NSW Police Force

OFFICE OF THE COMMISSIONER

COPY

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

Dear Mr Wood, JAMES,

Please find enclosed the NSW Police Force's submission to the NSW Law Reform Commission's Consultation Paper 15 *Encouraging appropriate early guilty pleas: Models for discussion.*

The submission includes answers to the questions contained in the Consultation Paper; comments concerning the submission of the Office of the Director of Public Prosecutions dated 20 December 2013; and an alternative model prepared by the NSW Police Force for consideration.

The NSW Police Force is not supportive of a pre-charge bail regime or a statutory pre-charge advice scheme that requires the NSW Police Force to obtain permission from the Office of the Director of Public Prosecutions to commence criminal proceedings for serious offences. The NSW Police Force has however undertaken to continue discussions with the Director of Public Prosecutions to explore the merits or otherwise of his proposal.

I request that my office be consulted prior to any publication of the enclosed submission.

Thank you for the opportunity to contribute to this consultation process.

Yours sincerely,

A P Scipione APM
Commissioner of Police

12 MAY 2014

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NSW POLICE FORCE SUBMISSION

NSW Law Reform Commission Consultation Paper 15

Encouraging appropriate early guilty pleas: Models for discussion

Question 3.1

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

The NSW Police Force is not supportive of a pre-charge bail regime that requires police to obtain permission from the Office of the Department of Public Prosecutions to commence criminal proceedings for serious offences.

There is insufficient logistical information available on how such a regime would work in practice to express an informed view.

DPP Submission	NSWPF Comment
Until such time as there is confidence that evidence sufficient to support all the elements of an offence will be forthcoming…	NSWPF queries the meaning of "evidence sufficient to support all the elements of *an* offence will be forthcoming"? NSWPF queries whether this is "sufficient evidence to charge" and what the difference is between sufficient evidence to charge and sufficient evidence to commence proceedings. For 'charge decision bail', what particular offence is the bail authority expected to base their decision on in circumstances where any matter, including the strength of the prosecution case, is to be decided on the balance of probabilities? NSWPF queries what offence is to be taken into account in, for example, circumstances where a victim has been wounded and the prosecution does not yet have evidence from a medical expert that the injury is in fact a 'wound'.
Once the investigator has provided the ODPP with the brief of evidence to make a charging decision…protect witnesses and victims from any interference.	DPP Guideline 14 currently requires provision by police of sufficient material **in admissible form**. This guideline is consistent with the Prosecutor's Duties within the *New South Wales Professional Conduct and Practice Rules 2013 (Solicitors' Rules).* This means any analyst certificate must be in the form of an expert certificate. The scope of this type of evidence does not only encompass drugs, but also fingerprint and DNA evidence. If police have to wait for provision of this evidence before a 'charging decision' can be made, the protection and welfare of victims and witnesses will be jeopardised.

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

The advantages as explained in the consultation paper appear sound. As do those of the Chief Magistrate in his December 2013 submission to the LRC on this reference.

However, the majority of Serious Crime investigations and subsequent prosecutions involve the gathering and presentation of extensive and very complex evidence, particularly in relation to forensic evidence; covertly obtained physical and electronic surveillance evidence; telecommunications data and expert opinion often from multiple sources. In most cases it would take weeks or months to gather, analyse and prepare that evidence.

Most of the investigations conducted by State Crime Command (SCC) investigators are into ongoing or imminent serious criminal activity. Currently, the usual practice is that offenders will be arrested and charged once sufficient grounds exist against the individual or group involved; the main concern being to stop planned or ongoing criminal activity. The bulk of the evidence gathered is put into admissible format after the time of charge. Perhaps a better way to make the criminal justice system more efficient is to look at ways of simplifying the production of evidence in admissible format.

In the context of pre-charge advice, it appears that two points along the time line of a criminal proceeding are being consumed within the scope of pre-charge bail: 1) charge and 2) filing of indictments. Unless the time ordinarily taken for the prosecution to be in a position to file an indictment is not only provided for, but accepted by the judiciary, it is feared that persons who pose an unacceptable risk to the community that cannot be sufficiently mitigated by bail conditions will be released.

