



28 April 2011

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The Honourable Stephen Wade MP
Shadow Attorney-General
Parliament House
North Terrace
ADELAIDE SA 5000

Dear Mr Shadow Attorney-General

Criminal Law (Sentencing) (Sentencing Considerations) Amendment Bill 2010

I refer to an email from your adviser, Mr Biar, of 25 March 2011 and thank you for referring the above Bill to the Society for consideration. The Society is encouraged to see what the Government is attempting to achieve through this Bill with "early discounts". However, it has some concerns with the Bill as it is currently drafted and there is a concern that it will not achieve its objective. Indeed, we consider that a regime for early discounts is only a small step along the path to necessary reform in the criminal justice system.

We address our concerns with this Bill and make other comments under the following headings.

No Discount

The principal concern with the Bill is that a discount is not permitted for guilty pleas potentially well before trial commences in the superior courts¹ and within four weeks of trial commencing in the Magistrates Courts² (referred to here as "the no discount period").

We believe that this is counter-productive and is likely to cause more matters to go to trial. It is our view that a discount should be available, at the discretion of the sentencing court as is currently the case, where a guilty plea saves the State time and resources and reduces the burden on those involved in the trial (eg, victims and witnesses).

There are, generally speaking, four phases during the criminal justice process as follows:

- i) investigative (pre-charge)
- ii) brief preparation (post arrest/charge)³
- iii) case preparation (post delivery of brief)
- iv) the trial

Potentially, each phase requires much work and is resource intensive.

¹ s10(5)(d) of the Bill

² s10C(2) of the Bill cf s10C(2)(b)(ii)

³ on some occasions the brief (eg, witness statements and exhibits obtained) will be prepared prior to charge. It is often the case, however, that additional work is required following assessment by the DPP

The first phase is not specifically the subject of the Bill even though it is not unknown for people to volunteer their guilt for crimes that have not yet been uncovered or investigated. Those people should, we believe, be afforded the opportunity⁴ to receive a greater discount than the arrested or charged person who pleads guilty inside the first four weeks following the first appearance date. In our view the Bill should address this scenario by permitting a greater *maximum* discount.

Otherwise, the Bill aims to reduce the time and resources that could be taken up in the final three phases. The problem with the Bill, however, is that the final phase is not sufficiently catered for by not permitting a discount if there has not been a guilty plea during the no discount period. There are a number of concerns with this.

Firstly – and significantly, the Bill does not cater for fault on the part of the DPP or, except in very limited circumstances⁵, the Court. Where, for example, the DPP makes an amendment of substance to the charges or withdraws one or more disputed counts, the defendant will not be entitled to any discount other than that which applies according to the statutory period in which he/she pleads guilty.

As presently framed, the Bill only allows, arguably, an amendment to the charges to help maximise a discount provided one is available: ss10C(4)(e) and 10D(4)(e). It does not give a court the ability to deal with the defendant outside one of the designated statutory periods in which the guilty plea was entered.

This will occasion great unfairness to a defendant because the defendant may justifiably defend a matter that has not been charged or particularised in a way that captures his/her conduct. A defendant should not be prejudiced in any way for failing to plead to an incorrect charge.

We therefore strongly recommend the inclusion of a provision(s) equating amendments of substance with the laying of fresh charges. That is, that the time starts ticking from the moment of the amendment of substance as it should, on our reading of the Bill, if fresh charges are laid.

Secondly – the fundamental premise of the Bill is that defendants who have not pleaded guilty during the no discount period are, in effect, at fault for not doing so. In other words, they are treated as if they could or should have pleaded guilty earlier. This premise is misconceived. There are a myriad of justifiable reasons why a plea may be entered later. For example, a defendant may legitimately believe he/she has a good defence but has an adverse pre-trial ruling (*vis* a rule 9 application – SEE BELOW) / the defendant's case might weaken as a result of certain events (eg, a defence witness becomes uncooperative) / the prosecution case may strengthen / an adverse ruling after seeking the court's intervention on issues such as disclosure (including where privilege or immunity is claimed) / a change in the law, particularly an adverse ruling by a higher court on an unrelated matter / a defendant's personal circumstances might change (eg adverse ruling on another matter with which he is charged and sentenced or financial / family / employment).

