NEW SOUTH WALES
BAR ASSOCIATION

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Ms Sallie McLean
New South Wales Law Reform Commission
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Dear Ms McLean

Encouraging Appropriate Early Guilty Pleas: Models for Discussion

The New South Wales Bar Association is grateful to the Commission for the opportunity to comment on Consultation Paper 15 and the models put forward for discussion drawn from the experience in other jurisdictions.

The Association confirms the matters put forward in its Preliminary Submission PEGP08 (5 July 2013) and relies upon those (without repeating them) as a foundation for the more specific comments now made under the headings and in response to the questions adopted and posed by the Commission.

Ten Obstacles to Early Guilty Pleas

While these may conveniently be the focus of the Commission's work in this area, these points do not tell the whole story. Indeed, some of these matters would be factors in only a small minority of cases, if ever.

The most positive change would be effected by the allocation of resources to the DPP to enable more senior prosecutors to have carriage of matters from an early point in the proceedings.

1. *The prosecution serves parts of the brief of evidence late.*

While this may be an obstacle, the background to it should also be examined to see if action may be taken otherwise to improve the situation. It may well be that police or other investigators do not provide the full brief of evidence to the prosecution until a late stage. It may be that the prosecution makes requisitions to police to investigate further matters and there are delays in that action being taken. It is submitted that shortcomings in police practice should not be overlooked.

2. *The defence expects further evidence will be disclosed closer to the trial.*

This may be a product of obstacle 1 and provides another reason to address police practice.

3. *The defence believes that it is common practice for the prosecution to overcharge early, and that the charges will be reduced as the proceedings advance.*

Again, this is influenced by police practice. It is common for police to overcharge, especially in relation to indictable matters. The reasons for this should be explored and attempts made to address it. The prosecution commonly reduces the severity or number of charges, even without charge negotiation between the parties. Negotiations may reduce them further.
In addition to police overcharging practices, attention should be given to enabling the prosecution to screen charges earlier and engage in negotiations at an earlier time.

4. *The prosecution accepts a plea to a lesser charge late in the proceedings.*

If it is appropriate to do this, it must be done. This is not really an obstacle in itself – it may be a consequence of other identified obstacles.

5. *Senior Crown Prosecutors with the authority to negotiate are not briefed until late in the proceedings.*

This is purely a resource issue. If additional resources (funds) are provided to prosecution agencies, more senior prosecutors may be assigned to cases earlier and remain in them. Without additional resources, it is usually not possible for the senior prosecutor ultimately with carriage of the matter to be briefed in it earlier.

One way to address that obstacle is the Association's suggestion of specific allocation of representatives on both sides to be given the task of negotiating pleas of guilty to be undertaken in accordance with formulated guidelines.

6. *The defence perceives the court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that occurred later in the proceedings.*

The only effective way to address this is by tightly worded legislation applicable to all cases, curtailing the ability of the court to stray in this way.

7. *The defence is sceptical that sentencing discounts will be conferred to their client*

The Association relies upon its earlier submission advocating more certainty about discounts.

8. *The defence believes that they will obtain better results in negotiations that occur just prior to trial*

If a more tightly regulated regime is in place with earlier attention to pleas, that belief may be dispelled.

9. *Discontinuity of legal representation means that advice and negotiations are inconsistent*

This is a resourcing issue, principally – at least from the prosecution side and so far as Legal Aid is concerned. That covers the bulk of matters.

10. *The defendant holds back a plea because the defendant wants to postpone the inevitable penalty; denies the seriousness of his or her predicament until the first day of trial; and/or is hopeful that the case will fall over due to lack of witnesses or evidence.*

This may be addressed by a series of measures already identified – but there will still be an area of obstruction and uncertainty arising from human nature.

Question 3.1

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

No.

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

Advantages include: enabling police to compile a full(er) brief of evidence before charging; enabling police to seek pre-charge advice (as to the evidence and appropriate offence/s); increasing certainty of charge; relieving courts of repeated bail hearings; allowing suspects to continue at liberty (even if subject to conditions).

Disadvantages, which in the Association's view, outweigh the advantages, include: allowing police to use arrest as a means of social control; allowing police to defer investigation and preparation of a brief; (limited) interference with the liberty of a person who may ultimately not be charged.

