

Criminal Law Committee

Encouraging appropriate early guilty pleas

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Preliminary submission

NSW Law Reform Commission

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Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the terms of reference given to the NSW Law Reform Commission ("the Commission") on 1 March 2013 on encouraging appropriate early guilty pleas.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 persons.

The Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

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Summary

In this preliminary submission, the Committee argues that current trends and developments in the criminal justice system in New South Wales must be taken into account in considering how early pleas of guilty ought be encouraged and facilitated into the future. Most pressingly, these are:

- the rise of self-represented accused persons in the Local Court;
- the unknown impact of the right-to-silence and trial efficiency legislation;
- recent Legal Aid policy changes; and
- funding crises in other organisations involved in the criminal justice system.

These developments place a caveat over this submission as a whole. The Committee is not entirely confident that the current plea environment will reflect that found in the near future.

The Committee then outlines, for the Commission's consideration, various perspectives provided by its members on the stages and obstacles of the charge negotiation process, and suggests some reasons for the disparity of opinions. The views are indeed varied, as the Committee has consulted criminal law practitioners from prosecuting authorities, public defence bodies and private defence firms. (These views reflect those expressed to the Committee by individual members and are not necessarily representative of the Committee's views as a whole.)

Lastly, this submission covers a number of legislative and policy ideas that may help improve the current system, and outlines approaches in overseas jurisdictions that may provide fresh perspectives and guidance. Principally, the Committee argues for more funding to be made available to the criminal justice system. But it also submits that a statutory framework ought be implemented to encourage charge negotiation at the earliest available opportunity and to allow judges and magistrates to apply the available discounts in a consistent fashion. The Committee also reviews the available discounts and suggests a widening of the available range so as to properly reflect the utilitarian value of pleas at different stages of the pre-trial process.

Current trends and developments

Amendment to the right to silence

The *Evidence Amendment (Evidence of Silence) Act 2013* has been passed by Parliament and is, as of the time of writing, awaiting proclamation. Its terms are notorious and require no exposition.

When it is proclaimed, the fact that a permissible adverse inference might be drawn from an accused exercising his or her right to silence may in turn make a plea of guilty more attractive. This should be weighed against the Committee's later discussion of "inappropriate" guilty pleas.

A plea of guilty ought be made voluntarily and the abrogation of an accused's right to silence may have the undesirable effect of encouraging guilty pleas where the evidence does not overwhelmingly support such a finding and perhaps where the guilt of the accused is not bona fide. In essence, the danger is that the amendment might tip the balance in circumstances where an accused would otherwise have entered a plea of not guilty.

The Committee concedes that the suggestions made below, in particular those regarding a reformulated statutory guideline would be adversely affected by the amendments to the right to silence. The Committee reiterates its objection to the amendment to the right to silence and submits that its proposals would only work fairly and properly if the amending legislation were repealed.

Trial efficiency reforms

The *Criminal Procedure Amendment (Mandatory Pre-trial Defence Disclosure) Act 2013* is, at present, in the same position as the *Evidence of Silence Act*.

The Committee is concerned that the obligations that will be placed on accused persons to comply with pre-trial disclosure requirements will place further pressure on accused persons to plead guilty. There is, in the present funding environment, a real chance that this legislation will merely increase pressure without commensurately raising the quality of the advice an accused is likely to receive. This will lead to more inappropriate guilty pleas, or to a practice of pleading every defence. Neither outcome is desirable.

NSW Legal Aid

Legal Aid recently circulated a board decision to stop funding a large number of defended cases in the Local Court and only grant aid in cases where there is a "real possibility of a jail sentence"¹. This means that accused persons facing charges for offences of

- shoplifting;
- goods in custody;
- assault;
- assaulting police;
- resisting arrest;
- offensive language; and
- minor drug offences

will often be left to their own devices. The decision will affect large numbers of self-represented accused persons, many of whom would likely be from severely marginalised and disadvantaged backgrounds. It is clear that it is a decision reached because of a funding crisis in the organisation.