A guilty plea by such a defendant which, in turn, will save the State (court, DPP, jury, legal services commission) from running any trial (let alone a long trial), deserves credit reflected in the reduction of the sentence.

There is still much work to be done by the DPP during the no discount period (as there is during a trial in the event of a guilty plea early in the trial). This is particularly so in the superior jurisdiction where the

⁴ whether the maximum discount is warranted will, of course, depend on the circumstances of the case (including the circumstances of the volunteering of guilt, the likelihood of apprehension etc)

⁵ ss10C(3) and 10D(3)

no discount period may be many months before trial. In this regard we note with some alarm that the no discount period commences by reference to a time after the first date fixed for arraignment rather than by reference to the trial. This means that the no discount period could (and will in a not inconsiderable number of cases) commence *prior* to the matter being listed for trial.

A guilty plea during this period (depending on its timing) will:

- save a significant amount of work for the State in preparing the matter for trial;
- save victims and witnesses the time and often the anguish of being involved in the trial preparation process;
- save victims and witnesses the inconvenience of travelling (eg proofing / trial) and the associated cost to the State in witness expenses; and
- importantly, save the enormous cost to all in running a trial.

The fact is, despite the Bill (assuming it becomes law) there will be many defendants who enter the no discount period who may still be inclined to plead guilty. That being so, the unavailability of a discount may well act as a disincentive to a healthy percentage of them. This is likely to lead to trials being run that otherwise would not have been. This is particularly the case where the defendant is not funding the trial, which occurs in the majority of cases. In such cases the defendant has nothing tangible to lose by running the trial and everything to gain (ie, the possibility of an acquittal).

The major concern rests with those who would otherwise have pleaded guilty during the no discount period but who will now take their chances at trial because there is no incentive for them to plead guilty. The end result of this is that it is likely there will be *more* trials than presently is the case. This is obviously counter-productive to the principal object of the Bill.

The same point can be made for defendants who plead guilty during a trial. A guilty plea after one week of a five week trial should not be discouraged by not permitting a discount.

Thirdly – the Bill does not appear to make allowance for the adjournment of a trial that is taken out of the trial list. This could occur, through no fault of the prosecution or the defendant, for several reasons including:

- trial not reached (due to unavailability of a courtroom or a judge);
- unforeseen circumstance resulting in a successful defence application for an adjournment (eg change of legal representation);
- mistrial.

A re-listed adjourned trial will not take place for at least several months. Presently, the longer trials are not listed to commence within 12 months.

Where an adjourned trial is re-listed, and a defendant pleads guilty soon after the adjournment/vacation of the trial date, a significant saving to the State will be made. The matter will otherwise have to be prepared for trial again. Often there is no less work involved in preparing a matter for the second time. Sometimes there will be more work.

A defendant who pleads guilty many months before trial (albeit a second listing) deserves credit for saving the State time and resources. Importantly, an incentive should operate for such a defendant to encourage a guilty plea.

The Bill should be amended to make specific allowance for an adjourned trial.

Fourthly – as already raised, the Bill does not make allowance for an adverse ruling for the defendant at a pre-trial hearing (*vis* a rule 9 application). A defendant may legitimately believe he/she has a defence to the charge and, consequently, not plead guilty. A pre-trial adverse ruling, however, may either remove the defence (eg, a ruling that a record of interview is admissible) or tip the scales in favour of the prosecution. In the ordinary course, this would lead to a guilty plea.

In such instances, the defendant's plea should attract a discount because of the admission of guilt and the saving of considerable time and resources by not proceeding to the trial proper. In such cases, the defendant is prepared to plead guilty following a ruling(s) on the admissibility of certain evidence. In other words, the defendant would abide the decision of the Court. In that sense the defendant is in a different position to one who pleads not guilty and runs a trial, but gets no credit for his plea. This is not equitable.

