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Case Conferencing

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From 1 January 2006 new procedures were implemented in NSW for committal proceedings in the Local Court for those matters where Court Attendance Notices were issued on or after 1 January 2006. The new procedures relate only to those matters that are either strictly indictable or those Table matters listed in Schedule 1 of the *Criminal Procedure Act 1986* where an election has been made to proceed on indictment. The procedures are also only to apply to those adult accused persons who are legally represented and who have not yet entered a plea of guilty. They relate to any of those persons who are to be committed to trial in either the District or the Supreme Court of NSW. The aim of the reforms is to encourage appropriate early pleas of guilty, and the resolution of any other matters relevant to sentence proceedings, in addition to recognising the benefit of such pleas to both the community and the accused. At this stage the reforms only apply to matters in which the NSW Office of the Director of Public Prosecutions have conduct of the prosecution.

There is no mysticism to the concept of “case conferencing” or “criminal case processing”, as it was originally known, although the lengthy and at some stages problematic lead up to reforms may have created understandable concern in the minds of the profession as to the ultimate outcome. A number of proposals were initially put up by the various stakeholders within the working party who developed the reforms, hoping to obtain systemic change in the way matters proceeded to trial. The various stakeholders, representing the different interest groups all understandably had disparate needs and expectations as to how proposed reforms could make the criminal justice system, in relation to matters proceeding to trial, work more efficiently and fairly. Given the disparate interest groups involved in the working party, it is not surprising that there were a variety of areas in which agreement could not be reached. Ultimately, legislation has not been introduced to shape the reforms and the process of case conferencing is administrative with its basis in three documents:

· The Chief Magistrate’s Local Court Practice Note No 5 of 2005 issued on 5 December 2005;
· The NSW State DPP’s Disclosure Certificate; and
· The DPP conference letter.

All of these documents are attached to this paper and I will talk in detail about them further on. The end result of months of negotiation are reforms which, in my view, will in many cases be of benefit to all parties, the accused as well as the justice system as a whole. But first a bit of background.

THE PROBLEM

For some time it has not been uncommon in New South Wales criminal courts for pleas of guilty to be entered on the eve or the morning of trial, or for the DPP to “no-bill” or direct no further proceedings on or close to the date of trial. Any solicitor or barrister practicing in criminal trial work in NSW (or in any kind of litigation for that matter) knows that the days leading up to a trial are a vital time for negotiation. It is well known that much of the discussion and refinement of issues takes place at the 11th hour as the parties finalise instructions, focus in on the evidence and prepare themselves to face the realities of running the trial.

Criminal Courts statistics for 2003 revealed that of the 2,102 matters that were committed from the Local Court for trial in the District Court, 1,168 of these or 55.6% proceeded to sentence. In 263 or 12.5% of the matters, no charges were proceeded with. Only 578 matters or 27.5% of matters actually proceeded to trial.

A study by the Legal Aid Commission indicated that in 49% of state criminal matters committed in 2003 that were legally aided, there was a plea of guilty entered on the first day of trial.

These figures confirm what I think has been common knowledge within the profession: that a large number of matters are prepared as trials but do not proceed to trial.

It appears that a number of factors influence this outcome. These include:
· issues with the late service of parts of the brief of evidence;
· an expectation that more senior counsel will become involved closer to trial;
· a belief that there is a common practice of over-charging creating an expectation that the charge will be reduced;
· a belief that better results are obtained in negotiations prior to trial;
· the manner in which the Legal Aid Commission remunerate practitioners in assigned matters; and
· an expectation of a reasonably 'flexible' application by the courts of the discount applied to pleas of guilty on the basis of utility pursuant to *R v Thomson; R v Houlton [2000] NSWCCA 309 ("R v Thomson, R v Houlton")* in the superior courts.

The cost to the criminal justice system as a whole of this practice is obvious. As was recognised by the Court of Criminal Appeal at [131] of *R v Thompson; R v Houlton*, late pleas of guilty have a major impact upon the criminal justice system, taking into account:
· Preparation time, for both prosecution and defence;
· Police resources – being rostered off duty in order to attend the trial, marshalling of witnesses and exhibits for trials that end up not running;
· Court resources, court appearances and listing problems;
· stress to victims and witnesses;
· the time to jurors who are needlessly assembled for trial; and
· uncertainty to the accused, especially an accused who is on remand and awaiting classification.

