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CRIMINAL CASE CONFERENCING TRIAL BILL 2008

Second Reading

Debate resumed from 2 April 2008.

The Hon. JOHN AJAKA [11.50 a.m.]: I lead for the Opposition on the Criminal Case Conferencing Trial Bill 2008. The Opposition does not oppose the bill. The bill seeks to establish a 12-month trial scheme commencing on 1 May 2008 and limited to certain indictable proceedings being heard in specified courts that will, firstly, codify the discounts on sentence to be allowed by the courts in respect of guilty pleas in those proceedings; secondly, reduce the maximum sentence discount that may be allowed for guilty pleas in the proceedings; and, thirdly, require the legal representative of an accused person and the prosecution to participate in a compulsory conference to determine whether there is any offence to which the accused person is willing to plead guilty before the accused person is committed for trial or sentence.

In 2006, according to the Bureau of Crime Statistics and Research, of all matters committed for trial in the New South Wales District and Supreme courts, only 16.8 per cent actually proceeded to trial while 73.5 per cent proceeded to sentence. Of those that proceeded to trial, 83.7 per cent of accused persons were found guilty. In the New South Wales Supreme Court 32 persons charged, or 33 per cent of the total charges, proceeded to sentence only—that is, the defendant pleaded guilty and the case did not proceed to trial. In the New South Wales District Court 2,517 persons charged—or 74.7 per cent of the total charges—proceeded to sentence only.

These figures confirm what has long been common knowledge in the profession: A significant number of matters committed for trial do not in fact proceed to trial because the accused decides to plead guilty or the Office of the Director of Public Prosecutions no bills or directs no further proceedings on the day or eve of trial. Criminal justice agencies are consequently left facing heightened problems of inefficiency and wasted resources. The model proposed in the bill is essentially a reincarnation of a previous failed attempt by the Government to introduce a statutory scheme to formalise and make compulsory the process of case conferencing.

In 2004 the Attorney General established a criminal case processing committee consisting of senior representatives of justice agencies and the courts with a mandate to formulate a statutory model to reduce the number of matters that were committed for trial and prepared for trial and did not proceed, and to reduce the significant costs associated with late pleas of guilty. However, at that time the New South Wales Police Force withdrew its support for the statutory model and the Criminal Case Processing Bill was not introduced into Parliament. Case conferencing—a non-compulsory administrative model—commenced in 2006 in lieu of the statutory model envisaged in 2004.

The Government, having failed to enact the essential and necessary legislation, agreed to fund extra staff for the Director of Public Prosecutions and Legal Aid for

criminal case processing. However, as a result of the Government's procrastination, the case conferencing scheme was only partially successful, and this caused much of the wrangling between the Government and the Director of Public Prosecutions over budget money. The Opposition is supportive of the criminal justice agencies in New South Wales and does not oppose the introduction of the statutory model for criminal case processing, which will hopefully address the problems caused by late guilty pleas that so encumber the system at present.

I will now deal with the substantive detail of the bill. The proposed trial scheme is to apply to proceedings in relation to an indictable offence if committal proceedings in respect of the offence will be heard in the Local Court sitting at the Downing Centre, Sydney, or Central Court, Sydney. The regulations can extend the application of the proposed Act to other courts or substitute the courts to which it applies. Under the trial scheme, the legal representative of an accused person and the prosecution will be required, with some specified exceptions outlined previously by the Attorney General, to participate in a compulsory conference in person, by audiovisual link or telephone before the accused is committed for trial—that is, at the first available opportunity at the local court stage of criminal proceedings. The conference is to be completed within a timetable fixed by a magistrate. Its principal purpose is to determine whether there is any offence to which the accused person is willing to plead guilty. I note that, with a view to optimising efficiency with respect to resource savings and the time that would be expended if trials were held, providing an avenue for the accused to express his or her contrition and have this accounted for in sentencing proceedings, and minimising the trauma to victims and the exposure of vulnerable witnesses to the accused throughout the trial by providing early closure, the bill before the House seeks to give legislative weight to a front-end process essentially through accelerating the process of charge negotiation.

