One year of early appropriate guilty pleas?

Perspectives on the early appropriate guilty pleas amendments

By Belinda Baker

In 2014, the New South Wales Law Reform Commission observed that while most criminal matters in the District Court were resolved by a guilty plea (83% in 2013), the vast majority of those (66% in 2012/ 2013) occurred on the day of trial. The Commission noted that such late pleas caused considerable inefficiency and delay.

The Early Appropriate Guilty Plea (EAGP) reforms were enacted as a response to these concerns. The legislation – the *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* and the *Criminal Procedure Amendment (Committals and Guilty Pleas) Regulation 2018* – amend the *Criminal Procedure Act 1986*, the *Children (Criminal Proceedings) Act 1987*, the *Crimes (Sentencing Procedure) Act 1999* and other Acts. The legislative reforms are supplemented by the relevant Practice Notes of the Local Court and Children's Court.

The reforms include:

- Early disclosure of a 'simplified' brief of prosecution evidence;
- prosecutors with delegation being briefed at an early stage for the purpose of charge certification, and with the intent that that prosecutor remain in the matter to finalisation;
- Mandatory case conferencing in the Local Court, to enable the prosecutor and the defence lawyer to discuss the case at a formal meeting to enable early dispute resolution;
- Fixed sentence discounts for the utilitarian value of guilty pleas (25% discount where the plea is entered in the Local Court; 10% discount for a plea entered up to four days before the first day of the trial; and a maximum of 5% in other circumstances); and
- The abolition of a Local Court magistrate's power to discharge an accused person upon assessment of the evidence, with the power to direct witnesses to give evidence retained.

> *'From the evidence we believe that it is not an overstatement to say that indictable proceedings have major systemic issues and are presently in, or approaching, a state of crisis',*
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> *New South Wales Law Reform Commission, Encouraging Early Guilty Pleas, Report 141 (2014).*

The reforms, which apply to all strictly indictable charges and those charges which the prosecution has elected to deal with on indictment, commenced on 30 April 2018.

The reforms have resulted in significant changes to the New South Wales criminal justice system. It is essential that all counsel practising in criminal law in New South Wales are aware of the reforms, and the practical operation of the regime.

In this article, Chief Judge Price provides an overview of the EAGP reforms from the perspective of the District Court. The Director of Public Prosecutions, a Deputy Senior Public Defender and experienced counsel in private practice provide their perspectives on the practical operation of the scheme, as well as providing advice to practitioners in conducting criminal cases under the new regime.

Justice D Price AM

Chief Judge of the District Court of New South Wales

President of the Dust Disease Tribunal of New South Wales

An overview of early guilty pleas from the perspective of the District Court

The early involvement of Crown prosecutors in serious criminal offences by the introduction of the Early Appropriate Guilty Plea Reform package ('EAGP') is a significant improvement in the criminal justice system for State offences. There have been too many occasions in the past when neither a Crown prosecutor nor counsel for an accused has been briefed until shortly before the commencement of a trial. The consequences of late briefing include last minute plea negotiations, amendments to indictments, non-compliance with notice requirements under the *Evidence Act 1995* (NSW), service of additional evidence and lack of agreement as to issues in dispute at trial.

Delay in finalising criminal charges adds to the distress of victims, witnesses, accused persons, particularly those in custody, and creates additional public and private costs in trial preparation and the assembly of jury panels. Delayed plea negotiations disadvantage accused persons as the discount for the utilitarian value of the plea has been determined largely by the timing of the plea: see *R v Borkowski* (2009) 195 A Crim R 152; [2009] NSWCCA 102.

The EAGP scheme places an obligation on the Director of Public Prosecutions (which will usually be exercised by senior prosecutors) to specify the offences that are to be the subject of proceedings against the accused. The charge certification process in the Local Court undertaken under Ch 3, Part 2, Division 4 of the *Criminal Procedure Act 1986* (NSW) ('the CPA') will do much to ensure that accused persons are appropriately charged and 'not overcharged' by NSW Police. It will also give case ownership

and responsibility to a senior prosecutor and solicitors from the Office of the Director of Public Prosecutions ('ODPP').

The Director's intent to give a senior prosecutor ownership of a serious criminal case from 'cradle to grave' is laudable, but I apprehend it will be difficult to achieve given the large criminal caseload.

Charge certification, the mandatory utilitarian discount of 25% for a guilty plea entered in the Local Court and the maximum cap of 10% in the District Court should focus the parties on fully understanding and identifying the issues in proceedings. With that understanding, the accused's legal representative is expected to fulfil the mandatory obligation under s 72 of the CPA to obtain instructions concerning the matters to be dealt with in the case conference held under Ch 3, Part 2, Division 5 of the CPA.

