

THE PUBLIC DEFENDERS CRIMINAL LAW
CONFERENCE
17 MARCH 2018

**REFORMS TO THE
CRIMINAL JUSTICE
SYSTEM**

PACKAGE OF REFORMS

NSW Government passed legislation in October 2017 to reform the criminal justice system. The reforms include:

1. Encouraging early and appropriate guilty pleas ('EAGP') reform: *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017*
2. Sentencing reform: *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017*
3. Parole reform: *The Parole Legislation Amendment Act 2017*
4. Reform of the high risk offender framework: *Crimes (High Risk Offenders) Amendment Act 2017*

ROLL OUT OF REFORMS

- Late 2017 Parole phase 1: High risk offenders
- 26 February 2018: Parole phase 2
- **30 April 2018: EAGP**
- 28 May 2018: Parole phase 3 (reintegration home detention)
- **24 September 2018: Sentencing**

SENTENCING LEGISLATION

Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017

- *Passed by NSW Parliament 18 October 2017*
- *Commencement date 24 September 2018*

KEY CHANGES

1. Abolition of home detention orders, community service orders, good behaviour bonds (sections 9 and 10(1)(b)) and suspended sentences
2. Creation of a range of community-based sentencing options with supervision by Community Corrections
3. Strengthening and tightening of Intensive Correction Orders ('ICOs')
4. Conversion of pre-existing sentences into new forms of sentence order
5. New provisions relating to domestic violence offenders

EAGP LEGISLATION

Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017

Commencement 30 April 2018

PART 1: 5 ELEMENTS OF EAGP REFORM

1. Police will provide a 'simplified' brief of evidence.
2. A senior prosecutor will review the evidence and file a 'charge certificate' in the Local Court confirming the charges that will proceed to trial.
3. The prosecutor and defence are required to have a 'case conference' to determine whether there are any offences to which the accused will plead guilty.
4. Magistrates will no longer be required to consider the evidence and determine if there is a reasonable prospect that a jury, properly instructed, would convict the accused person of the offence.
5. The provisions allowing witnesses to be called at committal are retained, but will become sections 82 and 84 of the amended *Criminal Procedure Act 1986*.
6. A statutory sentencing discount scheme is introduced.

DIVISION 2: NEW COMMITTAL PROCEDURE: S.55

- a) Committal proceedings are commenced by the issuing and filing of a court attendance notice
- b) a brief of evidence is served on the accused person
- c) a charge certificate setting out the offences that are to be proceeded with is filed in the Local Court and served on the accused person
- d) if the accused person is represented, 1 or more case conferences are held by the prosecutor and the legal representative for the accused person
- e) if the accused person is represented, a case conference certificate is filed in the Local Court
- f) The accused person may apply for witnesses to be called in Local Court;
- g) the accused person pleads guilty or not guilty to each offence being proceeded with, and the matter is committed for trial or for sentence

DIVISION 3 DISCLOSURE OF EVIDENCE

STEP 1: THE BRIEF OF EVIDENCE

- The brief must contain copies of all material obtained by the prosecution that:
 - (i) forms the basis of the prosecution's case,
 - (ii) any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person, and
 - (iii) copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case [s.62(1)].
- S 15A of the *Director of Public Prosecutions Act 1986* continues to apply.
- The material contained in the brief of evidence is not required to be in an admissible form [s.62(2)]

FROM CHARGING TO CHARGE CERTIFICATION

STEP 1: The brief is served on the DPP/or person holding equivalent office, and the accused

→ the matter is adjourned for charge certification

STEP 2: Preparation towards charge certification

STEP 3: Charge certification

Charges settled and the DPP/equivalent appears

→ Charge certificate filed and 1st appearance of DPP

DIVISION 4

STEP 2: CHARGE CERTIFICATION

- The prosecutor must certify two things [s.66(2)]:
 - That the evidence available to the prosecutor is capable of establishing each element of the offences that are to be the subject of the proceedings against the accused person; and
 - That the prosecutor has received and considered a disclosure certificate.
- The charge certificate will specify any backup or related offences that are proposed to be the subject of a s.166 certificate.
- The charge certificate will set out which offences, if any, are being withdrawn
- The charge certificate must be **filed** within 6 months of the first return date [s.67(2)], though there is an exception to this timeframe if either the accused consents or it is in the interests of justice.

WHAT HAPPENS IF NO CHARGE CERTIFICATE IS FILED?

- If the prosecutor fails to file and serve a charge certificate within 6 months of the first return date of the CAN (or any longer period set by the Magistrate), the Magistrate must do one of two things [s.68(2)]:
 - Discharge the accused person as to any offence the subject of the committal proceedings, or
 - If the Magistrate thinks it appropriate in the circumstances of the case, adjourn the committal proceedings to a specified time and place.

The interests of justice test applies when the Magistrate is determining which course to take.

