



Commonwealth Director of Public Prosecutions

6 February 2014

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

Dear Mr Wood

Submission on Consultation Paper 15: Encouraging Appropriate Early Pleas of Guilty

1. I am writing to make a submission on behalf of the Commonwealth Director of Public Prosecutions (CDPP) to the NSWLRC's Consultation Paper on Encouraging Appropriate Early Pleas of Guilty. The Consultation Paper makes a number of proposals designed to encourage early guilty pleas including:
 - Pre-charge bail regime;
 - Plea negotiations;
 - Case conferencing;
 - Fast-track schemes;
 - Abolition of committal proceedings;
 - Sentence indication scheme; and
 - Sentencing discounts for early pleas of guilty.

Commonwealth Prosecutions in State Courts

2. The role of the CDPP is to prosecute criminal offences against the laws of the Commonwealth and, in some circumstances, confiscate the proceeds of Commonwealth crime. The CDPP has no power to investigate criminal matters and relies on investigative agencies to refer briefs of evidence for consideration of prosecution action.
3. As Australia does not have a comprehensive federal judicial system of designated federal courts constituted to deal with federal criminal matters, the CDPP prosecutes Commonwealth offences in the courts of the various States and Territories. The federal judicial system in respect of criminal matters relies upon the system of State and Territory courts, which are given federal jurisdiction to determine Commonwealth criminal matters. As a result of this, the prosecution of Commonwealth offences involves a complex mix of federal and State or Territory law.

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4. The offences are offences against the laws of the Commonwealth and the general principles of criminal responsibility are provided by the *Criminal Code* (Cth). On the other hand, State and Territory laws of procedure apply concerning matters such as evidence, the procedure for summary conviction, committal for trial, trial and conviction on indictment, the hearing of appeals, sentencing and incarceration of people.
5. Pursuant to section 68(2), within Part 10 of the *Judiciary Act 1903* (Cth), and in combination with respective State or Territory legislation granting criminal jurisdiction to a court, the State and Territory courts that have jurisdiction with respect to summary conviction, committal proceedings and trial on indictment of persons charged with offences against the laws of the relevant State or Territory, are invested with 'like jurisdiction' in respect of persons charged with offences against the laws of the Commonwealth.
6. Section 68 of the *Judiciary Act* and the meaning of the phrase 'like jurisdiction' have been considered in a number of cases. When exercising 'like jurisdiction' in respect of the determination of a Commonwealth offence the court applies the relevant procedural laws of the State 'by analogy'.¹
7. The *Judiciary Act* operates to vest jurisdiction in State Courts in respect of trials on indictment of offences against laws of the Commonwealth as well as summary matters, and make applicable State laws as to the procedure for those trials. Section 68 of the *Judiciary Act* provides:

(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences and the procedure for -

- (a) Their summary conviction; and*
- (b) Their examination and commitment for trial on indictment; and*
- (c) Their trial and conviction on indictment; and*
- (d) The hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith*

and for holding accused persons for bail shall subject to this Section apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred in several Courts of that State or Territory by this Section.

(2) The several Courts of a State or Territory exercising jurisdiction in respect to

- (a) The summary conviction; or*
- (b) The examination and commitment for trial on indictment; or*
- (c) The trial and conviction on indictment;*

of offenders or persons charged with offences against the laws of the State or Territory and with respect to the hearing and determination of appeals

¹See *Williams v R (No. 2)* (1933) 50 CLR 551; [1934] HCA 19; *Peel v R* (1971) 125 CLR 447; [1971] HCA 59; *Solomons v District Court of New South Wales* (2002) 211 CLR 119; [2002] HCA 47.

arising out of any such trial or conviction or out of any proceedings connected therewith shall subject to this Section and to section 80 of the Constitution have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

