



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Criminal:JDad808298

19 December 2013

The Hon James Wood AO QC
Chairperson
New South Wales Law Reform Commission
DX 1227 Sydney

By email: NSW_lrc@agd.nsw.gov.au

Dear Mr Wood,

Encouraging appropriate early guilty pleas: Models for discussion

I write to you on behalf of the Criminal Law and Juvenile Justice Committees ("the Committees") of the Law Society of New South Wales in relation to the Law Reform Commission's consultation paper on encouraging appropriate early guilty pleas.

I thank you for the invitation to comment, and now attach the Committees' submission for your consideration.

Yours sincerely,

John Dobson
President

NSW Law Reform Commission

Encouraging appropriate early guilty pleas

Submission by the Criminal Law and Juvenile Justice Committees of the Law Society of New South Wales (“the Committees”)

Question 3.1

1) Should a pre-charge bail regime be introduced in NSW?

It is the Committees' view that if a pre-charge bail regime is introduced in NSW, it would have to be in conjunction with the NSW Police consulting with the Office of the Director of Public Prosecutions (“ODPP”). It is the Committees' further view that if introduced, a condition should be that it is subject to a court review and there be time limits as to how long it can apply. The Committees are also of the view that it should only be used where there is enough evidence to support a criminal charge, and the only issue is which is the appropriate charge.

2) What are your views on the advantages and disadvantages of introducing a pre-charge bail regime?

It is the Committees' view that a major disadvantage of introducing a pre-charge bail regime is that offenders may be in custody for a lengthy period of time (if pre-charge bail is refused or is breached). There are also other disadvantages; for example, it places a person under potentially onerous conditions, in circumstances where there may not be and may never be sufficient evidence to found a charge. It also gives police and prosecuting authorities a significant degree of control over the process and the suspect, without adequate court scrutiny.

It is the Committees' view that one of the advantages (if this new regime is introduced in conjunction between NSW Police and the ODPP) is that it is likely there will not be the overcharging problems the current regime has now.

3) If a pre-charge bail regime were introduced, should it aim to facilitate: a) ongoing police investigations and the finalisation of the police brief of evidence, and/or b) ODPP early charge advice?

It is the Committees' view that if a pre-charge bail regime is introduced it is likely to facilitate ongoing police investigations, the finalisation of the police brief of evidence and ODPP early charge advice, but only when there is sufficient evidence to support a charge. The Committees' further view is that the main aim of introducing this regime should be to facilitate ODPP early charge advice.

4) What limits should be applied to any pre-charge bail regime?

It is the Committees' view that any pre-charge bail regime should have general time limits and the ability to apply to the court to review a bail decision.

Question 3.2

- 1) **Should a more extensive scheme of early charge advice between the police and the ODPP be introduced in NSW?**

It is the Committees' view there should be a more extensive scheme of early charge advice between the police and the ODPP in NSW.

- 2) **If such a scheme were introduced:**
 - a) **what features should be adopted**
 - b) **how could it interact with a pre-charge bail regime, and**
 - c) **what offences should it relate to?**

It is the Committees' view that if such a scheme were introduced, one of the features would need to be that it occurs early and in a timely manner. The Committees' further view is that it should only apply to strictly indictable offences and Table 1 offences.

- 3) **How could such a regime encourage early guilty pleas?**

It is the Committees' view that if offenders were charged at an early stage with all the evidence being made available, then early guilty pleas may be encouraged because the evidence to be relied upon would be served and there would have already been charge advice between the police and the ODPP. Presently, advice from the ODPP does not normally occur until after the ODPP receive the brief of evidence, and the accused is already before the Court.

Question 4.1

- 1) **How could charge negotiations in NSW be more transparent?**
- 2) **If charge negotiations are made more transparent, what impact would this have upon the likelihood that defendants will seek out a plea agreement?**

While the Committees understand the reasons set out in the paper as to why charge negotiations in NSW should be more transparent, the Committees' view is that it may be counterproductive as much of the information exchanged in charge negotiations could be prejudicial to a defendant if no agreement is reached.

Question 4.2

- 1) **Should NSW Crown prosecutors be able to incorporate sentencing outcomes into plea agreements?**

Yes.

- 2) **How could NSW Crown prosecutors incorporate sentencing outcomes into plea agreements?**

It is the Committees' view that part of the plea agreement would also include agreement on the sentence outcome which would bind the Crown.

3) What would be the impact of incorporating sentencing outcomes into plea agreements on the number of early appropriate guilty pleas?

It is the Committees' view that the impact of incorporating sentencing outcomes into plea agreements may create more certainty and likely to encourage more guilty pleas. If an offender were to receive a penalty similar to the plea agreement, it would be extremely difficult to appeal.

Question 4.3

Should the courts supervise/scrutinise plea agreements?

