

Transforming Criminal Justice

CONSULTATION PAPER

Efficient Progression and Resolution of Major
Indictable Matters



Attorney-General's Department

“ Putting
People First ”



Government of South Australia
Attorney-General's Department

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Feedback on this Consultation Paper can be provided via email to justicereform@sa.gov.au or to Justice Sector Reform, Office of the Chief Executive, Attorney-General's Department, GPO Box 464, ADELAIDE SA 5000.

Feedback must be lodged by **30 April 2015**.

Important information about your submission

If you do not want the public to read your answers, please write "confidential" on your submission. Please be aware that unless you write "confidential" on your submission it may be made public.

If someone asks for your answers through the Freedom of Information Act process, and if you have told us your answers are confidential, we will contact you and explain what is happening. However, we have to follow the law. Even if your answers are confidential, we may still have to let someone read your confidential answers, if they ask for them through the Freedom of Information Act process.



Introduction

The criminal justice system serves the community of South Australia. The community has the right to expect that the criminal justice system will operate efficiently and effectively with resources used where they are most required. In addition, the Government needs to balance the resources invested in the criminal justice system with its other priorities such as health, education and social services.

In December 2014 the Attorney-General released the *“Transforming Criminal Justice: Putting People First”* Strategic Overview (the Strategic Overview) which raised questions with the community and the legal profession about the operation of the criminal justice system as a whole. This document signalled Government’s intention to address, amongst other things, backlogs within the court system and the waste of resources that occurs when guilty pleas are entered late, when that plea could have been entered at a much earlier point in time.

There are backlogs in our criminal court system. This means that justice is delayed for victims of crime and witnesses are waiting for extensive periods of time for matters to be resolved.

The Government is committed to reducing the time it takes for matters to come to trial and is committed to reform to encourage the early resolution of major indictable matters.

This Consultation Paper on the Efficient Progression and Resolution of Major Indictable Matters puts forward proposed reform designed to improve how major indictable matters are dealt with in the criminal justice system.

The Government is committed to improving the effectiveness of the criminal justice process without undermining a suspect’s right to a fair trial and without compromising the fundamental principles of the criminal justice system.

The problems of delay and wasted resources in the criminal justice process are complex and longstanding. There is no simple or straightforward solution and more resources is not the solution. The criminal justice system as a whole can, and must, do better; productivity and efficiency must improve.

There is no ‘silver bullet’ to address these problems. No single piece of legislation will overcome the challenges facing the criminal justice system and not all the solutions are legislative. Indeed, the solutions will be as much administrative and cultural as financial or legislative.

Latest data has shown that the clearance rate in the criminal jurisdiction of the District Court in South Australia has improved. However, at the same time, backlogs are worsening. The South Australia District Court recorded the greatest proportion of cases pending over 12 months of all those jurisdictions with a District Court and the average number of attendance at court per finalisation was the highest of all jurisdictions with a District Court.¹

The proposed scheme set out in this Consultation Paper will require a significant change in culture amongst South Australia Police (SAPOL), the Office of the Director of Public Prosecutions (ODPP), defence lawyers and the courts. For reform to be successful, it is crucial that all parties work together to actively assist the court in the effective and efficient management of a criminal case.

The Government is seeking feedback on the proposed scheme and welcomes discussion and debate on these changes, as well as any suggested improvements to the proposed scheme.

¹ Productivity Commission (2015). Report on Government Services 2015. Volume C Justice. Chapter 7 - Courts Attachment tables. ‘Table 7A.19 Back log indicator as at 30 June and Table 7A.22 Attendance Indicator, noting that ACT, Tasmania and the Northern Territory do not have District Court.



Did you know

In South Australia in 2013/14 there was a total of 3,098 criminal matters lodged in the Supreme and District Courts.

Executive Summary

The criminal justice system is made up of a number of agencies and players. Each performs a central role in addressing crimes in our community. This proposed reform impacts upon numerous different elements of the system and will change how and when these interact.

An overview and explanation of the operation of the criminal justice system and of the committal process can be found in the Strategic Overview, available at: www.agd.sa.gov.au/tcj.