8. It is now settled that section 68(2) of the *Judiciary Act* operates to confer federal jurisdiction in criminal matters on State and Territory Courts (*Adams v Cleeve* (1935) 53 CLR 185; [1935] HCA 12, *R v Bull* (1974) 131 CLR 203; [1974] HCA 23). It is also settled that by virtue of s.68(2), provisions in State Laws conferring a right of appeal on State Attorneys-General in respect of State matters also confer an analogous right of appeal on the Commonwealth Attorney-General in respect of Commonwealth matters (*Peel v R* (1971) 125 CLR 447; [1971] HCA 59).²
9. Section 79 of the *Judiciary Act* also adopts the laws of procedure of the relevant State or Territory in respect of certain matters. Under this arrangement the relevant State or Territory laws in respect of the following matters will specifically apply to Commonwealth offences (subject to the Constitution and save where Commonwealth laws have otherwise provided):
 - Arrest, bail and custody of offenders or persons charged with offences;
 - Summary conviction of offenders or persons charged with summary offences, or indictable offences that may be dealt with summarily;
 - Committal proceedings in respect of persons charged with offences;
 - Trial upon indictment of persons charged with indictable offences;
 - Appeals arising out of any such trial, conviction or proceeding connected with the above proceedings;
 - Laws relating to procedure; and
 - Laws of evidence and the competency of witnesses.
10. Except as otherwise provided by the Constitution or the laws of the Commonwealth, the State or Territory laws applicable will be binding on all Courts exercising federal jurisdiction in that State or Territory. Under section 79 of the *Judiciary Act* the laws of the States are 'picked up' and applied as if they were laws legislated by the Commonwealth.³
11. Despite the general application of the State or Territory laws of procedure in Commonwealth criminal matters it should be noted that both the Commonwealth Constitution and the various laws of the Commonwealth do 'otherwise provide' for a specific procedure in many instances.

² Note that s.9(7) of the *DPP Act 1983* provides that the DPP may exercise such rights of appeal in respect of prosecutions which he has instituted, taken over or carried on as are exercisable by the Commonwealth Attorney-General. In such cases it is the Attorney-General's power which is being exercised and that power is subject to the conditions imposed on its exercise by State Law (*Rhode v DPP* (1986) 161 CLR 119; [1986] HCA 50). It is noted, however, that the Commonwealth DPP has no power to appeal against a sentence imposed in respect of a State offence which he has prosecuted (*Byrnes v R* (1999) 199 CLR 1; [1999] HCA 38).

³ *Pederson v Young* (1964) 110 CLR 162 at 165; [1964] HCA 28; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559 at 610; [130]; [2001] HCA 1; *Solomons v District Court of New South Wales* at [21].

12. The sentencing, administration and release of federal offenders is primarily dealt with in Part 1B of the *Crimes Act 1914* (Cth), rather than the State or Territory legislation of the jurisdiction in which a matter is prosecuted. The *Crimes Act 1914* (Cth) deals directly with a number of evidentiary and procedural matters. Where the *Crimes Act* applies, it excludes State and Territory law. For example, the *Crimes Act* contains provisions dealing with summary proceedings summarily, deals with the distinction between summary and indictable matters and the disposal of indictable offences – see sections 4J and 4JA.
13. The *Judiciary Act* only ‘picks up’ State or Territory laws “so far as they are applicable ...”. Such State or Territory law would not be applicable if it was inconsistent with either the Constitution or a law of the Commonwealth.
14. Therefore, all Commonwealth offenders are sentenced pursuant to Part 1B of the *Crimes Act*, which sets out general sentencing principles and makes extensive provision in relation to the sentencing process and sentences that may be imposed⁴.