¹ Richard Ackland, 'Legal Aid now just a Band-aid', 17 May 2013, Sydney Morning Herald. Accessed online: <http://www.smh.com.au/legal-aid-now-just-a-bandaid-20130516-2jp8j.html>.

The Committee is gravely concerned that any reforms to further encourage accused persons to plead guilty may simply induce particular persons to plead guilty because they may perceive it to be the easy option. Any such reforms should not distort the criminal justice system by allowing policy efficiency arguments to prevail over common law principles of the presumption of innocence. Unless Legal Aid is provided with additional funding, any reforms should operate so as to ensure there is a balance of power between the system and the accused. In light of recent legislative reform, this balance is unlikely to be struck.

Self-represented accused

Having regard to the above, the Committee submits that duty solicitors should be made available to otherwise self-represented accused persons to help encourage early appropriate pleas of guilty. Accused persons are often unfamiliar with the elements a criminal offence and may plead not guilty based on a misperception of what constitutes the offending behaviour as well as his or her disagreement with certain facts stipulated in a police Facts Sheet. For example, some accused persons may not understand the statutory definition of sexual assault and what constitutes consent or a lack thereof.

If Legal Aid is not provided sufficient funding to reverse its board decision, the Committee submits that, at the very least, enough funding be released so Legal Aid duty lawyers may provide provisional advice to unrepresented persons at court. Ultimately, the provision of preliminary advice regarding the elements of offence/s only (and not of disputed facts and/or evidence) might save the courts time and money by allowing pleas of guilty to be entered where appropriate.

Practical experiences

Encouraging early guilty pleas

Practitioners expressed a range of views as to the approaches they take in their practice towards encouraging (or not encouraging) accused persons to enter early guilty pleas.

At one end of the spectrum, for the defence, some practitioners stated that they did not “encourage” defendants to plead guilty at all. Rather, they explained to their client the evidence against them, the strength of that evidence, the likelihood of conviction and the likely penalty if convicted. It was observed by these practitioners that accused persons who are not experiencing their first encounter with the criminal justice system are generally fairly well acquainted with their prospects of conviction or acquittal following service of the full brief of evidence and therefore did not need to be encouraged to enter a plea of guilty. But it was also said that recidivist accused could be reluctant to “help the system” even where a plea was appropriate.

The more prevalent defence view was that clients were encouraged to plead guilty when they agreed with the facts as alleged by the prosecution. This encouragement was said to be provided through a plain English explanation of the benefits of early guilty pleas and the range of matters that will be taken into account on sentence. In such cases, the strength of the prosecution case was still assessed and explained to the client as soon as was reasonably practicable.

One member’s response to the Committee’s enquiries was particularly illuminating:

I find that sometimes clients do not initially realise that they are legally guilty of an offence. When clients are unsure of whether to plead guilty or not guilty I tend to explain to them the legal elements of the offence which the prosecution must prove to succeed. This often enables the client to see that they do not have a defence. For example, a client who has been charged with assault but says to me “I didn’t mean to assault him/her”. Once the concept of recklessness is explained it often leads to the client realising that they do not have a defence available to them. In these circumstances I explain the process of pleading guilty as pleading guilty ‘with reasons’ – this seems to reassure the client that their side of the story will be adequately conveyed to the court.

I am also very realistic with my clients about their prospects of success. For example, if 3 police officers say X and my client says Y, I explain to the client how the magistrate is likely to view that evidence and whether they are likely to succeed.

From another perspective, one member practising as a prosecutor informed the Committee that it was her experience that the prosecution make approaches towards the defence at all stages of the process with the aim of eliciting an early guilty plea. Encouragement was said to be provided by referring to the generally accepted scale of discounts.

Obstacles in practice to early guilty pleas

A threshold observation is that defence and prosecution practitioners tended to blame the other side for their perceived obstacles to timely guilty pleas. The Committee is of the view that this reveals frustration with the existing system.

