



ODPP
New South Wales

EARLY APPROPRIATE GUILTY PLEAS PROJECT

Elements of the EAGP Legislation

as presented at the
December 2017 Solicitor's Conference
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Slides accompany film clip of presentation



The EAGP legislation:

- ❑ a new procedure for committal proceedings in the Local Court
- ❑ the introduction of a statutory sentencing discount regime
- *The Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017 was passed by Parliament in October 2017 and commences 30 April 2018*
- *The Act amends the Criminal Procedure Act 1986, the Crimes (Sentencing Procedure) Act 1999 and the Children (Criminal Proceedings) Act 1987 and other associated Acts.*
- *It applies to proceedings commenced after 30/04/18, regardless of when the offence was committed.*



5 elements to the 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
 - ❑ 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*
1. A statutory sentencing discount scheme is introduced



New committal procedure: s.55

Current sections 55-108 are omitted and new sections 55-104 are inserted.

1. Committal proceedings are commenced by the issuing and filing of a court attendance notice
2. A brief of evidence is served on the accused person
3. 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
4. If the accused person is represented, 1 or more case conferences are held by the prosecutor and the legal representative for the accused person
5. If the accused person is represented, a case conference certificate is filed in the Local Court
6. The accused person pleads guilty or not guilty to each offence being proceeded with, and the matter is committed for trial or for sentence

What will be in the police brief?

- 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)].
- The material contained in the brief of evidence is not required to be in an admissible form [s.62(2)]
 - a presumptive drug result,
 - a notebook statement (where appropriate)
 - or a preliminary DNA result.
- A new brief protocol is currently being negotiated with NSW Police.

From charging to charge certification

1. Brief complete

The brief is served on the DPP and the accused

→ → → the matter is adjourned for charge certification

(It is anticipated that the adjournment period for charge certification will be 6 weeks)

2. Preparation towards charge certification

Allocation

→ → → Solicitor with carriage prepares report for charge certifier

3. Charge certification

Charges settled and DPP appears

→ → → Charge certificate filed and 1st appearance of DPP

What is charge certification?

- The prosecutor must certify two things [s.66(2)]:
 - i. 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
 - ii. 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.



Quick questions

Do I still have to do a charge certificate if the accused wants to plead guilty prior to charge certification?

- No. A Magistrate can commit an accused person for sentence before a charge certificate is filed if the prosecutor consents to a person being committed for sentence for an offence [s.95(2)].

What do I do if an accused wants to PG straight away but all my charges are wrong and I haven't had a chance to review the brief?

- A Magistrate must not accept a plea of guilty before the time, and in the circumstances, provided for by s.95 [s.97(2)]

What happens if the accused is unrepresented?

- The Prosecution is required to file a charge certificate in all committal proceedings, and it will need to be served on the accused person.

What has to be done?

- A senior prosecutor will certify the charges that will proceed to trial.
- The Solicitor with Carriage will be required to screen the brief and prepare the matter for charge certification by the charge certifier:
 - identification of factual and legal issues
 - may involve the need to issue requisitions (although it is hoped that this will be exception as the evidence need not be in admissible form)
 - may involve the need to conference a complainant or other important witnesses
 - written report recommending charges to be certified

There is an expectation that there will be no change to the offences that proceed to trial.

What happens if the prosecution fails to file a charge certificate?

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.

Note: the 6 month timeframe does not apply if a warrant has been issued.

The charge certificate has been finalised, what next?

- The DPP will appear at court following the filing of the charge certificate
- If the accused is legally represented, the Magistrate will adjourn the matter for a case conference to be held
- 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)

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)].

How will case conferences happen?