Application of Proposals to Commonwealth Prosecutions

15. Given this interaction between State and Commonwealth legislation throughout the criminal prosecution process, it is important to consider if the proposals should or could apply to Commonwealth prosecutions and if so, how that might be achieved.
16. We note that the *Criminal Case Conferencing Trial Act 2008* (NSW) that provided for compulsory conferences in relation to indictable matters did not apply to Commonwealth prosecutions. It only applied to matters being conducted by the NSW DPP and occurred prior to committal.
17. The reason for this appears to derive from the case conferencing scheme being directly linked to specified sentencing discounts. An essential component of the criminal case conferencing scheme was that where the conference resulted in a guilty plea a sentence discount applied. Specifically, a 25% discount for pleas before committal and up to 12.5% discount for pleas after that point. Discounts greater than 12.5% could be given where there were substantial reasons why a greater discount should be given.
18. Due to the application of the *Crimes Act 1914* (Cth) to the sentencing of federal offenders, and the direct link between the scheme and sentencing process, the scheme could not be applied to Commonwealth prosecutions.
19. Similarly, if the proposals outlined in the Consultation Paper are intended to apply to Commonwealth prosecutions, it will be necessary to consider each of the proposals in terms of the Commonwealth and State legislative interaction.

⁴ However, note that Part 1B of the *Crimes Act* is not a code: *Director of Public Prosecutions (Cth) v El Karhani* (1990) 21 NSWLR 370 cited in *Putland v R* (2004) 218 CLR 174; [2004] HCA 8

Pre-Charge Bail Regime

20. A pre-charge bail regime inherently benefits prosecution agencies that deal with a high proportion of arrest matters in which the investigating agency makes the initial decision regarding choice of charge.
21. The majority of matters prosecuted by the CDPP are referred to the CDPP as a brief of evidence to be assessed in accordance with the *Prosecution Policy of the Commonwealth* (the *Prosecution Policy*) before decisions are made regarding charges to be laid. Matters referred to the CDPP following arrest generally involve serious offences where there is a presumption against bail or bail is refused.
22. We think it unlikely that any pre-charge bail regime in New South Wales would be applicable to Commonwealth matters given the provisions of the *Crimes Act 1914* relating to arrest and investigation as set out respectively in s.3W of the *Crimes Act 1914 (Cth)* and Division 2 Part IC of the *Crimes Act 1914 (Cth)*.

Charge Negotiations

23. The CDPP takes an active role in charge negotiation and encourages prosecutors to initiate negotiations with defence. The *Prosecution Policy* specifically provides for the charge negotiation process to be undertaken at any stage of a prosecution.
24. The *Prosecution Policy* states the following in relation to charge negotiation:
 - 6.14 *Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.*
 - 6.15 *The considerations in this section in relation to charge negotiations should be read with reference to the general principle in paragraph 2.21 that under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiations.*
 - 6.16 *Charge negotiation is to be distinguished from private consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in R -v- Marshall [1981] VR 725 at 732 said:*

Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the defendant, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice.

- 6.17 *Negotiations between the defence and the prosecution are to be encouraged, may occur at any stage of the progress of a matter through the Courts and may be initiated by the prosecution. Negotiations between defence and the prosecution as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:*
- (i) the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant;*
 - (ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and*
 - (iii) there is evidence to support the charges.*
- 6.18 *Any decision whether or not to agree to a charge negotiation proposal must take into account all the circumstances of the case and other relevant considerations including:*
- (a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;*
 - (b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;*
 - (c) the desirability of prompt and certain dispatch of the case;*
 - (d) the defendant's antecedents;*
 - (e) the strength of the prosecution case;*
 - (f) the likelihood of adverse consequences to witnesses;*
 - (g) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;*
 - (h) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;*
 - (i) the need to avoid delay in the dispatch of other pending cases;*
 - (j) the time and expense involved in a trial and any appeal proceedings;*
 - (k) the views of the referring department or agency; and*

(l) the views of the victim, where those views are available and if it is appropriate to take those views into account.

6.19 The prosecution should not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert his or her innocence with respect to a charge or charges to which the defendant has offered to plead guilty.

6.20 Where the relevant legislation permits an indictable offence to be dealt with summarily, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may involve a request that the proposed charges be dealt with summarily and that the prosecution either consent to or not oppose (as the legislation requires) summary disposition of the matter. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the matter is dealt with summarily. While the decision of the prosecution in respect of such a request should be determined having regard to the above considerations, reference should also be made to the considerations set out earlier under Mode of Trial.

