# Duty lawyer guidelines – criminal law

## Magistrates’ Court criminal law cases

### Purpose of these guidelines

* 1. To set out who is eligible to access the Duty Lawyer Service in criminal cases at Magistrates’ Court locations throughout Victoria.
  2. To help Duty Lawyers and support staff to prioritise eligible clients in the Duty Lawyer Service.

### Application

* 1. This Guideline applies to all Duty Lawyers providing services to accused people at the Magistrates’ Court, whether they are VLA Staff, briefed counsel or private practitioners. This Guideline does not apply to the Children’s Court, Family Violence proceedings or applications in the MMC Infringements Special Circumstances List.

### Underlying principles

* 1. VLA resources are limited and must be carefully targeted to those who are most in need of legal help bearing in mind the client’s ability to pay for legal representation, whether the client falls into a priority group and the nature of the outcome that the client is facing.
  2. A primary goal of the Duty Lawyer Service is to resolve cases on the first day that a person comes into contact with the service, unless it is impractical or unreasonable to do so.
  3. The Duty Lawyer Service is an important part of the effective functioning of the Magistrates’ Court and the service is to be arranged and delivered with that in mind.
  4. The priorities of, and demands on, the Duty Lawyer Service are different across the State and there must be enough flexibility in these guidelines to allow the service to be arranged with those differences in mind.
  5. The benefit of the doubt about whether an accused person qualifies for Duty Lawyer Services is to be exercised in favour of providing the service.

### What the Duty Lawyer Service is

* 1. The Duty Lawyer Service is made up of lawyers and, in some locations, support staff, based at Magistrates’ Court locations and available to help people in the following ways:
* In-Court Advocacy: By a lawyer providing advice to an accused person, negotiating with the prosecution and also representing the accused person in court on the day.
* Legal Advice Only: By a lawyer providing advice to an accused person but not representing the accused person in court. This can, at the discretion of the lawyer, include negotiating with the prosecution. The lawyer should also refer the person to appropriate services.
* Legal Information: By providing information in writing to help an accused person to understand the charges they face, the process to be followed, how to represent themselves in court and where to access services, including those of a private practitioner.
* Referral for a Grant of Legal Aid: By helping an accused person to complete an application for legal aid and, if necessary, helping the person to get an adjournment for that application to be processed.

### Summary of these guidelines

* 1. All people who are in custody and are appearing in court for the first time in relation to a matter must be helped by the Duty Lawyer Service. No means test is to be applied for this help.
  2. For all other accused people Legal Advice and In-Court Advocacy should not be provided unless the client meets the income test.
  3. In-Court Advocacy should be provided for a client who meets the income test and who:
     1. faces a significant charge; or
     2. falls into a priority group and faces a significant or a straightforward charge; or
     3. for other compelling reasons cannot reasonably be expected to represent themselves. This will only apply in exceptional circumstances.
  4. Legal Advice Only (i.e. without In-Court Advocacy) should be provided to a client who meets the income test and who faces a straightforward charge.
  5. Legal Information should be made generally available but must be available for an accused person who is not otherwise eligible for a Duty Lawyer Service. This will usually be accused people who do not meet the income test and those facing minor charges.

### Accused people in custody

* 1. An accused person who is in custody and has been brought to court for the first time in relation to a matter is a priority. The Duty Lawyer Service must prioritise seeing all accused people in this category. No income test is to be administered. The Duty Lawyer will give advice and representation on the day or help the person to get legal representation either through an application for legal aid or by a referral to a private practitioner. Wherever possible unrepresented bail applications should be avoided.
  2. Where the accused has not requested the assistance of a private lawyer and the Duty Lawyer believes that it is appropriate that a bail application should be made on the day then the Duty Lawyer Service must prioritise that application. A Duty Lawyer will ordinarily appear to make the bail application.
  3. Where the accused identifies as Aboriginal or Torres Strait Islander and instructs the duty lawyer to make an application for bail, the duty lawyer should prioritise the making of this application even if the prospects of success are remote. The duty lawyer should ensure that the accused fully understands the implications of making a represented bail application before doing so.

### The income test

*Only clients who meet the Income Test get Advice and/or In-court Advocacy*

* 1. The income test is not the same as a means test for a grant of legal aid. It is a way of ensuring that limited legal aid resources are targeted to those people who genuinely cannot afford their own lawyer. The income test will be communicated to Court Staff and publicised to accused people through signage, VLA Legal Information material and the Legal Help telephone service.
  2. An accused person who can produce a current Centrelink Benefit Card or Pensioner Concession Card is automatically assumed to meet the income test.
  3. All other accused people will need to make a simple declaration of income without the need for documentary proof.
  4. An accused person seeking assistance passes the income test if:
     1. they receive a Centrelink benefit as their primary income source or have a current Health Care Card or Low Income Health Care Card; or
     2. they are not supported by anyone else and their weekly after tax income is less than:
  + $850.00 if they have no dependent children; or
  + $1000.00 if they have a dependent partner or one dependent child; with an additional $50 for each dependent child; or
    1. they are supported by a partner or another person and their combined income is less than $1000.00 after tax per week, with an additional $50 for each dependent child. This requirement can be waived if the accused person cannot reasonably rely on that person to fund their legal costs e.g. because of family violence.
  1. Where an accused is employed on a short term contract a weekly average of the income for the previous three months may be used as their weekly income for the purposed of the income test.