- It is anticipated that the new PN will direct that once the charge certificate has been filed, at the mention to confirm that the Prosecution has filed the charge certificate, the matter will be adjourned for a case conference:
 - 6 weeks for the case conference to occur
 - Further mention in 8 weeks (to allow for any additional matters to be attended to, and preparation and signing of the case conference certificate by the parties).
- 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 programme from computers in our offices
- It is anticipated that the Regulations will provide that an accused person must be present at a case conference, but that presence will be defined as being available either on the phone or via AVL.
- 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).
- This will enable defence to be able to dial in to speak with their clients, and also dial in to speak with our Office separately (ie. we will not be in an AVL meeting with both the accused and defence at the same time).
- The ODPP will not participate in case conferences with an accused person present, in any way, for safety reasons.
- Legal Aid will have the capacity to make bookings for their own staff, and also the private profession (if they want assistance making the booking), at their case conferencing hub. They will also have new AVL suites that can be used by either their staff, or the private profession, to participate in case conferencing.

What does 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)].
 - Legal Aid have advised that it is likely that they will require the first 15 minutes of a case conference to confirm their instructions with the accused.
- *The ODPP's position is that we will not dial in to a case conference until the time that defence are ready to engage in discussions with the ODPP.*
- *If defence are utilising lengthy periods of the case conference time to obtain instructions, our Office will either reschedule the case conference or, if possible, dial in at a later stage to conduct the case conference on the same day.*

What happens after the case conference?

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

Quick questions:

- *What if I can't conduct the case conference because defence refuses to engage?*

If defence unreasonably fails 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)].

- *What if we fail to engage in case conferencing or fail to file a case conferencing certificate?*

If we 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)].

What is to be included in the case conferencing certificate?

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 with which the prosecution will proceed (on indictment or on a s.166 certificate)
 - Any plea offers by the accused
 - Any plea offers by the prosecution
 - Indication whether the accused or prosecution has accepted any such offer
 - How each of the offences will proceed (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

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]

Declarations by the legal representative and the accused

- The case conferencing certificate must also contain a declaration by the legal representative that they have explained to the accused the following matters specified in 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%): [s.75(2)(a)]
- 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)]

The statutory discount regime

- Division 1A is inserted into the *Crimes (Sentencing Procedure) Act 1999*
 - Sections 25A-25F prescribe the mandatory discounts to be afforded
- Two notable exceptions:
 - Commonwealth offences, and
 - Offences committed by juveniles

The discounts

Discounts for offences dealt with on indictment

- 25% PG is entered prior to committal: s.25D(2)(a)
- 10% PG is entered at least 14 days before the first day of trial:s.25D(2)(b)
 - If the accused serves notice on the prosecutor of an intention to enter a PG at least 14 days before trial, and enters a plea of guilty as soon as practicable, then this satisfies the requirement
 - The first day of trial means the first day fixed for the trial i.e. the date that the court lists the matter for trial.
- 5% PG is entered after that time: s.25D(2)(c)

However, a 25% discount will also be available in the following situations

Ex officio count

Where the accused indicates a PG as soon as practicable after the ex officio indictment is filed: s.25D(3)

However, the 25% discount will not apply where:

a) the evidence that establishes the ex officio count, 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:s.25D(4)(a)

OR

b) the offender refused a plea offer made by the prosecutor to PG to the offence (the ex officio count) and that offer was recorded in the case conference certificate: s.25D(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.25D(5)

25E- sentencing discounts where:

Guilty plea offer not accepted and accused convicted (of that offence):s.25E(1)

The following conditions apply:

- a) The defence offer was recorded in a negotiations document;
- b) That offence (the **different offence** to which the accused offered to PG to) was not an offence the subject of the committal proceedings;
- c) The offer was not accepted by the prosecutor;
- d) The offer was not subsequently withdrawn by the accused; and
- e) The offender was found guilty of the **different offence** or an offence that is reasonably equivalent to the **different offence**

The Act provides that ***an offence is reasonably equivalent to a different offence*** if:

- 1) The facts of the offence are capable of constituting the different offence, and
- 2) The maximum penalty for the offence is the same or less than the different offence.