6.21 A proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the prosecution not oppose a defence submission to the Court at sentence that the penalty fall within a nominated range. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the prosecution will not oppose such a submission. The prosecution may consider agreeing to such a request provided the penalty or range of sentence nominated is considered to be within acceptable limits to a proper exercise of the sentencing discretion.

25. The Commonwealth sentencing regime does not permit sentencing outcomes devised via charge negotiations to be taken into account in the sentencing process.

Case Conferencing

26. As stated previously, the Criminal Case Conferencing trial that was introduced in NSW in 2008 only applied to matters being conducted by the NSW DPP and therefore did not apply to the CDPP. We understand that this was largely due to the direct link between participation in case conferencing and discount on sentence that was not available to Commonwealth offenders due to the applicability of the Commonwealth sentencing regime.

27. Whereas the CDPP has no formal experience of the case conferencing process in NSW, we did undertake informal case conferencing during this trial and continue to do so in some matters.

28. We note that the Act governing the trial was repealed in 2012 and that a review by the *Bureau of Crime Statistics and Research* in 2010 of the scheme concluded that there was only very weak evidence that it had achieved desired outcomes. The Bureau concluded that:

'The question arises as to why the CCC scheme had little or no effect on outcomes... There are three main possibilities. The first is that the legislative scheme may not have been very different in practice to the administrative scheme that preceded it and that operated in both Sydney and non-Sydney Courts. A second and related possibility is that the CCC scheme was never implemented consistently enough to influence outcomes being measured. ... The third possibility is that defendants and/or their legal representatives may continue to view the promise of significant sentence discounts for a plea of guilty with some scepticism'.⁵

29. We understand that both the NSW DPP and NSW Legal Aid have expressed their support for case conferencing.

30. In terms of case conferencing applying to Commonwealth prosecutions, we have the following concerns:

- The application of any such scheme to Commonwealth matters could not include a prescribed limit or direction concerning the impact of a plea of guilty on sentence (beyond that of an early plea of guilty) as this would conflict with section 16A of the *Crimes Act 1914*.
- It may be difficult to devise an effective and efficient formal case conferencing scheme without an incentive of a sentencing discount or another sentencing outcome.
- Commonwealth prosecutions tend to include a large proportion of lengthy, complex matters involving particularly voluminous amounts of documentary evidence. Successful pre-trial conferences of these matters rely upon both parties having a clear knowledge and understanding of all of the evidence, the prospects of conviction and the material facts in agreement. It may be difficult to adhere to a strict time schedule in these matters to arrive at a point where a meaningful conference could take place early in the prosecution process.
- Case conferencing may also add another level of complexity to the current process which may require significant resources of time and expertise to meet the obligations.

31. If case conferencing were to apply to Commonwealth prosecutions, the CDPP would welcome the opportunity to be involved in the developmental process.

Fast-Track Schemes

32. Similarly to case conferencing, a fast-track scheme generally depends upon the provision of specific sentencing discounts for an early plea.

⁵ The impact of criminal case conferencing on early guilty pleas in the NSW District Criminal Court, NSW Bureau of Crime Statistics and Research, Issue Paper no.44 June 2010.

33. As noted above, specific sentencing discounts are not available to Commonwealth offenders due to the Commonwealth sentencing regime contained in the *Crimes Act 1914*.
34. In our view the current system is reasonably efficient in dealing with early pleas. In general, where a plea is indicated at the committal of a Commonwealth matter it proceeds to sentence within a reasonable timeframe.
35. The early identification of a plea matter will depend on a defendant (or their legal advisors) and the prosecution being provided with sufficient material, at an early stage, to form a view of a matter. By way of example, in some ASIC matters discussions between the agency and defendant prior to charging, and following consultation with the CDPP, have resulted in facilitation of a plea shortly after the charge is laid.
36. However in most Commonwealth matters, investigation agencies will not be able to engage with defendants in this way prior to charging. In particularly complex Commonwealth matters defendants are rarely able to determine to enter a plea based simply on the investigation agency's statement of facts and require full analysis of the brief of evidence and advice before indicating a plea.

