NSW Law Reform Commission

Encouraging early pleas of guilty in indictable criminal matters
Options for reform

Preliminary Submission of the
Office of the Director of Public Prosecutions (ODPP)

Introduction

The ODPP welcomes the opportunity to participate in this reference to investigate ways of encouraging accused persons to plead guilty to criminal offences early in the proceedings.

The ODPP faces increasing cuts to its budget over the next three years. Other agencies involved in the criminal justice system face similar cuts. At the same time the means of detecting offences are improving. The number and type of offences in the criminal calendar together with the complexity of the law and investigations is increasing. We are seeing an increase in the work loads of the Local and District Court. These issues and trends suggest there is a critical need for a radical change to the criminal justice process. In our submission the resolution of this issue will ultimately only be achieved by introducing better mechanisms to control what new work is put into the system and by redefining the roles of the parties and the Courts.

Background

As noted above the workload of the ODPP and the courts is increasing. Annexure A to this submission outlines statistics produced from the ODPP CASES system "Committal and Trials Registrations 06.06.13". The document includes a state wide summary as well as the number of committal and trials at each ODPP centre and indicates the number of early or late pleas from 2011 until April 2013. "Late pleas" means a plea after the committal hearing.

The state wide figures show that committal registrations have increased by 12% and trials by 18%. Early pleas have decreased by 5% and the rate of late pleas has remained constant. The increase in trial and committal registrations by ODPP centre are shown in the following tables:

Local Court Committal registrations by DPP centre			
	1/7/10-17/6/11	1/7/11-17/6/12	1/7/12-17/6/13
SYDNEY	***1448***	***1475***	***1548***
CAMPBELLTOWN	685	632	701
PARRAMATTA	758	782	875
PENRITH (includes Bathurst)	547	550	662
SYDNEY WEST	***2024***	***1964***	***2238***
DUBBO	288	294	302
GOSFORD	227	182	218
LISMORE	333	352	433
NEWCASTLE	675	606	718
WAGGA WAGGA	233	228	231
WOLLONGONG	424	418	469
COUNTRY	***2180***	***2080***	***2371***
ALL DPP CENTRES	***5652***	***5519***	***6157***

District Court trial registrations by DPP centre			
	1/7/10-17/6/11	1/7/11-17/6/12	1/7/12-17/6/13
SYDNEY	***510***	***475***	***492***
CAMPBELLTOWN	164	158	186
PARRAMATTA	180	196	249
PENRITH (includes Bathurst)	198	167	194
SYDNEY WEST	***542***	***521***	***639***
DUBBO	83	76	75
GOSFORD	59	61	64
LISMORE	84	74	141
NEWCASTLE	189	203	267
WAGGA WAGGA	47	66	78
WOLLONGONG	122	172	143
COUNTRY	***584***	***652***	***768***
ALL DPP CENTRES	***1636***	***1648***	***1899***

This information together with the collective experience of ODPP lawyers suggests there is a tendency for accused to plead on the steps of the court. This is caused not by the whim of individual accused but is attributable to systemic issues. Accordingly, in our submission this reference needs to examine the operation of the criminal justice system from arrest to trial, and not only consider how the process may be improved, but critically assess what steps in the process still serve a valid purpose.

There have been a number of attempts in NSW, past, present and soon to be implemented to address issues that impact on the cost of running the criminal justice sector. These attempts have focused on different areas including:

- Criminal Case Conferencing[1] (CCC)
- Sentence Indications[2]
- "Docket system" (early allocation of a Judge) trial in the Sydney District Court in mid 1990's
- Case management and defence disclosure[3]

To date these innovations have failed to change the culture and work practices of criminal lawyers in NSW, because in our view none of these schemes by themselves went far enough, and all have been trialed within the existing criminal justice process.

In relation to CCC the ODPP's assessment was that there was an improvement in the early plea rate and a change in culture was emerging. In our submission CCC was regrettably terminated before it reached its potential and achieved its objectives.