DPP Submission	NSWPF Comment
...ensure that the right charge is laid at the outset.	Whilst there have been instances where the original charge filed by the police may not have been the most appropriate charge, by far the most common outcome is that the DPP will accept a plea to a lesser charge in circumstances where the original charge laid by the prosecution was appropriate in terms of evidence available. The ODPP's answer to Q.4.1.1 confirms this as a current practice. Refer column below.
• There is no advantage in the offender postponing their plea waiting for a more favourable offer.	The ODPP's answer to Q4.1.1 confirms the current practice of accepting pleas to a lesser charge and that there will "always be room to move" in respect to Form 1's and agreed facts. The practices of the ODPP have contributed to an expectation by the defence that negotiations will be entered into and a plea to a lesser charge, or a watering down of the facts, is likely.

	Refer to ODPP's answer to Q.4.1. Offering agreed facts and placing charges on a Form 1 is a 'more favourable offer'. Refer to ODPP's answer to Q.4.2. The DPP will continue to encourage the expectation by initiating negotiation.
• Reduce the award of costs in the Local Court where charges are discontinued or amended.	NSWPF queries the empirical evidence that gives basis to this point; particularly with regard to costs following an amendment.
• Number of matters taken to the District Court will be reduced because the ODPP will be better placed to determine appropriate charges capable of being dealt with in the Local Court when making elections.	NSWPF queries whether this means that these charges will be returned to police prosecutors to prosecute. Disregarding when the decision on which matters are taken to the District Court is made, it is assumed that the basis of the decision will remain the same. That being the case, stating that the number of matters taken to the District Court will reduce appears misleading.
• Local Courts will not be managing the matters	This could be achieved by eliminating committals in line with the alternative model proposed by NSWPF.
The Disadvantages Once possible criticism...	The meaning of this paragraph is unclear. NSWPF queries whether it means that: if the ODPP does not meet the 6 month time frame an accused person who poses an unacceptable risk is either released or on no bail at all. If so, it would conflict with community expectations.

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,

If it does not, persons who pose an unacceptable risk to the community that cannot be sufficiently mitigated by bail conditions will be released.

b) ODPP early charge advice?

In Strictly Indictable proceedings and Table 1 and 2 matters where the ODPP would ordinarily elect to proceed on indictment, yes. The latter would require the DPP to be more prescriptive about the type, circumstances and nature of offences they would ordinarily elect to proceed on indictment with. This in turn would require a great deal of ODPP resources in order to provide timely pre-charge advice.

What of accused persons who pose an unacceptable risk (in terms of bail) at the time police would ordinarily charge, who would ordinarily be granted conditional bail? There is little information on how this type of situation would be provided for.

In circumstances where the charge is dependent on the ODPP's advice, the NSWPF queries whether the ODPP be in a position to provide, and be prepared to provide, appropriate and sufficient advice where the evidence is not available in the admissible form ordinarily available before committal.

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

Two aims of the proposal are to reduce the time proceedings are before the court and provide for efficiencies within the court system. Figure 2.12 in the consultation paper shows that in matters finalised by trial, the time from offence to committal is between 222 to 324 days. Implementing time limits within three months duration will do little to reduce time before the court. Currently, if a person is charged/issued with a Court Attendance Notice and granted conditional bail, the proceedings are listed for first mention 21 days afterwards. Applying a 28 day limit as suggested will only decrease the time the accused person is before the court by seven days. Any limit should be flexible and consistent with the evolving time taken to provide a full brief to the ODPP and the time taken by the ODPP to provide advice.

The above demonstrate that a pre-charge bail scheme is in effect a scheme by which the accused person's first appearance at court is delayed. This in turn will provide for efficiencies within the Courts. However, at least one trade off will be a reduction in oversight of bail.

The impact of a Court ordering that a brief be served should not be underestimated. The authority of the Court and the prospect of costs being awarded against the prosecution for non-compliance provides for efficiency. The ODPP has produced statistics on how long after charge it takes to serve a full brief in both strictly indictable and non-strictly indictable proceedings.[1] The loss or reduction in case management by the Court in this respect may have negative ramifications, such as increasing the time from offence date to defended hearing/trial. This would also have negative consequences on witness recollection.

If introduced, Pre-Charge Bail should complement the new bail model. That is, pre-charge bail should only apply to persons accused of an offence who pose an unacceptable risk of (*Bail Act 2013* ss 17(2)):

- Fleeing the jurisdiction;
- committing a serious offence;
- endangering the safety of individuals or the community; or
- interfering with witnesses or evidence.

Where the accused person poses an unacceptable risk that cannot be sufficiently mitigated by bail, they should be charged, refused bail and brought before the next available court (s 46 and 20).

