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Early Appropriate Guilty Pleas Legislation ["EAGP"]

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ARMIDALE PAPER (2)

EARLY APPROPRIATE GUILTY PLEAS LEGISLATION [“EAGP”]

1. Overview

The Amending Act [EAGP] passed Parliament on 18 October 2017 and the Department of Justice [“DoJ”] has advised it is expected that the EAGP reform will commence by **May 2018**.

The Department of Justice [“DoJ”] has referred to the EAGP reforms as “a systemic shift in the way serious criminal matters are managed in the courts”. Indeed, the reforms will significantly change the way in which a criminal lawyer should approach the client’s case and likely, in the advice to be given to that client.

In my view, published comments made by the senior deputy Crown prosecutor in December 2017 [inter alia, reminding ODPP lawyers that they participate in an adversarial system and should not too readily consent to Facts amendments or any other concessions sought by the defence, whether on sentence or at trial], are singularly unhelpful in instilling criminal lawyers with confidence that lawyers from the ODPP will be prepared to compromise to the extent necessary to facilitate the reforms achieving their objectives.

Those objectives are stated by the DoJ to be: *“To ensure that cases are actively managed from the start to encourage early appropriate guilty pleas, early resolution of issues and reduce uncertainty and delay;earlier guilty pleas will reduce the stress for victims, minimise court delays and deliver swift, more certain justice”*.

The reform is made up of five elements:

1. Early disclosure of evidence by NSW Police, including simplifying the ways in which evidence is provided to the prosecutor and the accused person at the early state of the case.
2. Senior prosecutors in the ODPP and CDPP will be engaged in the case earlier, to review the evidence and confirm the charges that will proceed as early as possible by filing a charge certificate.
3. Mandatory criminal case conferencing between the senior prosecutor and the lawyer for the defence to identify any opportunities for early appropriate guilty pleas and discuss the issues in the case.
4. Flexible Local Court case management and the abolition of the magistrate’s substantive committal decision. Instead, magistrates will be responsible for ensuring the new steps in the committal process are completed before a case is committed to the District Court or Supreme Court for trial or sentence.
5. Strict statutory sentence discounts for guilty pleas to act as an incentive to plead guilty early, where appropriate.

It is not possible in this paper to cover all the changes to the Criminal Procedure Act 1986 [“the CP Act”] and the focus is on the more significant amendments.

2. Amended Definitions

"Case conference" means a conference held under Division 5 of Part 2 of Chapter 3: CP Act.

"Case conference certificate" means a case conference certificate required to be completed and filed under Division 5 of Part 2 of Chapter 3: s 3. CP Act.

"Case conference material" is defined in S.78 (5) of the CP Act as:

- (a) a case conference certificate, or
- (b) evidence of anything said between the parties, or of any admission made, during a case conference, or
- (c) 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 made to or by, an accused person.

"Charge Certificate" is not defined as such but is referred to in s.66 (1):

Charge certificates

- (1) A **"charge certificate"** is a document in the form prescribed by the regulations and signed by the prosecutor that:
 - (a) relates to the offences specified in a court attendance notice for the committal proceedings, and
 - (b) specifies the offences that are to be the subject of the proceedings against the accused person, and
 - (c) sets out the details of each of those offences in a way that is sufficient under this Act for the purposes of an indictment or an averment in an indictment, and
 - (d) specifies any back up or related offences (within the meaning of section 165) that are proposed to be the subject of a certificate under section 166 (1) relating to charges against the accused person, and
 - (e) if applicable, confirms that proceedings against the accused person for other specified offences are no longer being proceeded with, and
 - (f) contains any other matters prescribed by the regulations for the purposes of this section.
- (2) The prosecutor must certify in the certificate that:
 - (a) 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
 - (b) in the case of an offence other than an offence under the law of the Commonwealth, the prosecutor has received and considered a certificate under section 15A of the *Director of Public*

Prosecutions Act 1986 relating to that offence.

- (3) Subsections (1) and (2) do not limit the matters that may be included by the regulations in the prescribed form of charge certificate.

"Committal proceedings" means proceedings before a Magistrate for the purpose of committing a person charged with an indictable offence for trial or sentence.

"Plea Offer" is defined in s.77 (1) as an "offer" that:

- (a) is made by the accused person or the prosecutor after the filing of the case conference certificate in committal proceedings, and before the accused person is committed for trial or sentence, and
- (b) is an offer of a kind that would have been required to be included in a case conference certificate if it had been made before the filing of the certificate, and
- (c) is made in writing and served on the other party, and
- (d) is filed in the registry of the Local Court.