With this reform, the Government is proposing the introduction of a system of pre-charge bail and changes to the committal process for major indictable offences. This reform will change how matters progress through the Magistrates Court for committal to the either District Court of South Australia or the Supreme Court (although for the purpose of this Consultation Paper, reference is made to matters progressing to the District Court for trial or sentencing). This will inevitably involve changes to the practice of the ODPP and SAPOL. The major change involves the introduction of a pre-charge bail scheme with a formal charge to be authorised by the ODPP following a period a time to allow for investigation by SAPOL.

Enhanced pre-trial disclosure by SAPOL, the prosecution and the defence also feature in this reform proposal. Compliance is encouraged and non-compliance carries significant risks.

A preliminary prosecution brief is to be provided at the commencement of the court proceedings. At this time, or following consideration of this preliminary brief, a defendant (with advice from their defence counsel) is expected to be in a position to inform the court whether they intend to enter an early guilty plea, whether they will be entering into further negotiation with the prosecution or whether they intend to dispute the prosecution case.

This will inform the court and the ODPP of the extent of further work required to resolve the matter. In turn, this advice from the defendant will inform whether further work needs to be undertaken by investigating officers within SAPOL or by Forensic Science South Australia (FSSA).

Under this reform the defence will be required to identify and narrow issues in dispute. This provides clarity for FSSA, the ODPP and SAPOL as to the evidence that needs to be gathered and analysed or led (at both the investigative and trial stages). Under this new regime a 'carrot and stick approach' is taken by including both appropriate sanctions for non-compliance and an incentive for pre-trial co-operation (sentence discounts). In addition, by identifying certain matters at a sufficiently early time, earlier resolution is possible.

It is expected that by introducing these new processes and requirements there will be a reduction in the number of court appearances in the committal process.

SAPOL will be required to provide the ODPP with a full prosecution brief, and in turn, the ODPP will be required to provide that brief to the defence, all prior to committal. In response, the defence will also be required to file a new form (just prior to a committal conference) to identify the elements of the offence in dispute, including raising defences or alibis.

This proposal draws upon previous reviews of the criminal justice system and builds upon previous reform and projects.

Firstly, this proposal supports and builds upon changes made by the *Criminal Law (Sentencing) (Guilty Pleas) Amendment Act 2012* (the Guilty Pleas Act).

When the Guilty Pleas Act was introduced into Parliament, the Attorney-General noted that the main objective of the Guilty Pleas Act was to improve the operation and effectiveness

of the criminal justice system by reducing current delays and backlogs in cases coming to trial; by encouraging offenders who are minded to plead guilty, to do so in a timely way. The Guilty Pleas Act now regulates and makes transparent the sentencing discounts given to offenders who plead guilty.

This scheme will remain in place but the timing and the percentage discounts available to defendants will be amended to reflect the proposed reform. It is intended that a maximum discount of a 40% reduction in sentence will be available to defendants (as per the current scheme) but only to those who plead guilty at a first hearing. The discounts made available to defendants will then gradually decrease.

Secondly, back in October 2011 a Major Indictable Briefs Review Committee made recommendations for change to current practices, procedures and legislation with respect to major indictable matters. The committee, made up of representatives from the ODPP, SAPOL and the Attorney-General's Department, was chaired by the Honourable Brian Martin AO QC. The Committee recommendations resulted in a pilot program in the Holden Hill Magistrates Court aimed at accelerating the resolution of matters and addressing concerns that a significant number of major indictable matters were resolved late by a guilty plea or as a result of withdrawal of charges, unnecessarily using up criminal justice resources.

The Holden Hill pilot program captured matters that would usually resolve in one of three ways: by guilty pleas to the offences charged, by guilty pleas to other alternative charges or by withdrawal. Work was brought forward, negotiation and consultation with police and victims was done early. Matters were concluded as soon as possible, rather than slowly reaching their inevitable conclusions after many court appearances and time in the system.

At the conclusion of the pilot program a series of recommendations were made relating to the changes required to realise the benefits of early resolution across all relevant criminal justice sector organisations.

