13/52

5 July 2013

Ms Sallie McLean
New South Wales Law Reform Commission
DX 1227 SYDNEY

Dear Ms McLean

Encouraging appropriate early guilty pleas

The New South Wales Bar Association is grateful for the opportunity to comment in relation to this reference.

The New South Wales Bar Association supports the encouragement of early guilty pleas and recognises the well documented benefits to all stakeholders in the criminal justice process. This submission will identify ideas, some of which are innovative, that are likely to encourage appropriate early guilty pleas.

Many participants are involved in the criminal justice process from investigation to verdict, including victims, witnesses, experts, police and other investigators, prosecutors, defence lawyers, magistrates, judges, juries and many kinds of court support personnel. There are a large number of criminal trials where guilty pleas are entered very late in the process. All participants are affected by the delay in some meaningful way. The reasons for such delays are complex. This submission endeavours to take a practical approach and posits positive proposals for encouraging earlier pleas of guilty.

The saying 'Justice delayed, is justice denied' is sometimes attributed to the 19th Century British statesman and Prime Minister, William Gladstone. It is a principle that is almost trite but the principal consequence in the criminal process is that if a criminal trial is delayed, justice may not be able to be done to the community or the accused for a host of practical reasons.

Victims of crime are understandably frustrated by a late plea. Often, many months and even years can lapse between complaint to police and a late plea. An offender can be disadvantaged in many ways too if a late plea is accepted by the Crown when it was in fact offered early in the process and rejected. Intervention early in the criminal justice process must necessarily bring with it earlier and better resolution in relation to plea discussions.

Late pleas of guilty can result in the loss of community confidence in and support for the criminal justice process and the just rule of law.

Of course, on the other hand, great care must be taken to ensure that any plea of guilty arises from acknowledgment of guilt. Any incentives to plead guilty must not be such as to impose pressure on an innocent accused to plead rather than face the uncertainties of trial. Equally, it is not appropriate for an accused person to be penalised for defending a criminal allegation and any changes which might have that consequence or which might encourage such a perception should be looked at very cautiously.

In May 2011 the UK Sentencing Council published the results of research it had commissioned into public attitudes towards reduced sentences for offenders who plead guilty. The research also looked at the attitudes of victims and offenders. Some of the key findings were as follows:

1. The public assumes the key motivation for the guilty plea reduction is to save time and money, but prefers the idea of it as something to help victims avoid the emotional trauma of giving evidence.

2. There is more support for sentence reductions if the guilty plea is entered at an early point, and the public, victims and witnesses are less likely to feel that the offender can 'play the system'.

3. Offenders, however, say that they are less likely to enter an early plea, but prefer to weigh up the evidence against them first.

4. There was weak support from the general public for higher levels of reductions beyond the current guideline range of up to 33%, and a fifth felt that there should be no reduction at all.

Two common impediments to successfully negotiating guilty pleas are the form of the charges and the content of "Agreed Facts" documents. Although there has been some degree of criticism of the process of "charge bargaining", this process is often essential to the crystallisation of a guilty plea and is usually carried out in good faith by both parties.

Trust and goodwill between counsel needs to be developed so that there can be an open exchange of information and a frank conversation about the strengths and weaknesses of each party's case. This exchange should occur in a context where counsel should feel free to negotiate without the risk of suffering professional jeopardy. Counsel on both sides should bring a degree of objectivity and disinterestedness to this process to maximise the advantages of the negotiations to their client and to minimise the disadvantages of protracted proceedings to the court.

To the extent that is truly constitutionally available, courts should do all they can to facilitate effective charge negotiations, including negotiations about "Agreed Facts".