If no discount is available, a defendant may be inclined to take his/her chances and run a trial on the basis he/she has little to lose (on sentence) and much to gain (an acquittal). As indicated above, this is likely to lead to more trials than is otherwise the case.

If a significantly reduced or no discount is available, the defendant is, in effect, being prejudiced by reason of the late timing of the rule 9 procedure. In the event the rule 9 hearing was held as soon as possible after arraignment (and well before trial), and the ruling was binding on the trial court, a number of defendants may plead guilty at a much earlier time. Given the Government's manifest desire to encourage early pleas, it may be an opportune time to consider this more fundamental change to the criminal justice system.

Related to this is where a re-trial is ordered following an appeal against conviction. This could occur as a result of an incorrect ruling by the trial judge. In any event, a guilty plea in these circumstances may be entered many months before trial and represent a significant saving to the State.

Fifthly – the Bill does not make allowance for a stay application pursuant to rule 8. A defendant may legitimately argue that he/she is not fit for trial or, because of some other unfairness, that the trial should be stayed. In that event, a defendant should not be prejudiced if he/she pleads guilty after an adverse stay application ruling.

Sixthly – the proposal for no discount appears inconsistent with the legislative policy behind ss285BA, 285BB and 285BC *Criminal Law Consolidation Act 1935*. We refer in particular to s285BA(6) which provides that a court may take into account a defendant's unreasonable failure to make an admission in response to a notice to admit facts provided under s285BA(1). The essence of s285BA is to reduce the length of the trial and to effectively penalise the defendant for failing to cooperate in that regard.

Given the fundamental principle of sentencing that a person may only be sentenced for the offence, the mechanism by which s285BA must operate is to provide a discount to a defendant for his/her cooperation in reducing the length of the trial.

It follows, therefore, that it would be anomalous, inconsistent and plainly unjust for, on the one hand, a defendant who pleads guilty prior to trial not to receive *any* discount and, on the other hand, a defendant who pleads not guilty, runs a full trial but agrees some evidence, receives a discount after being found guilty.

Before leaving this topic we mention briefly s10C(2)(ii). As we understand it, a guilty plea in the Magistrates Court more than four weeks after the defendant's first court appearance but before a date has been set for trial will attract a discount of up to 30% until the commencement of the trial. It seems strange that this provision would mention the commencement of trial when it contemplates a guilty plea. Surely its purpose is not to make available the discount to those that plead guilty, successfully withdraw their plea, list the matter for trial and then plead guilty (again) just before trial.

Section 10C(2)(ii) is a curious provision which does not appear to conform with the other provisions, particularly s10C(2)(i).

The Periods Attracting Discounts

We express concern about sub-ss10C(6) and 10D(6) which permits the Governor, by regulation, to vary the periods in sub-ss10C(2) and 10D(2) within which a defendant must plead guilty to qualify for a discount ("the discount period").

The Society has long been concerned about a tendency to legislate by regulation. Matters that are properly the subject of legislation should not be dealt with by regulation for obvious reasons. We consider the fixing of the discount period to be in this category.

Much debate within the legal community has centred around the appropriate length of the discount period with particular reference to other provisions that impact on it, such as disclosure provisions and processes. It will also be the subject of further debate in Parliament and submissions (see below).

The discount period is so critical to the discount regime that it must, we suggest, be the subject of legislation and, therefore, legislative amendment. All the attendant safeguards inherent in the Parliamentary process will then rightfully apply to such an important aspect of the scheme.

We therefore recommend that sub-ss10C(6) and 10D(6) be deleted.

The Maximum Discount

The maximum discount available to a defendant is where the guilty plea is during the first four weeks after the first court appearance. Many defendants will not know the case against them during this period. They will not have been provided with the evidence, let alone had an opportunity to consider it or obtain legal advice.