The Criminal Justice Sector Reform Council (the Council) agreed to support an Early Resolution Project, led by the ODPP, aimed at implementing the recommendations, to create efficiencies within the criminal justice sector by reducing the time taken to resolve matters in the early stages of the criminal justice process.

Through the Early Resolution Project what was a pilot program has now been partially implemented by the ODPP. This proposed new scheme is designed to build upon the success of the pilot program.

This Consultation Paper provides a basis for feedback to be provided on the proposed new scheme and is part of the *Transforming Criminal Justice* program of reform looking into increasing efficiencies in the criminal justice system. This Consultation Paper seeks comment as to the proposed changes and on any operational or technical implications.

It is beyond argument that reform is needed. The Office of Crime Statistics and Research (OCSAR) has analysed data from the ODPP for all major indictable matters finalised between 1 January 2011 and 30 September 2012.

This data demonstrated the need for change, indicating that of matters which resolved by a guilty plea, only 35.7% of the pleas occurred at the committal stage with 59.5% of guilty pleas resolved after the committal but prior to a trial commencing. These proposed changes aim to increase the efficiency of the progression of major indictable matters by reducing the number of guilty pleas occurring after the committal stage, instead encouraging an appropriate guilty plea at an earlier stage.



Pre-Charge Bail

At the moment too much court time is wasted in the Magistrates Court as part of the committal process while a brief of evidence is compiled by SAPOL and provided to the ODPP, the defence and the court.

The committal process before the Magistrates Court commences when a suspect is charged with a major indictable offence. A suspect will usually be charged straight after arrest. This is often too early for anything but the most basic investigation to have been carried out or for useful decision-making by the parties. The investigation continues in parallel to the matter proceeding in court and as a result there are many unproductive court hearings requiring the attendance of the defendant, legal practitioners, judicial officers and support staff. This all adds to the cost of a matter and is an ineffective use of resources.

It is inefficient for the court stage to be operating in tandem with the very early stages of a SAPOL investigation.

Under this proposal, SAPOL will lay an initial holding charge after arrest or report and have the power to grant bail, whether conditionally or unconditionally, for a period of six weeks to enable a preliminary brief of evidence to be compiled.

Pre-charge police bail will allow the case to be further investigated and an informed decision made by the ODPP as to whether there is enough evidence to charge and the most appropriate charge/s to be filed in the court.

This scheme of pre-charge bail and what is known as statutory charging has been used in England where it has proven effective.

If at the expiry of the initial six weeks the ODPP is not satisfied that the charge should proceed, SAPOL may apply to the Magistrates Court for an extension of bail of up to six weeks to continue the preliminary investigation or can let the preliminary charge lapse.

If a Magistrate extends the time, it cannot be further extended. If the ODPP are still not satisfied at the expiry of any extended period that the charge should proceed, SAPOL will have to let the preliminary charge lapse. SAPOL can continue to investigate and the ODPP may authorise the filing of an information if satisfied that there is enough evidence to proceed at a later time. However, in the interim the alleged offender will no longer be subject to bail.

The charges on an information may well be different to the initial holding charge. There is often insufficient material available at the commencement of an investigation of a major indictable offence for the ODPP to ensure that the charge is correct. This contributes to the high rate of matters being discontinued.

If the police lay a holding charge and consider that a suspect should be refused bail under the *Bail Act 1985*, the suspect may have the decision reviewed by a Magistrates as per the present system. The Magistrates Court at this stage will only deal with issues relating to bail. A suspect will also have the power to ask a Magistrate to vary any bail condition imposed by the police.

SAPOL will be responsible for the investigation and preparation of the case during the period from holding charge to the filing of an information in the Magistrates Court.

If a defendant wishes to plead guilty to an initial holding charge the matter can be fast tracked and listed in court for the first hearing before the six weeks has elapsed. The defendant would then plead guilty to the charge/s on the information filed in the Magistrates Court upon authorisation of the ODPP.

