

There is no one correct strategy when approaching the court, but activists need to give thought to approaching the court and the legal system.

For detailed information about preparing for court and court structure and processes see www.activistrights.org.au

Some activists choose to ignore the court completely or simply treat it as a nuisance getting in the way of the campaign activism.

Other activists see court as an integral part of action and which can be planned as a politically useful and effective part of the campaign.

However you see court – if you are facing court it is worth putting effort and planning into your approach.

Pleading guilty or not guilty?

The plea that you enter can be a difficult political choice. It should be considered in the context of the aims of the action and your ability to conduct a court case and deal with the range of possible penalties.

Pleading guilty

Many, if not most, activists tend to plead guilty because it can be easier, involves little or no organisation and need not involve legally trained people. This is the dominant reason why people plead guilty to summary offence charges arising out of nonviolent actions.

Entering a guilty plea at your mention date means that the case will be heard and determined quickly and hence you will not be burdened with a drawn out court case. If you feel that you can achieve more by investing energy elsewhere there is a strong case for a pragmatic plea of guilty.

It is important to note that a plea of guilty will (in the absence of various other factors) ensure a criminal record.

By cooperating with a system which operates on the basis of a large proportion of guilty pleas it might be reasonable to expect a lighter sentence, although this depends largely on the magistrate who hears the case and the charge faced.

Despite the relative ease of pleading guilty, some degree of legal support is still required if people are to minimise the penalties imposed and enter pleas in mitigation of sentence. If at all possible those charged should be present and represented at their hearing.

The courts operate on the basis that most people will plead guilty to the charge/s laid against them. Some activists say that pleading guilty supports the system and allows police, on occasion, to get away with the most outrageous charges simply because they were never forced to prove them.

Other activists say that pleading guilty to a charge, by its very nature, recognises the validity of the law and the system of criminal justice.

At a personal level a plea of guilty can be seen as an acceptance that what was done was indeed criminal and worthy of punishment by the state. That is, of course, unless you do not recognise the legitimacy of the state. If this were the case then the most logical course would appear to be the entry of no plea.

Pleading not guilty

Many activists feel that by pleading not guilty they can question the validity of laws that they are alleged to have broken.

At a political level a plea of not guilty is effective in two ways. The first is that the police have the onus to prove the offence with which they have charged you. In mass actions this requirement alone may seriously overburden the court system. The successful defence of a small number of those charged may also be successful in forcing the prosecution to drop charges against other arrestees which cannot be successfully prosecuted.

The second advantage of a not guilty plea can be publicity. If one of the aims of the action was to gain publicity for an issue then the successful defence of those involved will gain further favourable publicity for the issue. The defence in such cases can be seen as the second half of the symbolic victory of the action.

A not guilty plea is only useful if the case can be won. If people intend to plead not guilty there is little point in doing so unless sufficient effort is put into their defence to give it a good chance of success. The risk of the not guilty plea is that of higher penalties and the imposition of costs on those found guilty. This is the disadvantage of pleading not guilty, it requires organisation if it is to be successful.

No plea

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

Refusing to enter a plea or remaining silent when asked is an extension of non-cooperation with the legal system. If you also refused to cooperate with the police when you were arrested this may be a consistent approach. This could be effective at both a personal and on a broader political level.

However, the entry of no plea by a defendant who refuses to recognise the validity of the system of justice will almost inevitably lead to a finding of guilt because (presumably) the only evidence presented will be that of the prosecution

Making political statements in court

In court, there is often an opportunity for individuals to make their own statements about why they chose to be arrested.

The conventional legal wisdom is that the court hears only one limited matter – the charge before it – and does not enter into social or political debate, but carefully constructed defences can often be heard even if they have limited chance of success.

Though the court purports to be neutral, judges and magistrates may conduct proceedings and apply the law in slightly different ways. There are no guaranteed outcomes and often, depending on the magistrate, results will be very different. Someone charged with the same offence as you may get a very different outcome.

Some judges and magistrates are more likely to be sympathetic to your cause and hear your argument than others. The court can be a forum for airing your political opposition, but it can also silence your motivations. It's important not to put too much expectation on the outcome of a court case and to ensure it is not the only strategy you are putting energy into as a campaign.

Alternatively, you may have decided that the court case has wider implications, and you want to use it as another platform for your activism. In some situations this will be successful, in others it will backfire and you will receive a heavier penalty.

Lawyers, focusing on what they believe will influence the magistrate or judge the most, generally minimise what they see as political content. Make sure you have a clear understanding with your lawyer about what is important to you during the court process.

Statements in mitigation

Many activists do this by pleading guilty and making a speech when asked for comment in mitigation before sentence is passed. In this case the choice to plead guilty is tactical rather than philosophical. Arrestees may take the same approach but plead not guilty and make their statements from the witness stand.

Pleading guilty explicitly recognises that a crime has been committed according to the law.

By pleading not guilty activists stress that they believe they have committed no moral wrong.

Political messages as evidence

You may be able to give direct evidence relating to the charge against you whilst incorporating your own political statements in a form that makes them relevant to the issues of your defence. You can ask your lawyer about arguments that may allow you to use international law as a moral defence, call other activists or even scientists and others as 'expert witnesses', or use information about your protest as evidence.

