a serious indictable offence has been committed; and
- you know or believe that the offence has been committed: and
- you know or believe you have information which could help with the offender being arrested, charged or convicted; and
- you fail, *without reasonable excuse*, to tell the police or other appropriate authority.

If you are a *victim*, it is very unlikely you would get in trouble if you choose not to report the crime to the police.

There is also a similar offence of concealing a child abuse offence. For more details see our fact sheet on *Age of consent: issues for youth workers*.

(d) Terrorism-related investigations

3.2 Should I make a statement?

Here are some things to consider when deciding whether or not to give a statement:

- If you make a statement, this may help to ensure that the offender gets appropriately dealt with, and that you or other potential victims are protected. Or, in some cases, your statement might help stop an innocent person from being wrongly convicted.
- If you're a victim of a crime, you might be able to apply for victims compensation. If you fail to report the crime within a reasonable time or to co-operate with police, this might affect your ability to get compensation. See our fact sheet on *Victims' compensation and support* for more information.
- If you make a statement and charges are laid, *you can't change your mind later*. You will have to give evidence in court if the police want you to. If you are a victim, you can't simply decide to "drop the charges". (see '*Dropping charges and retracting statements*').
- Even if you decide *not* to make a statement, the police might subpoena you to go to court anyway, if they think you have important evidence to give (see '*Do I have to go to court*?').

3.3 How do I make a statement?

There are a few ways that you can make a statement to police, depending on the situation.

(a) Notebook statement

Sometimes the police will ask you to tell then what happened, and will write this down in their notebook.

They will usually ask you to sign the notebook. Before you sign, make sure that you have read the statement (or have it read out to you) and that it is accurate.

(b) Typed statement

Sometimes, when the police ask you what happened, they will type it into a statement instead of writing it in their notebook.

They will usually ask you to sign the statement. Before you sign, make sure that you have read the statement (or have it read out to you) and that it is accurate.

(c) DVEC (for victims of domestic violence offences)

If you are over 18 and have been a victim of domestic violence, you may make a recorded statement known as a DVEC (Domestic Violence Evidence in Chief).

Instead of asking you to come to the police station, police will often come to your home (or wherever the offence happened) and ask you questions while recording it on video.

The police have to get your consent before doing this. If you don't feel comfortable having your interview recorded, you can ask to make a typed or notebook statement instead.

If the defendant pleads not guilty, the DVEC will be played in court as your *evidence in chief*, to save you from having to tell the court what happened all over again. However, you will still have to go to court to give the defendant's lawyer the opportunity to *cross-examine* you (see *'Questioning in Court'*).

(d) Other electronically recorded statements

If you are a vulnerable witness, e.g. you are under 16, (see '*Vulnerable Witnesses'*) police will often get you to make a recorded statement, a bit like a DVEC.

Like a DVEC, this recording can be used in court as your *evidence in chief*, but you will still have to go to court if anyone wishes to *cross-examine* you.

3.4 Telling the truth in your statement

When you make a statement, you are saying that the statement is true.

If you are being asked to sign a typed or notebook statement, make sure everything in the statement is correct before you sign it.

You could be charged with an offence if you make a statement that you know is not true (see '*Lying in court*').

3.5 Can I have a copy of my statement?

Usually, yes. Police policy says that witnesses should be given copies of their statements.

Sometimes the police might not give you a copy of your statement (e.g. if they think you will share your statement with other witnesses and "contaminate" the evidence).

3.6 Who will know that I made a statement?

If you make a statement, and someone is charged with an offence, then that person (the *accused* or *defendant*) will usually see a copy of that statement. Your statement forms part of the *brief of evidence* in their case.

You can ask that some personal details (e.g. address) are kept confidential in your statement.

4 Dropping charges and retracting statements

If you report a crime or make a statement to the police, and someone is charged, *you can't simply retract your statement or "drop the charges" later on*.

You might not even have a say in whether charges are laid in the first place. *This decision is up to the police*.

In domestic violence cases, the police will often lay charges or make an AVO application even if the victim doesn't want them to. If the victim hasn't reported it to the police or made a statement, the police will sometimes lay charges based on information from other people (e.g. neighbours, family members). For more information, see the NSW Police Force Code of Practice at: https://www.police.nsw.gov.au/crime/domestic_and_family_violence/code_of_practice_for_the_nsw_police_force_response_to_domestic_And_family_violence.

