The Chief Magistrate of the Local Court

16 December 2013

The Hon. James Wood AO QC
Chairperson
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Chairperson

Submission – Encouraging appropriate early guilty pleas

I write in response to your invitation to make a submission in relation to the Commission's reference on encouraging appropriate early guilty pleas. My comments on the models for discussion set out in Consultation Paper 15 are as follows:

Pre-charge bail and statutory charging

From my submission to the Commission's review of bail in 2011, you would be aware that I favour the introduction of a system of pre-charge bail that facilitates:

- A more thorough investigation and evidence-gathering process to be undertaken prior to charge.
- Identification of the appropriate charges to be laid prior to the commencement of proceedings. Ideally, this would involve early consultation with the Office of the Director of Public Prosecutions in both determining whether a matter is suitable for a grant of pre-charge bail (or whether court proceedings should be commenced), and in advising on the appropriate charges. In turn, this could be expected to reduce the frequency of the amendment of charges mid-proceeding, and the scope of or need for plea negotiations in the course of proceedings.
- Preparation of the substance of briefs of evidence prior to the first court appearance, enabling truncated brief service orders to be made and/or reducing the number of adjournments due to the non-service of briefs.

Given common criticisms such as the absence of adequate disclosure at an early stage of the proceedings and/or the initial overcharging of offences, it seems reasonable to anticipate that the combination of the involvement of prosecutors at the charging stage, the greater level of certainty as to the charges to be pursued once proceedings are commenced, and the availability of the brief at an earlier stage of the proceedings may assist in promoting early guilty pleas where appropriate.

The introduction of a pre-charge bail scheme would require consideration of appropriate limitations around areas such as:

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- *Duration*: in light of the criticism of the UK pre-charge bail scheme that too many people are subject to pre-charge bail and that it is being used to subject individuals to control for lengthy periods of time, it appears appropriate to limit the duration of any period for which an individual can be subject to pre-charge bail. One option would be for an initial period of bail of up to 3 months, with the ability for a police officer to apply to the Local Court for a single extension for no more than 3 months. (An initial 3-month period would roughly correlate with timeframes for the progress of committal proceedings set out in Local Court Practice Note Comm 1.)
- *Types of offence*: in recognition that it represents a limitation on the liberty of an individual prior to charges being laid, pre-charge bail should only be available when the charge under contemplation involves a strictly indictable or Table 1 offence. Within those categories it may also be appropriate to exclude certain offences, such as those involving violence, in circumstances where if charges were to be laid the accused person would likely be refused bail under existing bail law.
- *Conditions that may be imposed*: the purpose of imposing conditions on an individual would presumably be directed at ensuring they are able to be located in the eventuality that proceedings are commenced. The conditions permissible should thus be limited to those that are no more onerous than reasonably required to achieve that purpose (for instance, to notify the police of a change of address; to surrender a passport; to not leave the jurisdiction without approval).

Plea negotiations

As noted above, if a pre-charge bail scheme involving early prosecutorial charging advice was to be introduced, for matters where pre-charge bail is utilised it might be expected that the greater certainty at the outset of the proceedings about the charges to be pursued would have the consequence of limiting the need for or extent of charge negotiations in the course of the proceedings.

Generally I do not consider it is the place of the Court to scrutinise any agreement arising out of plea negotiations and do not support the incorporation of sentencing outcomes into plea agreements, regardless of the extent to which such an outcome is capable of binding the sentencing court or whether such an outcome is expressed as a general range of sentences or a specific sentence.

However, one area that represents an exception is the need for a legislative authorisation for the Court to refuse to accept a plea in circumstances where there is inconsistency between the agreed facts and offence/s to which a defendant seeks to enter a guilty plea.

I previously raised this frequently encountered issue in the course of the Commission's recent reference on sentencing and the difficulties it creates in that context. While I note the Commission's observation that it is a matter to be addressed by education and training, it seems unlikely this would be a panacea in an environment where negotiated outcomes are a regular and entrenched part of the administration of justice. It would also be desirable for the Court to have the ability to refuse a plea where there is patent inconsistency or artifice on the face of the material before it.

Case conferencing

I am not persuaded that the reintroduction of a legislative case conferencing scheme in NSW would significantly improve the rate of early pleas of guilty, noting that a 6-week adjournment has been built into the Court's committal practice note following the repeal of *Criminal Case Conferencing Trial Act 2008*. It expressly states that the purpose of the adjournment is the facilitation of negotiations between the parties, without imposing any of the formalities entailed by the trial scheme.

From the Court's experience of the trial scheme it is apparent that the framing of any available sentence discount for a plea of guilty is a key issue. In the course of the trial scheme, difficulties were encountered due to the statutory guarantee of a 25 percent discount for a plea entered at any stage in the Local Court. In many instances this was actually counterproductive because it removed the incentive to progress the proceedings whilst ever they remained in the Local Court.

Fast tracking

I do not have a view as to the utility of adopting a fast-track scheme for pleas of guilty, as this suggestion appears to contemplate a scheme in which the Local Court's role would be limited to directing proceedings to a particular type of hearing in a higher court on the basis of the indication provided by the parties.