The proposed model draws on the system used in England. The police in England can grant pre-charge police bail (whether conditionally or unconditionally) whilst an investigation proceeds into the suspected offence. A major indictable offence (in England called an indictable only offence) cannot be charged until the Crown Prosecution Service (CPS) is satisfied that there is enough evidence to charge. The CPS also decides the appropriate charge.

Formal Charge and Bail

At the expiry of the preliminary investigation the ODPP must decide if authority is to be given for the defendant to be charged and what the formal charges will be. The committal process before the court will commence once SAPOL has filed an information in the Magistrates Court.

The defendant will be provided with a copy of the information detailing the charge/s he or she will face. A preliminary prosecution brief will also be provided to the defendant at this time.

The preliminary brief will convey the essence of the prosecution case (i.e. whatever is available at the time). It is not intended to be, and is not likely to be, the entirety of what the prosecution would ultimately rely upon if the matter proceeded. Rather it is the provision of available material to enable the defendant and his or her lawyer to reach an informed initial decision as to plea.

This has the potential to reduce wasted resources gathering evidence as to issues or elements of the alleged offence that will not be in dispute. It will help address current delays and improve the operation and effectiveness of the criminal justice system and will complement the changes made by the Guilty Pleas Act in encouraging offenders who are minded to plead guilty, to do so in a timely way. However, amendments to the current regime of sentence discounts will need to be made to reflect these new processes.

First Appearance

The defendant will appear in the Magistrates Court four weeks after they have been formally charged. If represented, the defendant should be accompanied by their lawyer.

Based on the preliminary brief, at this appearance the defence will need to indicate to the Magistrate one of three options: the entering of a guilty plea, whether they will be entering into negotiation with the prosecution (with a view to a potential guilty plea or the narrowing of issues in dispute) or advise there is to be no deal/no cooperation. This indication will determine the level of further investigation and disclosure required of the police and the prosecution.

First Stream - Guilty Plea

No further investigation should be required in the guilty plea stream. The defendant will plead guilty on the basis of the preliminary brief at the first hearing. The defendant will be entitled to a maximum discount of up to 40%, consistent with the existing statutory guilty plea regime (however, as noted above, the legislation will need to be amended to reflect this new regime). The defendant can be promptly committed for sentence to the District Court or sentenced in Magistrates Court with the consent of all the parties under amendments made by the *Statutes Amendment (Court Efficiency Reforms) Act 2012*. If the matter remains in the Magistrates Court, the defendant can be sentenced at the second appearance.

Second Stream - Negotiation

The defendant indicates to the court a potential guilty plea (perhaps to some or alternative charges) and/or willingness to commence negotiations with the ODPP to limit the further investigation required, informing the requirements of the substantive prosecution brief.

The parties will liaise to determine the issues in dispute. The defence will have the responsibility of identifying the issues to be raised at any trial with a view to SAPOL avoiding the need to gather evidence with respect to elements of the alleged offence or issues in the case that are not in dispute.

It may be that in a case of alleged sexual assault, the defendant indicates at the preliminary hearing that sexual intercourse took place and the issue is one of consent. Therefore it is unnecessary to obtain DNA evidence to confirm that sexual intercourse took place.

The defendant in a large scale case of cultivation of cannabis might accept that the plants in question are cannabis and the issue is their involvement in the cultivation. It is therefore unnecessary to obtain expert evidence to confirm the plants are cannabis.

Third Stream - No Deal / No Cooperation

This stream will require the full investigation of the case and indicates to the ODPP that a full brief of evidence will be required prior to a committal conference. The defendant remains entitled to insist that SAPOL compile a full brief of evidence before indicating what, if any, issues or elements will not require strict proof at trial.

It is important that the defendant has consulted a lawyer prior to the first appearance in the Magistrates Court. If the defendant is to be represented, the defence lawyer must be adequately prepared to advise the court on his or her client's position.

There will also need to be changes in the allocation of legal aid funding and the operation of the Legal Services Commission to encourage and support early decision making at the first appearance.

Second Appearance

As noted above, if the defendant has entered a guilty plea at the first hearing, he or she will be entitled to a discount of up to 40% in sentence. The second appearance will therefore involve sentencing submissions either in the District Court or Magistrates Court.