Ideas for encouraging early pleas

The court should facilitate negotiations between the parties

Wherever possible, judges and magistrates should encourage the parties to reach agreement about an appropriate guilty plea. This can be done through appropriate judicial intervention in case management contexts including through the court's encouragement of case conferencing, by pressing for details of relevant defences and through allowing time for negotiations to proceed if there are still prospects of an agreement being reached. Practice Notes could also stipulate a process for judges to make relevant enquiries of the parties concerning prospect of successful negotiations occurring and to press for the process to be diligently pursued.

In some cases it may be appropriate for the parties to engage in mediation. In cases involving complex and expensive white collar crimes or occupational health and safety offences, for instance, lengthy trials may be avoided if the parties were to participate in good faith in mediation. Alternative dispute resolution procedures are now tried and tested in most civil litigation contexts. There is no reason why they could not work in a criminal case to enable the facilitation of pleas of guilty to appropriate charges with appropriate agreed facts. Indeed, the courts could formalise such a mediation process in appropriate cases through Practice Notes, guidelines and judicial encouragement.

Early briefing of counsel

The charges initially laid may not be the most appropriate to proceed. If by negotiation between the parties appropriate charges can be agreed and pleas of guilty entered, fewer defended trials will need to proceed. To achieve those results it is necessary for properly informed and instructed representatives on both sides to be able to negotiate in advance of hearings (or between committal and trial). Crown Prosecutors are often briefed late. Defence Counsel are also often briefed late. Both should be briefed early to allow meaningful discussion to occur. Resourcing is an issue in relation to Crown Prosecutors and Public Defenders, as well as private defence counsel funded by Legal Aid. Even if an accused is privately represented, it can be difficult to negotiate a plea if no Crown is briefed.

Prosecutors and barristers should be allocated to specifically negotiate pleas of guilty

Prosecutors and legally aided barristers, including Public Defenders should be trained specifically in negotiating skills and be allocated the task of negotiating pleas of guilty to be undertaken in accordance with formulated guidelines. Effective communication can be maximised if regular opponents know and trust each other and can thereby work effectively with each other. Prosecutors and Public Defenders could be regularly allocated (perhaps on rosters) to undertake the bulk of the charge bargaining and the negotiation of pleas of guilty in legally aided cases.

Creating an appropriate Legal Aid fee structure to encourage meaningful plea negotiations

Currently, Legal Aid fees for guilty pleas are significantly less than for appearances at trial. The NSW Bar Association has consistently campaigned for increases in the fees applicable for work done in association with guilty pleas and for aid to be assigned to barristers to

appear on guilty pleas. Although fees have risen in recent years, fees for work associated with guilty pleas is still woefully inadequate.

The practical reality is that, if a barrister successfully negotiates a guilty plea and then appears only at the sentencing hearing, their brief fee is extremely modest. There is, therefore, a risk that pleas may be entered late due to reluctance on the part of counsel to forgo appearance and preparation fees. The legal aid fee scale should be adjusted to obviate this problem.

Currently there are no criteria for the payment of preparation fees in criminal cases. The payment of preparation fees for guilty pleas is quite exceptional. This situation should be remedied. It is likely to concentrate defence counsel's minds' if there was a fairer fee scale for guilty pleas than currently exists. Ideally, the fees should reflect the amount of work done by counsel to prepare a case either for trial or for plea.

More significant discounts

As noted above, it is not appropriate for an accused person to be penalised for defending a criminal allegation; accused persons are presumed innocent and the onus of proving guilt lies upon the prosecution. Consequently, additional costs and sanctions may not be visited upon any accused who simply exercises his or her rights. However, it is proper for a person pleading guilty to a charge to be rewarded for taking that course. This may be justified on the basis that it shows a level of remorse and/or on the basis that it provides a utilitarian benefit to society by not requiring the case to be proved at trial. Such is, needless to say, already recognised in NSW.

The earlier the entry of a plea of guilty, the greater the utilitarian benefit and the demonstration of remorse may be taken to be and consequently the greater the discount to be allowed.