The Sentence Indication Scheme was also in the view of many ODPP lawyers highly effective in particular courts. As was the "Docket system" trial in the Downing Centre District Court in the early - mid 1990's. That trial involved short trials listed at the Sydney District Court being allocated to four Judges with two Crown Prosecutors dedicated to each court list. From the ODPP perspective this arrangement worked well. There was case management, and sympathetic allocation of prosecution and Court resources. We understand that the scheme was discontinued because it was ultimately thought to be an inefficient allocation of Court resources. On this note the ODPP has found that particular Judges in regional areas implement a form of case management which reduces the number of trials where there is a plea on the first day or at least reduce the occasions when witnesses are unnecessarily brought to court. This sort of judicial intervention is effective but on its own is inadequate to significantly reduce the number of trials and comes too late in the process to achieve real savings.

Legal, procedural and administrative changes are frequent in the criminal justice area in NSW. These impacts individually and cumulatively make it

[1] *Criminal Case Conferencing Trial Act* 2008
[2] *Criminal Procedure (Sentence Indication)Amendment Act* 1992
[3] *Pre Trial Disclosure Act* 2001 and *Criminal Procedure Amendment (Mandatory Pre-Trial Defence) Disclosure Bill* 2013

difficult to compare NSW with other jurisdictions and even with NSW 10 years ago. For instance the criminal justice landscape in NSW in 2013 is very different to the landscape in 1993 when sentence indications were trialled. We consider that it would be worthwhile to revisit earlier schemes tried in New South Wales and consider some or all of the innovations in other jurisdictions particularly for instance the Victorian sentence indications scheme and the UK pre charge bail system. But what we would ultimately suggest is that there is not one solution to the problem, there needs to be a range of changes or options incorporated into criminal practice and procedure that capitalises on the opportunities that arise for resolution in, what we will refer to in this submission as the natural "momentum or critical points" of the criminal trial.

Another preliminary observation is that when analysing the short comings of NSW criminal procedures and processes, common arguments are made that one of the parties to the proceedings is failing to play their part for example the Crown Prosecutor is not briefed early enough or the defence have not got instructions. These sorts of generalisations are not constructive or accurate. The ODPP is increasing the rate of early briefing of Crown Prosecutors and without a change in defence practices to discuss guilty pleas close to trial. A better approach in our view is to acknowledge that the public legal resources available to drive results and reforms in the criminal justice system are finite (and stretched). We suggest that it is more constructive to look at the reality of running a busy criminal trial practice from a defence and prosecution point of view, and capitalise on the opportunities that arise or the critical points in time from the clients and lawyers perspective to resolve the matter.

The Critical Points

At present, there are two critical points in the proceedings from the accused's point of view; when they are arrested and when the matter is listed for trial. The natural evolution of the matter is driven by the fact that the more the accused gets accustomed to the idea of the matter moving through the system, the imperative to resolve the case is lost and their interest lies in postponing the final outcome for as long as possible. Similarly the police have resources martialled at arrest and compiling the brief then they move on to the next investigation.

The lawyers are preoccupied dealing with the matter that is in court next. The two critical points in time for both prosecution and defence lawyers (assuming there is to be continuity of representation) are the time that counsel sit down and read the brief for the first time and the time that they have to argue the matter in court. These two points in time should coincide with the critical points from their client and the Police perspective.

But in the current system the opportunity to resolve the matter at the earliest point in time from the client and Police perspective, arrest and charge, is lost because it doesn't directly coincide with the first critical point in time for the lawyer i.e. when they are reading the brief for the first time.

Accordingly on this analysis, unless a plea is taken very early where there is no brief or only a partial brief available, it is more likely not to happen until as late as possible. In our submission under the current system a major impediment to a plea being entered before trial is the absence of a brief of evidence at the beginning of the proceedings. One way to achieve a change in this time line is to postpone the commencement of proceedings, so the proceedings commence at the same time as the evidence is made available. The UK pre-charge bail system is one such mechanism to align the opportunities to resolve the matter. We note that Australia is one of the only common law jurisdictions that does not have a pre charge bail scheme.

A brief of evidence available at the beginning of proceedings combined with the availability of a discount on sentence for a very early plea is one way to capitalise on the opportunity to resolve the matter early. A suggestion from a DPP lawyer is that written notice could be given to accused persons, shortly after charging or at their first appearance at court, outlining the diminishing discounts for a plea of guilty at various stages of the proceedings. At the least, such a notice might encourage accused persons to actively seek advice from a solicitor on this issue at an early stage in the proceedings.