If Parliament is going to provide a regime for sentencing discounts, it should be available to everyone. It is illusory to suggest that it will be where the maximum discount is only available prior to the delivery of the brief. The offences many defendants will be charged with will be serious.

If the Bill is to maximise its efficacy, the *maximum discount* should be available for a longer period of time. We suggest:

- for indictable matters – by the answer charges date;

- for minor indictable matters to be dealt with summarily – eight weeks after the defendant's first court appearance, being the time within which the defendant must elect⁶; and
- for summary matters – four weeks after full disclosure (as certified by the prosecution) has been made or such other period as the court directs.

Otherwise, the maximum discount of 40% will not, in practice, act as an encouragement to plead guilty.

Certainty in Discounts

Presently the discounts are expressed up to a maximum. In order for the Bill to achieve its objective, we believe that there should be a level of certainty in the discounts otherwise defendants will not be encouraged to plead guilty.

It might be said that the proposed s9E provides the certainty in that, by preserving the common law, courts would be bound to provide an acceptable minimum level of discount. This is debatable though. Issues such as whether a contrary intention appears and, if not, what the appropriate range is are at large.

If there is going to be a legislative regime providing for graduated sentencing discounts to encourage guilty pleas, we believe that it should set the range (upper and lower).

Reduction of Sentences for Cooperation [s10A]

The Bill is silent as to how, if at all, the sentencing discount regime in ss10C and 10D relates to s10A. As it is currently framed, a defendant who pleads guilty (within ss10C(2)(a) or 10D(2)(a)) and cooperates will receive the same maximum discount (under s10A(3)) or a marginally greater discount (under s10A(2)) as one who pleads guilty without cooperation (within ss10C(2)(a) and 10D(2)(a)).

The common law position is that a defendant who pleads guilty to an offence and cooperates with law enforcement agencies will be entitled to a greater discount than would otherwise apply if he/she had not cooperated. The Bill should reflect the common law position. It is clearly anomalous and unjust for a defendant who pleads guilty and cooperates, particularly under s10A(2), to receive little or no more of a discount than another defendant who does not cooperate where they are otherwise both entitled to the sentencing discounts provided under the Act for guilty pleas.

Significantly, there will be little or no incentive to a defendant to cooperate if he/she is unlikely to obtain a reasonable discount in addition to the discount he is entitled to for his/her plea of guilty.

Section 10A(4) caps the maximum discount for law enforcement agency cooperation at 20% where the defendant is found guilty other than by way of guilty plea (usually after a trial). The Bill does not distinguish between the s10A(2) and s10A(3) cooperation.

Given that the s10A(2) cooperation is considered to be of a greater value than the s10A(3) cooperation, as reflected in the fact that the s10A(2) discount is uncapped whereas the s10A(3) is capped at 40%, the Bill should similarly provide for a greater maximum discount for the s10A(2) cooperation.

⁶ rr21.04 – 21.07. Where no summary of evidence is requested or directed, the election must be made no later than six weeks after the defendant's first court appearance: r21.07

In so doing, it will fairly reflect the policy contained in the very same section (in particular sub-s(2)), give guidance to the courts and, importantly, give incentive to defendants to cooperate.

Sub-sections 10A(2) and (3) provide for the reduction of a defendant's sentence if he/she cooperates, or undertakes to cooperate. For greater certainty, and to reduce the incidence of appeals, there should be a reference to the head sentence and the non-parole period where imprisonment is imposed. Presently, the section refers only to "*the sentence*". For offences attracting a mandatory life imprisonment, "*the sentence*" can only be the non-parole period. For sentences without a non-parole period, it can only be the head sentence. The more challenging scenario is where there is a head sentence and a non-parole period. Where they are both reduced, the Bill should outline the Court's responsibility with regard to the sentence (eg, it must specify the head sentence and the non-parole period that would have been imposed but for the co-operation). It may appear obvious, but one must not take such things for granted as we have all seen basic sentencing errors that should not have been made. Consequential amendments would also need to be made to s10B. As a guide, s21E *Crimes Act 1914* refers to the terms "*sentence*" and "*non-parole period*".