The practice of over listing, especially in country courts, in order to ensure that there are cases for judges to hear on the day further exacerbates the resource crisis for agencies (and privately funded accused) attempting to prepare cases for trial that ultimately "fall over". In addition, with so many cases in the list, pre-trial judicial case management initiatives are not a realistic option.

The main focus of the case conferencing scheme is therefore to attract early pleas of guilty in this 'target group', that is those matters that are presently committed for trial that undergo trial preparation, but do not ultimately proceed to trial. The reforms are *not* aimed at those cases that either are already resulting in early pleas of guilty, or are proceeding onto trial.

"Front-end loading"

The reforms aim to introduce an element of "front-end" loading of resources in an attempt to ensure accuracy of charge laid and early investigation of any chance of settling a plea, facts, or charges. The key aspects to this outcome can be summarised as follows:
· A need for greater consultation between police and the DPP at the time of charging in order to ensure the accuracy of charge and the appropriate preparation of evidence to support the charge;
· The involvement and advice of more senior and experienced practitioners earlier in the process to engage in meaningful negotiation whilst the matter is still in the Local Court;
· Alterations to the funding of legally aided trials so that adequate compensation is allowed for earlier negotiation; and
· Stressing the benefit to an accused in an early guilty plea which attracts a discount at sentence.

DPP charge Advice

Laying the appropriate charges at the outset reduces the expectation that charges will be reduced at a later stage. Closer co-operation between the DPP and Police, including advice during investigations, will improve case preparation and identify appropriate charges.

Early consideration of charges, will also ensure that matters which are withdrawn, are withdrawn at an early stage. It is hoped that this earlier intervention will be one factor influencing an earlier plea.

It is also hoped that the advice protocol will decrease the amount of court time wasted awaiting service of the full brief of evidence as the DPP will already be in possession of the key parts of the brief, and will have had the opportunity to give directions to the police concerning the gathering of additional evidence at a much earlier stage.

At present, police charge a person and then the matter is referred to the DPP for prosecution in appropriate cases. The DPP wait for the brief before screening the charges. When it is received, the DPP may request further material from the Police. In some matters, months of court time is wasted

waiting for the brief. In some cases, discussion relating to the appropriate charge does not occur until the matter is listed for trial. It is intended that in those matters where there is no need to immediately arrest or charge an offender, the DPP may be consulted prior to the laying of charges.

At the moment this protocol is operating at State Crime Command, which is the area where most serious investigations will occur, such as those undertaken by homicide and the drug Squad.

The Disclosure Certificate (attached)

The reforms also aim to enhance prosecution disclosure by ensuring the defence are better informed of the full nature of the case at an earlier stage in order to inform pre-committal negotiations. This will be assisted by the provision of a detailed Disclosure Certificate by the DPP to the Defence which will in effect certify the sufficiency of the brief. It will be a useful document for defence counsel to rely upon if subsequent evidence is served on the defence, to the extent that any fresh evidence is argued to fundamentally change the case against the accused (although note the comments on *R v Katz [2005] NSWCCA 128*.)

The Disclosure Certificate is also a useful mechanism by which to focus the prosecution's attention on the evidence and turn their minds at an earlier stage not only to the sufficiency of the brief, but also to issues as to how the trial might be run concerning admissibility of evidence and whether they will rely on tendency, co-incidence or other kinds of evidence.

Case Conference Procedure

The scheduling of a face-to-face conference prior to committal aims to shift the activity that usually occurs in the weeks before the trial, to the weeks before the committal. The factors needed to achieve meaningful negotiation as this stage are:
· The service of a complete brief of evidence;
· that practitioners seriously analyse the brief and in the case of the defence obtain full instructions; and
· that the practitioners be of sufficient seniority, on both sides, to have the confidence to make an assessment of the brief and any prospective trial, and to be in a position to come to a binding agreement.