25E- sentencing discounts where:

Guilty plea initially rejected by prosecutor (but later accepted):s.25E(2)

The following conditions apply:

- a) The defence offer was recorded in a negotiations document
- b) That offence (the **different offence** to which the accused offered to PG to) was not an offence the subject of the committal proceedings
- c) The offer was refused but accepted by the prosecutor after the offender was committed for trial
- d) The offender pleaded guilty to the **different offence** at the first available opportunity able to obtained by the offender

25F-Exceptions to the 25% discount

Extreme moral culpability

- Community interest in retribution, punishment, community protection and deterrence cannot be met by application of the discount [s.25F(2)]
- Prosecution not entitled to apply to the court for a determination that the discount not apply (or be reduced) unless the case conference certificate records that the prosecutor intended to make the application [s.25F(3)]

Disputed facts not resolved in favour of offender

- Discount not to be applied (or reduced) by reduced utility of the plea because of a dispute on the facts [s.25F(4)]
- The offender bears the onus for establishing that grounds exist for the sentencing discount [s.25F(5)]

Other sentencing provisions

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)]

No discount for a guilty plea where the Court determines a sentence of life imprisonment [s.25F(9)]

Examination of prosecution witnesses in committal proceedings

Section 82: Magistrate may direct witness to attend if there are substantial reasons

- An application can only be made after the charge certificate has been filed [s.82(3)]
- It is anticipated that the PN will also require that a case conference be held before any application to call witnesses

Section 83: Witnesses who may not be directed to attend:

- complainants in prescribed sexual proceedings with a cognitive impairment, and
- child complainants in child sexual assault offences

Section 84: Victim witnesses generally not to be directed to attend unless there are special reasons

Note: Because the committal test has been abolished, what will amount to substantial or special reasons is unclear given that there is no power for a Magistrate to discharge an accused.

Evidence of prosecution witnesses

- Evidence of witnesses to be given orally [s.85(1)]
- Evidence may be given by a written statement if:
 - the accused and prosecutor consent to the statement being tendered, or
 - the Magistrate is satisfied there are substantial reasons in the interests of justice, the evidence should be given by a statement [s.86(1)]
- Evidence may be given by a DVEC [s.85(2)]

Fitness: Division 7

- Sections 93 and 94 apply where the issue of fitness to plead is raised in the Local Court:
 - Question of unfitness can be raised by either accused, prosecutor or the Magistrate [s.93(2)(a)]
- Magistrate is satisfied that it has been raised in good faith: [s.93(2)(b)]
- The Magistrate may require a psychiatric or other report relating to the fitness issue before committing a person to the District Court: [s.93(3)]
- The Magistrate may only commit a person for trial if a charge certificate has been filed by the Prosecution:[s.94]

Children

The new provisions apply to SCIO.

- Committal proceedings are unchanged for children (the committal test for remains for *indictable* offences), but the committal provisions are now included in the *Children (Criminal Proceedings) Act 1987*: sections 31A-L.
- There are some changes to those provisions and some have been reworded, so it is advisable to look at them closely if you are seeking to commit a non-SCIO offence for trial.
- Where a young person is charged with an indictable offence and the young person advises the Children's Court at any time before the close of the prosecution case that they wish for their matter to proceed at trial according to law:
 - s.31(2A) now provides that the proceedings are to continue for the purpose of completing all of the evidence of the prosecution
 - This provision was introduced to avoid the Prosecution having to call the evidence again in committal proceedings.

Summary

- We will now have to certify each charge that proceeds to the District Court against each accused person
- There will be an expectation that there will be no change between the certified charges and the charges that run to trial
- Case conferencing will be mandatory
- We will have a total of six (6) months from the first return date of the CAN to commit matters for trial, or they can be dismissed
- There will be a new Practice Note setting timeframes for charge certification, case conferencing, and committal
- Statutory sentencing discounts will be implemented
- There are new provisions relating to fitness and the way that matters will be dealt with in the Children's Court