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

Neither.

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

Limits should include: applicability to certain offence types only (where the issues it means to address are most commonly encountered); a reasonable time limitation (perhaps with a requirement for court review); appropriate ongoing reporting of its operation; proper resourcing of police.

Question 3.2

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

Yes. The England and Wales scheme provides a good model. However, the Association would not support any change in the role of the ODPP, particularly with respect to independence. What is envisaged is simply greater use of ODPP advice with respect to the formulation of charges in serious, sensitive or complex matters.

2. *If such a scheme were introduced:*
   a. *what features should be adopted?*

Features should include: appropriate resourcing of the ODPP; compulsory in relation to certain offence types, optional in others; prescribed time limits/requirements for action by both police and ODPP; to be used in conjunction with pre-charge bail; a governing protocol to be in place between the Police Force and ODPP; internal guidelines to be furnished by the DPP; DPP Prosecution Guidelines to be updated accordingly; full and timely reporting of the operation of the scheme.

   b. *how could it interact with a pre-charge bail regime?*

Both may operate, with some overlap where the criteria applied.

   c. *what offences should it relate to?*

Serious, sensitive or complex matters – to be identified by law part code; but with flexibility to enable police, by agreement with the ODPP, to refer other matters in appropriate circumstances.

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

By enabling settled charges to be laid at the outset of the court process, with a good prospect that those charges will be prosecuted to conclusion. It increases certainty and therefore predictability, which in turn alters defence mindsets to encourage earlier commitment. It also gives confidence to prosecutors that the charges they (later) receive have been laid after professional consideration.

Question 4.1

1. *How could charge negotiations in NSW be more transparent?*

The first question to be asked is whether or not charge negotiations in NSW should be more transparent (or accountable) than they are already. As the Association's Preliminary Submission pointed out, the efficacy of the charge negotiation process really lies in the trust and goodwill between legal representatives on both sides and preparedness to bring to the process a degree of objectivity and disinterestedness. The NSW DPP's Prosecution Guidelines (especially 19 and 20) and section 35A of the *Crimes (Sentencing Procedure) Act* 1999 ensure that sufficient transparency is brought to the process.

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

This is uncharted territory; but there could be a discouraging influence upon the willingness of defendants to engage in charge negotiations from the knowledge that a wider audience than at present will be witnessing events.

Question 4.2

1. *Should NSW Crown Prosecutors be able to incorporate sentencing outcomes into plea agreements?*

Prosecutors generally are obliged to assist courts to avoid appellable error by providing appropriate information to the courts – but it is the court's role to determine an appropriate sentence.

In practice there appears to be some variation in the extent to which prosecutors are prepared to go in assisting the sentencing court to avoid error. Some will indicate that a particular mode of sentence would be open without nominating a quantum, some will submit that a sentence lower than a nominated quantum would be falling into error, some will actually nominate an appropriate sentence. In some cases, the prosecution has agreed to make a submission regarding 'the appropriateness of any particular sentence, or a component of it', and the sentencing court is required to give that submission careful consideration: *Ahmad v R* [2006] NSWCCA 177 at [23]. The law and practice in this area is still developing around the country and the Association considers that it would be premature to settle on one approach at this stage.

2. *How could NSW Crown Prosecutors incorporate sentencing outcomes into plea agreements?*

The prosecutor would disclose the sentencing range that would be put before the court as a sentencing submission made by the prosecution.

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

That is impossible to guess; but it may have very little impact given that the sentencing court would be free to impose a different sentence.

Question 4.3

Should the courts supervise/scrutinise plea agreements?

No, the courts should act consistently with the principles confirmed in *Maxwell* and *GAS.*

Question 5.1

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

Yes; and for greatest efficacy it should be compulsory (as under the discontinued model).

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

The BOCSAR review and findings were flawed. First, BOCSAR effectively compared the statutory CCC scheme with the pre-existing administrative scheme, so it would not be expected that a great difference would be found. Secondly, the review was premature – more time was needed for any genuine effects of the statutory scheme to be measured. Thirdly, the review was not designed to and not capable of assessing cultural change driven by the CCC scheme, which was happening and was affecting professional attitudes to the early entry of pleas of guilty.