To this end both the DPP and Legal Aid have recruited appropriate high-level practitioners, who will be looking at the brief earlier and preparing for a face-to-face conference at a time after the brief has been served but before the matter goes to committal. The Chief Magistrate's Practice Note (attached) allows for a further time-period of *not more than* 8 weeks (unless a further period is required in the interests of justice), after service of the brief but prior to committal to allow for the conference and the necessary obtaining of instructions and negotiations to take place. Where the accused is in custody and instructions have already been obtained a shorter period may be appropriate. Occasionally, it is envisaged that parties may wish to have short conferences on the day of the S91/93 procedures, especially in those cases where certain evidence may need to be investigated on committal which may affect the direction of negotiations (see 2.3 of the PN).

Unlike the UK or Canadian, the NSW scheme does not involve the use of mediators or judicial officers to chair these conferences, nor does it involve any negotiations that could be described as "plea bargaining". The conferences are formal meetings of the parties, but they are to be organised and run by the parties themselves. It is not stipulated where the conferences are to take place, or who is, or is not to be present at them. One would envisage however, that if the atmosphere of the pre-trial environment is to be recreated, and a plea, if possible and appropriate obtained, then it is desirable that key players such as the accused, the police informant and the victim, are at least accessible during the conference in order to obtain instructions. Whether this "vision" of how the conference reforms could work plays out in practice without the backing of legislation, remains to be seen. Much of it will depend on the systems put in place by the main players, namely the DPP and the Legal Aid Commission.

In addition to recruiting the necessary staff the Legal Aid Commission and the DPP have entered into a protocol governing conferencing and Legal Aid has produced a new fee structure.

During the conference procedure it is expected that the parties will turn their minds to the following issues:
· whether the accused will agree to plead guilty to the offences charged, or to any other charges;

· on what facts will the accused agree to plead guilty;
· whether the Crown will offer to accept a plea to any alternative charges;
· whether there is any agreement as to the placing of certain offences on a form to be taken into account on sentence pursuant to section 32 of the *Crimes (Sentencing Procedure) Act (NSW) 1999*;
· whether there is any dispute as to the adequacy of the brief of evidence; and
· whether the DPP opposes or does not oppose the defence submission as to the appropriate allowable discount for the utilitarian discount on plea.

Post-conference, the DPP have developed a pro-forma letter which will set out between the parties the outcome of any discussions. Again, there is nothing sacred about this letter, and it has no legislative backing, it is merely a convenient way outcomes can be recorded. If there is disagreement between the parties as to conference outcome, further correspondence may ensue. On most occasions one would expect the contents of this letter would not be referred to on sentence. It could be envisaged however, as being relevant on sentence to the utilitarian value of a plea where an offer has been made by one party at conference, initially rejected by the other party, but subsequently accepted prior to trial.

Advantages of an early Plea and the impact of the reforms on discounts for utility

All of the administrative and cost benefits to justice agencies would be meaningless unless there was a benefit to an accused person in entering an early plea. An early plea saves victims, witnesses and police officers from having to attend court to give evidence. It saves court time. The preparation for a plea of guilty by both defence lawyers and DPP solicitors is significantly less than the preparation of a matter for trial.

Sentencing law in State matters, currently provides for a discount where a person has pleaded guilty: s22 *Crimes (Sentencing Procedure) Act 1999.* Section 22 states as follows:

> **22 Guilty plea to be taken into account**
>
> (1) In passing sentence for an offence on an offender who has pleaded guilty to the offence, a court must take into account:
>
> (a) the fact that the offender has pleaded guilty, and
>
> (b) when the offender pleaded guilty or indicated an intention to plead guilty,
>
> and may accordingly impose a lesser penalty than it would otherwise have imposed.
>
> (2) When passing sentence on such an offender, a court that does not impose a lesser penalty under this section must indicate to the offender, and make a record of, its reasons for not doing so.
>
> (3) Subsection (2) does not limit any other requirement that a court has, apart from that subsection, to record the reasons for its decisions.
>
> (4) The failure of a court to comply with this section does not invalidate any sentence imposed by the court.

In *The Queen v Slater* (1984) 36 SASR 524 King CJ again emphasised the significance of an early plea for all the reasons that have been discussed earlier in this paper. His Honour said at [526]:

> The degree of co-operation in the administration of justice meriting a reduction in sentence is obviously consistently greater in the case of an offender who pleads guilty when he is first arraigned in the court than in the case of an offender who delays his plea of guilty until the morning of the trial when time of the court has been allocated and the witnesses and jurors summoned. I think that it is important, if the practical ends discussed in *Shannon* are to be served, that sentencing judges should make significant reductions in sentences in recognition of the co-operation in the administration of justice which the plea of guilty manifests and should explain that they are doing so. I think that it

> is important, too, that the reduction should be graduated according to the stage at which the plea of guilty is entered and should thereby reflect the degree of co-operation in the administration of justice which the offender has shown.