NB: the 6 month timeframe does not apply if a person is out on a warrant.

DIVISION 5

STEP 3: CASE CONFERENCE

- After the charge certificate will be filed and the DPP/prosecutor will appear to adjourn the matter for case conferencing.
- More than one case conference may be held
- The case conference procedures do not apply if the accused:
 - a) Is not, or ceases to be, represented by a legal practitioner,
 - b) Pleads guilty to each offence being proceeded with, or
 - c) Is committed for trial under Division 7 (where fitness has been raised)

CASE CONFERENCE PROCEDURE?

- It is anticipated that the a new practice note will be released by the Chief Magistrate in the new year that will require that a case conference is held within a 6 week period after the charge certificate is filed and the matter will return to Court 8 weeks after the charge certificate is filed.
- The first case conference must be held either in person or via AVL: s.71(2)
- The ODPP will participate in case conferencing via AVL using a teleconferencing program from computers in their offices
- It is anticipated that the Regulations will provide that an accused person must be available during a case conference, including by telephone, AVL, or, by agreement, in person.
- Where an accused is in custody, case conferences will occur via bookings through JustConnect (an AVL booking system that is being rolled out for the DPP and Legal Aid).

WHAT IS THE PURPOSE OF A CASE CONFERENCE?

- The principal objective is to determine whether there are any offences to which the accused person is willing to plead guilty: [s.70(2)].
- A case conference may also be used to:
 - Facilitate the provision of additional material or other information that may be reasonably necessary to enable the accused person to determine whether or not to plead guilty
 - Facilitate the resolution of other issues relating to the proceedings, including identifying key issues for the trial of the accused person and any agreed or disputed facts: [s.70(3)].

WHAT DO DEFENCE HAVE TO DO BEFORE A CASE CONFERENCE?

- The accused person's legal representative is to seek to obtain instructions before participating in the case conference [s.72(1)]
- The accused person's legal representative also has to explain the following things to the accused:
 - the statutory sentencing discount regime,
 - the penalties applicable for the offences specified in the charge certificate, and
 - the effect on the applicable penalty if the accused was to plead guilty [s.72(2)].

FURTHER CASE CONFERENCES?

- If there are further issues to be ventilated, more than one case conference can be held [s.70(5)].
- A second or subsequent case conference can occur via telephone [s.71(2)].

STEP 4: THE CASE CONFERENCING CERTIFICATE

The parties are required to complete and file a case conference certificate [s.74(3)]

The purpose of the CCC is to assist the Court to ascertain the appropriate sentence discount to be applied.

- The case conferencing certificate must include [s. 75]:
 - The offence or offences that the prosecution is proceeding with (on indictment or on a s.166 certificate).
 - Any plea offers by the accused.
 - Any plea offers by the prosecution.
 - Whether the accused or prosecution has accepted any such offer.
 - How each of the offences are proceedings (committal for trial, or committal for sentence).
 - If a plea offer has been accepted, details of the facts that are agreed and areas in dispute.
 - Details of offences to be placed on a Form 1.
 - Whether or not the prosecutor has informed the accused of an intention to make a submission to the sentencing court that the statutory discount should not apply or be reduced.

DECLARATIONS BY THE LEGAL REPRESENTATIVE AND THE ACCUSED

- The case conferencing certificate will likely contain a declaration by the legal representative that they have explained to the accused the following matters [s.72(2)]:
 - the effect of the statutory discount scheme.
 - the maximum penalties that apply to each offence being proceeded with
 - the effect on the applicable penalty of pleading guilty at different stages of the proceedings (25%, 10%, 5%).
- If the accused is pleading not guilty, a declaration by the accused that the legal representative has explained the above matters: [s.75(2)(b)].

FAILURE TO COMPLETE CASE CONFERENCE

- If defence unreasonably fail to participate in a case conference or complete a case conference certificate, the Magistrate may commit the accused person for trial or sentence as if the case conference was not required to be held or adjourn the committal proceedings [s.76(3)].
- If the prosecution unreasonably fail to participate in a case conference or complete and file a case conferencing certificate, the Magistrate may discharge the accused person or adjourn the proceedings [s.76(2)].

HOW AND WHEN THE CASE CONFERENCE CERTIFICATE CAN BE USED

Case conference material is not admissible in legal proceedings, except for sentence proceedings (including appeal proceedings) [s.78(2)]

'Case conference material' means:

- A case conference certificate
- Evidence of anything said between the parties, or any admissions made, during a case conference, or
- Evidence of anything said between the parties, or of any admission made, during negotiations after a case conference concerning a plea to be made by, or offers to be made by, an accused person.

The matters specified in the case conference certificate are to be treated as confidential [s.79], and there is a prohibition on publication of any case conference material [s.80]

DIVISION 6: EXAMINATION OF PROSECUTION WITNESSES IN COMMITTAL PROCEEDINGS

After the Charge Certificate has been filed (s 82(3)):

- A Magistrate may direct witness to attend if there are substantial reasons (S 82);
- Where the witness is a victim witness there must be special reasons (s 84).