The perception of one public defence lawyer was that an obstacle was the lack of funding for her organisation. This issue is addressed in the next section.

Another obstacle was said to be the approach taken by the police and the ODPP. Particular instances included the following.

- Failure to provide “backup” charges to which an accused might be willing to plead guilty.
- Circumstances where the prosecution was not supplied with a “mini-brief” (including notebook statements, photographs and so on) by investigating police, causing delay.
- A general lack of response to defence representations as to offences to which the accused is willing to plead guilty until the day of hearing.

The two most widespread complaints from defence practitioners were of not being in possession of all necessary prosecution evidence so as to adequately advise the client, and of the difficulty in negotiating factual disputes:

1. One example cited in relation to the first point was with reference to Commonwealth charges of drug supply. When the defence has not been provided with outstanding drug analysis certificates, a client cannot be advised whether the amount alleged is an indictable or trafficable quantity. It was argued that it would be remiss of a practitioner in those circumstances to advise on making an early guilty plea as it is not simply a case, as is occasionally put by magistrates to practitioners, of asking a client "if he did it".
2. Often a client is willing to plead guilty but disagrees with the facts in either the Facts Sheet (in the Local Court) or the Crown Case Statement. While a plea of guilty is only an admission of the facts in so far as they establish the elements of the offence, facts not agreed to are often taken at face value in the Local Court. It is common, for instance, for inflammatory material to be present in the Facts Sheet that is not agreed to. The Local Court is not a convenient environment in which to have a disagreement at sentence over the relevant standard of proof for facts adverse or beneficial to the accused (*R v Olbrich* (1999) 199 CLR 270). It was asserted that Magistrates are unlikely to grant adjournments to allow negotiations between parties as to the factual dispute, meaning defence solicitors must choose between:
 - o hoping the prosecutor will amend the facts at the sentence hearing;
 - o having the matter set down for a disputed facts hearing, further delaying the process; or
 - o proceeding to sentence with facts that are not agreed.

Prosecutors, on the other hand, expressed frustration at guilty pleas being entered at a very late stage because, in their view, defence solicitors were intent on leaving open the possibility of a last-minute forensic advantage. One example was a perception that, on occasion, defence were waiting until the day of trial to see if important witnesses would be available.

In summary, it is clear, taking into account these views, that practical obstacles to appropriate early guilty pleas include:

- a lack of timely communication between the prosecution and the defence;
- failure to provide evidence;
- factual disputes; and
- optimistic tactical and forensic decisions.

“Inappropriate” guilty pleas

The Commission’s reference to “appropriate” guilty pleas should be considered with regard to what practitioners believe “inappropriate” guilty pleas to be.

Some practitioners did not believe that there could be any such thing, provided a client was adequately advised. It is true that a person may plead guilty without believing him or herself guilty of a criminal offence. One practitioner referred to a number of factors motivating persons to plead guilty while maintaining innocence in private. These included financial considerations, stress, the discount for an early plea of guilty and the likelihood of being released on parole earlier. Her view was that the decision to plead guilty was ultimately for the client to make, and she referred to the remarks of Brennan, Toohey and McHugh JJ in *Meissner v The Queen* (1994-5) 184 CLR 132 at 141:

A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty ... A court will act on a plea of guilty when it is entered in open court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of a free choice in the interests of the person entering the plea. There is no miscarriage of justice if a court does act on such a plea, even if the person entering it is not in truth guilty of the offence.

Another defence practitioner, who had been instructed to enter pleas of guilty based on questionable grounds, thought that such pleas were inappropriate. Interestingly enough, a member who practices as a prosecutor also expressed a similar view (albeit on a purely theoretical basis).

It was mentioned to the Committee that, on occasions, a guilty plea might be inappropriate because it impacts on co-accused. Where one accused makes a pragmatic plea to a charge where the evidence does not necessarily support all elements, the ability of other accused to negotiate pleas to lesser offences is compromised. Also, although juries are safeguarded from having such knowledge (unless a co-accused gives evidence for the prosecution), sentencing magistrates and judges are not and it was noted that this could have a psychological effect on them.

