

OVERVIEW – Summary

- Significant changes to the NSW criminal justice system with amendments to
 - *Criminal Procedure Act 1986*
 - *Children (Criminal Proceedings) Act 1987*
 - *Crimes (Sentencing Procedure) Act 1999* and
 - Other Acts including the *Mental Health (Forensic Provisions) Act*
- Relevant prosecutors are the
 - ODPP and
 - CDPP
- The amendments commenced on 30 April 2018

Does the EAGP Scheme apply?

EAGP matters are

- Proceedings commenced on or after 30 April 2018 for strictly indictable and elected Table offences
- All aspects of the reform except the sentencing discounts apply to Commonwealth committal proceedings and children's offences if charged before 21 y.o. if commenced on or after 30 April 2018

Non-EAGP matters are

- Charges laid on or after 30 April 2018 under same H number of committal proceedings commenced before 30 April 2018
- Proceedings for strictly indictable and elected Table offences commenced prior to 30 April 2018

Clause 119A, Criminal Procedure Regulation 2017

The Act, as in force before its amendment by the Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017, continues to apply to committal proceedings that deal with one or more offences if proceedings for any of those offences commenced before the amendments made to Part 3 of the Act by that amending Act commenced.

Children

- Refer to *Children (Criminal Proceedings) Act 1987* and *Children (Criminal Proceedings) Regulation 2016*

For Serious Children's Indictable Offences only

- The EAGP committal process applies
- Some operational differences
- The mandatory sentencing discounts do not apply to offences if they were committed when the accused was under 18 years and charged when under 21 years

For Indictable offences (other than serious children's indictable offences)

- These matters continue to be dealt with summarily in the Children's Court unless
 - the accused elects to have their matter committed, or
 - the Court exercises its discretion to commit under s 31, C(CP)A
- The committal procedures for these offences are mostly akin to the former committal procedures

1. EARLY DISCLOSURE – Summary

Who is involved?

- The Magistrate makes brief orders
- The Officer in Charge will prepare the brief
- Police Prosecutors will appear until they
 - Indicate brief is served and complete, and
 - Seek orders for charge certification
- ODPP will appear thereafter

When?

- Subject to LC Practice Note
- 8 week adjournment for brief service

What is Early Disclosure?

Contents of Brief: s 62(1)

- All material obtained by the prosecution that forms the basis of the prosecution's case
- Any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person
- Any other material obtained by the prosecution that would affect the strength of the prosecution's case.

What is Early Disclosure?

Alternative Forms of Evidence: s 62(2)

- “Admissible form” = the form required by Part 3A, Chapter 6 or in any other form required for it to be admissible
- Evidence “may be, but is not required to be” in admissible form
- The only evidentiary material to be served unless you
 - requisition material for negotiations
 - subpoena material or
 - matter proceeds to trial

Refer to Appendices A, Brief Protocol & CDPG Guidelines

For example...

1. Drug Analysis Certificate >>> Alternate Form = Result of presumptive drug testing identifying the drug & quantity
2. Fingerprint evidence & an expert's statement >>> Alternate Form = Result from the EFIMS & Forensic Summary Report
3. Audio and transcripts of telephone intercepts >>> Alternate Form = Audio of telephone intercepts with detailed synopsis, summary of calls & key calls identified

2. CHARGE CERTIFICATION – Summary

The Purposes of Charge Certification

- To provide early charge certainty to defendants to encourage early guilty pleas where appropriate
- Prosecutors with delegation will be involved at an early stage and remain in matters to finalisation

Who: s 65

- NOT Police
- The DPP or A-G
- The Commonwealth DPP or A-G
- A legal representative of the above

When

- After the brief is served
- Six weeks – *LC EAGP Practice Note*
- Six month time limit for filing – **s 67**
- Time limit can be extended,
 - If accused consents, or
 - Magistrate considers it is in the interests of justice
- If not filed, Magistrate can,
 - Discharge the accused
 - Adjourn the proceedings

How: s 66

- By the completion of a charge certificate by a prosecutor
- To certify the evidence available is capable of establishing each of the offences that are to be the subject of the proceedings against an accused
- **Form 1A** in *Regulations*
- The prosecutor who certifies the charge signs the charge certificate
- The prosecutor must file the charge certificate with the Local Court registry
- A copy must be served on the accused
- The certifying prosecutor who signs the charge certificate will attend the case conference

3. CASE CONFERENCING – Summary

Purposes of Case Conferencing

s70(2) & (3)

Principal purpose – “to determine whether there are any offences to which the accused person is willing to plead guilty”

Secondary purposes – May facilitate:

- Additional material which you may need to decide whether to plead guilty
- Identifying key issues for trial and to shorten any trial

Remember Your Section 72 Obligations

You must explain to your client before the case conference:

1. The operation of the mandatory sentence discount scheme,
2. The penalties applicable to the offences certified in the charge certificate,
3. The penalties applicable to any other offences the subject of offers, and
4. The effect on the applicable penalty if your client was to plead guilty to any offence at different stages of the proceedings.