In the negotiation stream, there may be a plea entered or further discussion in the form of a case conference as to the requirements for the prosecution brief (short of the full brief) prior to the committal conference.

If there is an acceptable guilty plea entered as part of this second stream, sentencing will commence on the third appearance (either in the District Court or Magistrates Court). A guilty plea at this stage will attract a lesser discount. It is intended that the percentage discount available for a guilty plea at the second appearance will also be capped, but at a level less than 40%. The views of the community and the legal profession are sought as to the appropriate discounts that should apply as a matter progresses through the system.

If the defendant has indicated that he or she does not intend to cooperate or negotiate with the prosecution, the defendant's second appearance will be at the committal conference. It is taken that the defence are insisting that a full brief of evidence be prepared.

Substantive Prosecution Brief

At the second appearance the court will make an order as to the interval between this second appearance and the next (third) appearance, being the committal conference. This interval will take into account the requirement for the prosecution to provide the substantive prosecution brief and a case summary four weeks prior to the committal conference. This necessarily requires SAPOL to have provided the substantive prosecution brief to the ODPP in time for the ODPP to consider the evidence provided and meet this deadline.

In the third stream, this brief should include all the evidence the prosecution intends to adduce at trial. In the second stream, this should be all the evidence necessary to be adduced at trial in light of any negotiations to determine that it will not be necessary to gather specific evidence as to particular elements of the alleged offence or to ascertain issues that will not be disputed.

There is an expectation that the substantive prosecution brief will amount to the case being effectively (or as near as possible in all the circumstances) trial ready. This will enable the defence to reach an informed view in advance of the committal conference about plea, the proposed defence at trial, any pre-trial legal arguments, any claim of significant outstanding material and what evidence can be agreed for trial to prevent the unnecessary attendance of witnesses at trial as to facts or issues that are not in dispute.

SAPOL and the ODPP should aim for full and timely compliance with the prosecution's duty to disclose the evidence to be lead at trial. There cannot be an absolute rule requiring the prosecution to serve all its evidence before committal. There will be circumstances in which the interests of justice will require the prosecution to adduce further evidence beyond that available and served as part of the substantive prosecution brief. It may be that a significant new witness emerges after committal or a missing witness is found or an unexpected issue suddenly arises after committal that was not previously foreseen.

Prosecution Case Summary

The ODPP will be required in streams 2 and 3 to provide a case summary setting out the circumstances of the alleged offence and specifically how and what evidence supports each element of the alleged offence at least four weeks prior to the second appearance.

The prosecution case summary in stream 2 should proceed upon the basis of any concession made to date by the defence as to what, if any, element of the alleged offence or issue is not in dispute at trial.

The case summary will accompany the substantive prosecution brief.

Defence Form

The defence will be required to submit a response to the substantive prosecution brief and case summary. This will need to be supplied two weeks prior to the committal conference.

The defence will be required to declare the position it will adopt at trial on the elements of the offence(s) and will be bound by this declaration other than in exceptional circumstances.

Any defences to be raised at trial should also be outlined in the defence response as well as notice of any alibi to be led. The defence will need to include in their defence response any Rule 20 application to call a prosecution witnesses to give evidence at committal, any intention to submit that no case to answer exists and any expert witnesses and/or reports to be presented at trial.

The defendant will remain free to put the prosecution to strict proof and insist that the prosecution establish each element of the alleged offence at trial beyond reasonable doubt.

Consistent with the English Court of Appeal in *R v Rochford*² the defendant is entitled to sit through a trial and see whether the Crown can prove its case or not. What the defendant is not entitled to do is to conduct the trial by putting in issue specific matters and advancing either evidence or argument towards them without giving notice in the defence response that he or she is going to do it.

The defence will not be entitled to resort to 'ambush defences' at trial where they have not previously supplied notice of an intention to raise a positive defence. If the defence submit a defence statement that lacks reference to a defence they intend to raise (such as simply noting their intention to put the prosecution to strict proof), they will not be entitled to raise a positive defence at trial and would need leave of the Court to rely on it. Such leave will only be given in exceptional circumstances.