### In-court advocacy

*Priority Clients get In-Court Advocacy*

* 1. In-Court Advocacy should be provided for a priority client who:

meets the income test, and

faces a significant charge, or

faces a straightforward charge, or

is appearing in an infringements matter where submissions will be made pursuant to s160(2) or (3) of the Infringements Act

* 1. Our priority clients are people:

with an intellectual disability, an acquired brain injury or other mental health issue;

who are experiencing homelessness;

who cannot effectively communicate in English; or

who identify as Indigenous Australians

* 1. A Duty Lawyer will need to use their training and experience to assess whether a client falls into a priority group and the benefit of the doubt should be given to concluding that the client does fall within a priority group.

*Non-Priority Group Clients Get In-Court Advocacy for Significant Charges*

* 1. In-court Advocacy should be provided for a non-priority client who:

meets the income test; and

faces a significant charge or

is appearing in an Infringements matter where submissions will be made pursuant to s160(2) or (3) of the Infringements Act .

* 1. A significant charge is one where the accused is at a real risk of imprisonment, a Community Corrections Order or a substantial fine (i.e. a total fine of more than $1500). This necessarily requires an assessment of prior convictions but presumptively includes:

Dishonesty offences other than shop theft

Fail to Appear with substantive charges

Criminal Damage

Aggravated Burglary and Burglary

RCSI, ICI, RCI and Assault by kicking

Possess a prohibited weapon

Stalking

Threat to kill

Breach of Family Violence/Personal Safety Orders

Third Drink driving

Possess Drug of Dependence – other than a small quantity of cannabis

Third DWD/DWS

* 1. However, regardless of the charge, In-Court Advocacy will not be provided for applications to adjourn where the person has a lawyer or they have adjourned a matter on a previous occasion and has not arranged representation.

*Lawyer discretion to provide In-Court Advocacy*

* 1. Where the accused person is not facing a significant charge and is not in a priority group, a Duty Lawyer may exercise his or her discretion to provide In-Court Advocacy where there are compelling reasons why the accused person cannot represent themselves. This will only apply in exceptional circumstances.
  2. A decision to provide In-court Advocacy under this discretion needs to consider the competing priorities in the court list on the day.
  3. This discretion can only be exercised where the accused person meets the income test.

### Matters in which advice only is given

*Non-Priority Group Clients facing a Straightforward Charge get Legal Advice Only*

* 1. Duty Lawyers should provide ‘Legal Advice Only’ to an accused person who is not in a priority client group and who faces a straightforward charge i.e. a charge where the legal issues are narrow and the penalties are likely to be low level fines and licence loss. This would ordinarily include:

Careless Driving

Infringement matters (no section 160(2) or (3) application)

Other low level driving offences such as forge/alter registration/number plate

Matters listed for Diversion

Unlicensed Driving

Hinder police (no assault)

Use or Possess Drug of Dependence – small quantity of cannabis

Re-hearings

Appeals against a registrars decision to refuse revocation

CCO variations (elected, with consent)

Drug driving

First or second Drink driving

Use Drug of Dependence

First or second DWD/DWS

Other summary assaults

Shop theft

### Minor charges

*In-Court Advocacy and Advice are Not Available for Minor Charges*

* 1. No In-Court Advocacy or Advice are to be given for clients facing the following minor charges:

License restorations

Traffic infringements where a client has elected to take the matter to court

Prosecutions under the Domestic Animals Act

Department of Transport prosecutions for minor offences e.g. no ticket, feet on seats or smoking on a train

Applications for Interlock device removal

Agency prosecutions by Taxi Directorate, Department of Taxation , Department of Fisheries (with the exception of Abalone Poaching or Commercial Fishing)

Minor traffic matters in which there is no punishment of imprisonment including speeding, unregistered vehicle, fail to wear a seatbelt, improper use

Public Drunkenness

### Legal information

*Universal Entitlement to Legal Information*

* 1. All accused people who face a criminal charge are able to access available legal information relevant to their circumstances including information about the charge, the process and how to represent themselves in court.
  2. Legal Information is provided by VLA through its website, Legal Help and at court through printed brochures, information sheets and self-representation guides.
  3. The Duty Lawyer Service must pro-actively provide Legal Information to accused people including those who are otherwise ineligible for a Duty Lawyer Service because of their income or the minor nature of the charges that they face.

### Witnesses

* 1. The Duty Lawyer may provide advice to witnesses who may be excused from giving evidence pursuant to s 18 of the Evidence Act or who require advice about the risk of self-incrimination.