Should such a scheme be introduced, the availability of sentencing discounts should be consistent with the principles of general application set out in the common law that distinguish between a plea entered in the Local Court as against a higher court. Whether the common law continues to operate or a statutory regime is developed, I see no need for departure from the existing position that a plea of guilty entered in the Local Court is capable of attracting a discount of up to 25 percent, while in the usual case, a plea of guilty on arraignment should not result in a discount of more than 15 percent. My further comments on sentencing discounts are set out below.

Abolishing committals

The question of whether to retain or abolish committal proceedings is a policy issue for government, due to the significant change to the criminal justice process for indictable offences that it would represent, and the resourcing and access to justice considerations it would likely entail. In light of the experiences in other jurisdictions, assuming one aim of such a change would be to reduce delays in the determination of proceedings, any alternative system would need to avoid simply moving matters more quickly into a higher court with a smaller bench and more limited geographic presence than that of the Local Court.

On the issue of whether changes might be made to streamline committal proceedings, one option for consideration is the reformulation the current two-limb determination that the magistrate is required to undertake. As you would be aware:

- Under section 62 of the *Criminal Procedure Act 1986*, the first limb requires the magistrate to initially consider, after the taking of the prosecution evidence, whether that evidence "is capable of satisfying a jury, properly instructed, beyond reasonable doubt that the accused person has committed an indictable offence".

- Following a determination on the sufficiency of the prosecution evidence and the provision of an opportunity for any defence evidence, section 65 then requires the magistrate to "consider all the evidence and determine whether or not in his or her opinion, having regard to all the evidence before the Magistrate, there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence".

It is very rare for an accused person to be discharged at the second stage. The considerations relevant to the second limb test will often go to the cogency of the evidence, with the result that the magistrate may consider an issue (for instance, the credibility of a witness) should properly be left to the jury as the tribunal of fact at trial rather than seeking to forecast their possible conclusion. Nor can the magistrate exclude evidence on the basis of the discretions under the *Evidence Act 1995*. Moreover, if the magistrate was to determine the accused person should be discharged on the second limb test, the DPP retains the power to file an ex officio indictment in any event.

While perhaps not immediately pertinent to question of how to encourage appropriate early guilty pleas, it may nonetheless be opportune to give consideration to consolidating the current two-step process into single test on the basis of the sufficiency of the evidence to establish the commission of an indictable offence, to be applied at the conclusion of all the evidence.

Sentence indication

As the possible reintroduction of a sentence indication scheme in proceedings for offences dealt with on indictment would operate in the higher courts, I do not have any comments. My view on the possible introduction of a sentence indication scheme for proceedings dealt with summarily is set out below.

Sentence discounts

I have previously indicated the view that the common law principles applicable to the sentence discount available upon a plea of guilty should continue to operate. However, it is recognised that a statutory regime broadly based on those principles may have some benefits in promoting greater clarity and understanding of how a sentence discount is to be determined, including for defence legal representatives advising their clients. In that regard, it could assist to build in a practical measure such as a requirement for defendants to be given a notice at the first return date that explains the range of sentence discounts available depending on the timing of a plea of guilty.

Any statutory regime should be based upon a sliding scale in recognition of the fact that the utilitarian value of a plea decreases the later in the proceedings it is entered. It would also be desirable for:

- A degree of flexibility to be retained to allow departure by the court where there are good reasons in the interests of justice not to award the discount that would otherwise be available at a given stage (having regard to the observed consequences of a mandatory sentence discount as part of the case conferencing trial, described above); and
- There to be a global approach so that any scale covers both offences determined summarily or on indictment, in recognition of the large category of Table offences

where the mode of determination depends on the decision of whether or not to make an election.

On the latter point, another observation from the trial of case conferencing was the emergence of a differential approach to the sentence discount available depending on whether or not a matter came within the case conferencing scheme. In the case of proceedings for Table matters, this was dependent entirely on the (sometimes unpredictable) decision as to an election.

In committal matters, which were required to undergo a case conference, a mandatory statutory discount of 25 percent applied whenever an offender pleaded guilty in the Local Court, regardless of whether that plea occurred at the first appearance or any later point prior to committal, or how the proceedings had been conducted.

In matters proceeding summarily, the common law principles applied, providing for a sentence discount of *up to* 25 percent for a plea entered in the Local Court and allowing due regard to be had to the course of the proceedings up to the entry of the plea.

Aside from resulting in inconsistency at a broader level across all criminal proceedings, in some instances this could contribute to particular issues of disparity (for instance, between co-offenders where one was dealt with summarily and another was dealt with on indictment).

Summary case conferencing

I am not persuaded there is presently a need for change to the Local Court's current summary case management practices such as by introducing case conferencing, although as a matter of practice this remains an issue for ongoing review. The Productivity Commission's annual *Reports on Government Services* have for a number of years indicated that the Court has outperformed all other magistrates' courts in the Commonwealth in efficiency measures in the criminal jurisdiction. Data obtained from the Bureau of Crime Statistics and Research further indicates the proportion of matters proceeding to a defended hearing has remained relatively low and steady, dropping to just under 15 percent in the 12 months from October 2011 to September 2012.

The introduction of a summary sentence indication scheme in the Local Court is not universally feasible as it relies upon the availability of at least two judicial officers at a courthouse. All but approximately a dozen of the 148 locations at which the Local Court sits throughout the State are single court complexes.

Thank you for the opportunity to make a submission to this reference. Should the Commission wish to discuss any aspect of the above comments further, please do not hesitate to contact my office.

Yours sincerely,

Judge Graeme Henson
Chief Magistrate