The decision whether to withdraw charges is also up to the police (or the Director of Public Prosecutions in more serious cases). If the police or the DPP are thinking about withdrawing charges, they must consult the victim and take their views into account, but this doesn't mean they have to do what the victim says.

If you tell the police that you want the charges dropped, they may be prepared to do this in some cases (e.g. if it's a case of someone stealing your bike, especially if you've now got your bike back). However, they are unlikely to withdraw the charge if it involves domestic violence or other serious violence.

Some witnesses think they can make charges go away by retracting their statement, i.e. making another statement or giving evidence in court to say that the first statement wasn't true. There is nothing wrong with making a second statement to clarify some details in the first one, but you should be careful. Admitting to lying or making a false statement can lead to you being charged with making a false accusation, and you could go to prison for up to 7 years.

Some witnesses also think that they can get charges dropped by failing to attend court on the hearing or trial date. Although it is true that charges may be dismissed if the victim (or another important witness) does not give evidence, it is not that simple. The case may be adjourned, especially if it's a fairly serious charge, and the court may even issue a warrant to get the witness to court next time (see part 5.3 below).

5 Do I have to go to court?

5.1 Generally

If you have been issued with a subpoena (or a similar document, sometimes called a summons) you will have to go to court.

Otherwise it's your choice.

5.2 Subpoenas

A *subpoena* is a legal document requiring you go to court to give evidence or produce documents to the court.

If you have provided a statement to the police, they will usually subpoena you to make sure you attend court and give evidence. Sometimes they will subpoena you even if you have refused to give a statement, if they believe that you have important evidence to give.

Normally a police officer will come to your place and give you a copy of the subpoena. Sometimes they will send it by post or email.

Sometimes the accused person (defendant) might subpoena you to be a witness in their case.

The subpoena will tell you the details about where and when you need to go to court, the names of the parties involved, and details of the person who had the subpoena issued.

You don't have to comply with the subpoena if you receive it less than 5 days before the court date, or if you haven't been given adequate *conduct money* to cover the costs of travelling to court.

If you cannot attend the court date for a good reason (e.g. work commitments, exam, travel), you should contact the person who had the subpoena issued and discuss it with them. If you are an important witness and you are unavailable, the hearing date could possibly be changed to accommodate you.

If the court date cannot be changed, and you still can't attend, you should write to the court explaining why you can't attend, and attach supporting documents (e.g. a letter from your boss, medical certificate, travel itinerary).

5.3 Failing to appear in response to a subpoena

If you don't go to court in response to a subpoena, this is *not* an offence.

However, the court may issue a warrant for your arrest, so you can be brought to court to give evidence. This is a drastic step which doesn't happen often, but it does happen, especially in cases involving serious or violent offences.

If you get arrested on a warrant, you could be granted bail to come back to court on another date to give evidence. There is also a chance that you may be locked up until the court date.

6 What if I don't want to give evidence?

In some situations, you may not want to give evidence. For example, because you don't want to say something harmful to a close friend or family member, or you are scared of what might happen if you give evidence.

6.1 If you have been subpoenaed

If you have been subpoenaed, you will generally be *compellable* to give evidence, which means you have to give evidence.

However, in some situations you won't be compellable, or you may be excused from answering certain questions.

If you don't want to give evidence, or you are worried about it, you should try to get legal advice as soon as possible.

6.2 If you have not been subpoenaed

If you have not been subpoenaed, you do not have to attend court to give evidence.

6.3 Giving evidence against a co-accused

If you are the accused person in a case, you cannot be forced to give evidence against any of your co-accused *if your cases are being heard together*.

However, if you are being tried separately, you can be subpoenaed to give evidence against your co-accused.

6.4 Giving evidence against family members and partners

(a) Do I have to give evidence against my family member or partner?

In some cases, you can be excused from giving evidence against a close family member or partner.

(b) When can I be excused from giving evidence against my family member or partner?