[1] http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2012-2013-annual-report.pdf?sfvrsn=6 p.28

A different process for strictly summary proceedings and indictable proceedings dealt with summarily must also be considered. No brief is ordered unless the accused person enters a plea of not-guilty in the majority of these matters. For many strictly summary offences, no brief is ordered at all. The fact that the State has not gone to the time and expense of preparing a brief is currently taken into account for the purpose of any sentencing discount. If a full brief was to be required for these matters, not only would the operational effectiveness of police be reduced due to an increase in red tape, but statutory discounts for entering an early plea would have to be reconsidered.

Whilst not advocating for it, if the scheme were to be introduced for strictly summary proceedings and indictable proceedings dealt with summarily, charge advice should be sought from a police prosecutor; and should be able to be sought on the information obtained during the investigation at the time of pre-charge. That is, police prosecutors would provide advice on less than a full brief, or solely on the facts sheet. Considering police prosecutors deal with approximately 95% of all criminal and related proceedings, this would have a significant impact on police prosecutor resources and staffing levels may need to be considered. Consideration should also be given to what strictly summary proceedings and indictable proceedings dealt with summarily could be commenced without being subject to charge advice.

Question 3.2

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

The information available on how this scheme would work in practice is not detailed enough for the NSWPF to provide an informed response.

Without advocating for it, any such scheme should be restricted to Strictly Indictable proceedings and Table 1 and 2 matters where the ODPP would ordinarily elect to proceed on indictment.

If the ODPP solicitor providing the pre-charge advice is not the advocate who will appear for the Crown in any subsequent trial, there will be duplication of effort and likely differences of opinion on what are often lengthy briefs of evidence containing, or enlivening, multiple issues of law.

In many cases offenders plead guilty early. Although a brief of evidence still needs to be prepared, the early plea obviates the need to obtain much of the technical, and in many cases very expensive, corroborative evidence that would be required if the charges were contested. These efficiencies may be lost in an early charge advice scheme, resulting in much greater resource implications and cost for investigations and subsequent prosecutions.

Arrest and charge also provides tactical and strategic opportunities for further investigation into concurrent serious crimes, particularly where covert methods are used. A requirement to consult outside the NSWPF prior to the charge process risks jeopardising or compromising those investigative opportunities. This would significantly hamper the NSWPF's ability to investigate serious crime.

The State Crime Command has qualified police prosecutors allocated to each Squad. These prosecutors are consulted and provide advice during the investigation process and when framing the appropriate charges. If this approach is not

considered adequate, even within the scope of a statutory requirement for pre-charge advice, greater engagement with the ODPP from an early stage would be helpful in organised crime matters where an entire syndicate or gang is being investigated. Any such approach however may be perceived as eroding the independence of the ODPP. Notwithstanding, the establishment of an ODPP liaison officer for each Strike Force would enable the ODPP to develop an understanding of the investigation early on, thereby placing the ODPP in a good position to provide advice on charges. If this ODPP officer were to then have carriage of each prosecution under that Strike Force, the solicitor would be better prepared to both understand and prosecute the matter. The time required to digest and understand a complex brief could be spread over the duration of the strike force as opposed to a limited time immediately before charge or committal.

It is essential that this consultation process consider the current incentives to reach an agreement with the defence on the charges to be advanced. The ODPP frequently accept a plea of guilty to a lesser charge after running a committal on the more serious charge and after filing an indictment on the more serious charge. In this context, the NSWPF does not accept that pre-charge advice will reduce the number of matters or time taken to dispose of proceedings in the District Court.

The NSWPF expects that even with pre-charge bail, the defence will seek to negotiate a late plea; and that an offer will still be considered and some charges will be discontinued as a result. This may erode public confidence in the system, particularly if the result is a lessening of the charges recommended by the ODPP.

The situation described in England and Wales under the heading of *2003 trial findings of the statutory charging pilot* was:[2]

- 4781 statutory charging decisions by the CPS.
- Of these, 1924 were initially rejected (told not to proceed) by the CPS:
    - 1674 for lack of evidence, and
    - 250 on public interest grounds.

Approximately 40% of matters that would have ordinarily proceeded (and presumably failed) did not.

It would useful to compare this data to current statistics in New South Wales, i.e. perhaps the ODPP could provide figures on the number of proceedings that they prosecute and fail, including matters that fail at the local court; specifically, during or immediately following committal proceedings and in other circumstances where they prosecute criminal proceedings to finality in the Local Court.