The Association does not see any significant disadvantages of reintroducing the scheme. It is preferable that it have a statutory basis, to ensure certainty and consistency and to carry weight.

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

As it was when it was terminated.

Question 6.1

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

If a CCC scheme is operating, there is less need for a fast-track scheme; but if CCC is not to be reintroduced, then a fast-track scheme would be useful. It is possible that both could operate, but there would be likely to be inefficiencies created and procedural inconsistencies could be troublesome.

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

The Western Australian model has worked well in that jurisdiction and would have good prospects in NSW.

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

They should be legislated and should be set at the highest level that policy considerations would allow.

Question 6.2

1. *Should NSW adopt a program of differential case management?*
2. *If a program of differential case management were introduced:*
    a. *what categories could be created; and*
    b. *how should each of these categories be managed?*

The Association does not have a position on this issue.

Question 7.1

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

The present system of committals operates as an efficient administrative step with sufficient safeguards built in to accommodate the interests of both defence and prosecution. It should be maintained.

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

It would resemble the present form of committals in NSW, but by a different name and without the requirement for the magistrate to assess the existence of a reasonable prospect of conviction.

Question 7.2

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

The Association considers that the current arrangements are satisfactory.

Question 8.1

1. *Should NSW reintroduce a sentence indication scheme?*

The Association supports the reintroduction of a sentence indication scheme. However, it must be conceded that such a scheme is unlikely to encourage *early* guilty pleas.

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

If such a scheme were to be reintroduced, care should be taken to ensure that its operation is not distorted by the routine allocation of particularly 'lenient' judges to the scheme hearings. This occurred during the previous scheme and there is a great incentive for the courts to do precisely that – it assists with clearing cases, it benefits defendants and their representatives; but it increases Crown appeals and brings the system into disrepute in the community at large. If sentences indicated at that stage are less than sentences imposed upon defendants who plead guilty at an earlier stage, the scheme provides a disincentive to plead early.

Question 8.2

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

The conditions that applied during the conduct of the earlier NSW scheme seem appropriate.

Question 9.1

1. *Should NSW introduce a statutory regime of sentence discounts?*

In addition to section 22 of the *Crimes (Sentencing Procedure) Act* 1999, a more detailed statutory regime is desirable. It gives greater certainty and consistency to the practice of discounting sentences and it enables people to know in advance what is to happen at various stages. It also assists in promoting public acceptance of the process and can help to dispel public dissatisfaction with perceived lenient sentences following pleas of guilty.

Such a regime should be based upon two principles: that the discount is to reflect the utilitarian value of a plea of guilty; and that the earlier a plea is entered, the greater that utilitarian value. Additional discounts should still be available (as at present) for assistance to authorities. However, there must be sufficient flexibility to ensure fairness. Thus, for example, if the defendant offers at an early stage to plead guilty to a particular charge and this offer is only accepted at a late stage, the discount should correspond to that which would have been given if the plea had been accepted at the early stage.

2. *If a statutory regime of sentence discounts were introduced:*
    a. *what form could it take?*

There should be a presumptive percentage discount for different stages. The Association favours a 33.33% (one third) before service of the prosecution brief with lower discounts for subsequent stages (at or before committal, at or before first arraignment, at or before pre-trial disclosure, and so on). However, there must be a discretion conferred to give a higher discount than the presumptive discount if it is in the interests of justice.

b. to what extent should it be a sliding scale regime?

As suggested above, for the reasons given at (1).

Question 10.1

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

In paragraph 10.24 of Consultation Paper 15 it is said: 'In consultation, it was submitted that the late entry of guilty pleas in summary proceedings at the Local Court is not an issue that causes delay or consumes resources as it does in the District Court.'

In those circumstances, the Association does not see a need to add case conferencing to the case management procedures that appear to be working reasonably well in the NSW Local Court.

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

The Association does not see a need for such a scheme.

3. *If a summary sentence indication scheme were introduced:*
   a. what form should it take?

The Victorian model is probably closest to the circumstances of NSW and is therefore worthy of consideration.

b. what type of advance indication would be appropriate?

See above.

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

It appears that there would be no appreciable effect (other than, perhaps, to add another set of procedures that could contribute to inefficiency).

Should you or your officers require any further information, please do not hesitate to contact the Association's Executive Director, Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely

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