In our submission commencing criminal proceedings later would have the following additional benefits to the whole criminal justice system:

- It allows time for the brief to be prepared before costs are incurred in system by reason of Local Court appearances,
- allows the DPP time to screen charges and ensure an appropriate charge is laid,
- service of brief at the commencement of proceedings capitalises on the opportunities of all key players being willing and able to negotiate,
- it provides an opportunity to restructure the way criminal cases are conducted and administered by key agencies such as DPP and Legal Aid, with more senior lawyers being assigned early to prepare and manage the case; and
- it would reduce the incidence of costs being awarded against the prosecution for adjournments and withdrawal/dismissal of charges.

Committal Hearing

The current Local Court Practice Note's purpose is to control the time the matter takes to travel through the Local Court. It is not designed to encourage or assist the parties to resolve the matter. In our submission, while acknowledging that matters cannot be allowed to languish, forcing parties to progress matters forward in the Local Court is futile as neither party to the proceedings has any control over the preparation of the brief of evidence, and the receipt of crucial evidence might be genuinely delayed by factors beyond the courts, parties, and Police's control. All that is occurring is the parties and the court, are waiting for adequate information to be available. In our submission the process does little to add to the quality of the prosecution and only serves to generate legal costs by way of appearances for both parties. So notwithstanding the time and legal

costs spent in the Local Court, it is still the case that briefs are not entirely complete after the committal process and the expectation is that the brief service and disclosure process will not be complete until the trial commences.

Accordingly when the Commission considers the question of pre charge bail, we suggest alternatives to the committal for trial process are looked at. Committals have been abolished this year in England.

Case Management in District Court

The upcoming changes in relation to defence disclosure in the *Criminal Procedure Amendment (Mandatory Pre-Trial Defence) Disclosure Bill 2013* have not yet commenced. It is expected that this legislation will have an impact on the way in which the defence prepare matters for trial, where its predecessor the *Pre Trial Disclosure Act* 2001 did not .

In our submission the forthcoming legislative changes would be greatly enhanced by a change in listing practices in the District Court, and the incorporation of two changes to the current system:

a) Implementation of something similar to the Early Guilty Plea Scheme in England. Case management to get a matter fully ready for trial is not required in many cases committal for trial in the District Court. In the UK the Crown Prosecutor Service have a role in listings. Despite the accused plea a prosecutor can ask for a matter to be listed in the Case Management Court (this is called the Early Guilty Plea Scheme). An experienced Crown prosecutor would place the matter in the Case Management Court particularly where the Crown case is strong and there is an expectation by the Prosecutor that a plea will be entered at some stage. The experience in England is that this changed the culture and the dynamics of the case. If the defence (in an identified case) want to take it out of the Early Guilty Pleas list, they can go to Court and ask for this to happen. The Court will require an explanation of the issues and the defence case statement. The Court will also make clear that the full 25% early plea discount will be lost at that moment. The loss of full discount is strictly adhered to. Where pleas are entered Judges make special note of the full discount in the remarks on sentence. It helps reinforce the view that full discount is only for early pleas. The Chief Executive of the Crown Prosecutor Service described the Early Guilty Pleas as “the one initiative that has changed culture and lead to early guilty pleas”.

b) Once matter move to the trial list short trial should be placed in a “docket” system: a series of short trials listed at the Sydney District Court being allocated to a particular judge with two Crown Prosecutors dedicated to that court list. From the ODPP perspective this arrangement would enable case management in advance of the trial and the efficient allocation of Crown Prosecutor and solicitor resources;

Plea negotiation

> *"No observer is entirely happy that our criminal justice system must rely, on, to the extent that it does, negotiated dispositions of cases. However crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with.*" Notes of Committee on the Judiciary, House Report No 94 – 247; 1975 amendment

The prosecution and defence do not have ultimate control over the fate of the matter, unlike civil disputes where the parties can reach agreement as to the outcome. The police lay the initial charge. The prosecution has no control over the work that is sent to them by the police. The court sets timetable that the prosecution has to comply with even though they do not have control over the preparation and gathering of the evidence. The prosecution can't make agreements that bind the court.