Whilst there may be opposition to these proposals such reforms are necessary and overdue. As Chief Justice de Jersey of the Supreme Court of Queensland observed in 2013³:

I believe we have long passed the point where the defence should be permitted to withhold disclosure of its intended trial approach. A criminal proceeding should not in this 21st century amount to a game where the players may keep their cards up their sleeves.

These views are not new.

² [2011] 1 WLR 534.

³ Chief Justice Paul de Jersey, Paper presented at Queensland Law Society 2013 Symposium, Brisbane Convention and Exhibition Centre 15 March 2013, 5, <http://archive.sclqld.org.au/judgepub/2013/dj150313.pdf>.

As was observed as early as 1996 by Chief Justice Doyle in *Ling v Police*⁴:

It may be that the time has come for some limits to be placed upon the right to silence and for some obligation to be imposed upon the defence to join in the identification of and limiting of issues in criminal proceedings to the extent inconsistent with the maintenance of the right of silence. It is well known that the criminal courts in Australia and in other countries are struggling to cope with the volume of work coming before them. It is equally well known that the length of trials is tending to increase. These matters are a cause for real concern. It is equally well known that the effectiveness of current methods of case flow management is limited because, among other things, under Rules such as those that exist in South Australia the court has no power to require the defence to disclose the nature and extent of the defence case.

In 2004 Lord Justice Auld in *R v Gleeson*⁵ stated:

To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, it is understandable why as a matter of tactics a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.

A defence practitioner form will be filed at the same time as the defence form is filed. This will be similar to the form already required to be filed in the District Court under the *Criminal Law (Legal Representation) Act 2001* as to legal representation. This form will certify that the defence legal practitioner has taken instructions from his or her client and has fully informed them of the implications and consequences of disclosure and non-disclosure and of entering or not entering a plea of guilty.

Third Appearance - Committal Conference

The committal conference will be mandatory in all cases except where a defendant has pleaded guilty at the first or second appearance. The expectation will be that by the committal conference, the case will be effectively (or as near as possible in all the circumstances) trial ready at this stage. SAPOL and the prosecution should have obtained and disclosed all the evidence it intends to adduce at any trial. It is acknowledged that this will not be possible in all instances, such as where there are delays in the provision of forensic reports etc.

⁴ (1996) 188 LSJS 488, 494.

⁵ [2004] 1 Cr. App. R. 406, 416.

Both sides should come to the committal conference adequately prepared. The Magistrate will take an active case management role at this hearing to facilitate the efficient progression and resolution of the case in question.

The committal conference will include consideration and discussion of whether the case is capable of resolution and clarification or confirmation of what will or will not be in dispute at the trial. The Magistrate will be able to commit the case for trial without consideration of the evidence on the basis of an acknowledgement by the defence lawyer that a case to answer exists. This reform will save time and maximise the effective use of judicial resources as the Magistrate will not have to unnecessarily read the entire prosecution brief to be satisfied a case to answer exists when the parties acknowledge that the evidence is sufficient.

In the negotiation stream: if a guilty plea was entered at the second appearance, the third appearance is for sentence (whether in the District Court or Magistrates Court) and as stated above, there will be a second (lesser) maximum discount set at a level below 40% for such a guilty plea.

It is intended that the committal conference will provide the last opportunity for early resolution for a defendant to receive a significant discount for pleading guilty. There will be a third (and lesser again) maximum discount set for a guilty plea that is entered at the committal conference.

For a defendant who later enters into a guilty plea (being any time after the committal conference) a fourth (and lesser again) maximum discount will be applied.

The focus of the changes are to maximise the effectiveness of the committal process.

It is necessary to address the current problem of too many defendants pleading not guilty at committal to only plead guilty at the higher courts.

It is intended that a defendant entering into a guilty plea at the higher courts will only be eligible for an even lower maximum discount, with those found guilty at trial being eligible for a lesser again discount for co-operation.

The views of the community and the legal profession are sought as to the appropriate percentage discount at each stage, starting at a maximum of 40% and gradually reducing.