The Nuremberg defence

In the Nuremberg trials the Nazi leaders defended their actions on the grounds that they were following orders. This defence was rejected by the tribunal. It was found that men and women, whether military or civilian, have a duty to resist orders from above if those orders require them to commit crimes against humanity.

Another activist defence case involved the use of literature on the Nuremberg trials, which states that any person who, "with actual knowledge that a crime against humanity (or war crime or crime against peace) is being committed, and having such knowledge, was "in a position to shape or influence the policy that brings about initiation or 'continuation' of the crime" to the extent of his ability...will be responsible if he could have influenced such policy and failed to do so". Martin J., *Limbo v. Little* 65 NTR 19 at 45, quoting from Frank Lawrence, "The Nuremberg Defence", 40 *Hastings L. J.* (1989).

From this "Nuremberg defence", Len Linden claimed that international law places a personal responsibility upon him as an individual, to do everything possible to prevent such crime not only if he knows that such a crime is being committed or planned, but also if he suspects that such circumstances exist.

Public statements outside the court

Political statements can be repeated effectively outside court, through public speaking or media conferences on the steps of the courthouse, for instance. This needs to be well-organised in order to get maximum media attention. But you also need to consider the impact upon the court case itself.

It is well worth consulting with your legal representatives. Magistrates have no real power of contempt outside their own court rooms and contempt actions have generally only been laid after public comments very close to a jury trial.

Public comments about the political issues surrounding a protest action, or about police behaviour at that action, can still be made. The fear of getting charged with contempt can deter important public comment.

Contempt of court

The laws of contempt are designed to protect the principle of the right to a fair trial. In general the law of contempt prevents the publication of material that is prejudicial about matters that will be or are currently before the courts. In popular parlance the purpose of contempt law is to minimise the likelihood of 'trial by media'. Types of information which are considered prejudicial include:

?? details of prior convictions;

- ?? the creation of an adverse impression of the accused;
- ?? statements about guilt or innocence of the accused; and
- ?? in cases where identification of the accused is in issue, the naming of the accused or the provision of other means by which the accused may be identified.

There is a limited form of defence of 'public concern'. However, the closer the comment is directed to the actual subject matter of the trial the less likely it is that this defence will be available. The defence is intended more to protect the publication of material in the context of ongoing public debate about the broader issues, where the risk of prejudice to a trial is incidental and unintended, rather than discussion of the specifics of any particular trial.

Contempt law is against any public comment on an issue that is before the courts and is to be decided by the courts. Notice, though, that the issue to be decided is often a narrow one (did a person commit a particular offence), and does not prevent public discussion of the background or wider context of the events concerned.

So for instance, the charging of a demonstrator at an environmental action does not prevent others from criticising police operations at that demonstration, or from talking about what the action was all about. However, some lawyers advise against public comment that in any way relates to a court case.

People are not prosecuted for proclaiming their innocence of a charge, which is their right.

Total non-cooperation

This has been used as a strategy for dealing with the courts as a way of protesting against the unjustness of state institutions. It has been based on either a political/moral refusal to work with the system or a pragmatic choice to try and make the state pay.

Refusal can include refusing to attend court at all. You can then either wait to be arrested and taken to jail or present yourselves to a police station after a warrant has been issued for your arrest and volunteer to be locked up on that particular day.

You need to consider the fact that this approach will almost certainly result in you forfeiting bail as well as having to pay any fines issued against you (or serve the equivalent amount of time in prison).

A different form of refusal can be to refuse to speak or refuse to enter a plea (used by Greenham Common women in the United Kingdom). This means that you refuse to say whether you plead guilty or not guilty. The court will basically treat you as having pleaded not guilty.

One group of activists, arrested at Nurrungar military base in 1991, refused to attend court but handed themselves to police in a group to serve their sentence at a convenient time. In this way they were able to maintain control over when and how they dealt with the legal system.

Court as a protest site

Court rooms have been used by activists as a protest site throughout history.

Protest has been brought into the courtroom in countless creative ways. Activists have dressed up in costumes, unfurled banners, stood and turned their back to the court, worn blindfolds or refused to address the court when asked, gone limp when moved or just shouted out the injustice for all to hear.

When considering any sort of protest in a court room it is vital that you consider that:

- ☞ You may face contempt charges.
- ☞ The penalties you receive are likely to be more severe than they otherwise would be.
- ☞ You may affect the case of other activists on similar charges or from the same group.

Fishing expeditions

The court has sometimes been used as a way of getting information that is otherwise unavailable, by cross-examining officials or calling for documents. This approach was successfully used in the McLibel case against McDonalds in the UK.

However this can be time consuming and expensive, so it's useful to consider other ways of accessing information (eg, Freedom of Information, etc).

Court can also be a way of getting alternative information into court and onto the public record, particularly if good media is used.

It may be possible to call for documents or witnesses dealing with the subject of the original action or to read them into the court record yourself. For example, in explaining why they felt they had to trespass at Nurrungar, some activists spoke in court about the functions of the base and its role in US war fighting strategies.

Learning

Court can be an opportunity to learn: activists can work individually or (more powerfully) together to find out about how the courts operate and what the applicable law is. However without appropriate preparation, support and strategy, it can be a harsh lesson.

Adapted from Greg Ogle and Mary Heath's article, 'Approaching the court' and the OUR RIGHTS Activist Rights Handbook.