As is well known the Court of Criminal Appeal has issued a guideline judgement on this issue specifying that the range of the discount for the *utilitarian value* of the plea is 10-25%. *Thomson & Houlton* [2000] NSWCCA 309 adopted at [160] the following guidelines applicable to offences against State laws where a plea of guilty had been entered:

> (i) A sentencing judge should explicitly state that a plea of guilty has been taken into account. Failure to do so will generally be taken to indicate that the plea was not given weight.
>
> (ii) Sentencing judges are encouraged to quantify the effect of the plea on the sentence insofar as they believe it appropriate to do so. This effect can encompass any or all of the matters to which the plea may be relevant - contrition, witness vulnerability and utilitarian value - but particular encouragement is given to the quantification of the last mentioned matter. Where other matters are regarded as appropriate to be quantified in a particular case, e.g. assistance to authorities, a single combined quantification will often be appropriate.
>
> (iii) The utilitarian value of a plea to the criminal justice system should generally be assessed in the range of 10-25 percent discount on sentence. The primary consideration determining where in the range a particular case should fall, is the timing of the plea. What is to be regarded as an early plea will vary according to the circumstances of the case and is a matter for determination by the sentencing judge.
>
> (iv) In some cases the plea, in combination with other relevant factors, will change the nature of the sentence imposed. In some cases a plea will not lead to any discount.

It is also well know that the utilitarian value of the plea is a *separate* consideration to an assessment of remorse and contrition and is not reliant on a determination of the strength or otherwise of the Crown case.

There are two exceptions to the rule that there should be a discount for a plea of guilty in *Thomson & Houlton* –
· Crimes where the protection of the public requires a long sentence to be imposed so that no discount for the plea is appropriate; and
· Crimes that so offend the public interest that the maximum sentence, without any discount for any purpose, is appropriate. This includes situations in which a life sentence without parole is imposed.

It is presumed that during the conference process that the DPP will be up front if it is their opinion that the particular offence falls within either of these categories, and for this reason it is referred to in the pro-forma DPP letter attached.

One of the difficulties experienced in the practice of criminal trials was a longstanding belief, referred to in the guideline judgment and mentioned above, that such a discount was often illusory in practice and not readily recognisable on sentence:

> [126] Nevertheless the scepticism about the benefits of an early plea, which appears to be widespread amongst participants in the New South Wales criminal justice system, does suggest an element of inconsistency. Most significantly, however, the evidence available to this Court indicates that the scepticism is reflected in actual practice: where pleas occur, they tend to be late. One of the reasons for that fact is the scepticism about the benefits in fact afforded.

Consequently, a view developed in the profession that in some instances there was nothing to be lost by taking a matter up to trial allowing for a late consideration of the state of the evidence and the offer, if any, made on the eve or morning of trial.

Given that the reforms have no legislative backing, it remains to be seen whether the introduction of the case conferencing reforms will have any effect on the application of the *Thomson and Houlton* discount on sentence, and how the introduction of an opportunity to actively settle proceedings provided in the Local Court time-table will sit with recent case law, especially as to that body of case law that refers to offers made by Accused to plead to alternative charges early, and refusals to plead to wrongly particularised indictments.

Cameron v The Queen [2002] HCA 6 at [21], in dealing with a Western Australian case, said that the question of the appropriate discount following plea was to be determined not simply by when a plea was entered but in considering when it was *reasonable* in all the circumstances to expect a plea to be announced, and what forensic prejudice the offender would have suffered were they to have pleaded guilty earlier. The majority indicated that it was the offender's willingness to facilitate the course of justice, rather than the objective utilitarian value of the plea that should be considered in determining the discount. The majority found that it was not reasonable to expect an offender to plead to an offence which wrongly particularised the type of drug to which the charge related. At [24] the majority held:

> More importantly, the appellant should not have been expected to acquiesce in procedures which might result in error in the court record or, indeed, in his own criminal record.