If an accused person stands charged and indicates a willingness to plead guilty almost immediately, prior to the compilation of a brief of evidence, a greater discount should be given. A discount for a plea so early in the process could be considered generally. Such a 'fast track' system operates in Western Australia. Particularly for more 'traumatic' crimes, consideration could be given to offering such larger discounts where an accused pleads guilty immediately and thereby saves victims and witnesses from the many traumatic steps necessarily undertaken during the criminal justice process.

More certainty about discounts

There is value in having sentence discounts prescribed (or at least indicated) in legislation. This gives legitimacy, certainty and consistency to the awarding of discounts for proper purposes. Apart from other considerations, it enables defence lawyers to authoritatively advise their clients of what might be expected if a plea is entered. Presently, there is a wide discretion regarding what discount is applied at what stage. (It is understood that the Commission will address this matter in its Sentencing report.) If there were a number of clearly defined markers during the criminal justice process, and points at which certain discounts were lost or applied, pleas would be encouraged.

Legislative markers that provide real guidance to the courts and to the parties about what discounts are likely to be awarded are useful tools that would encourage more early guilty pleas. There ought, though, remain some residual judicial discretion to depart from the legislative markers if the interests of justice require it.

Better information about discounts for accused people

Police could provide an accused, upon charge, with a schedule of discounts at the various stages of the criminal justice process. They could be provided with the contact details of defence lawyers on the panel of lawyers earlier raised as an option – lawyers able and willing to provide timely and sound advice about pleading guilty. Magistrates could mandatorily provide accused people with information about the discount at that point and which is lost if a committal proceeds in lieu of a plea, with the change in discount being a significant one at that point in the process. An adjournment for an accused to take advice from a defence panel member may be an additional step at that stage to allow for proper advice to be sought and acted upon.

Filing a certificate by the accused before fixing a matter for trial

There is a perception that explanations regarding the benefits of a plea of guilty are sometimes inadequate or poorly understood. Consideration might be given to requiring an accused, before fixing the matter for trial, to file an appropriate certificate signed by a solicitor and/or counsel signifying that the accused has received appropriate advice about the benefits of pleading guilty. This certificate could be filed at arraignment.

Listing pre- trial hearings soon after committal

Pre-trial hearings (with or without formal case management provisions) may serve a number of purposes, including: enabling the examination of witnesses; enabling rulings to be made on the admissibility of disputed evidence; enabling rulings to be made on procedural aspects of the conduct of the trial. Such hearings may require evidence to be called and/or legal submissions to be made. Rulings may hold great sway in terms of the advice provided to an accused person by counsel.

A principal benefit in the listing of preliminary hearings is the necessity to brief counsel to appear. The brief must be assessed and advice would be given on the strength of the Crown case. The mere preparation for argument by a Crown Prosecutor and defence counsel at such an early stage would ensure that weak and strong cases, where appropriate, result in consideration by the Director regarding no further proceedings or advice to accused persons regarding pleas. The oft complained of issue of late briefing of Crown Prosecutors would be ameliorated as Crowns would necessarily be briefed to appear at preliminary hearings.

If a plea does not result, such pre-trial proceedings would assist in shortening the trial with benefits especially for jury trials, where legal issues arising may require the jury to be removed from court and where delays increase.

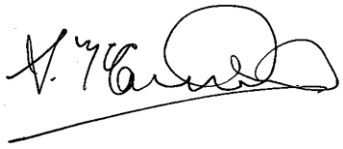
There is a practice in some Courts to avoid such listings, even when sought jointly by the parties. There should be a specific legislative requirement.

Diversionary Schemes

The application of restorative justice principles may be advantageous; diversionary schemes certainly contribute to the reduction of defended trials. Such schemes should at least be reviewed, and others trialled, especially in cases of juvenile and drug crime, circle sentencing and in respect of some kinds of violent and sexual offending.

Should you or your officers require any further information, please do not hesitate to contact me on 9232 4055 or amcconnachie@nswbar.asn.au.

Yours sincerely



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