Lastly, it was suggested that pleading guilty where an accused's prospects of acquittal were high is inappropriate. The rationale here is that, being the Crown's burden to prove guilt beyond reasonable doubt, if there are doubts as to the strength of the prosecution case then the Crown ought be put to proof. The Committee agrees that a guilty plea entered where an accused's prospects of acquittal are high is inappropriate.

It should be noted that where a practitioner has reasonable grounds to suspect that an accused wishes to enter a plea of guilty when they have not in fact committed the offence/s alleged, he or she is expected to make every effort to advise their client to enter a plea of not guilty. Where a client wishes to enter a plea of guilty notwithstanding this advice, instructions ought be put in writing.

Legislative or policy improvements to facilitate appropriate early guilty pleas

More funding

The Committee is alive to the fact that the NSW Government is seeking to reduce public sector costs in all areas. The criminal justice system has not been spared the general cuts. But, perhaps counter-intuitively, it is our submission that the most effective way to save money by avoiding unnecessary trials is to provide greater funding at an earlier stage of the process. Prosecutors need better staffing to produce timely briefs. Legal Aid needs more funding to increase staffing and brief counsel earlier so as to advise accused on the contents of the brief and their prospects of conviction. The profession bears the burden of responsibility, and at an early stage. As Muirhead J said in *Putti v Simpson* (1975) 6 ALR 47 (NT) at 50-51:

But it is absolutely vital that counsel remember their function and obligations, not the least of which is to ensure they are adequately instructed before appearing for clients – especially when the liberty of those clients may be in jeopardy – and that the clients are properly advised. These matters are basic. Half baked instructions which may come from unreliable sources are, as a rule, just not good enough. The practice of appearing armed only with hurriedly gained instructions, especially where language or cultural differences jeopardize understanding, may result in substantial injustice to individuals.

...

...it is the responsibility of solicitors and counsel, not of the court, to ensure that all necessary submission and evidence in mitigation of penalty are placed before the court. As in most areas of the law this requires thorough preparation.

These processes and responsibilities cannot be short-circuited by legislative schemes and timetabling without the necessary resources. They are not only matters of justice to accused; they are matters of professional obligation.

If more funding is directed to both prosecutors and public defence organisations, to be made available at the early stages of criminal proceedings, it is very likely more accused will plead guilty early.

Late evidence

Early guilty pleas are often hampered by late evidence. This was the single most widespread complaint. The Committee realises there is a tension between, on the one hand, the desire to reduce cost by encouraging early guilty pleas, and on the other the investment in forensic employees and pre-trial resourcing that will be required to ameliorate the present situation.

Aside from that observation, two proposals that did not include improved funding included the following.

1. Relaxation of trial timetables where the accused wishes to write representations or where evidence has been served late.
2. A prohibition on brief material being served after committal, except with leave. The court could consider, when determining whether to grant leave, whether the proposed additional material has only just come to light, or if there is a valid reason for it not having been prepared and served earlier.

It remains to be seen what impact the trial efficiency reforms will have on defence preparedness to plead guilty during the pre-trial process.

Clear benefits

Practitioners often experience difficulties in conveying to a client the benefits of entering an early guilty plea. Clients who have little or no faith in the criminal justice system do not readily accept explanations of the practical application of the discretionary discount.

Also, self-represented accused are also likely to misapprehend the advantages of an early plea under the current system.

The Committee suggests, as an option to be explored by the Commission, a new statutory guideline that simplifies the procedure for courts when determining an appropriate discount for a plea of guilty and has appropriate regard to the utility of pleading guilty at different stages of the pre-trial process. The Committee, in formulating the following guideline, has had recourse to the early guilty plea scheme used in the United Kingdom.