Fundamental to the success of the case conference are the adequacy and timeliness of the briefs of evidence. The requirements for prosecution disclosure are found in Ch 3, Part 2, Division 3 of the CPA. I understand that the ODPP is working closely with NSW Police to ensure compliance with the disclosure requirements and in particular towards the production of short form expert certificates in areas where delays are being experienced.

Initial results from case conferences are promising. They disclose an increase in guilty pleas and summary finalisations in the Local Court. However, it is too early to draw any definite conclusions about the success of the principal objective of the case conference, which is to determine whether there are any offences to which the accused is willing to plead guilty.

A case conference has other objectives. In particular, s 70(3)(b) provides:

> (3) A case conference may also be used to achieve the following objectives:
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> (b) to facilitate the resolution of other issues relating to the proceedings against the accused person, including identifying key issues for the trial of the accused person and any agreed or disputed facts.

It is evident from the enquiries made during readiness hearings in the District Court that the opportunity to resolve issues in the proceedings during the case conference is often overlooked.

The identification of issues in dispute is consistent with a barrister's obligation under r 58 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) to:

(a) confine the case to identified issues which are genuinely in dispute,

(b) have the case ready to be heard as soon as practicable,

(c) present the identified issues in dispute clearly and succinctly,

(d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case, and

(e) occupy as short a time in Court as is reasonably necessary to advance and protect the client's interests which are at stake in the case.

Counsel for an accused should be mindful that the identification of key issues in the trial and agreement as to facts might be of assistance on sentence should the outcome of the trial be adverse to an accused. Lesser penalties may be imposed for facilitating the administration of justice pursuant to s 22A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

As to difficulties being experienced by the hours available for an accused in custody to attend a case conference by audio visual link ('AVL'), Corrective Services have been asked to extend their hours so that AVL may be available from 8am (and possibly earlier).

The EAGP scheme may provide a 'springboard' for further reform of the criminal justice system. There is both a public and private interest in reducing delays in the finalisation of serious criminal offences.

Lloyd Babb SC

Director of Public Prosecutions (NSW)

The prosecution perspective

Background

When the Early Appropriate Guilty Plea reform package came into effect on 30 April 2018, it introduced the most significant changes to the criminal justice system in New South Wales since the creation of the Office of the Director of Public Prosecutions (ODPP) in 1987. Since that time, and in preparation for those changes, my Office has undergone a period of unprecedented transformation both in terms of internal processes and organisational structure.

Under EAGP, the committal process begins with an assessment of whether the originating charges as laid by police are correct.

The EAGP reform, which aims to encourage the entering of guilty pleas in committal matters at an earlier stage, features several key activities which are to be undertaken while the matter is still in the Local Court. Each of these activities requires the significant involvement of Crown prosecutors and solicitors within my Office.

These include:

1. the service and screening of a simplified brief of evidence;
2. charge certification by a senior prosecutor; and
3. attendance at a mandatory case conference.

In the higher Courts, the EAGP reform introduces a statutory sentence discount scheme. The changes also aim to achieve greater continuity of representation throughout the life of a prosecution.

Given my Office's position at the cornerstone of each of these elements, the impact of the EAGP suite of reforms on the operations of my Office has been substantial. Most notably, the abolition of the committal decision by a magistrate has required the Crown to take on the important role of gatekeeper in determining what charges are to be committed.

Benefits of the early involvement of a senior prosecutor at charge certification, case conference and beyond.

As part of the EAGP changes, Crown prosecutors from all over the State have been taking ownership of serious criminal cases at the Local Court stage. When the EAGP brief arrives at the ODPP, a solicitor and senior

prosecutor (which may include a Crown prosecutor) are assigned to the case and from that time forward, the senior prosecutor remains briefed to run the trial (should the matter not resolve by way of a guilty plea). The prosecution team will then maintain ownership of that case until completion. In order to achieve continuity, the cooperation and support of the judiciary in taking into account the Crown's availability (where appropriate) in the higher Courts will be required.

Under EAGP, the committal process begins with an assessment of whether the originating charges as laid by police are correct. The senior prosecutor will consider what the most appropriate charges are and inform the police, the defence and the Court of their decision through the filing of a charge certificate in the Local Court. Charge certification is not the end of the consideration about what charge (or charges) adequately reflects the criminality of the alleged offending, it is merely the start of that process.