It is envisaged that when considering these statistics against the NSW Police Force's successful prosecution rate of approximately 90%, and factoring in that police prosecutors prosecute approximately 95% of all criminal prosecutions in the State,[3] the case will not made out for an early charge advice scheme for strictly summary proceedings and indictable proceedings dealt with summarily.

Refer also to the concerns outlined above in response to Q.3.1 regarding pre-charge bail in the context of early charge advice.

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[2] Para 3.45 of CP 15

[3] Computerised Operational Policing System, NSW Police Force, Enterprise Data Warehouse figures obtained on 18/5/11

2) If such a scheme were introduced:

a) what features should be adopted

No comment .

b) how could it interact with a pre-charge bail regime, and

If introduced, Pre-Charge Bail should complement the new bail model (*Bail Act 2013*). That is, pre-charge bail should only apply to persons accused of an offence who pose an unacceptable risk of:[4]

- Fleeing the jurisdiction;
- committing a serious offence;
- endangering the safety of individuals or the community; or
- interfering with witnesses or evidence.

Where the accused person poses an unacceptable risk that cannot be sufficiently mitigated by bail, they should be charged, refused bail and brought before the next available court.[5]

At the point in time where advice is received that proceedings should not be commenced, enforcement of pre-charge bail should cease and the accused person notified accordingly.

c) what offences should it relate to?

Any such scheme, if implemented, should be restricted to Strictly Indictable proceedings and Table 1 and 2 matters where the ODPP would ordinarily elect to proceed on indictment.

The answer to this question would be better informed by research into the types of offences where proceedings are withdrawn in lieu of accepting a lesser charge.

DPP Submission	NSWPF Comment
Once a charge decision is determined an indictment would be filed in the district court.	This could still occur in the alternative model proposed by the NSWPF.
...further evidence is provided by the police or requisitions answered.	This is consistent with the current process and would fit within the NSWPF's alternative model.
...end the practice of overcharging	See comments in answer to Q3.1.2 and table below.
...reduce expenses associated with current system.	The NSWPF's alternative model would also achieve this.

[4] *Bail Act 2013* s 17(2)
[5] *Bail Act 2013 ss 20, 46*

The DPP submission indicates that police 'overcharge'. NSWPF conducted a dip sample of 16 cases from the 137 persons charged with Robbery (simplicitor) under s 94 of the *Crimes Act 1900* in the 2013 calendar year.

The table demonstrates that in 4 of the 16 sampled proceedings, there is no change to the original Robbery charge filed. In one sample the original Robbery charge is placed on a Form 1. In another 4 of the 15 sampled proceedings, the original Robbery charge was the incorrect charge or the police 'overcharged'. In another, the original charge of Robbery is increased to Aggravated Robbery and placed on a Form 1. In the remaining 6 matters a plea was accepted to lesser charges or a lesser charge where there was evidence available to prove Robbery. Arguably, the easier and more cost effective option in these cases was to accept a plea to a lesser charge or charges. From the sample, and on the information available at the time of charge, police did not 'overcharge' in 75 per cent of matters.

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

No comment.

Question 4.1

1) How could charge negotiations in NSW be more transparent?

Whilst section 35A of the *Crimes (Sentencing Procedure) Act 1999* provides some transparency, negotiations would be more transparent if the ODPP were to consider the views of the NSWPF and the victim/s and provide written advice on the reasons for a decision following charge negotiations. This advice should be specific to the circumstances of the particular case and not merely refer to a portion of the ODPP Guidelines, and made available to the NSWPF, the victim/s and the accused.

The ODPP Guidelines require the views of the police officer in charge and the victim to be *sought* at the outset of formal discussions, rather than actually be obtained. Charge negotiations could be made more transparent if the ODPP were required to obtain, as opposed to seek to obtain, the views of the police and victim at the outset.

DPP Submission	Comment
	The ODPP's answer to Q.4.1.1 does not indicate how charge negotiations could be more transparent.
...the current practice of accepting a plea to a lesser count would be infrequent.	Refer to comment in table under Q3.1.2
...there will always be room to move in respect of Form 1's and the agreed facts.	Refer to comment in table under Q.3.1.2
...there is charge certainty and a likely sentence outcome.	A lack of charge certainty may be due to the practices of the ODPP creating the expectation that charge negotiations will likely be fruitful. From the sample of Robbery

	proceedings considered, in 11 out of 12 (or 92 per cent) of the proceedings where negotiations were apparent, and 11 of 16 (or 69 per cent) of the total proceedings sampled, the accused was ultimately successful in negotiating a lesser offence, a watering down of the facts or having offences places on a Form 1.

