The Public Defenders

21 June 2013

Paul McKnight,
Executive Director,
NSW Law Reform Commission,
Department of Attorney General and Justice,
DX 1227 SYDNEY

Dear Paul,

Preliminary Submission on the reference encouraging appropriate early pleas

We welcome the opportunity to contribute to possible legislative and operational reforms to encourage appropriate early pleas in indictable proceedings. Any reform should be approached with two fundamental protections in mind: firstly, that an accused have sufficient disclosure to make a decision as early as possible and, secondly, that any system must ensure a plea is freely entered by an accused.

We suggest that the following matters are worthy of consideration:

1. **Avoiding overcharging practices**

Operational reform should be implemented to ensure professional legal evaluation when charges are laid to avoid overcharging practices. The charges should be evaluated so that they accurately reflect what is likely to be proved at trial. The practice of overcharging causes delays in the timing of a plea because often it s not until a short time before trial that the evidence is sufficiently evaluated by prosecuting authorities.

2. **Adequate funding for Legal Aid**

An essential factor to the early preparation and provision of advice to accused persons, is the involvement of sufficiently experienced defence representative at the earliest possible time after charge. Early involvement of defence counsel and continuity of legal representation enhances the opportunity for early pleas. When an accused has the benefit of trusted professional advice at an early stage of proceedings he/she is more likely to follow that advice.

Legal aid funding should be maintained at a level that ensures the involvement of experienced representatives who have the knowledge and authority to critically assess and negotiate during the early stages of the trial process.

3. **Early briefing policy for Crown Prosecutors**

A consistently identified issue in relation to late plea negotiation is the fact that Crown prosecutors are often not briefed until a short time before trial.[1] Early communication

[1] "Guilty Pleas: Discussions and agreements", Mack & Anleu Journal of Judicial Administration (1996) 6 JJA 8; "Reform of Pre Trial Criminal Procedure: Guilty Pleas", Mack & Anleu Criminal Law Journal Volume 22 at 263; "Managing Trial Court Delay", Weatherburn and Baker, NSW Bureau of Crime

between the parties is critical to the quality and timeliness of case preparation and identification of appropriate and early pleas. The success of pre-trial negotiation relies heavily on the level and quality of communication between defence counsel and prosecuting counsel.

In a study conducted by the NSW Bureau of Crime Statistics and Research[2] two most highly rated reasons for late guilty pleas were late decisions by Crown prosecutors to accept pleas to lesser charges and the inability to discuss the matter with a Crown until late in the process. In the survey conducted with defence counsel, a recurrent issue was the incapacity of defence counsel to negotiate because a Crown was not briefed in the trial until a short time before trial.

An essential part of a system aimed at encouraging early pleas is the involvement of experienced counsel on both sides who have carriage of the matter and are briefed to conduct the trial.

A number of Australian jurisdictions have implemented various methods aimed at improving the efficiency and effectiveness of the criminal trial procedure. Encouraging early pleas requires a focus on "front ending" the criminal trial procedure so that each of the key parties is obliged to prepare, communicate and negotiate well in advance of the trial date.

4. Sentence Indication

A Sentence Indication Hearings Pilot Scheme began operation in New south Wales on 1 February 1993. It was introduced to address delays in trial matters in the District Court and to obtain earlier and more pleas of guilty. The scheme was abandoned in 1996 because:[3]

- It had no quantifiable impact on the number of matters finalised by a guilty plea.
- It gave rise to sentencing disparities and to unduly lenient sentences.
- There was a lack of guidance on the weight to be given to a guilty plea at ot immediately after a sentence indication hearing.
- It gave rise to a number of appeals concerning the processes used and the sentences ultimately imposed.

A system of sentence indications raises some policy concerns in so far as such a system may bring pressure to bear upon an accused to plead guilty in circumstances where they have a legitimate defence available. It is for this reason that we would advise caution with respect to any such legislative reform. However, we acknowledge that there may be several potential benefits:[4]

Statistics and Research 2000; Criminal Trials delays in Australia: trial listing outcomes", Australian Institute of Criminology No 74, 2007

2 2000, Don Weatherburn and Joanne Baker: "Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court.

3 Report by the Bureau of Crime Statistics and Research: "Sentence Indication Scheme Evaluation", (1995)

4 Submission made by C Loukas and S Odgers 6 September 2010

- It would permit the accused to make a better-informed decision whether to plead guilty or not.
- It may result in more guilty pleas, with the consequent reduction in the number of trials.

The system must be designed in such a way as to avoid the creation or appearance of pressure on the accused to plead guilty in circumstances where a defence is available.

We note that in June 2008 a Pilot Sentence Indication Scheme commenced in the County Courts in Victoria, following recommendations made by the Victorian Sentencing Advisory Council. The Scheme included a sunset clause which was repealed on 8 June 2010 to allow the Scheme to continue. The Scheme applies to summary and indictable proceedings commenced on or after 1 January 2010.

5. Discounts for guilty pleas

Accused persons may perceive limited incentives to plead guilty at an early point in the trial process. Consideration should be given to whether the range of discounts currently prescribed for guilty pleas provide a sufficient incentive for an accused to enter an early guilty plea.

We hope that these preliminary thoughts are useful. Please do not hesitate to contact us if we can be of further assistance.

Yours faithfully,

Mark Ierace SC
Senior Public Defender