The Committee submits that a statutory guideline that recognises early indicative pleas of guilty might help facilitate early and expedient pleas of guilty and potentially short-circuit some of the concerns raised earlier in this submission. Rather than being an early guilty plea scheme per se, the following proposal is a procedural amendment aimed at fostering charge negotiation at the earliest possible opportunity. For that reason, the Committee's proposal differs significantly from that used in the UK as it would take place at the commencement of proceedings rather than at the post-committal stage. This is also the significant point of distinction from the now repealed *Criminal Case Conferencing Trial Act 2008*.

A new statutory guideline

Committee members noted a disparity between the approaches to pleas for matters in the Local Court and those for more serious offences. If an accused person is not likely to receive any gaol time for an offence, or an amount within the jurisdictional limit of the Local Court, the gradation of discounts from early to late pleas loses any relevance as a motivation to plea. A client expecting to receive a bond is not concerned that he or she might lose 10% of the maximum discount by vacillating on a plea. The Committee suggests, then, that any legislative or policy approach to the "reward" element of encouraging early pleas recognise this distinction.

With respect to serious indictable offences where the accused can expect to receive a lengthy gaol term if convicted, the Committee outlines below one possible approach to encouraging pleas. This is, in substance, increasing the discount available for an early plea. If this approach were to be taken up, its efficacy would best be explored in a pilot study where the increased discount was made available to an offence or offences that show a marked preponderance of late pleas. If guilty pleas showed an increase in volume and timeliness, the scheme might be applied more widely.

A possible structure could be as follows:

- **Discount of 30% for pleas of guilty before service of brief of evidence**

In order to encourage pleas of guilty when a matter is first set down for plea in the Local Courts, the discount available for a plea of guilty entered at this stage could be increased from 25% to 30%. The rationale here would be to encourage pleas of guilty before preparation of the prosecution brief of evidence. Essentially, once appraised of the charges and facts upon which the prosecution rely, an accused is in a position to plead guilty if they agree with the elements of the offences. If they do not agree, an accused is of course free to enter a plea of not guilty and be served with the prosecution brief. However, a willingness to enter a plea of guilty at such an early stage is of extremely high utilitarian value and this ought be recognised.

The following procedure in the Local Court could be adopted:

- A matter is to be set down by a Magistrate for a date on which a plea is to be entered in the Local Court;
- If an accused person wishes to obtain a 30% discount, they must enter an indicative plea of guilty at this time (i.e. agreeing to the elements of the offence/s charged);
- The matter may then be adjourned for a set period allowing time for prosecution and defence to negotiate the particular facts upon which the accused is to be sentenced;

- During this time, the prosecution would be required to serve on the defence all materials to be tendered on sentence within a set period of time and negotiations may subsequently occur;
- If agreement is reached during the set timetable, the matter can proceed directly to sentence on the day on which the matter is next before the court (or, if indictable, committed for sentence);
- If agreement is not reached but the plea is adhered to, the matter can be set down for a disputed facts hearing, after which the matter will proceed directly to sentence;
- If an accused withdraws his/or her plea during this time he/she would be precluded from receiving a 30% discount.

The rationale behind this submission is that there is currently no practical distinction between a plea entered at the earliest available opportunity and a plea entered prior to committal but after service of the full brief of evidence. They are often both considered to represent “the earliest available opportunity” and attract a discount of 25%. However, the differential between these two times can be very significant. Considerable amounts of time, money and resources are expended by police in preparing full police briefs of evidence.

- **Discount of 20% for pleas of guilty before Committal (or after service of brief in Local Court)**

Having argued that in some circumstances early pleas have greater utility than currently recognised by the available discount, it would be remiss of the Committee to not observe that, in other circumstances, pleas with relatively little value attract high discounts.

A plea entered prior to committal but following service of the brief ought to be subject to a real analysis of its utilitarian value. At present, these pleas almost uniformly attract a discount of 25%, as suggested by *R v Thomson & Houlton* [2000] NSWCCA 309. In some cases, the police facts and associated material will be extremely inadequate, and a plea of guilty might be inadvisable. This may be, as in a scenario outlined above, because important technical information underpinning the charge, such as a DAL certificate, is absent. But for other offences, the fact sheet may disclose the elements of the offence with sufficient particularity, and the time and resources expended compiling a full brief of evidence is accordingly ill spent.