Once a charge certificate has been filed, the senior prosecutor will then engage with defence counsel at a mandatory case conference to explore options for resolving the matter by way of an early appropriate guilty plea or, if the matter is to be contested, to narrow the issues for trial. The difference between an EAGP mandatory case conference and its previous iteration, commonly referred to as the Criminal Case Conferencing Pilot, is that defence counsel must ensure their client is available to give instructions if necessary during the period in which the meeting takes place. While the defendant does not attend the conference itself, they must be accessible throughout.

Early ownership of serious criminal cases by a senior prosecutor who will run the trial holds many benefits for the criminal justice system. For defence counsel, it means the prosecutor will be briefed to consider the matter in Local Court and the charges to be proceeded on will be settled in advance. Further, the attendance of both the senior prosecutor and defence counsel at a formal face to face case conference provides greater opportunities for more meaningful discussions about the future direction of a matter.

Early involvement of a senior prosecutor also removes the risk of a perception by a defendant that closer to trial another prosecutor will bring a different or more pragmatic approach to the running of the case. For victims of crime, it provides them with continuity of the same prosecutor team who is responsible for handling of the case from beginning to end.

The feedback I have received from prosecutors involved in case conferences is that the discussions that are occurring are very similar to the discussions that have often occurred in the weeks leading up to the listed trial date. Participants on both sides are coming to the case conference with a real understanding of the strengths and weaknesses of the case and are trying to resolve the matter (if it is appropriate to do so).

The only issue that has been experienced with case conferences to date (and which may have some impact on its success) is the limitation in the hours available to conduct conferences where the defendant is in custody. In those cases, the case conference can only be held between the hours of 9am and 3pm. This presents a challenge to all trial lawyers. Unless the senior prosecutor is excused from Court to attend the conference while their trial is running, or unless the conference can be rescheduled, then the solicitor allocated to the matter may be required to attend the conference in his or her absence. This is particularly problematic for the Crown in matters that involve multiple defendants who are in custody. In the majority of such cases, a separate conference will need to take place for each individual defendant, all of which will require the attendance of same senior prosecutor.

Positive early signs

I have long advocated in favour of a criminal justice system that facilitates early charge certainty, ongoing case management and lifelong continuity. I am therefore pleased to note that the preliminary results for EAGP matters provided thus far demonstrate an increase in Local Court resolution and committals for sentence, and a decrease in matters being committed for trial. While the reform is still in its infancy, this indicates the expected impact of the changes is moving in the right direction.

I am buoyed by these early positive signs and remain confident that the changes brought about as a result of EAGP will continue to reap benefits for all participants and stakeholders in the criminal justice system in the months and years to come.

Sharyn Hall, Rose Khalilizadeh and Phillip Boulten

The EAGP experience for defence practitioners at the private bar

Some of the positive aspects of the scheme include the earlier service of the brief; early conversations between parties; a Crown prosecutor being briefed early; and the prosecution being able to discuss fair and appropriate pleas, encouraging early pleas. Unfortunately, the transition to the scheme has not been seamless. Some common issues are emerging:

- Lack of flexibility in timing of case conferences, where, e.g., a barrister blocks out time for a case conference, but where the prosecutors can only conduct the case conference outside of Court hours and hence outside of AVL hours. As many members of the private Bar book conferences on days when they are not in a trial, prosecutors should be permitted to apply the same level of flexibility in scheduling;
- The prosecution not seeking the views of victims, stakeholders or Director's chambers prior to case conference (even preliminary views);
- The prosecution not considering appropriate disposition of the matter and relying on the accused to propose options, not being willing to discuss the prosecution's views during the conference and asking the accused to reduce their plea offers to writing for later consideration;
- The prosecution not being briefed with flexible options as to plea arrangements so as to encourage the entering of a plea deal, but rather forcing the accused into inflexible or unnecessarily harsh plea

arrangements, which are not in the spirit of negotiation;

- Corrective Services not facilitating AVL or phone link-ups outside of a narrow window of hours, limiting the scope of availability for the parties to participate in a case conference i.e., compliant with the regulations; and
- The discount scheme (and s 72 obligations upon practitioners) being difficult to explain to an accused who is cognitively impaired or otherwise mentally affected.

Like most things, much depends on who is appearing for the Crown. Defence lawyers have run the whole gamut of very positive to less than impressive experiences. The first thing to note is that it is still possible to do things the old-fashioned way. Early representations can still be made before the case conference, so each party knows the other's 'final' position by that time.

Some Crowns have been very proactive in conferencing the complainant and getting instructions from the police before the case conference. Sometimes this still needs to be finalised after the case conference, but the groundwork has been laid.