The defence lawyer needs instructions from their client and finality from the prosecution in terms of what evidence is available and what the charge is to be. The defence can't make promises to the client about the outcome of a matter.

Our hypothesis is that a significant part of what drives the matter to a "steps of the court" conclusion is a result of the fact that the parties don't have the means to control the outcome. This lack of control results in matters going to trial or resolving itself in a plea at the latest possible moment.

The decision not to elect on a Table offence by the DPP is in effect a determination by the prosecution that a certain sentence is within range. It is currently the only mechanism the prosecution has to control how much work flows through to the District Court. Is it such a radical step to allow the prosecution, in appropriate cases, to have more control over the final outcome of the matter?

North American Style Plea Agreements

In the United States there are 4 types of plea agreements recognised by US Federal Rules of Criminal Procedure

1. Take a plea to a lesser or related offence
2. Move for dismissal of other charges
3. Make a recommendation, or agree not to oppose the defendants request for a particular sentence, with the understanding that such recommendation or request will not be binding upon the court or
4. Agree that a specific sentence is the appropriate disposition of the case, with the court retaining discretion to reject the agreement. If the agreement is rejected by the court the accused may withdraw the plea.

Taking these types of plea agreement in turn it is apparent that the differences in procedure are not that significant. The first two are currently available and

widely utilised in NSW. The third is currently possible but there are impediments to its use, including that it is difficult to guarantee the continuity of the same prosecutor from plea to sentence and there are problems (not unresolvable) associated with binding the Director on an appeal. The fourth is not available in the criminal jurisdiction however it is used in other jurisdictions in NSW such as the professional disciplinary sphere – see for example s564 *Legal Profession Act* 2004.

An agreement as to the outcome has many advantages for the accused. There is certainty, it is cheaper and it is quicker. If the agreement is accepted by the court, it would cut back on the number of reports that are prepared for sentencing and the costs associated with those reports[4]. It would be a more effective incentive than the advice given concerning a discount on sentence, because of the inherent illusoriness of a discount on sentence.

Plea agreements would also save court time. They will not be appropriate or achievable in every case, but it would be possible to negotiate an agreement very early in the life of the case in the Local Court, which is not something a sentence indication scheme can provide (unless Magistrates were to indicate the sentence a District Court Judge would give, which does not seem feasible).

Sentence Indications

We suggest that a flexible plea agreement regime could be incorporated into a sentencing indication scheme. One of the problems with the sentencing indication scheme in NSW in the 1990's was the sceptre of a Crown appeal, which meant the indication hearings became complicated by establishing a range of sentences[5]. The Victorian model is simply to indicate if an immediate custodial penalty is being considered, but this has its limitations as well[6]. A middle ground should be explored, in doing so we acknowledge that the DPP's position on whether a right to appeal is to be preserved needs to be reviewed. Indeed we envisage that a plea agreement / sentence indication would require the endorsement of a senior prosecutor. With respect to victim and police concurrence with any plea agreement, s35A *Crimes (Sentencing Procedure) Act* could be modified to ensure that their views were taken into account and reflected in the agreement.

Incentives to Plea of Guilty by a reduction in penalty

The incentive of a reduction in penalty is an important aspect to encourage early pleas and accordingly has a role to play in the criminal justice process.

[4] Particularly in cases where a prison sentence is agreed. But there is no reason that the parties could not seek the assessment for the non prison sentence options as part of the negotiation/agreement process. This would also save court time in respect of adjournments to enable the reports to be prepared.

[5] R v Archie Leslie Glass (Unreported) CCA 24.5.94

[6] See Sentencing Advisory Council (Victoria) "Sentence Indication- A report on the pilot scheme" February 2010 p 22 at 3.10

However the role should not be overstated as there are limits as to how far the reduction can go without eroding public confidence in the system. The availability of discounts to date has clearly not had sufficient impact to make a big enough difference to the rate of late pleas. Any scheme of graded discounts on the basis of the time a plea is entered should not however be overly complex or technical because it can unnecessarily complicate the sentencing process.

We support a limit on discounts for early plea once the matter has left the Local Court, and that the utilitarian discount increases if the plea is entered pre service of the brief.

Office of the Director of Public Prosecutions
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