3. **Division 2 – Committal Proceedings Generally**

New sections 55-60 have been introduced [see annexure "A" to this paper].

I refer to some of these changes:

- After the Brief is served a "charge certificate" is to be filed in the Local Court and served on the accused: s.55
- If the accused is legally represented, one or more case conferences [with the prosecutor] are to be held: s.55
- If the accused is represented a case conference certificate is to be filed in the Local Court: s.55
- Although the committal proceedings are to take place in open court, in certain circumstances, the case management can take place electronically, in the absence of the public: s.57
- The Chief Magistrate may issue practice notes as to the practice or procedure to be followed in committal proceedings: footnote to s.58
- The presiding Magistrate must give an oral and written explanation of the committal process and the discount for guilty plea [s.59]: see part 3 of the *Crimes (Sentencing Procedure) Act 1999*
- A failure by the Magistrate to comply with s.59 does not invalidate the committal proceedings: s.59 (5)

4. **Division 3 - Disclosure of Evidence – ss. 61 – 64 of the Act**

- 1. Requirement for service of the Brief: s.61
- 2. S.62 is re-produced in its entirety:

Matters to be disclosed in brief of evidence

- (1) *The brief of evidence must contain the following:*
 - (a) *copies of all material obtained by the prosecution that forms the basis of the prosecution's case,*
 - (b) *copies of any other material obtained by the prosecution **that is reasonably capable of being relevant** to the case for the accused person,*
 - (c) *copies of any other material obtained by the prosecution that would affect the strength of the prosecution's case.*
- (2) *The material contained in the brief of evidence **may be, but is not required to be, in the form required under Part 3A of Chapter 6 or in any particular form otherwise required for the material to be admissible as evidence.***
- (3) ***The regulations may specify** requirements for material included in a brief of evidence.*
- (4) *The Minister is to consult with the Minister for Police before a regulation is made under subsection (3).*

Comment on s.62

- a S.62 (1): The bold emphasis has been added and in my view, is of concern. S.15A of the *Director of Public Prosecutions Act 1986* (NSW), inter alia, provides that the disclosure include material “*that might reasonably be expected to assist the case for the prosecution or the case for accused person*”. Guideline 18 of the ODPG Guidelines provides that prosecutors are under a continuing obligation to make full disclosure to the accused of, inter alia, “all material known to the prosecutor which can be seen on a sensible appraisal by the prosecution to be relevant or possibly relevant to an issue in the case.

Further, how/when will the defence know if the Brief does not comply with s.62 (1)? The defence may not know during negotiations that the Brief does not comply and that may cause wrong or incomplete or different advice to be given to the client during the negotiation phase. That is a real concern.

If defence lawyers do not have confidence that full and proper disclosure has been made there is unlikely to be an early plea, the effect of which will be to undermine one of the most significant objectives of the reforms.

- b S.62 (2): As it stands, there is no definition as to the form or content of the “material” that is to be contained within the Brief.

S.62 (3) states that the “material” may be specified by the Regulations, but as yet they are not defined.

The danger is that the prosecution will seek to rely [at committal] on *evidence* that would be inadmissible or in an inadmissible form. It is of concern that there is no mechanism for the accused to make application to the court for particular evidence to be in admissible form, failing which, it should not be capable of being relied upon.

I ask [rhetorically]: what point a case conference, if there is important evidence contained in the Brief that would clearly, not be admissible at trial?

Example: Drug supply charge; evidence relied upon as to the nature and weight of the drug is a presumptive testing certificate; where the accused challenges the nature and weight of the drug, it will be a central issue at trial. In those circumstances, advising the accused would likely prove very difficult and is not likely to facilitate an early plea.

This may well lead to more applications to cross examine prosecution witnesses at the committal hearing under ss.82 and 84 of the CP Act (formerly ss. 91 and 93) and/or a greater number of *Basha* inquiries at trial: *R v Basha* (1989) 39 A Crim R 337.

- c. S.62 (3) is regrettable and may create problems because matters as essential as the requirements for material included in the Brief should not have been left to Regulation. It would have been easy enough for the Act to have included a schedule setting out with specificity the types of material where evidence may be served in an alternative form.
- 3. S.63 Provides for additional material to be served by the prosecutor as soon as practicable after it is obtained by the prosecutor. It may be observed that the section does NOT make any provision for a disclosure certificate certifying compliance with s.15A of the *Director of Public Prosecutions Act* 1986 or ODPF guidelines or any other law relating to disclosure.
- 4. S.64 excuses service of material that is impossible or impractical to copy or where the accused consents to the material not being served; however, the prosecution must give notice to the accused specifying a reasonable time and place for inspection.