2) If charge negotiations are made more transparent, what impact would this have upon the likelihood that defendants will seek out a plea agreement?

No comment.

Question 4.2

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

No. Matters should be prosecuted on the basis of each offence. The argument that 'the accused won't get any more for this offence than that one' often leads to serious assaults becoming common assaults; serious drug supply matters being reduced to less serious matters and in the long run only serves to lessen the average sentence for serious offences; and in turn, erode any truthful account of the extent and criminality of offences committed.

Incorporating sentencing outcomes into plea agreements may erode the community's perception of judicial independence, especially if the judicial officer is bound to the agreement reached. The importance of preserving the independence of the judiciary and the perception of such, should be vigorously protected.

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

No comment.

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

No comment.

Question 4.3

Should the courts supervise/scrutinise plea agreements?

The courts should scrutinise but not supervise plea agreements. That is, a judicial officer should have the discretion to make comment on agreements and refer them back to the parties where they appear inappropriate.

Question 5.1

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

Please refer to our preliminary submission.

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

Please refer to our preliminary submission.

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

Please refer to our preliminary submission.

Question 6.1

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

NSWPF notes that statutory and common law in NSW already provides for sentencing discounts.

The Consultation Paper indicates that 53% of defendants committed for trial end up pleading guilty, and 61% of these do so on the first day/s of trial.[6] However there is limited information provided as to why this is the case.

Case Management within the Local Court of Strictly Indictable proceedings and Table 1 and 2 matters where the ODPP have elected to proceed on indictment, ensures that once committed for trial, the prosecution brief is complete.

As indicated in the NSWPF's preliminary submission, the longer proceedings are before the court, the greater the financial gain for private legal practitioners acting on behalf of the defence. This includes the provision of Legal Aid funding. To increase guilty pleas, the financial incentive to encourage accused persons to plead not guilty must be addressed.

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

No comment.

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

No comment.

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[6] Para 6.25

Question 6.2

No comment.

Question 7.1

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

NSW should change the present system in line with the Chief Magistrate's suggestion to consolidate the two limb determination under sections 62 and 65 of the *Criminal Procedure Act 1986.*

The evidence presented in the Consultation Paper appears to discount the percentage of committal cases 'disposed of'[7] in the local court. In 2012/2103, 41% of committal cases were disposed of;[8] in 2011/2012 45%;[9] & in 2010/2011 38.7%.[10] Abolishing the present system of committals may see all these failed prosecutions sent straight to the higher courts, unnecessarily adding to their workload. However, it is acknowledged that if a pre-charge advice scheme prevented the said failed prosecutions from being commenced in the first place, then the abolition of committals is viable.

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

No comment.

Question 7.2
When in criminal proceedings should full prosecution and defence disclosure occur?

No comments will be provided on disclosure requirements relevant to Strictly Indictable proceedings and Table 1 and 2 matters where the ODPP have elected to proceed on indictment.

With regard to indictable matters heard summarily and strictly summary proceedings (and without suggesting that the principles of fairness are compromised), the current directions and practice concerning the service of full briefs of evidence do not encourage early pleas of guilty. Instead, the defence will often enter and maintain a plea of not guilty for the purpose of finding out what evidence the prosecution has, and in order to delay proceedings. It is often the case that when served, a summary prosecution brief will not contain corroborative police officer statements and/or expert certificates. The defence will raise the missing items with the magistrate. Some magistrates will require the missing items be served before setting the proceedings down for hearing, at times awarding costs against the prosecution for unreasonable conduct or delay.

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[7] This term is used within ODPP Annual Reports. The writer assumes that this term equates to 'dismissed/withdrawn'.
[8] http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2012-2013-annual-report.pdf?sfvrsn=6 pp. 26 & 27
[9] http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2011-2012-annual-report.pdf?sfvrsn=2 p.40
[10] http://www.odpp.nsw.gov.au/docs/default-source/recent-annual-reports/2010-2011-annual-report.pdf?sfvrsn=2 p.41

A positive step forward initiated by the Chief Magistrate is the current Presumptive Testing Certificate Trial for summary drug proceedings. If the prosecution is required to provide a full (non-presumptive) expert certificate in the event that a finding of guilt is made, and the drug analysis certificate confirms the findings of the presumptive test, the Police Prosecutor will make an application for the cost of the presumptive analysis and obtaining the drug analysis certificate. Consequently, the accused is discouraged from delaying proceedings. A similar procedure could be considered for Fingerprint and DNA expert certificates.