Steps to take

1. Adjourn proceedings to consider certified charge(s) and take client's instructions on possible guilty plea
2. If no guilty plea to certified charge(s) or no committal for trial where fitness in issue
 - Seek extension to Legal Aid grant for Counsel and brief Counsel (if appropriate)
 - Arrange case conference with certifying prosecutor, ODPP solicitor with carriage and defence Counsel
3. Confirm conference date at next Court appearance
4. Magistrate gives oral and written explanations of process to accused
5. Adjourn to hold case conference
6. Give s 72 advice to client
7. Participate in case conference
8. Finalise the case conference certificate

How to Conduct a Case Conference

- 1st conference: By AVL (or in person), unless exceptional circumstances
- Any 2nd or subsequent conference: By telephone

When

- During business hours, remembering CS NSW AVL booking times if client is on remand
- Request booking via Legal Aid NSW Case Conferencing Hub or JustConnect

Who attends?

Signatory of charge certificate and ODPP solicitor with carriage

and

Defence representative including Counsel (where briefed)

with

Client available to provide instructions

Available to provide instructions means,

- If on remand, in person or by AVL or if not reasonably practicable, by phone
- If not in custody, in person or if not reasonably practicable or appropriate, by AVL or phone

4. CASE CONFERENCE CERTIFICATE – Summary

What is a Case Conference Certificate?

It is a formal record of any offers made by both the ODPP and defence before, during and after the case conference

It will certify:

- The certified charge(s)
- Any offers by either side and whether those offers were accepted or rejected
- If an offer is accepted, any agreed or disputed facts
- Any backup/related offences
- Any Form 1 matters
- If 'worst case category no discount' will be sought by ODPP, and
- How the matter will proceed

PRESCRIBED FORM – Form 1B, Regulations

It is the FINAL opportunity to secure your client a 25% discount on sentence for their guilty plea

- A CCC is completed and filed even if a resolution is reached.
- If more than one case conference is held, then it is filed after the final one

The Process

1. ODPP drafts the case conference certificate (CCC)
2. Both parties then sign the CCC including the defence representative's declaration as to compliance with s 72 obligations
3. Client to sign to declare receipt of s 72 advice if maintaining a not guilty plea
4. ODPP files the CCC as per the Magistrate's orders
5. The CCC is sealed in a Court issued envelope
6. Both parties can
 - Be present when filed and sealed, and
 - Retain copies
7. If not filed, a Magistrate,
 - Will consider the interests of justice and any "unreasonable failure" to participate in case conference or complete the CCC
 - Can discharge accused or adjourn proceedings if a prosecutor is at fault, or
 - Commit an accused for trial or sentence or adjourn proceedings if a defence representative is at fault

Late Offers

If an offer is:

- Made after the CCC is filed and before committal,
- Of the kind that would have been included in the CCC,
- Made in writing and served on other party, and
- Filed in the Local Court Registry

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- ✓ It will be attached to and filed with the CCC
- ✓ It is not required to be signed by the ODPP
- ✓ It can secure a 25% discount for your client

5. COMMITTAL – Summary

The Magistrate's power to discharge an accused is abolished

The role of the Magistrate will be to

- A. Case manage committal matters
- B. Direct prosecution witnesses to attend "witness hearings"
- C. Commit an accused for trial or sentence

A. Case Management

Timeframes are set out in the Practice Note:

- Brief service – 8 weeks
- Charge certification – 6 weeks
- Consider a witness hearing – 4 weeks
- 2 weeks to file and serve submissions
- 2 weeks for ODPP consideration
- Case conferencing – 8 weeks
- 6 weeks – hold case conference
- 2 weeks – finalise case conference certificate

The operation of the Practice Note is suspended when fitness is in issue

Remember 5.1 – the interests of justice

B. Witness Hearings

Purpose(s)

- To assess the strength of Crown case
- Convince ODPP there is not sufficient evidence for certified charge, to result in withdrawal or amendment of certified charge
- Convince your client a guilty plea is in their best interests, given the availability of a 25 % discount pre-committal
- Resolve a factual dispute to preserve your client's 25% discount

Applying for a Witness Hearing

- The ODPP or accused can apply
- By oral application

The Test

- **Substantial** Reasons (s 82 – former s 91)
- Direction must be given if other party consents
- If no agreement, the Magistrate can hold a hearing to decide and require submissions
- **Special** Reasons (s 84 – former s 93)
- Witnesses who cannot be directed to attend (s 83)