But, some case conferences occur without prosecutors thinking about the likely disposition of charges, requiring written representations afterwards. In some cases, charges are seemingly certified simply on the basis that they were charged by the police in the first place and without giving due consideration to the evidence in the brief.

The first thing to note is that it is still possible to do things the old-fashioned way.

Early representations can still be made before the case conference ...

Even where the client is determined to plead not guilty, it is still important to use the process to establish the matters in dispute and to liaise with the Crown about further material to be served and any notices that might be relied on; tendency, for example.

It is important to go to each case conference with instructions and if those instructions are to negotiate the charges, to be clear about what those charges are.

You need to be in a position to state what you want in order to protect your client's ultimate position. Some Crowns have been very willing to consider all options and it has been possible to keep some matters in the Local Court even if the client has not accepted the charge disposition offered by the Crown.

Defence lawyers do, though, find inflexibility in the Court timetable frustrating. For example, when issues of fitness or a possible defence of mental illness are raised, magistrates ought to allow time for these issues to be resolved in the Local Court in order to protect the client's options – and importantly, their discount should the client decide to plead guilty.

Consistency is the key to the scheme's effectiveness; in the approach taken by the prosecution, in the practice of serving of the brief, and in case management.

Encouraging efficiency in a complex justice system is no easy task. Inevitably, there will be teething problems and the need for revision.

Addressing these concerns would not only result in greater effectiveness of the scheme, but also reduce the costs to the criminal accused (whether privately funded or funded by Legal Aid or the Aboriginal Legal Service).

Richard Wilson

Deputy Senior Public Defender

The EAGP scheme – the public defenders' perspective

The public defenders appear for legally aided accused persons in serious criminal matters in the higher Courts across the State. This includes clients of the Aboriginal Legal Service and community legal centres. public defenders provide telephone advice to defence barristers and solicitors in relation to legally aided criminal matters and have exposure, directly or indirectly, to a wide range of criminal cases.

The Early Appropriate Guilty Scheme, or EAGP, commenced on 30 April last year. It is a complex and multi-faceted scheme which includes the abolition of contested committal hearings. It is assumed that the reader has a basic knowledge of its workings. Links to relevant articles and information are available on the public defenders' website (see breakout within this article).

The goal of the scheme, as is apparent from the name, is to encourage early pleas of guilty in appropriate cases. Broadly speaking (and there are important exceptions), the scheme is designed to encourage accused persons to plead guilty early by providing:

> a 'carrot': a guaranteed 25% discount for a plea entered before committal;
>
> and
>
> a 'stick': a cap of a 10% discount thereafter, further reducing to 5% after four days out from the first day of trial.

It is also intended to encourage the prosecution, before committal, to make any appropriate decisions to discontinue proceedings and to accept pleas to appropriate charges (not just the most serious possible charges which fit the alleged facts at their highest). There is, however, nothing in the scheme which provides any particular incentive for the prosecution to do so.

The scheme is not designed to increase the overall number of pleas of guilty nor, therefore, to reduce the number of trials which actually run. It is designed to minimise the number of matters which are listed for trial, and which occupy a position in the trial diaries of the District and Supreme Court, but which result in a late plea or no bill.

The public defenders, from the outset, were concerned about some practical aspects of the scheme. The main concerns were about the adequacy of briefs served at the committal stage, the timeliness and continuity of the briefing of Crown prosecutors and about the standard timetable in the Local Court.

Adequacy of briefs

Overall there appear to have been somewhat mixed results, especially in matters which are for committal to the District Court. We are aware of significant numbers of cases where police briefs are served which are inadequate for providing proper advice about the strength of the Crown case and the appropriate charges. In many such cases, the DPP have been making requisitions (very often of their own motion) to obtain what is needed. However in others, including at least one murder, the provision of further material has been resisted. This appears to be a false

economy on behalf of police, who will need to prepare a full brief in any event if the matter cannot be resolved by a plea.

As any criminal lawyer knows, every accused person – from those who are stridently asserting their innocence to those who are admitting their guilt – requires a meaningful answer to all three of the following obvious questions (distilled to their crudest and most basic form):

1. 'What are my chances?'
2. 'What will I get if I lose?'
3. 'What will I get if I plead guilty?'

There are some other questions - slightly less obvious but equally important – which often need to be answered even if not directly asked:

4. 'Based on my account of what happened, do I have a defence? Does it mean I'm guilty of something else?'
5. 'What are my chances of being found guilty of something else (other than the most serious offence charged)?'
6. 'What will I get if I'm found guilty of something else?'
7. 'What will I get if I plead guilty to something else?'