In New South Wales the Director of Public Prosecutions has the discretion as to which charges will be laid and whether to accept an accused person's plea to a lesser charge or a charge not in the indictment pursuant to section 153 of the Criminal Procedure Act 1986. Essentially, the bill will ensure that this discretion is exercised at the earliest possible stage in criminal proceedings to eliminate the unnecessary waste of resources associated with the preparation of matters that do not proceed to trial. Indeed, implementing the scheme outlined in the bill will lead to a reduction in costs to the court and to the parties involved because up to 50 per cent of criminal prosecutions turn into pleas of guilty on the first day of trial. The costs incurred in the preparation of such trials are obviously significant.

The bill further stipulates that, prior to the compulsory conference, a brief of evidence and a pre-conference disclosure certificate are to be served on the accused person, or his or her legal representative. The prosecution is to certify certain matters in the pre-conference disclosure certificate—for example, disclosure of all material in its possession that is of relevance to the matters on which agreement is to be sought at the compulsory conference—and the legal representative of the accused is to obtain instructions from the accused either before or at the time of the conference. This represents a further safeguard to ensure fairness and transparency in pre-trial dealings between the prosecution and defence.

The proposed scheme would also require a magistrate to give the accused a written statement explaining the effect of participating in a compulsory conference and the effect of the discounting of sentencing provisions. Any agreement reached by the parties is to be certified in a compulsory conference certificate to be completed after the conference and filed with a local court pursuant to clause 12 of the bill. The compulsory certificate cannot be required to be produced by a subpoena in any proceedings before a court, tribunal or body. It is admissible as

evidence before a sentencing court for certain limited purposes relating to the imposition of a lower penalty for a guilty plea. A court may refuse to admit a certificate as evidence if the conference has not been held or certificate completed as required by the proposed part, unless it is satisfied that there is a good and proper reason for the failure to comply and it is in the interests of justice to admit the evidence.

I turn to the rationale behind the sentence discount provisions of the bill. Chief Justice Spigelman, in the guideline judgement of *Regina v Thomson* [2000] New South Wales Court of Criminal Appeal at page 309, stated:

> From the utilitarian perspective alone, an early plea offers distinctive and substantially greater benefits over a plea that occurs at the commencement, let alone during, a trial. By the time of the trial considerable expenditure has been incurred by the prosecution and the defence in preparing the case, witnesses and victims are in attendance, a substantial proportion of the cost of the legal aid system has already been incurred and a jury panel has been required for attendance.
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> …
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> The frequency with which guilty pleas are made on the day of the trial is a matter which considerably disrupts the efficiency with which courts in New South Wales can plan the use of their resources.

This sentiment is also expressed in the 2007 prosecution guidelines of the New South Wales Office of the Director of Public Prosecutions. At present, sections 21A and 22 of the New South Wales Crimes (Sentencing Procedure) Act 1999 require a court, during sentencing proceedings, to take into account as mitigating factors, firstly, that an offender has pleaded guilty; and, secondly, the point in the proceedings at which the offender pleaded guilty or indicated an intention to plead guilty.

In relation to the current position at common law with respect to sentence discounts for guilty pleas, the sentencing guidelines set out in *Regina v Thompson* 2000 New South Wales Court of Criminal Appeal page 309, indicate that a maximum sentence discount of 35 per cent is available. The bill contains specific limits for the maximum applicable discounts that must or may be allowed for guilty pleas, which hopefully will improve the transparency of the process and alter what was once a widespread perception that there is no benefit from an early plea. A discount of 25 per cent must be allowed if the offender pleads guilty at any time before committal.

A discount of up to 12.5 per cent may be allowed if the offender pleads guilty at any time after committal, but any such discount is to be proportionate to the remaining benefit of the guilty plea. Even after an offender has been committed for trial, he or she may be able to establish an entitlement to a discount of between 12.5 per cent and 25 per cent if he or she can demonstrate that substantial grounds exist for allowing the greater discount. The burden of establishing substantial grounds lies with the accused on the balance of probabilities. Substantial grounds are limited to four circumstances: first, the offender was found unfit to be tried and pleaded guilty—

Pursuant to sessional orders business interrupted and set down as an order of the day for a later hour.