Witnesses who may not be directed to attend (complainant in prescribed sexual proceedings with cognitive impairment and child complainant in child sexual assault offence)(s 83)

DIVISIONS 7 & 8

STEP 5: COMMITTAL FOR TRIAL/SENTENCE

- Provisions regarding the Act of committal for trial or sentence remain the same as Ss 99-108 of the *Criminal Procedure Act*;
- Should fitness be raised at any point by any party during the committal proceedings (magistrate included) then magistrate may commit a person for trial once the charge certificate is filed (Ss 93-94).

**AMENDMENT TO THE *CRIMES (SENTENCING
PROCEDURE) ACT 1999*
STATUTORY DISCOUNT REGIME**

Sections 25A-25F prescribe the mandatory discounts to be afforded for pleas of guilt.

Two exceptions:

- Commonwealth offences, and
- Offences committed by juveniles

DIVISION 1A: THE DISCOUNTS

Discounts for offences dealt with on indictment (S. 25D(2)):

- | | |
|-----|--|
| 25% | PG is entered prior to committal |
| 10% | PG is entered at least 14 days before the first day of trial
(if the Accused serves notice on the prosecutor of an intention to enter a PG at least 14 days before trial, this satisfies the requirement) |
| 5% | PG is entered after that time |

25% DISCOUNT FOR EX-OFFICIO INDICTMENTS AND AMENDED INDICTMENTS

Where the accused indicates a PG as soon as practicable after the ex officio indictment is filed (S. 25D(3)(a)), or amendments to the indictment unless:

a) the evidence that establishes the ex officio count/new count offence, is substantially the same as the evidence in the brief served in the committal proceedings, and the maximum penalty for the ex officio count is the same, or is a lesser penalty than the original offence (S25D(4)(a));

or

b) the offender refused a plea offer made by the prosecutor to PG to the offence (the ex officio/new count) and that offer was recorded in the case conference certificate (S25D(4)(b)).

Person found fit to be tried

Where the accused indicates a PG as soon as practicable after the accused is found fit to plead (s. 25(5)).

25E (1) - DISCOUNT WHERE GUILTY PLEA OFFER REFUSED BY THE PROSECUTOR AND LATER CONVICTED OF THAT OFFENCE

- A 25% discount will be available where an accused person offers (in a negotiations document) to PG to a *different offence* prior to committal, the offer is rejected by prosecutor, the offer is not withdrawn, and the accused is subsequently found guilty of that different offence, or an offence that is reasonably equivalent to that offence.
- Offers made after committal to different offences attract discounts in accordance with the Section.

25E (2) - DISCOUNT WHERE GUILTY PLEA OFFER REFUSED BY THE PROSECUTOR AND LATER ACCEPTED

A 25% discount is also available where:

- a prosecutor has refused an offer in relation to a 'different offence', recorded in a negotiations document, but following committal for trial, the prosecution accepts the offer to plead to that different offence, and
- The plea is entered at the first available opportunity obtained by the offender.

25F-EXCEPTIONS TO THE STATUTORY SENTENCING DISCOUNTS

- Extreme culpability (s25(2))
- Disputed facts not resolved in favour of offender (s25F(4))

OTHER PROVISIONS APPLYING TO DISCOUNT: S 25F

- The offender bears the onus of establishing that grounds exist for the sentencing discount (s.25F(5)).
- No discount for a guilty plea where the Court determines a sentence of life imprisonment [s.25F(9)]

OTHER MATTERS

- **Children's matters**

- The new committal procedure applies to children who are charged with serious indictable offences and are dealt with according to law;
- in respect of non-serious indictable offences where there is an election to be dealt with according to law, the committal procedure as currently applies continues.

(amendments to the *Children (Criminal Proceedings) Act 1987*).

- The sentencing discounts apply to sentencing in the **Drug Court**, if:

- the accused indicates an intention to PG to the offence before being referred to the Drug Court, and
- subsequently enters a PG before the Drug Court [s.25F(6)]

(amendments to the *Drug Court Act 1998*).

FURTHER INFORMATION AND TRAINING

- The paper that has been distributed today is available on the Public Defender's website at http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/public_defenders_mostrecentpapers.aspx
- The Public Defenders are working on a table of non-exhaustive check-list of possible alternative charges alongside primary charges. When complete it will also be made available on the Public Defenders website.
- Legal Aid NSW is holding further training sessions concerning the various reforms. Members of the NSW Bar are welcome to attend any of those sessions. Attendees may sign up via the Legal Aid Management System (LMS) Attendees will be able to sign up shortly via the Legal Aid Learning Management System (LMS): <https://learning.legalaid.nsw.gov.au/>.