When to apply

- Any time after filing of the charge certificate
- Adjourn for four weeks (two weeks for submissions and two weeks for consideration by the ODPP)

C. Committal

- Unless a guilty plea is accepted an accused will be committed for trial
- A plea can be accepted or rejected by the Magistrate
- A plea cannot be accepted before the time when can be committed for sentence, which is 1. After the CCC is filed 2. After the charge certificate is filed or 3. Before the charge certificate is filed, if the prosecutor consents

Fitness

The Test

- *R v Presser* [1958] VicRp 9
- The common law still applies

Who can raise fitness?

- An accused or the ODPP, though the Magistrate must be satisfied unfitness has been raised in good faith, and
- May request a psychiatric or other report
- A Magistrate can raise it of their own volition

When can it be raised?

- At any time
- Committal only after a charge certificate or CCC has been filed

6. SENTENCING DISCOUNTS & PLEA OFFERS – Summary

- Division 1A, *Crimes (Sentencing Procedure) Act 1999*

Application

- Mandatory
- For the utilitarian value of a guilty plea (see *R v Borkowski* per Howie J)
- Applies to all offences dealt with on indictment
- The defence has the onus for establishing grounds for a discount
- The standard of proof = balance of probabilities

Definitions

- 'first day of the trial' = The first day fixed for trial or, if that day is vacated, the next day fixed for the trial that is not vacate
- 'complies with the pre-trial notice requirements' = If an offender serves a notice on the ODPP at least 14 days before the first day of the trial accepting an offer by the ODPP to plead guilty to the offence or offering to plead guilty to the offence
- A 'reasonably equivalent offence' = 1. The offence has the same or lesser maximum penalty than X and 2. The facts of this offence are capable of establishing X
- A 'new count offence' = An offence the subject of an ex-officio indictment or an offence inserted by amendment to an indictment

A sentencing Judge must record:

- The calculation of the discount and
- The reasons for not applying or reducing a mandated discount

THE DISCOUNTS

The General Rule

- **25%** >>> For example, a guilty plea entered in the Local Court
- **10%** >>> For example, a guilty plea entered after committal but at least 14 days before trial
- **5%** >>> For example, a guilty plea entered less than 14 days before trial

Exceptions

- A. Commonwealth offences
- B. Offences committed when under 18yo and charged under 21yo
- C. Life sentences (no discount is given)

Variations

1. Reasonably equivalent offences
2. Refused offers later accepted
3. New count offences
4. Extreme Level of Culpability
5. Disputed Facts

Variations

1. Reasonably equivalent offences

An offer to plead guilty to X is made, the offer is recorded, the ODPP rejects the offer, client is found guilty of X or an offence that is reasonably equivalent to X = discount based on the time of the offer (25% or 10% or 5%)

2. Refused offers later accepted

An offer to plead guilty to X is made, the offer is recorded, the ODPP rejects the offer, the ODPP accepts the offer after committal, client pleads guilty to X, plea entered "at first available opportunity able to be obtained by client" = discount based on the time of the offer (25% or 10% or 5%)

3. New count offences

If "the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the (committal) brief of evidence... and the penalty for the new count offence is the same as, or less than, the offence set out in the original indictment" OR Client refuses an ODPP offer to plead to the new count offence in the original proceedings and offer is recorded = No 25% discount

Variations

4. Extreme Level of Culpability

- A sentencing Judge has the discretion to refuse or lessen a discount when the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of no discount or a lesser discount
- Court can determine on its own motion ,
- The ODPP can request only if defence informed of intention at / before the case conference and it is recorded

5. Disputed Facts

- A sentencing Judge has the discretion to refuse or lessen a mandated discount in circumstances where the utilitarian value of the plea of guilty has been eroded by a dispute as to facts that was not determined in favour of the offender
- Consistent with the common law – *R v AB* [2011] NSWCCA 229

Discounts if an accused is found fit

(s 25D(5), C(SP)A)

- 25 % - if guilty plea entered “as soon as practicable” after being found fit (to certified charge or Crown accepts plea to a lesser charge)
- 10% - if guilty plea not entered “as soon as practicable” but entered at least 14 days before trial / complied with pre-trial notice requirements
- 5 % - if guilty plea in any other circumstances

If offer to plead to an offence is rejected by Crown remit to Local Court

- Only way to preserve 25% discount
- Process set out in s 13A, *Mental Health (Forensic Provisions) Act 1990*
- Section 25D(5) does not cover:
 - Refused offers later accepted
 - Reasonably equivalent offences