The committal conference will also provide the final opportunity for the defendant to advise the prosecution of any expert witnesses or reports they intend to present at trial. Beyond the committal stage, any subsequent reports or witnesses must be disclosed to the prosecution and the court within seven days. The defendant will not be entitled to use any expert witnesses or reports at trial if they have failed to comply with these requirements without leave of the court, which will only be given in exceptional circumstances.

Other Issues

Legal Aid Funding

There will be a revised system for legal aid funding to support the proposed model and assist with defence negotiation, legal advice and representation at an early stage in the Magistrates Court and facilitate the early and efficient progression and resolution of major indictable cases. It is perverse that the current system of legal aid funding effectively discourages early preparation by defence lawyers and the early identification and resolution

of cases. Indeed, the present system actually provides an incentive to take a case to trial and to delay preparation and pleading guilty as long as possible. The system of legal aid funding must encourage greater pre-trial preparation and focus.

Guilty Plea Discount

There is an expectation that a defendant will enter a guilty plea at the earliest available opportunity. There will be a maximum discount of up to 40% for a guilty plea entered at a first appearance. The views of the community are being sought as to the appropriate discounts that follow when a guilty plea is entered into at a later stage.

There may also be cases where a defendant is committed for trial for the offence but before the commencement of a trial for the offence the defendant satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control.

Whilst the onus will be on the defendant to satisfy the court that he or she could not have entered an earlier plea, the question remains as to the appropriate maximum discount that should be available to the sentencing court in such cases.

Case Management by Judicial Officers

The scheme will require a shift in culture amongst both prosecution and defence lawyers and the courts.

The proposed model will require active and robust case management by judicial officers in all courts in accordance with the criteria and aims in Rule 4 of the *Supreme Court Criminal Rules 2013* that emphasises the need for the efficient and effective progression of a criminal case under positive judicial case-management.⁶ It is important that, in light of the enhanced role of the Magistrates Court in the case preparation and committal process, Magistrates assume an active and involved case management role in the efficient progression and resolution of major indictable cases before them.

Active case management in the criminal courts is not a new or novel development. It is an established feature of the modern criminal justice system. The community has the right to expect that the criminal justice system will operate effectively and efficiently and make the best use of limited public resources.

⁶ Rule 4.02 of the Supreme Court Criminal Rules 2013:

'With the object of

- (a) promoting the just determination of the business of the Court;
 - (b) disposing efficiently of the business of the Court;
 - (c) maximising the efficient use of the available judicial and administrative resources; and
 - (d) facilitating the timely disposal of business at a cost affordable by the parties and the community generally;
- proceedings in the Court will be managed and supervised in accordance with a system of positive caseflow management. These rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the above objects.'

See also Rule 3(1) of the District Court Criminal Rules 2014:

'The objects of these Rules are to—

- (a) establish orderly procedures for the conduct of the business of the Court in its criminal jurisdiction;
- (b) promote the just and efficient determination of such business; and
- (c) facilitate the timely disposal of such business at a cost affordable to the parties and the community generally, promote the just and efficient determination of such business; and
- (c) facilitate the timely disposal of such business at a cost affordable to the parties and the community generally.'

Issue of Subpoenas

The current abuse of the system through the requesting of subpoenas for the purpose of fishing expeditions will not continue.

At present a subpoena can be issued by a non-judicial officer without the presence or representation of the parties affected by it. The issuing of subpoenas without proper judicial oversight is time consuming, costly and burdensome for the party to whom the subpoena is directed.

It is acknowledged that there will be limited circumstances where the issuing of a subpoena is in the interest of justice.

That aside, requests for subpoenas must be raised in the defence response filed prior to the committal conference. Subpoenas will then be issued by a judicial officer in the District Court, not the Registrar as at present. This will ensure a subpoena is only issued and considered in relation to the specific facts and issues of a case and not in relation to matters not in issue. Those defendants who have cooperated in the pre-committal process by identifying the issues to be disputed at trial have this privilege. Even then, a defendant will need to convince the presiding judicial officer that the subpoena is necessary.

Sanctions and Incentives

To encourage and ensure defence compliance with pre-trial disclosure requirements it is proposed to adopt a carrot and stick approach.