Section 10B provides for a review of sentences reduced under s10A. We consider the provision is deficient in two respects (apart from the need to specifically refer to non-parole periods – see above).

The first deficiency is that s10B does not provide a timeframe within which the DPP must review the sentence. It cannot be unlimited. Ideally, the time should be limited by reference to a breach of the defendant's undertaking. In any event, it should be while the defendant's sentence is extant⁷. This leads into the second deficiency.

The second deficiency is that s10B does not have regard to whether the defendant's sentence has expired. Section 10B could not effectively operate where the sentence is complete. As s10B is currently framed, there is ambiguity as to whether the sentence can be increased beyond its completion. The ambiguity should be removed by s10B expressly dealing with this situation.

Section 10A(5) requires the Court to take into account certain factors in determining the percentage of the reduction. We comment on three of the provisions as follows:

- s10A(5)(f) refers to the degree the safety of the defendant has been put at risk of "*violent retribution*". The word "*violent*" should be removed. It is too limiting and, importantly, suggests that non-violent retribution should not be taken into account. Someone who cooperates with the authorities is, generally speaking, at risk of many forms of retribution. It is not limited to *violent* retribution. The current law enables the Court to take into account the risk to a cooperating defendant whatever that may be. The Bill should expressly do likewise by simply removing the word "*violent*";
- in relation to s10A(5)(h), the same amendment should be made for the same reasons (ie, remove "*violent*" from phrase "*violent retribution*"). Similarly, the phrase "*particularly severe conditions*" is too limiting and should be deleted. A replacement phrase could be "*special conditions*".

With both of these amendments (to (f) and (h)), the effect and purport of the provisions will

⁷ as is provided by s21E *Crimes Act 1914* (Cth) where the appeal must be made while the sentence is extant. Section 21E, however, does not deal with the scenario where the sentence is complete by the time the appeal is argued or determined.

remain unchanged except that it will enable a court to properly take into account the consequences (on, in effect, a sliding scale) to the defendant of cooperating with the authorities without resort to a catch all provision;

- s10A(5)(j) refers to the likelihood the defendant will commit further offences. This is a general sentencing principle that is out of place and, we suggest, not relevant in determining the discount to be provided to a defendant who has cooperated. Each of the other nine subparagraphs concern the undertaking directly or consequences that flow from it.

As indicated above, defendants will be discouraged from assisting authorities if the discounts they would otherwise be entitled to are not given due to an assessment of their future rehabilitation prospects.

Section 9AA(3) requires a court to notify a "*prescribed person*" about an application to inspect material relating to the reduction of a sentence under s10A or a review under s10B. Our concern is one of drafting. It seems that s9AA(3) is intended to apply, as it should, to an attempt by a non-party to the ss10A and 10B proceedings to obtain access to the material. On its terms, however, it is invoked when any person applies.

This should not be the case. The parties to the ss10A and 10B proceedings should not be subject to the restrictions imposed by sub-ss9AA(3) and (4). The defendant or the DPP/Police, as parties to the proceedings, should have unrestricted access to the file. The public policy reasons applying to restrict access to such information cannot apply to the parties to the proceedings. We therefore suggest an amendment to s9AA(3) that expressly excludes the parties or their legal representatives.

Similarly, in relation to s9AA(3)(a), the parties to the ss10A and 10B proceedings should be expressly nominated as entities to which notification should be made that a s9AA(3) application has been made. In addition, provision should be made (whether it be in the Act or the regulations) for the personal representatives of the defendant to be notified in the event, for example, the defendant is deceased, cannot be located, is out of the jurisdiction or is incapacitated. This is necessary to protect the defendant's family, successors and associates from acts of retribution in the event the defendant's cooperation is made known.

Section 9AA(4) requires the same amendment we propose to s9AA(3)(a).

I trust these comments are of assistance. Please do not hesitate to contact me, should you wish to discuss any aspect of this submission.

Yours sincerely



Ralph Bönig
PRESIDENT