Abolition of Committal Proceedings

37. As the CDPP prosecutes matters in each jurisdiction in Australia, we are familiar with the varied approaches to committal proceedings, including the administrative committal process in Western Australia.
38. Whereas we note that the abolition of court-based committal proceedings may achieve efficiencies in the criminal court process, we are uncertain about its value in encouraging appropriate early pleas of guilty.
39. One possible way to streamline the committal process and improve its efficiency may be, in the case of paper committals, to allow the Magistrate to make the relevant finding based solely on:
 - a list of witness statements (without the need to produce the brief, unless requested by the Magistrate);
 - a 'without prejudice' Statement of Facts prepared by the prosecution to outline the prosecution case for the purposes of meeting the committal test only - not binding on either party in relation to the course of the trial or sentencing proceedings; and
 - any schedules and summaries prepared by either party to assist the magistrate with the relevant determination.
40. Our concern is that any process intended to replace the current committal process be flexible in its disclosure requirements so that the Commonwealth may meet the obligations even in the most complex of matters. Strict timetables and guidelines can often prove problematic when evidence is particularly voluminous.

Sentence Indication Scheme

41. We understand that a sentence indication scheme was available in NSW from 1992 to 1996 and was applied to Commonwealth matters.
42. A report in late 1995 by the *Bureau of Crime Statistics and Research* concluded that the scheme: '*does not appear to have been generally effective in encouraging either earlier or more frequent guilty pleas.*'⁶ It was also found that the scheme appeared to result in more lenient sentences than those for defendants who pleaded before committal⁷.
43. We note that a sentence indication scheme can encourage defendants to plead not guilty in the Local Court but seek an indication in the District Court following committal for trial. It may also encourage 'judge shopping'.
44. In our experience, a sentence indication scheme can significantly impact upon the prosecutorial resources required to participate in the scheme. For example, in order for a court to give an accurate sentence indication, the court needs to be apprised of all of the facts of the matter, the sentencing considerations and applicable legislative factors. This requires significant resources for preparation and appearance, similar to a full sentence hearing, but may not result in the actual sentencing of the offender.
45. Similarly, there is a danger that courts may inadvertently seek to conduct sentence indication hearings in a truncated way which may result in a sentence indication that does not fully take into account all of the relevant sentencing factors. It may not be possible to rectify this in the subsequent actual sentence hearing following the offender's acceptance of the sentence indication.
46. To be effective, a sentence indication scheme requires the court, prosecution and defence to commit resources to conduct a full sentence hearing that may ultimately be thrown away when the indication does not result in a guilty plea.
47. There is also a concern that the effort to encourage guilty pleas may result in more lenient sentences being indicated. This in turn may lead to a greater number of Crown appeals with the added complexity that defendants be given the option to withdraw their plea.

Sentence Discounts for Early Guilty Pleas

48. For the reasons stated above, it is not possible for NSW to legislate a sentencing discount that would be applicable to Commonwealth offenders.

Conclusion

49. The CDPP welcomes the opportunity to be involved in the process to develop a more efficient court system and encourage appropriate early guilty pleas, particularly insofar as it may apply to Commonwealth prosecutions.

⁶ Preface to final report.

⁷ Ibid.

50. Although a number of the proposals are complicated by the separate Commonwealth sentencing regime that applies to Commonwealth offenders, we are interested in ascertaining which of the proposals might ultimately apply to Commonwealth prosecutions conducted in NSW.
51. The CDPP is concerned about any possible resource implications of the proposals and would seek further consultation with the Commission if any changes to the current system are likely to impact upon our obligations to the courts and the resources required to meet those commitments.

Yours sincerely

A handwritten signature in black ink, appearing to read 'E. McKenzie', followed by a horizontal line.

Ellen M McKenzie
A/Deputy Director