In some cases, you can be excused from giving evidence against a close family member or partner, if:

- the accused person is your *spouse, de facto partner, parent or child* ; and
- there is a likelihood that giving the evidence would or might cause harm to you or to your relationship with the accused; and
- that harm outweighs the importance of the evidence you could give.

However, you generally can't be excused from giving evidence in cases involving child abuse or domestic violence (see paragraph (d) below).

(c) What sort of relationships does this apply to?

A *spouse* is someone who you are legally married to.

A *de facto partner* is someone who you are in a relationship with as a couple (whether of the same sex or opposite sex). [Note that this is the definition from the *Evidence Act.* In the *Criminal Procedure Act* a de facto partner is defined as someone who you are *living with* as a couple].

A *parent* can include adoptive parents or people who raised you as though they were your parents (e.g. grandparents, if you lived with them for most of your childhood).

Likewise, *child* includes adopted children and others who are raised as part of the family.

(d) When do I have to give evidence against my family member or partner?

If the case involves domestic violence or child abuse, you ***can't*** be excused from giving evidence against your family member or partner *unless:*

- the accused person is under 18; or
- the accused person is over 18 and:
  - the offence is fairly minor, and
  - the evidence is not very important, and
  - no one has threatened or forced you to give evidence.

6.5 What if I'm scared of coming to court?

If you have been asked to give evidence against an accused person, you might be scared of reprisals, intimidation, or confusing and misleading questions.

If you are concerned about this, you can speak to the prosecutor or police officer in charge of the case. You can also speak to a witness support worker who will help you prepare.

If you are under 16 or have a cognitive impairment, then you may be able to use CCTV or other alternative ways of giving evidence. See Part 9 below on *Vulnerable witnesses*.

7 Procedure when giving evidence in court

7.1 Oath or affirmation

When you give evidence in court, you first have to give an *oath* or *affirmation* to tell the truth.

An *oath* is where you swear to tell the truth on a bible or religious text that is important to you.

An *affirmation* is where you promise to tell the truth.

It doesn't matter which one you choose. However, once you have made an affirmation or oath, you are under a legal obligation to tell the truth and if you don't you could be subject to severe penalties (see *Lying in court* below).

7.2 Questioning in court

When you are called to court as a witness, there are three stages of questioning.

The first is called *examination in chief*. During the examination in chief, the person who is calling you as a witness (or their lawyer) will ask you questions. They will ask you to tell the court your version of events. They are not allowed to ask *leading* questions, which means they can't put words in your mouth.

Cross-examination is where the other party (or their lawyer) has a chance to cross examine you. A lawyer who is cross-examining you is allowed to ask leading questions. They may deliberately try to trip you up, to try to make your evidence appear unreliable, inconsistent or untrue. However, they are not allowed to ask questions that are confusing, intimidating, or offensive – if they do, the magistrate or judge should step in and tell you if you don't need to answer a particular question.

Re-examination is the final stage. Once the cross-examination is over, the person who first questioned you in examination-in-chief may want to ask you some follow-up questions about issues raised in the cross-examination.

8 Your rights and obligations when giving evidence in court

8.1 Lying in court

If you lie in court when you have sworn to tell the truth, you could be charged with *perjury* and could face up to 10 years' imprisonment.

8.2 Contempt of court

If you are called to court as a witness and refuse to answer questions, or if you behave inappropriately (e.g. abuse the magistrate, or refuse to stand up when asked), this may be considered *contempt of court*.

You could be issued with a warning, but if your behaviour is particularly serious you could be fined up to $2,200 or imprisoned for up to 28 days.

8.3 Privilege against self-incrimination

Self-incrimination is when you admit to having done something illegal.

If you are worried about incriminating yourself when giving evidence, you can object to answering certain questions.

If the judge or magistrate thinks that it is important that you answer the question, they can direct you to answer the question and give you a s*ection 128 certificate*. This means the evidence you give can't be used against you in other court proceedings. The police can still use the information you give to *investigate* other offences, but they can't use what you said directly against you in court.

However, a section 128 certificate will not protect you from being prosecuted for *perjury* if you lie when you give evidence.