These principles are also reflected in Justice Grove's comments in *R v Oinonen [1999] NSWCCA*, a case where an offer was made by the prisoner to plead guilty to a charge of manslaughter prior to trial which was rejected by the Crown. The trial proceeded and the jury returned a verdict of not guilty of murder, but guilty of manslaughter. His Honour allowed a benefit for the *offer* to plead and stated as follows at [15-18]:

> It is true that technically the applicant did not plead guilty to manslaughter and he therefore does not fall within the precise terms of section 439 of the Crimes Act. There has been a long practice, however, in this court and in trial courts to take into account the offer of a plea of guilty which matches the crime for which a person is ultimately convicted.
>
> The offer of that plea of guilty or, in usual circumstances, the actual plea of guilty, is of benefit to the person charged broadly in two ways: It is taken as an indication of remorse and contrition for the offence committed and, second, there is what is described as the utilitarian value of the plea; this includes the relief of the State from having to call witnesses and, indeed, the reliefs to the various witnesses of the burden of having to give evidence and potentially being cross-examined.

(Section 439 of the Crimes Act, requiring a court to take into account an offender's plea of guilty, has since been repealed and replaced by s22 of the Crimes (Sentencing Procedure) Act 1999.)

This view was accepted in *R v Pennisi [2001] NSWCCA 326* where in a joint judgment, Beasley JA, Wood CJ at CL and Carruthers AJ at [27] found that offers to plead guilty to a lesser offence were appropriately treated following trial upon the same basis as they would have been had the pleas of guilt been accepted.

R v Cardoso (2003) 137 A Crim R 535 the Crown argued in a similar scenario that an offer to plead guilty could not be reflected in an actual discount pursuant to a concept of "notional utility", and could only be granted where the benefit was realised by the entry of that plea and the avoidance or curtailment of a trial (at [17]). His Honour Justice Hidden found that the principle espoused in *Oinonen* survived notwithstanding *Thomson v Houlton* or *Sharma [2002] NSWCCA 142 at [21]:*

> *Oinonen* was dealing with a special situation to which no reference was made in *Thomson and Houlten* or *Sharma*, and I see no inconsistency between the reasoning in Grove J's judgement and those later important cases. If the submission of the Crown prosecutor in this Court were upheld, the measure of leniency afforded to an offender such as the applicant, prepared to plead guilty to a lesser charge fairly available on the evidence, would depend upon the Crown's attitude. This would be unacceptable.

It would appear that this notion of "fairness" as to the process of negotiation on appropriate charge will have a different impact depending on whether a matter is a State or Commonwealth offence. The above cases are in conflict with a new line of authority.

In State matters special attention needs to be given to a number of other cases. In *R v Dib [2003] NSWCCA 117* His Honour Justice Hodgson JA stated in relation to a case where a late plea was entered to a lesser charge offered by the Crown at [4-6]:

> However, the utilitarian discount is a recognition of advantages to the administration of justice that actually flow from a plea of guilty. By reason of statutory provisions applying in New South Wales, in this State it is not given merely on the basis that the offender's culpability is mitigated by demonstration of willingness to facilitate the course of justice: R v. Sharma (2002) 54 NSWLR 300, distinguishing Cameron v The Queen (2002) 76 ALJR 382.
>
> If a plea is entered a long time after a person is first charged, but at a time when a lesser charge is substituted for a greater charge, the advantages to the administration of justice are less, even though the plea may have been made at the earliest opportunity. There is in any event no entitlement to a 25% discount; and the fact that in this situation there are less advantages to the administration of justice can justify a smaller discount.
>
> 6This approach may mean that in some cases an offender may obtain a lower discount just because the prosecuting authorities initially brought a greater charge than that ultimately pursued, so that the delay in the plea of guilty was not the offender's fault. But this is consistent with the nature of the discount as being at least in part a recognition of practical advantages, and not merely a recognition of mitigation of culpability."

In *R v Katz [2005] NSWCCA 128*. His Honour Justice Giles, with whom the other members of the bench agreed, directed himself in accordance with *R v Thomson and Houlton* and found that the fact of an accused's mental illness at the time of the committal hearing was not sufficient to justify the imposing of a discount at the top end of the range for a plea entered in the District Court due to the reduced utility of the plea. His Honour stated that the utilitarian value came from the occasion when the pleas were entered, whatever the preceding history and the reason for their lateness, at [22].

