

Considerations for the Court process

So, you took a big step and were arrested as a part of a civil disobedience action? And you are preparing for court. The legal system can be confusing and intimidating, and you may find that lawyers can be quite busy without opportunity to explain things clearly, so if possible, talk with friends who have been through the court process before.

There are a range of things to think through when deciding how to approach your court case

- The legal technicalities of the case
- Whether you want to use the court process as part of your campaign
- If you have co-defendants what is in the best interest of the group, as well as yourself as an individual
- How much support you have from a pro bono lawyer
- The financial and time implications of various options, including travel costs if you were arrested interstate

It's important to talk cases through with co-defendants or your legal support team BEFORE speaking with a lawyer. The type of advice you receive will depend on whether your lawyer is familiar with dealing with activists and using the legal and court system as part of your ongoing campaign. Some activists have had really negative court experiences because their lawyer had no interest in their concerns or their philosophy and wanted to deal with the situation as fast as possible.

Some people self-represent. Many prefer having a lawyer represent them. Unless you are confident, have good advice and understand the legal system most people would suggest self-representation might not be the best idea, unless you have substantial time to prepare, and advice from people who have taken this path before.

However some activists have chosen to do this, and had great success, with magistrates being sympathetic to their cause. (In addition, if it is a simple matter and you are confident, it can be useful to leave the pro bono support for those who need it more).

Overview

Whilst there is a legal perspective to whether or not you should plead guilty or not guilty, there are other factors to consider as well. This section does not seek to advise people one way or the other, but to provide some context for non-legal considerations. Some activists view the court process as a continuation of taking civil disobedience action and an opportunity to further highlight the injustice they are working against.

For this reason alone, they may choose to plead not guilty. Others have acknowledged they may be technically guilty of a certain charge, yet argue that there was a moral imperative to take action, or that they were acting to prevent other people from breaking the law or to prevent a greater crime being committed. In pleading not guilty, the process takes longer, you can publicly argue your case, and you may have more opportunity to make a political statement to explain your actions, and gain media attention. And, you may even be found not guilty if you have a strong case!

People pleading guilty can still sometimes present a statement to court when pleading guilty. Whilst this can be an opportunity to have your views put on public record, it should be noted that there is a requirement to show 'contrition' in pleading guilty and seeking a reduced sentence, so this should be taken into account.

Some people may choose to plead guilty for practical reasons: it often means that your case can be heard and dealt with more quickly. It is also a fundamental principle of civil disobedience over many decades that a people take responsibility for the consequences of their actions.

OPTIONS

Not guilty

Some people do this because they want to argue the moral case, or believe they aren't guilty even if there may be evidence that demonstrates a strong likelihood otherwise.

Some lawyers will recommend this if the police prosecutor hasn't actually done due diligence in gathering evidence to prove the charge, or a technical mistake was made during the arrest process.

Some activists consider this gives them an opportunity to take up court time, and to argue their case. If appearing pro bono for you a lawyer may or may not recommend you do this, and may or may not support you if they believe the police have made the case.

You need to be aware that if you plead not guilty and are subsequently found guilty that you will receive a higher penalty and the court process will take longer.

Also, be aware that the "[necessity defence](#)" has rarely, been successful in Australia. This is when people have made the case that they took a particular form of action to intervene in a greater injustice.

You can also consider using the media to further your campaign, rather than the court process.

Guilty

In Victoria you need to plead guilty to receive a "diversion", which is offered at the discretion of the magistrate, and there may be conditions attached. In other states there are similar options that require pleading guilty, ie, WA is a spent conviction, NSW it is known as a Section 9. Many activists take this opportunity if presented as it means they will not receive a criminal record.

A basic tenant of [civil disobedience](#) is that you are breaking either an unjust law, or an incidental law to highlight a greater injustice. The philosophy of civil disobedience is that you break a law willingly and accept the consequences. (as long as they are reasonable)

One example: At an action at the Leard blockade (coal mine blockade in NSW, 2013-15) a number of activists were charged with "hindering mining machinery". This law was used inappropriately and was successfully challenged. Many pleaded not guilty to this charge, but guilty to trespass charges.