8.4 Other types of privilege

Privileged information is confidential information that doesn't always have to be disclosed in court. Examples of privileged information include:

- *Legal professional privilege* applies to communications between a lawyer and their client. This means you usually won't have to answer questions about what you told your lawyer or what legal advice you received.
- *Sexual assault communications privilege* applies to records of communications with a sexual assault counsellor. This usually means that the accused person can't get access to records

from any counsellor that a sexual assault victim has spoken to. However, the court may order that the information be disclosed in some circumstances.

- *Professional confidential relationship privilege* applies to other confidential communications, e.g., with a social worker or a counsellor who is not a sexual assault counsellor. The court may order that this sort of information doesn't have to be disclosed.

For more information about claiming privilege, see the Legal Aid NSW *Subpoena Survival Guide* (link at the end of this fact sheet).

9 Protection for vulnerable witnesses

There are special rules to protect witnesses who are vulnerable or who are giving evidence in cases involving sexual or violent offences.

Some of these overlap, for example, if a witness is under 16 *and* giving evidence as a victim of a domestic violence offence, they may be protected by two sets of rules.

9.1 Complainants in proceedings for sex offences

If you are the complainant (i.e. alleged victim) in criminal proceedings for "prescribed sexual offences" (which includes offences like sexual assault, sexual touching, sex trafficking, grooming, revenge porn, etc) you have the right to.

- A closed court.
- Give evidence via CCTV in a separate room away from the courtroom. If CCTV is not available, the court may be able to use alternative methods such as screens and planned seating arrangements in order to restrict contact between you and the accused person.
- A support person near you and within sight when you are giving evidence.
- Not be cross-examined directly by the alleged offender. If the accused is not represented by a lawyer, they are not allowed to cross-examine you (ask you questions) directly. Instead the court will appoint a person to question you on their behalf.

9.2 Complainants in criminal proceedings for domestic violence offences

If you are the complainant (i.e. the alleged victim) in criminal proceedings for a domestic violence offence, you have the right to:

- Have an electronic recording ("DVEC") used as your evidence in chief (if you were 18 or over when you made your statement to the police). You will still have to go to court, or appear by CCTV, and answer questions if the opposing side wants to *cross-examine* you.
- Give evidence via CCTV in a separate room away from the courtroom. If CCTV is not available, you may be able to use alternative methods of giving evidence such as screens and planned seating arrangements in order to restrict contact with the accused.
- A closed court when you are giving evidence, including when the court is playing a recording of a statement or evidence you have given earlier. The court may also be closed during other parts of the proceedings if the court orders this (after considering your needs, the interests of justice and any other matter it considers relevant).
- A support person near you and within sight when you are giving evidence.
- From 1 September 2021, you have the right not to be cross-examined directly by the alleged offender. If the accused is not represented by a lawyer, they are not allowed to cross-examine you (ask you questions) directly. Instead the court will appoint a person to question you on their behalf, or you may be examined via court technology like text-to-speech software. This is similar to the protection that already exists for complainants in proceedings for sex offences.

9.3 Protected persons in AVO applications

If you are a person seeking protection in an apprehended violence order (AVO) application, and the defendant is also charged with a domestic violence offence in which you are the complainant, you have the right to:

- A closed court when you are giving evidence, including when the court is playing a recording of a statement or evidence you have given earlier. The court may also be closed during other parts of the proceedings if the court orders this (after considering your needs, the interests of justice and any other matter it considers relevant).
- Give evidence via audio visual link or other technology in a separate room (or, if this is not available, the court can make other arrangements to restrict contact between you and the defendant, including the use of screens and planned seating arrangements).

9.4 Children under 16 and people with cognitive impairments

If you are under 16 or if you have a cognitive impairment (an intellectual disability, a developmental or neurological disorder, dementia, severe mental illness or brain injury), you are considered a “vulnerable person”.