Usually, no useful answer can be given to all of these questions without an adequate police brief. These questions are of great significance to the EAGP scheme, where there are both ethical and legal obligations to provide advice (see s 72 of the *Criminal Procedure Act 1986*).

The briefing of Crown prosecutors

One of the features of the scheme (although in no way enshrined in the legislation) is that the Crown prosecutor (or trial advocate) who certifies the charge is meant to be the same person who ultimately appears for the Crown at trial, thus taking 'ownership' of decisions. We understand that Crown prosecutors and trial advocates are not always briefed, or adequately briefed, in time to allow meaningful negotiations at case conferences.

It is too early to make any definitive comment on continuity of briefing, but we suspect that it will be quite difficult to achieve. Things seem to be a little more hopeful in the regions where continuity has historically been much better than in Sydney.

However, one issue is concerning. We are aware of a number of cases in which charges have been certified where the evidence contained in the brief does not support a *prima facie* case in relation to at least some charges. Under the old committal scheme, this would have resulted in discharge at a 'paper committal'.

In at least one of these cases, it appears that charges may have been certified when neither the Crown prosecutor nor the ODPP solicitor had read the brief. A fundamental aspect of the scheme is the requirement for a prosecutor to certify 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' (s 66(2)(a) of the *Criminal Procedure Act 1986*). It may be that, given their case load, some prosecution lawyers have insufficient time to read and analyse the brief in the timeframe set by the Court under the scheme. Whatever the cause, any such failures to comply with the requirements of the scheme are both unfair to defendants and detrimental to the success of the scheme itself.

Despite these troubling cases, the general impression overall is that there has been a noticeable change in the availability of Crown prosecutors and DPP trial advocates before committal and that fruitful discussions are being had in a large number of cases where that would not have been possible prior to the introduction of the scheme.

The standard timetable in the Local Court and necessary adjournments

The 'one size fits all' timetable of the EAGP scheme in relation to service of briefs, charge certification and case conferencing appears to be too long for some simple matters and too short for long and complex matters. This is particularly the case in matters such as murders where, commonly, the defence will need to obtain expert reports or conduct other investigations prior to being in a position to give the required advice. The feedback which we are receiving is that magistrates are usually granting necessary adjournments but are not uncommonly threatening to refuse to do so. In some cases, the prosecution is resistant to adjournments sought by the defence for the purposes of obtaining evidence.

Overall observations

In general, we understand that the practical aspects of the scheme appear to be working tolerably well in a reasonable proportion of cases – with some significant exceptions. Not surprisingly, the more serious the offence, the more likely that an adequate brief will be prepared and that a Crown prosecutor will be briefed early and appropriately.

When considering the various issues which arise about the adequacy of police briefs, the proper briefing of Crown prosecutors and the granting of adjournments, it needs to be kept firmly in mind that, if a matter is prematurely committed for trial, it is the accused alone who suffers the penalty of having any discount capped at a maximum of 10%.

In the long term there are some important questions which need to be answered in order to measure the true value of the scheme. Hopefully BOCSAR will be able to answer them when their analysis of the EAGP case data is complete:

1. Has the scheme resulted in a significant increase in the proportion of accused persons who plead guilty before, rather than after, a trial date has been fixed in the District and Supreme Courts?
2. Has the scheme increased the proportion of accused persons who actually go to trial because capped discounts have encouraged those who have missed out on the 'carrot', and who might otherwise have considered a late plea, to take their chances at trial?
3. Has it had any effect upon the backlog of trials – in particular in the District Court?

The public defenders, along with all of the other 'stakeholders' in the criminal justice system in this State, await the answer to those questions with great interest.

EAGP: resources for practitioners on both sides of criminal matters

The public defenders have prepared a number of resources to assist practitioners to comply with their legal and ethical obligations under the scheme in the best interests of their clients.

These may be found on the public defenders website https://www.publicdefenders.nsw.gov.au/ and include:

- 'Early Guilty Pleas, A New Ballgame' - A comprehensive explanation of the scheme by former Senior Public Defender Ierace J
- Model explanations to clients designed to comply with s 72 of the Criminal Procedure Act 1986
- A Table of Common Charge options – a 'ready reckoner' of hundreds of statutory and common law offences including maximum penalties, standard non-parole periods, indictable/summary options, time limits and whether they are possible, index offences for child protection registration or future applications under the Crimes (High Risk Offenders) Act 2006
- Links to other important information