R v Harmouche [2005] NSW CCA 398 BC00510272 21 Nov 2005 at [39] involved a case concerning a charge of supplying cocaine. A plea of guilty was entered 11 days prior to the date of trial. The Crown had conceded that a discount of 25% was appropriate on sentence for the combination of the accused's plea and the delay (in service of the brief). His Honour Justice Hulme said at [39]:

> That said, the 25% discount for the Respondent's plea was unduly generous. In giving it his Honour seems to have made a mistake commonly seen in this Court that because a plea was entered at the earliest opportunity (commonly shortly after the Crown reduces a charge) an offender is entitled to that discount. Such an approach is to misread **R v Thompson and Houlton** (2000) 49 NSWLR 383 and to ignore the rationale for a discount of that degree. The Chief Justice made it clear, at [154-5], that the rationale for a 25% discount was the extent of the utilitarian benefit and the complexity of evidence gathering and of any trial which was avoided. Certainly his Honour made reference to a plea being entered at the earliest opportunity but that was in the context to which I have referred and where his Honour was obviously contemplating the committal stage of criminal proceedings where the community would be saved the costs associated with prosecution of the case from (the beginning of) that stage.

The court went on to discuss the various authorities, including *R v Dib* (above) and the conflict with *R*

v Oinonen and *R v Cardoso* (above), and commented at [44-46]:

> How one should value a plea which has no utilitarian value in fact I do not know. Why one should give a discount for utilitarian value to someone who seeks to make his plea conditional and, if the condition is not met, enjoys the benefits of a prospective acquittal I do not understand. Nor am I disposed to do anything which encourages the degree of bargaining which now seems to characterise criminal prosecutions in this state and which, I have the firm impression, often lead to charges appreciably less serious or numerous than the evidence would suggest occurred.
>
> 45 However I do not need to decide these issues in this case. Firstly, it is agreed that the Respondent should receive a substantial discount for the plea ultimately made. Secondly, sentencing has become complicated enough without judges having to consider the worth of offers no more precisely described than "almost identical to what's in the indictment".
>
> 46 It is also not inappropriate to repeat something else often forgotten. As I said with the concurrence of the Chief Justice in **R v Stanbouli** [2003] NSWCCA 355, "Despite the terms in which submissions by defence counsel are often couched, there is no "entitlement" to receive a discount of 25% for every plea entered no later than committal – see also **R v Scott** [2003] NSWCCA 286 at [28]".

In the recent case of *R v F.D, R v F.D; R v J.D [2006] NSWCCA 31* His Honour Justice Sully voiced further disapproval for authorities allowing a 25% discount for an offer to plea to lesser charges where they were not accepted by the Crown, (placing him in conflict with Justice Hidden's comments at [20] in *Cardoso*). At [199] Justice Sully stated:

> Although JD offered to plead guilty to manslaughter, when the Crown refused to accept this plea in full satisfaction of the charge of murder he did not. He still could have done so, leaving a much narrower issue for the jury than, by pleading not guilty, he chose to run. Why in this situation, he should receive the discount he would have received by pleading guilty, I do not understand although I accept that there are decisions of this Court authorising that approach.

Back to the effect of conferencing

It will be interesting to see how the prosecution will deal with late pleas of guilty after an "unsuccessful conference" where a plea is subsequently entered prior to trial. The provision of the conference procedure, specifically provided for the purposes of considering the appropriateness of alternative charges, will bring these issues into greater play. The conflict in the above case law may well become more pronounced if appellate courts consider the availability of a conference procedure in their determination of the appropriate discount for utility on plea. Consideration might be given to how the "instinctive synthesis" approach adopted by the majority in *Markarian v The Queen [2005] HCA* 25 may be utilised to overcome the difficulties posed by these different approaches to the concept of "utility" vs fairness to the accused.

Monitoring of Reforms

A Monitoring Committee has been established to monitor the implementation and operation of the new system for a period of 2 years, involving representatives from the criminal justice agencies, the Law Society, and the Bar Association.

There is, therefore, possibility of future amendment to the scheme, administratively, or by legislation.