CRIMINAL CASE CONFERENCING TRIAL BILL 2008

Second Reading

Debate resumed from an earlier hour.

The Hon. JOHN AJAKA [3.43 p.m.]: Earlier I indicated that the burden of establishing substantial grounds lies with the accused on the balance of probabilities. The substantial grounds are limited to four circumstances. First, the offender was found unfit to be tried and pleaded guilty when subsequently found fit to be tried. Second, the compulsory conference certificate records an offer by the offender to plead guilty to an alternative offence that was refused by the prosecutor at any time before committal for trial and accepted by the prosecutor after committal for trial. Thirdly, the compulsory conference certificate records an offer by the offender to plead guilty to an alternative offence set out in the compulsory conference certificate that was refused by the prosecutor at any time before committal for trial and the offender was subsequently found guilty of that alternative offence. Fourthly, the offer to plead guilty to an alternative offence is made for the first time and accepted after committal for trial and the offender had no reasonable opportunity to offer to plead guilty to such an offence prior to the committal.

I note that the consequences of the bill with respect to allowable discounts for guilty pleas are not quite as straightforward as suggested by the Government. If a plea to a lesser offence is accepted when it is first offered, albeit at a later stage, judges still will be able to grant the maximum 25 per cent discount on the basis that the plea was made at the first available opportunity. For example, that may be because the prosecution at an earlier stage had not been prepared to accept a plea to a lesser offence. I note also that there is no specific guidance as to the interpretation of the test of "no reasonable opportunity" to offer an earlier plea in section 17 (5) (c). Furthermore, there may be difficulty in consistency when judges seek to determine precisely what discount is "proportionate to the remaining benefit of the guilty plea".

I turn now to examine the offences excluded from the discount guidelines in clause 16 of the bill. The clause applies to offences carrying a sentence of life imprisonment, offences under Commonwealth law, and offences that have been excluded by the prosecutor where he or she is satisfied under clause 18 (3) that:

> (a) the level of culpability in the commission of the offence is so extreme that the community interest … can only be met by imposition of a penalty with no allowance for discount under section 16, and
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> (b) it is highly probable that a reasonable jury, properly instructed, would convict the accused person of the offence.

These provisions ensure that the principles of proportionality are upheld in sentencing so that the punishment ultimately imposed is wholly reflective of the degree of criminality in the offence. They also allow for consideration of broad public interest so that community values are incorporated into the determination of the appropriate sentence. However, I again emphasise the importance of providing sufficient resources to the Office of the Director of Public Prosecutions to ensure that the legislation is effective. There is no point in passing legislation if the

necessary resources are not available to implement it. For the reasons I previously stated, the Opposition does not oppose the bill.

Reverend the Hon. FRED NILE [3.46 p.m.]: The Christian Democratic Party supports the Criminal Case Conferencing Trial Bill 2008. This bill will establish a 12-month trial scheme commencing on 1 May 2008 that will codify the discounts on sentence to be allowed by the courts in respect of guilty pleas, reduce the maximum amount of sentence discount that may be allowed for guilty pleas in those proceedings, and require the legal representative of an accused person and the prosecution to participate in a compulsory conference. The "NSW Criminal Courts Statistics Annual Report for 2006" of the Bureau of Crime Statistics and Research reported that 1,839 cases were finalised up to committal for trial in the District Court, that 496 proceeded to trial and that 1,060 had proceeded to sentence. In 283 matters no charges were proceeded with at all. They were either no billed by the Director of Public Prosecutions or were otherwise disposed of.