Courts ought have the discretion to impose a discount of between 20-30% if an accused elects to plead guilty at some stage before service of the full brief of evidence to reflect the utilitarian value in the particular circumstances of the case, taking into account the principles enunciated in *R v Borkowski* (2009) 195 A Crim R 1.

- **Discount of 15% for pleas of guilty at first arraignment in trial court**

The Committee suggests that 15% remains the maximum discount available for a plea of guilty at first arraignment, which was settled in *R v Borkowski*. The Committee does not think a higher discount being available at this stage would be appropriate.

- **Discount of 10% for pleas of guilty on first day listed for trial**

The Committee suggests that 10% remains the maximum utilitarian discount available for a plea of guilty, which was confirmed in *R v Thomson & Houlton*. A plea of guilty on the day of trial is still of some utilitarian value.

- **The principles in *R v Thomson & Houlton* and *R v Borkowski***

The Committee notes anecdotally that the principles distilled in *R v Thomson & Houlton* and *R v Borkowski* are often not being applied stringently.

The Committee is of the view that clarifying the principles distilled in these leading cases ought form part of the new statutory guideline where deemed necessary and appropriate. This would be useful for practitioners and courts and help facilitate the principles being consistently and appropriately applied.

Circuit sittings and regional areas

Trials in regional areas present distinct logistical difficulties. In larger metropolitan court complexes, a guilty plea entered even a week before the commencement of a trial means that other matters can get under way with relatively little inconvenience. But in regional areas, courts may only sit for limited periods e.g. 2-3 weeks. A late plea may mean that the court is left with no business for its sitting. ("Back-up" matters may have been listed for the same day in case of a late plea, but this can lead to further inefficiencies as back-up matters that do not proceed need to be re-listed further down the track.)

In relation to the "appropriateness" of pleas entered in regional areas, it was also suggested that rotation of magistrates in country areas be made more frequent. Some accused persons in regional areas do not feel that their matters are approached objectively due to his or her familiarity with the local Magistrate and accordingly enter pleas of guilty even when advised that they have good prospects of being acquitted. The Committee emphasises here that this is a view some practitioners hold regarding the perceptions of particular accused persons and not suggestive of any actual bias.

Attendance of witnesses

The Committee has outlined above a prosecution perspective that the defence seem to wait until trial to see if witnesses will attend and then enter pleas accordingly. From the defence point of view, it was explained to the Committee that the attendance of witnesses, and particularly of victims, was an important factor in the case against any client, and honest advice on the advisability of pleas would touch upon that topic.

The central fact between these two disparate views is that the attendance of witnesses is an important consideration in deciding whether to enter a plea of guilty. While in many cases it may not be known whether a particular witness will attend, better communication between prosecution and defence on such matters may facilitate early pleas.

However, such considerations are tactical and are difficult to deal with from a policy perspective.

Rehabilitation

At a sentencing level, pleas of guilty may be encouraged by a focus on rehabilitation and braking the cycle of recidivist offending. As a suggestion, a rehabilitation program that is guaranteed after a plea is accepted, and incorporated into the parole period, would add value to the discount for an early plea of guilty.

Legislative approaches in other systems

Guidelines

The UK has adopted the *Attorney General's Guidelines on the Acceptance of Pleas and the Prosecutors Role in the Sentencing Exercise 2009* ("the Guidelines"). The Guidelines seek to regulate the conduct of prosecutors during charge negotiation because of their gatekeeper role in that process.

The Guidelines aim to make charge negotiation and other pre-trial processes more transparent and conducive to the public interest (including victim's rights). The Guidelines are presented as being a compromise between flexibility and formal rules. They do not have a statutory foundation yet are mandatory requirements for prosecutors and are regarded as best practice by the judiciary. Thus breach of the Guidelines doesn't result in an immediate dismissal but it can be taken into account on appeal.