5. **Division 4 – Charge Certificates – ss.65 – 68 of the Act**

- 1. A “senior prosecutor” will be required to review the charges laid and served on the defence and file a “charge certificate” with the Local Court, not later than 6 months after the first return date. A later period can be consented to or if in the

view of the magistrate it is in the interests of justice. If the prosecutor forms the view that other charges should be laid, the prosecutor will liaise with NSW police to issue a new CAN. Any new charges will appear on the Charge Certificate.

2. If the prosecution does not file and serve the Certificate within time, the magistrate has the power to discharge the accused or, more likely, if the magistrate considers it appropriate, to adjourn the committal proceedings.

Comment on Division 4

- a. There is no definition of “senior prosecutor”. Is it intended to be a Crown or trial advocate or something else? Hopefully, it will at least be a prosecutor who has delegation to withdraw and/or substitute charges which are the subject of negotiations taking place.
- b. The common law provides that an accused may seek particulars of the alleged offence to enable a defence to be mounted: *Ex Parte Grinham*; *Re Sneddon* (1959) 61 SR (NSW) 862; 78 WN (NSW) 203; and to enable the accused to object to evidence sought to be led and to determine whether to plead guilty: *Stanton v Abernathy* (1990) 19 NSWLR 656; 48 A Crim R 16; *Stanton v Abernathy (No 2)* (1991) 53 A Crim R 241;
- c. Given the removal of the magistrate’s discretion to discharge at committal, it is regrettable that the Division did not include provisions:
 - i. to the effect that the Charge Certificate, particularise the specific offence(s) relied upon and any “back-up” charges and where applicable, specify the particulars of the offences – as to the essential elements of the offence(s); and
 - ii. to the effect that flexibility as to the adjournment of the Case Conference where there is a real prospect of settlement of the issues.
- d. Whilst it remains to be seen, as stated above, in my view it is likely that the reforms [such as they are] will lead to an increase in Basha inquiries; and further, Stay Applications.

6. Division 5 – Case Conferences – ss. 69 -80 of the Act

1. There is provision for the accused to appear at case conferences, either in person or by AVL: s.71 (2); although the magistrate has power to order that it be held by telephone in “exception circumstances”: s. 71 (3).
2. It will be mandatory for the prosecutor and the accused’s legal representative to participate in a criminal case conference: a formal, structured discussion

between the parties aimed at encouraging appropriate early guilty pleas and identifying key issues for trial.

3. It is not intended that the accused will be present in the same room as the lawyers for the whole of the case conference, but may participate from time to time.
4. The regulations may make provision for or with respect to case conferences: s.71(4)
5. The accused's legal representative **must** explain the following matters to the accused person before the case conference certificate is completed:
 - a. The effect of the scheme for the sentencing discount applied under Part 3 of the *Crimes (Sentencing Procedure) Act 1999* for a plea of guilty to an offence;
 - b. The penalties applicable to the offences certified in the charge certificate and to any other offences the subject of offers made by the accused or the prosecutor in the committal proceedings;
 - c. The effect on the applicable penalty if the accused person were to plead guilty to any offence at different stages of proceedings for the offence.

[s.72(2)]

6. If there are joint co-accused, a separate case conference is to be held for each, however a joint case conference may be held for two (2) or more co-accused with the consent of the prosecutor and each of the co-accused: s.73(1).
7. Section 75(1) and (2) sets out the intended content of the conference certificate where the magistrate is satisfied that a case conference certificate has not been filed within time because of an unreasonable failure by the prosecutor to participate in a case conference or to complete or file a case conference certificate, the magistrate may discharge the accused or adjourn the committal proceedings to a specified time and place: s.76(1) and (2).
8. If the magistrate is satisfied that the case conference certificate has not been filed because of an unreasonable failure by the legal representative of the accused to participate in a case conference or complete a case conference certificate, the magistrate may commit the accused person for trial or sentence (as the case may be) or adjourn the committal proceedings to a specified time and place: s.76(3).
9. Any plea offer (either by the accused or the prosecutor) is to be annexed to the case conference certificate: s.77(3).
10. The case conference material is not admissible in any proceedings before a court, tribunal or body: however, a case conference certificate is not inadmissible in relevant sentence proceedings or in respect of an appeal under

the *Criminal Appeal Act 1912* or the *Crimes (Appeal & Review) Act 2001*; or in proceedings for an application for plea reversal: s.78(1) and (2).