Resultant delay and costs against the prosecution provide incentives to plead not guilty. An alternative approach would be that upon the accused person entering a plea of not guilty, the prosecution are only required to serve: the 'meaty bits' of the brief on the defendant; presumptive certificates; and preliminary certificates from experts that list the minimum information required to determine what the prosecution's case is. Under those circumstances, it could not be said that the defence entered the plea to cause delay for an inappropriate purpose.

Question 8.1

1) Should NSW reintroduce a sentence indication scheme?

Please refer to our preliminary submission.

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

Please refer to our preliminary submission.

Question 9.1

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

NSW already has statutory and common law that provides for sentencing discounts. Expanding sentence discounts will not have a significant impact on the rate guilty pleas.

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?

No further comment.

Question 10.1

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

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

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?

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

NSWPF refers to its preliminary submission.

Comments relevant to the ODPP's suggested model for sanctioning charges

The NSWPF encourage the ODPP to provide continuity of prosecution representation in all proceedings it takes carriage of. Greater collaboration and communication should occur between the ODPP and the police prior to charging. NSWPF supports abolishing the committal process. However, the NSWPF is opposed to any statutory scheme that requires the NSWPF to seek permission from the ODPP to charge an offender with an offence, whether strictly indictable or otherwise. Save for amending the *Criminal Procedure Act 1986* for the purposes of replacing the committal procedure, the advantages sought to be gained by the ODPP's proposal can occur without introducing a complex new statutory scheme.

Whilst not indicating that the policy is wrong or inappropriate, the ODPP Guidelines encourage negotiations between the parties. 'Inefficiencies brought about by late pleas' are in the main due to the current expectation by the defence that if they enter into negotiations with the ODPP, it is likely their client will receive a more favourable result. In our sample, 75% of the time there was evidence available to substantiate the original charge filed by police. However, in 69% of the proceedings where negotiations were apparent, the accused person received a more favourable result as the ODPP proceeded with a lesser charge or charges. Whilst police do at times do overcharge, it is not likely they will do so. On the other hand, in any one particular criminal matter prosecuted by the ODPP, it is likely the ODPP will accept a plea to a lesser charge.

Complexity

The ODPP's proposed model is complex. Diagram 1 within the ODPP submission is evidence of this. Compare this diagram or flow chart to the one contained within s 16 of the *Bail Act 1978* and its complexity becomes evident.

Threshold Tests

Uncertainty surrounds the level of evidence required to meet the threshold for 'sufficient to put on bail' as compared to 'sufficient to charge'. NSW currently has one consistent, step by step test contained with the ODPP guidelines on the decision to prosecute:[11]

(1) whether or not the admissible evidence available is capable of establishing each element of the offence;

(2) whether or not it can be said that there is no reasonable prospect of conviction by a reasonable jury (or other tribunal of fact) properly instructed as to the law; and if not

[11] Guideline 4

(3) whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

If 'charging decision bail' relies on a lesser test of 'documentary evidence available to satisfy all the elements of the offence', then an allegation only, documented on paper, will be provided for. This is surely a step backwards and the community would expect something more.

From points 1 and 2 under the heading of 'A. The first aspect of the reform...',[12] when police have sufficient evidence to charge, the proposal is that two lawyers, a senior (level 2 or 3) ODPP lawyer and a senior prosecutor, be involved in a charge decision. It is uncertain whether this process would work out-of-hours so that a charge decision could be made within the time the accused person is detained, or whether 'charge decision bail' would always necessitate the provision of the second level of advice. On the other hand, where police have a mere reasonable suspicion following 'Response to an incident scenario', the model does appear to provide for a charge decision. It appears incongruous that a charge decision could be made on reasonable suspicion, but 'charge decision bail' would have to used where there is sufficient evidence to charge.

Bail Act

Following extensive consultation over at least four years, a new *Bail Act 2013* will be proclaimed in May 2014. The ODPP's model would require wholesale changes to this Act and the model that underpins it. For the purpose of a bail decision and in circumstances where a decision to charge with specific offences has not been made, question surrounds what specific offence or offences will be identified to the bail authority for consideration in order for them to make a decision within the scope of 'charging decision bail'.