If you are a “vulnerable person” giving evidence in a criminal case for a personal assault offence (or a related civil case), you will usually have the right to:

- Give your evidence in chief by an electronic recording: this usually means that your statement to the police is video-recorded. The recording is then played in court as your *evidence in chief* instead of you having to tell your story all over again. You will still have to be available to answer questions in court if the opposing side wants to *cross-examine* you.
- Give evidence by CCTV from a separate room away from the courtroom. You will be able to see, hear and speak to everyone in court without going into the courtroom. This also applies to vulnerable witnesses in applications for apprehended violence orders (AVOs).
- If CCTV is not available, there are other options. For example, you can have a screen placed in front of the accused person so that you can’t see them while giving evidence, or the seating arrangements in the courtroom could be changed.
- Have a support person near you (or in your sight) when you are giving evidence. A support person may be someone like a parent, guardian, relative, friend, youth worker or disability worker.
- Not be cross-examined directly by the accused person. If the accused is not represented by a lawyer, they are not allowed to cross-examine you (ask you questions) directly if the charge is in relation to a commission of a personal assault offence. Instead the court will appoint a person to ask questions on their behalf.

9.5 Children and young people under 18

If you are a witness aged 16 or 17:

- You may have a support person with you while giving evidence in AVO applications or criminal proceedings.
- If you are giving evidence in AVO application proceedings, the court must be closed while you are giving evidence unless the court directs otherwise.
- In other types of cases, the court may order the courtroom to be closed while you are giving evidence.
- Your name or other details that identify you cannot be published in the media.

10 Support for witnesses

The following services may be able to provide support in court, or help to prepare witnesses for court. Most of these services do not offer legal advice, but they may be able to refer you for legal advice if you need it.

The **Women's Domestic Violence Court Advocacy Service (WDVCAS)** offers support for women who are complainants in domestic violence charges and/or are applying for Apprehended Domestic Violence Orders (ADVOs). This support can include:

- Information about what will happen at court;
- Support in court;
- Keeping women informed about court dates and helping them to attend court;
- Ensuring women's safety concerns are addressed;
- Information, referrals and advice about accommodation, income support, children's needs and counselling;
- Connecting people with the Domestic Violence Practitioner Scheme.

http://www.legalaid.nsw.gov.au/what-we-do/community-partnerships/womens-domestic-violence-court-advocacy-program

The **Office of the Director of Public Prosecutions (ODPP) Witness Assistance Service** offers support for victims and vulnerable people who have to give evidence as prosecution witnesses in matters being prosecuted by the ODPP, which are usually serious charges in the District or Supreme Courts: https://www.odpp.nsw.gov.au/odpps-witness-assistance-service

The **Mission Australia Court Support Service** provides information, support, advocacy and referral to victims and witnesses of crime who are attending court. They usually require a referral from police, ODPP, WDVCAS, or another support service. The service can offer support at courts across the greater Sydney metropolitan area: https://www.missionaustralia.com.au/services?view=service&id=123catid=192

Enough is Enough mostly campaigns for law reform, but also provides counselling services, road trauma support groups, and assistance for those who want to take part in victim-offender conferencing: www.enoughisenough.org.au

Victims of Crime Assistance League (VOCAL) is both a lobby group and a support service for victims of crime in NSW. They also help with practical matters like preparing Victim Impact Statements, making complaints, attending parole hearings, and understanding restorative justice conferences: www.vocal.org.au

11 More information

NSW Department of Justice: Witnesses and Evidence

https://courts.nsw.gov.au/courts-and-tribunals/going-to-court/witnesses-and-evidence0.html

NSW Victims Services: Justice Journey

https://www.victimsservices.justice.nsw.gov.au/Pages/vss/vs_justicejourney/vs_justice-journey.aspx

Office of the Director of Public Prosecutions

https://www.odpp.nsw.gov.au/going-court-and-being-witness

https://www.odpp.nsw.gov.au/special-court-arrangements-vulnerable-witnesses

NSW Police: information for victims of crime

https://www.police.nsw.gov.au/crime/are_you_a_victim_of_crime

NSW Police: Domestic and Family Violence (including Domestic Violence Code of Practice

https://www.police.nsw.gov.au/crime/domestic_and_family_violence

Legal Aid NSW: Subpoena Survival Guide: Objecting to a subpoena

https://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/subpoena-survival-guide/objecting-to-a-subpoena

The Shopfront Youth Legal Centre
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The Shopfront Youth Legal Centre
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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army.

This document was last updated in September 2021 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

This document provides a summary only of the subject matter covered, without the assumption of a duty of care. It should not be relied on as a substitute for legal or other professional advice.