Many of the Christian activists involved in "Love makes a way" plead guilty, and some have self-represented (which allows you to make more of your own statements)

No Jurisdiction

Some first nations activists have pleaded “No jurisdiction”, (or other allies in solidarity with first nations activists) and to demonstrate that they do not accept the current commonwealth law and jurisdiction. This has generally not been recognised. (please contact us with updates if you have been part of a successful no jurisdiction case)

Behaviour in court

If you have co-defendants be aware that your behaviour and how you plead may impact them. Even if you don't respect the court system it is useful to consider respectful behaviour and dress as this can impact on how you will be treated.

Whilst it can be useful to hold banners and have a public presence out the front of the court (if this is this wish of the activists inside), unless you have express permission from all activists you should not protest inside the court, as this can have consequences for them.

FROM COUNTERACT LEGAL MANUAL

5.4 Deciding how to plead

A plea is simply an answer to your charge. After you have received legal advice, you can decide whether you will plead guilty to the charges or plead not guilty and go to trial.

5.4.1 Guilty plea

Pleading guilty means that you accept that you committed the crime.

Even if you want to plead guilty, you should still check the prosecution documents to see if they accord with your recollection of what occurred. Prior to you appearing in Court, you should be sent the preliminary brief, by police.

This will contain details of the prosecution's case against you. If you intend to plead guilty, make sure that you agree with the details in the preliminary brief. If you don't, you can contact police officer who charged you before the hearing to discuss the matter and ask them to change certain facts or withdraw charges.

At the hearing, the prosecutor will rely on the 'brief of evidence', which will have the details of the prosecution case, and evidence supporting their case. It will include your criminal history, if you have one, and a 'statement of alleged facts'. If you have a criminal history (including charges where you were convicted but no conviction was recorded), obtain a copy from the police before the hearing to check its accuracy.

At the hearing, police will read the 'statement of alleged facts' and your criminal history to the Magistrate. If you do not agree with the statement of alleged facts or think the history is inaccurate, you should tell the Magistrate what you don't agree with, and give your version of events. You can ask the prosecution to see these documents before the hearing.

If you enter a plea of guilty, your matter will go straight to sentencing: the Magistrate will decide what penalty you should get. At a sentencing hearing, you can argue why the sentence should be reduced. Reasons for reducing the sentence can include that you were protesting for a legitimate reason and that

you have a good character. You can bring references from people to support your argument that you are of good character.

5.4.2 Not guilty plea

If you plead 'not guilty', your matter will go to a full hearing, where both sides will bring evidence about whether you committed the offence. Sentencing (see above) will only occur if the court finds you guilty. If the court finds you not guilty, you are free to go and you will not have the matter recorded on your criminal record.

5.4.3 No plea

The entry of no plea by a defendant will be considered by the court as a 'not guilty' plea.

If you do not enter a plea you cannot enter evidence which means only the prosecutor's evidence will be heard.

5.4.4 Unsure of your plea

The best thing you can do if you are unsure of what your plea should be is to seek advice from a lawyer so that you clearly understand the implications and risks of each plea. You can seek the opinion of more than one lawyer but you need to consider costs.

5.4.5 Changing your plea

You can change your plea up to and including the day of your hearing. It is quite straightforward to change your plea from 'not guilty' to 'guilty'. However, it is very difficult to change your plea from 'guilty' to 'not guilty'. Therefore, we strongly recommend that you get legal advice before pleading guilty.¹⁰⁷

If you intend to change your plea, it is best to do so early so as not to inconvenience the court.

OTHER RESOURCES

[Should I get arrested](#)

Activistrights.org.au

This is intended to provide additional context for activists. It is not a replacement for legal advice. Please consult a lawyer regarding your court case.