It is envisaged that the model will provide for release applications during the period of 'charging decision bail', and these would be subject to similar restrictions as contained within s 74 of the *Bail Act 2013*. Even though the model does not overtly promote it, the model does provide for 'charging decision bail' in circumstances where the investigation is not complete but police have a reasonable suspicion that a serious offence has occurred. Currently a person can only be bail refused following a decision to prosecute in accordance with the ODPP's Guidelines.[13] If 'charging decision bail' results in the accused person being bail refused, then at the point in time when the accused person is provided with a new piece of evidence, they may lodge a release application even if the evidence is not exculpatory. In this context the number of release applications may increase.

LEPRA

For the purpose of obtaining further evidence and ODPP advice, the ODPP's model provides for the detention of an accused person for a longer period than would ordinarily be necessary:[14]

> ...we suggest that a 24-48 hour period be provided for an accused person to be detained after arrest, in order for a charging decision to be made.

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[12] Suggested ODPP Model for sanctioning charges, from page 3 and continuing to page 4

[13] Guideline 4

[14] Suggested ODPP Model for sanctioning charges, p. 5

Detaining for the sole purpose of further investigation and then extending this for the purpose of seeking advice appears to be in conflict with the principle that accused persons only be detained for as short a time period as necessary. The proposal would also require significant changes to Part 9 of LEPRA.

Table Offences

The current process is that persons are charged with a Table offence and the police prosecutor later (usually within days) determines whether it is appropriate that the charge be referred to the ODPP for election.

The ODPP's proposed model contemplates Table Offences in the definition of 'Serious Offence'.[15] It is rare that the NSWPF will refer a Table 2 matter to the ODPP. In 2007, of the 145,504 individual persons charged, 11,453 (8%) were charged with a Table 1 offence. Of these, the NSWPF referred 2952 (2% of total / 26% of Table 1 charges) to the ODPP for election. The ODPP elected to deal with 678 (0.5% of total persons charged / 6% of Table 1 charges / 23% of those referred).

Notwithstanding these statistics have some age, they are still representative. The NSWPF refer a low percentage of Table offences to the ODPP and the ODPP elect on an even lower percentage.

In this context, the ODPP's proposal is ambiguous or uncertain. Is it envisaged that at the time of or immediately before considering whether there is 'sufficient evidence to charge'[16], a decision on whether an election should be made will take place for Table offences. Either way, the model dictates that the ODPP provide advice on many more Table matters than they currently do, even if just on the question of whether the matter warrants "disposition in the Supreme or District Courts." Alternatively, it may be that a police prosecutor be on call to carry out the function of deciding what matters to refer to the DPP as a 'serious offence' or what matters fall within the proposed model; or is the police officer in charge of the investigation to do so? Police Prosecutions is not currently resourced to provide this sort of after-hours service.

ODPP Resources and Culture

In order for police to obtain advice on the appropriateness of charges following the investigation of a serious offence, the ODPP Guidelines prescribe:[17]

> (ii) Advice will be provided only on receipt of sufficient material in admissible form.
>
> (iii) Where insufficient material is provided to allow a decision to be made, the ODPP may request additional material before advice will be provided.
>
> (iv) Advice as to the sufficiency of evidence will generally be provided within four weeks of receipt of the material referred to in (ii) and (iii); however, where practicable and on the provision of reasons for urgency in the matter in question, a shorter period may be negotiated.

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[15] Suggested ODPP Model for sanctioning charges, p. 3
[16] Suggested ODPP Model for sanctioning charges, Diagram 1, p. 2
[17] Guideline 14

Accepting that corroborative statements are not required and that instead, presumptive tests, hand written or video statements, summaries and other short forms of evidence are sufficient to provide advice, would be a significant shift in position for ODPP solicitors. Whilst not advocating that it is the correct position, it may be the case that some ODPP solicitors will be of the view that the provision of advice on less than a full brief of evidence is not consistent with their professional obligations as a legal practitioner.

In addition to the required change in culture, the ODPP indicate that the major impediment to transitioning to their proposed model is the current budget allocation.[18] Noting the requirement for 24/7 state-wide coverage and suggested assigning of senior prosecutors to complex, large or ongoing investigations, the ODPP submission does not include empirical information or projections on the number of staff required, or any data on the advice to be provided and the timeframes required.