“Case Conference Material” is defined in s.78(5) as:

- a. *A case conference certificate; or*
- b. *evidence of anything said between the parties, or of any admission made, during a case conference; or*
- c. *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 to offers made to or by, an accused person.*

11. There is a prohibition on the publication of case conference material: s.80.

12. Importantly, the disclosure of any information during or in relation to a case conference is not, for the purposes of s.22A of the *Crimes (Sentencing Procedure) Act 1999*, a pre-trial disclosure and cannot therefore be used to argue a lesser penalty: s.81.

7. Division 6 – Examination of Prosecution Witnesses – ss.82 - 92

1. This division replaces the former sections 91 and 93 which provided for applications to cross-examine prosecution witnesses and/or alleged victims. The “substantial reasons in the interests of justice” test still applies in relation to prosecution witnesses as does the “special reasons” test in relation to alleged victims.
2. The magistrate may take into account “inadmissible evidence” for the purpose of determining any application: s.82(6).
3. In broad terms, this division is similar to the former apposite division.

8. Division 8 – Committal for Trial or Sentence – ss.95 – 98

1. The magistrate is to commit the accused person for trial or sentence after the case conference certificate is filed under division 5, or if a case conference is not required to be held in the proceedings, after the charge certificate is filed under division 4: s.95(1).
2. Notwithstanding, a magistrate may commit an accused person for sentence before a charge certificate is filed, if the prosecutor required to file the charge certificate advises the magistrate that the prosecutor consents to the accused person being committed for sentence for that offence, or if a charge certificate has been filed but no case conference has yet been held: s.95(2).
3. An accused person may at any time during the committal proceedings plead guilty to an offence and the magistrate may accept or reject the plea, however,

the magistrate must not accept a guilty plea before the time at which an accused person may be committed for sentence under s.95.

9. Sentencing Discounts for Guilty Pleas to Indictable Offences

1. The new discount regime is set out in Division 1A [ss.25A – 25F] of the yet to be proclaimed Crimes (*Sentencing Procedure*) Act 1999. The new division 1A sets out the framework for the fixed mandatory sentencing scheme under the EAGP Reform. The Division only has limited exceptions and variations to the scheme.
2. The sentencing discount scheme will not apply to sentencing proceedings for certain children and young people, as well as sentencing proceedings for Commonwealth offences: s.25A.
3. In Division 1A:

“Negotiations Document” means:

- a. If an offender was represented by an Australian legal practitioner in proceedings:
 - i. a case conference certificate (including any later plea offer) filed in committal proceedings for the offence concerned under the Criminal Procedure Act 1986; or
 - ii. any other document, served on the prosecutor in proceedings for the offence following committal for trial or sentence, that records an offer made by the offender to plead guilty to an offence specified in the document; or
 - b. if an offender was not represented in proceedings, any document served on the prosecutor in the proceedings that records an offer made by the offender to plead guilty to an offence specified in the document.
4. Section 25D – Sentencing discounts for guilty plea for offences dealt with on Indictment provides as follows:

(1) Mandatory nature of sentencing discount

In determining the sentence for an offence, the court is to apply a sentencing discount for the utilitarian value of a guilty plea in accordance with this section if the offender pleaded guilty to the offence at any time before being sentenced.

(2) Amounts of sentencing discounts

The discount for a guilty plea by an offender (other than an offender referred to in sub-section (3) or (5) or section 25E is as follows:

- (a) a reduction of 25% in any sentence that would otherwise have been imposed, if the plea was accepted by the magistrate in committal proceedings for the offence;
 - (b) a reduction of 10% in any sentence that would otherwise have been imposed, if the offender was committed for trial and the offender:
 - (i) pleaded guilty at least fourteen (14) days before the first day of the trial of the offender; or
 - (ii) complied with the pre-trial notice requirements and pleaded guilty at the first available opportunity able to be obtained by the offender;
 - (c) a reduction of 5% in any sentence that would otherwise have been imposed, if paragraphs (a) or (b) does not apply.
- (3) Discount variations – new count offences (ex officio Indictments) or new/additional counts in the Indictment have a similar sentencing regime: s.25D(3).
5. Section 25E – Sentencing discounts to apply in certain cases where guilty plea offer made for different offences and refused when made – is set out below:

(1) *Discount where offer not accepted*

In determining the sentence for an offence, the court is to apply a sentencing discount in accordance with this section if:

- (a) the offender made an offer recorded in a negotiations document to plead guilty to an offence; and
- (b) that offence (the “**different offence**”) was not the offence the subject of the proceedings when the offer was made; and
- (c) the offer was not accepted by the prosecutor; and
- (d) the offer was not subsequently withdrawn; and
- (e) the offender was found guilty of the different offence or an offence that is reasonably equivalent to the different offence.