Trauma and distress caused to witnesses, particularly victims, waste of resources of criminal justice agencies and uncertainty for the accused resulting from non-starter actions have been apparent to all. A guilty plea by the offender at the beginning of the process would have eliminated all the strain, stress, trauma and distress of witnesses, particularly victims. Experience has shown that criminal trials often settle close to or on the day of trial, and that happens for a number of reasons. By the time of the trial prosecution evidence has been finalised and served on the defence. The parties, including the accused, the defence representatives, the Crown prosecutor, the solicitor from the Director of Public Prosecutions, the police officer in charge of the investigation and, if applicable, the victim, are brought together to commence the trial. In that context an accused may be more inclined to face the reality of the situation, accept the advice of their counsel regarding the state of the evidence and whether conviction is likely, and, if conviction is likely, accept counsel's advice to plead guilty.

We support this trial, which will have three key components. The first is a compulsory conference between the parties; the second is the procedures involving the holding of a conference; and the third is the introduction of identifiable and appropriate discounts that attach to an early plea of guilty. The first part of the scheme requires parties, while still in the Local Court, to attend a compulsory conference. This is an important aspect of the trial that we trust will make the trial successful, and it can then be extended. As I stated earlier, it is to operate only for 12 months. The bill provides for a discount of 25 per cent if the offender pleads guilty at any time before committal. A discount of up to 12.5 per cent may be allowed if the offender pleads guilty at any time after committal. However, a discount that is greater than 12.5 per cent but not greater than 25 per cent may be allowed if substantial grounds exist for allowing a greater discount.

As members will know, the trial does not include all offences. Those excluded from the trial include offences carrying carry life sentences such as murder, serious heroin and cocaine trafficking; offences under section 61JA of the Crime Act 1900; and offences under Commonwealth law. We support the bill and congratulate the Attorney General on introducing it.

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [3.51 p.m.], in reply: I thank honourable members for their contributions to this debate. This bill is an important milestone in the development of criminal procedures in New South Wales and make fundamental and important reforms to the laws concerning sentencing. Its two main components are the compulsory conference and the mandatory discounting regime on sentence. Both of these initiatives are expected to result in savings in time and resources to agencies

involved in the criminal justice system, such as the Office of the Director of Public Prosecutions and Legal Aid New South Wales, and will save victims from the trauma of having to wait until the eve of a trial to hear that the offender has pleaded guilty.

I make several other things clear: firstly, the intention of this bill is that under section 16 (2) (c) the 25 per cent discount for an early plea of guilty includes the discount for contrition or remorse even though under the guideline judgement of Thomson and Houlton contrition or remorse was quantified separately from the utility of the plea. Furthermore, I emphasise that for the purposes of this bill the word "contrition" is used interchangeably with "remorse", as it was in the guideline judgement. If an accused person pleads guilty the discount for that plea is made up of utility, remorse and witness vulnerability and any other benefit associated with or demonstrated by the guilty plea.

Secondly, I want to discuss the special ground in section 17 (5) (c) for an accused person receiving a discount greater than 12.5 per cent for a plea entered after committal. This ground is for rare circumstances where there is another charge that could not originally have been contemplated that may arise at a late stage due to changed circumstances. This could be for instance an ex-officio indictment on a charge that was not related to the original charge. It is important to emphasise that it should only apply where the offender had no reasonable opportunity to plead guilty to a charge before committal and can only do so after committal. It should only be for a charge which could not reasonably have been in consideration of the accused at the time of the conference. We expect the accused, if he or she expects to benefit from the discounts provided in the criminal case conferencing scheme, to have demonstrated full and forthright cooperation in the case conference, and particularly in relation to the obligations envisaged under section 12. If an accused chooses not to cooperate he or she cannot then expect to receive the benefit of a large discount at a later stage. I thank members for their contribution to the debate and commend the bill to the House.

Question—That this bill now read a second time—put and resolved in the affirmative.

Motion agreed to.

Bill read a second time.

Leave granted to proceed to the third reading of the bill forthwith.

Third Reading

Motion by the Hon. John Hatzistergos agreed to:

That this bill be now read a third time.

Bill read a third time and transmitted to the Legislative Assembly with a message seeking its concurrence in the bill.