It appears that the ODPP would require a significant input of funding to make their proposed model work. There is uncertainty as to the procedures proposed and whether the significant cultural change required could be achieved within an appropriate amount of time.

NSW POLICE FORCE'S PROPOSED ALTERNATIVE MODEL

The NSWPF propose an alternative model that:

- Is not complex;
- Does not require wholesale changes to the *Bail Act 2013*;
- Does not require significant changes to Part 9 of LEPRA which have the effect of extending an accused person's time in custody;
- Either does not require additional funding, or if it does, very little additional funding;
- Abolishes committal proceedings;
- Preserves the current appropriate basis for deciding to prosecute as the catalyst for any decision on bail;
- In serious and complex investigations, provides investigators with legal advice early and throughout the course of the investigation; and
- For the purpose of the ODPP deciding on whether to file an indictment, provides for the use of presumptive drug testing certificates; video, digital or tape recordings of relevant previous representations made by available victims/witnesses contemporaneous to a crime; and short form expert certificates.

[18] Suggested ODPP Model for sanctioning charges, p. 6

Strictly Indictable Proceedings

In order, the high level step by step process proposed is:

1. Police make a decision to charge with a Strictly Indictable Offence.

2. Facts, Court Attendance Notice and Criminal Antecedents are automatically electronically forwarded to the ODPP.

3. The proceedings are listed for first mention in the Local Court. If the accused person has been refused bail by police, the Court makes a decision on bail.

4. The proceedings are adjourned generally.

5. Within 6 months of the first mention date the ODPP either withdraw the proceedings, file indictments in the appropriate jurisdiction, or seek an extension of time to do so.

Table Proceedings

In order, the high level step by step process is:

1. Police make a decision to charge with a Table offence.

Police prosecutors decide whether to refer the proceedings to the ODPP for election. If referral is made, the Facts, Court Attendance Notice/s and accused person's criminal antecedents are electronically provided to the ODPP.

The proceedings follow the current normal course within the Local Court, however, no court order for the service of a brief of evidence is made unless the police prosecutor informs the Court that the proceedings will not be referred to the ODPP for election.

2. If the ODPP elect to proceed with the matter on indictment or otherwise take carriage of the proceedings, the Court is informed and the proceedings are adjourned generally.

3. Bail, whether refused, conditional or unconditional is continued during the course of the general adjournment.

4. Within 6 months of the proceedings being adjourned generally, the ODPP either withdraw the proceedings or file indictments in the appropriate jurisdiction or seek an extension of time to do so.

What happens during the course of the general adjournment?

- Police provide the ODPP with the brief of evidence.

- If the ODPP decide to file indictments, the accused person or their legal representative is provided with a copy of the brief.

- Upon the indictments being filed the proceedings are listed for mention in the relevant jurisdiction on date chosen by the ODPP.

- From the time the ODPP provide the brief to the defence until the first mention date, negotiations take place with the defence in order to file indictments that adequately reflect the essential criminality of the accused person's conduct and provide adequate scope for sentencing.

- Compliance with the Charter of Victim's Rights.

What happens during the course of the investigation prior to charge?

- Police Prosecutions continue to provide legal advice to State Crime Command investigators during and at the conclusion of serious criminal investigations, including advice on the appropriate initial charge to file.

- If the investigation is complex or sensitive, advice is sought from Police Prosecutions on whether it is appropriate that application be made to the ODPP to assign a senior prosecutor/trial advocate or Crown Prosecutor to provide legal advice throughout the currency of the investigation.[19]

What efficiencies are provided for?

The efficiencies arise predominantly from the abolishment of committals.

- The Local Court need not roster a list court solely dealing with indictable proceedings that are not to be heard summarily.

- Time ordinarily set aside for committal hearings is returned to the Local Court diary. This in turn will decrease the ultimate time from charge date to finalisation of Local Court proceedings. Local Court Proceedings encompass 95% of all criminal and related proceedings.

- The ODPP and Legal Aid do not need to provide lawyers to appear at Local Court for the purpose of managing indictable proceedings that are not to be heard summarily.

What else can be done?

The NSWPF and ODPP could work cooperatively to identify the types of offences where police may overcharge and the reasons for this; and in turn develop education strategies to address future overcharging.

[19] Agreement to be reached with the ODPP on the pre-requisites for such assignment.