One area which may be appropriate for use in NSW are the instructions to prosecution and defence counsel in coming to an agreed summary of facts that the court bases its sentence on: C1. This document is signed, given to the trial judge and forms part of the public record: C8. This facilitates transparency in terms of charge negotiation and, as a result, guilty pleas.

On the other hand, there are many aspects of the Guidelines that would be inappropriate for use in NSW. This is particularly so in regards to C6, which encourages preparation of a plea and sentence document by the prosecution. Although the section has been amended, it is still criticised for focusing the prosecutor on writing submissions rather than negotiating early in the process, and for unduly confining judicial discretion

Early Guilty Pleas Scheme

In the United Kingdom an early guilty plea scheme was introduced into Crown Courts in 2012 with a view to encouraging early and appropriate pleas of guilty. This was introduced partially in response to statistics that revealed that around three quarters of Crown Court cases resulted in a plea of guilty on the first day of trial.²

Essentially, once an accused person has been committed to the Crown Court for trial from the Magistrates' Court, the Crown Prosecution Service are required to make an assessment of the strength of the prosecution case and determine whether an early guilty plea is likely or appropriate. If it is so determined and the defence are amenable, discussions may then occur between the parties in order to resolve any potential issues that could arise at sentence (without having to involve the Court) and ensure that the parties have reached agreement as to the facts underlying the plea. If these negotiations are successful, either the prosecution or defence can then seek an Early Guilty Plea hearing ("EGP"), at which arraignment and sentence will take place on the same day.

A significant feature of the EGP, which differs substantially from Australian jurisdictions, is that it creates the presumption that a plea of guilty at the EGP hearing is the first reasonable opportunity to enter a guilty plea. Also, and perhaps most notably, such a plea will result in a prima facie one-third reduction in sentence being applied (subject to some limitations).

The Inner London Crown Court and Wood Green Crown Court issued Protocols in 2012 setting out the specific procedures to be followed, which are very detailed and can be obtained at http://www.cps.gov.uk/london/early_guilty_plea_scheme/.

The Committee has outlined the Scheme for completeness. It is not of the view that such an ambitious scheme can be effectively implemented in the current funding environment. If this scheme were to be replicated without commensurate resources allocated to all bodies involved (from police to the ODPP to Legal Aid), the fairly severe timelines would facilitate injustices. As a legal side-point, the Crown Court's characterising an EGP hearing as a first reasonable opportunity to enter a plea is at odds with current

² Vanessa Castle, 'The Early Guilty Plea Scheme' (Press Release, 19 July 2012) <<http://www.justice.gov.uk/downloads/legal-aid/early-guilty-plea-scheme.pdf>>

considerations of utility and efficiency and would throw out guilty plea sentencing where it was not reliant upon the EGP scheme.

Indigenous accused

Canada shares with Australia entrenched Indigenous disadvantage. This has had, in both countries, an effect on offender populations and resulted in the need for targeted programs.

In the Yukon Territory it was been reported that a significant number of members of the First Nation population felt victimised by the formal justice system, so that crimes of domestic assault were under-reported. In 2000, a Domestic Violence Treatment Option Court was established that took a comprehensive and generally less punitive approach that encouraged the rehabilitation of the offender. A formal guilty plea (which the accused would be given a credit for) had to be entered into prior to the commencement of a treatment plan. Moreover, it provided protection, information and support for victims.

There may be scope for a similar program in Australia, or at least the incorporation of these principles into a guilty plea scheme.

The Committee thanks you for the opportunity to comment.

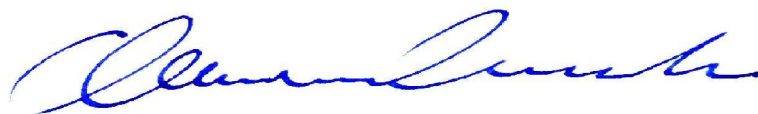
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Yours faithfully,



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