*For the purposes of this sub-section, an “**offence is reasonably equivalent to a different offence**” if:*

- (a) the facts of the offence are capable of constituting the different offence; and
- (b) the maximum penalty for the offence is the same or less than the different offence.

(2) *Discount where offer later accepted*

In determining the sentence for an offence, the court is to apply a sentencing discount of the utilitarian value of a guilty plea in accordance with this section if:

- (a) *the offender made an offer recorded in a negotiations document to plead guilty to an offence; and*
- (b) *that offence “**the different offence**” was not the offence the subject of the proceedings when the offer was made; and*
- (c) *the offer was refused but accepted by the prosecutor after the offender was committed for trial; and*
- (d) *the offender pleaded guilty to the different offence at the first available opportunity able to be obtained by the offender.*

(3) *Discount Variation – Offer to Plead Guilty to Different Offence*

The discount to be applied by the court is as follows:

- (a) *a reduction of 25% in any sentence that would otherwise have been imposed, if the offer was made before the offender was committed for trial;*
- (b) *a reduction of 10% in any sentence that would otherwise have been imposed, if the offer was made after the offender was committed for trial and at least fourteen (14) days before the first day of the trial of the offender;*
- (c) *a reduction of 5% in any sentence that would otherwise have been imposed, if the offer was made less than fourteen (14) days before or on or after the first day of the trial of the offender.*

6. Section 25F provides as follows:

(1) *Application*

This section applies to a sentencing discount under this division.

(2) *Exception to application of discount – level of culpability*

The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines, on its own motion or on the application of the prosecution, that the discount should not be applied or should be reduced because 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 a penalty with no allowance for, or a reduction of, that discount.

(3) *If a case conference certificate was filed in committal proceedings for the offence, a prosecutor is not entitled to apply to the court for a determination that the discount should not be applied or should be reduced unless the certificate records that the prosecutor notified the offender’s legal representative, at or before the conference of the intention to make the application.*

(4) *Exception to application of discount – disputed facts*

The court may determine not to apply the sentencing discount, or to apply a reduced sentencing discount, if the court determines that the discount should not be applied or should be reduced because 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.

(5) *Offender to establish grounds of discount*

The burden of establishing the grounds exist for the sentencing discount lies on the offender and must be proven on the balance of probabilities.

(6)

(7)

(8)

(9) *No discount where life sentence*

A sentencing court must not allow any discount under this Division for a guilty plea if the court determines a sentence of life imprisonment.

Comment on this Division:

- a This is an extraordinary provision in my view. Notwithstanding that technically, as the position currently stands, it is entirely a matter for the judge to determine the % discount to apply in a given case, I have never heard of a case where there was agreement between the Crown and the defence as to that %, but that sentencing judge overrode that agreement.

Is it more likely to happen under the EAGP reform given the expressed legislative intention? We will have to wait and see but I fear it may!

- b It is questionable, what, if any, incentive discount limited to 5% will be to encouraging a plea on the first, or subsequent, day of a trial. There are many instances where even a late plea can have very substantial utilitarian value and associated saving to the State. It may be observed that in the UK, recently adopted legislation applies a discount of 33% for pleas in the equivalent to our local courts; and a discount of 20% post committal in the superior court at arraignment; with a substantial drop down to 13% thereafter.
- c Legal representatives will have to be vigilant in advising clients in respect of Indictable matters in the Local Court and particularly, in relation to any plea offer negotiations. Legal representatives will have to ensure that the accused is made aware of the possibility when it comes to sentence that the sentencing court may, on its own initiative, determine that the level of culpability of the offender is such that the statutory discount regime should not apply. As to the prosecution making such an application, at least, the prosecutor will not be able to do so unless the conference certificate records

that the prosecutor gave notice to the offender's legal representative; at which time, in that event, it would be a red flag to the lawyer and to the offender.

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