It is the Committees' view that the courts should supervise/scrutinise plea agreements, while the Committees acknowledge that plea agreements do not necessarily bind the court.

Question 5.1

1) Should NSW reintroduce criminal case conferencing? If so should case conferencing be voluntary or compulsory?

It is the Committees' view that NSW should reintroduce criminal case conferencing, which should be compulsory but not structured. The way a case conference is conducted does not need to be formal.

2) What are your views on the advantages and disadvantages of reintroducing criminal case conferencing?

The Committees' view is that criminal case conferencing may result in the timely resolution of matters (if properly resourced with access to experienced prosecution and defence practitioners).

The Committees cannot foresee any disadvantages, however if it is reintroduced in the same form (as it was in the past), it may fail.

3) If criminal case conferencing were reintroduced, how could it be structured to improve efficiency?

See above answers.

Question 6.1

1) Should NSW adopt a fast-track scheme for cases likely to be resolved by a guilty plea?

It is the Committees' view that NSW should adopt a fast track scheme. A fast track scheme should ensure that all the information a defendant's lawyer requires to make a proper and informed decision about how to plead, is available.

2) If a fast-track system were to be introduced in NSW, how would it operate?

The Committees' view is that if a fast track scheme were to be introduced in NSW, both the offender and defendant's lawyer will still require all information available in the proceedings. It is the Committees' view that if there is early disclosure, and the sentence outcome is included in the plea agreement, this will provide more certainty for offenders.

3) How would sentence discounts apply to a fast-track scheme?

It is the Committees' view that the maximum sentence discount available should apply if there is to be a fast track scheme.

Question 6.2

1) Should NSW adopt a program of differential case management?

Yes.

2) If a program of differential case management were introduced

- a) what categories could be created, and**
- b) how should each of these categories be managed?**

It is the Committees' view that if a program of differential case management is introduced, the main categories would be cases proceeding to hearing/trial and those cases proceeding to plea.

Question 7.1

1) Should NSW maintain, abolish or change the present system of committals?

The Committees support changing the present system of committals but oppose the system being abolished.

2) If a case management system were introduced, what would it look like?

A case management system should have compulsory and optional features to allow for flexibility in managing different types of cases.

The Committees' view is that the court should also have the capacity to determine pre-trial applications well ahead of the date set for trial.

Question 7.2

When in criminal proceedings should full prosecution and defence disclosure occur?

The Committees have always opposed defence disclosure.

Question 8.1

1) Should NSW reintroduce a sentence indication scheme?

Yes.

2) If a sentence indication scheme were introduced, what form should it take?

It is the Committees' view that if a sentence indication scheme is introduced, it should form part of any plea agreement that would bind the Crown and the court.

Question 8.2

Once a defendant accepts a sentence indication, in what circumstances should it be possible to change it?

It is the Committees' view that once a defendant accepts a sentence indication it should not be possible to change it. However, it is the Committees' further view that there should still be provision made for appeal.

Question 9.1

1) Should NSW introduce a statutory regime of sentence discounts?

It is the Committees' view that NSW should not introduce a statutory regime of sentence discounts as this will unnecessarily limit judicial discretion and may lead to inconsistencies and injustices.

2) If a statutory regime of sentence discounts were introduced:

- a) what form could it take, and**
- b) to what extent should it be a sliding scale regime?**

See answer above.

Question 10.1

1) Should the Local Court of NSW introduce case conferencing as part of its case management processes?

The Committees' view is that the Local Court of NSW should introduce case conferencing as part of its case management processes. The Committees would support a system that improves case management, but acknowledges that there is a limit to how much the Police Prosecutor's office can accomplish (given the lack of resources across the whole justice system). The Committees' further view is that the procedure for making and responding to representations could be streamlined with cooperation on the part of the Police. The Committees note there was a case conferencing scheme adopted at Parramatta Children's Court a few years ago. Police prosecutors were delegated with more authority to negotiate and to withdraw/amend charges. This enjoyed some success from a case management perspective as prosecutors were able to obtain instructions reasonably quickly rather than having to adjourn matters for six weeks to await response to representations.

2) Should the Local Court of NSW incorporate a summary sentence indication scheme?

Yes. The Committees' view is that the main focus for sentence indication should be whether an offender is to be given full time custody or, at the other end of the spectrum, dealt with under s10 of the *Crimes (Sentencing Procedure) Act 1999*.

3) If a summary sentence indication scheme were introduced:

- a) what form should it take; and**
- b) what type of advance indication would be appropriate?**

See answer above.

4) What effect will case conferencing have on the Local Court's efficiency and guilty plea rate?

The Committees' view is that case conferencing is very likely to improve efficiency. The Committees acknowledge that any system introduced will involve additional resources, but will save resources in the long term, by encouraging matters to settle and not to proceed to hearing unnecessarily.