Discount for Pre-Trial Cooperation

The court should take into account in sentence, even if the defendant is convicted at trial, the timing, nature and extent of the defendant's pre-trial co-operation. In particular the defendant's cooperation in identifying the issues to be disputed and in confining the evidence to be gathered and/or presented at trial. The court should consider the stage and extent of the pre-trial cooperation such as whether the plea is entered at committal conference by the defendant in the negotiation stream or if the defendant in the negotiation stream goes to trial on limited issues. Section 10 of the *Criminal Law (Sentencing) Act 1988* already allows a court to take into consideration in sentence 'the degree to which the defendant has co-operated in the investigation of the offence.' The argument that rewarding those defendants who comply with pre-trial disclosure obligations indirectly penalises those who do not comply (as with the rationale for the discount in pleading guilty), is a distinction not without difficulties but is still real as has been recognised by the High Court in *R v Cameron*.⁷

Section 22A of the *Crimes (Sentencing Procedure) Act* (NSW) is an example of such a provision. It provides that a court may impose a lesser penalty 'having regard to the degree to which the administration of justice has been facilitated by the defence (whether by disclosures made pre-trial or during the trial)'. The New South Wales provision has been employed on a number of occasions.⁸ Provisions to similar effect are found in section 5(2D) of the *Sentencing Act 1991* (Vic) and section 35A of the *Crimes (Sentencing) Act 2005* (ACT).

⁷ (2002) 209 CLR 339, 343.

⁸ See, eg, *R v Maglovski (No 2)* [2013] NSWSC16; *R v Fahda* [2012] NSWSC 114, [52]; *R v Serona* [2012] NSWSC 1232, [13].

⁹ (2013) 115 SASR 461.

The New South Wales provision also provides that the lesser penalty ‘must not be unreasonably disproportionate to the nature and circumstances of the offence’. The existing South Australian provision for a discount for a plea of guilty provides a court need not confer such a discount when ‘the reduction of the defendant’s sentence by the percentage contemplated would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of that particular defendant, that it would shock the public conscience.’ Similarly, the court will necessarily be required to consider the nature and seriousness of the offending when determining the extent of the discount for pre-trial cooperation.

Sanctions

It is proposed to retain and draw on the existing potential sanctions for non-compliance with the present limited defence disclosure provided in sections 285BA, BB, BC and C of the *Criminal Law Consolidation Act 1935 (SA)*. Defence non-compliance may be properly taken into account in sentencing (see *R v Mustac*⁹). At present in South Australia, for example, if a defendant unreasonably fails to make an admission of facts under section 285BA(6) of the *Criminal Law Consolidation Act 1935 (SA)*, ‘the court should take the failure into account in fixing sentence’.

Other sanctions will include requiring the leave of the court to adduce new evidence, reporting in cases of culpable misconduct for professional misconduct, wasted costs orders, the allowing of adverse comment by the judge and the opposing party against the defendant as to the service of new evidence or raising a new defence and allowing the jury or judge (as the case might be) to draw an adverse inference.

Higher Courts

The focus at the District or Supreme Court should be on the efficient and timely preparation and conduct of any trial assisted by the material and indications provided by the parties earlier in the proceedings. As part of this process, any trial should as far as possible be confined to the issues in dispute in the case and witnesses should not be called to testify as to any facts or issues that are not in dispute (though the entitlement of a defendant to put the prosecution to strict proof of each element of the alleged offence will be retained as will the prosecution’s ability to call a witness even if their evidence is not to be seriously contested at the trial).

The existing powers under sections 285BA and BB of the *Criminal Law Consolidation Act 1935 (SA)* are very rarely used.

It is suggested that the existing powers in sections 285BA, BB, and C of the *Criminal Law Consolidation Act 1935 (SA)* be retained and clarified to facilitate the evidence to be led at trial to promote the efficient conduct of the trial and to avoid, as far as possible, calling unnecessary witnesses as to issues that are not in dispute. These provisions will complement the new regime proposed for pre-trial mutual disclosure in the committal process.

Conclusion

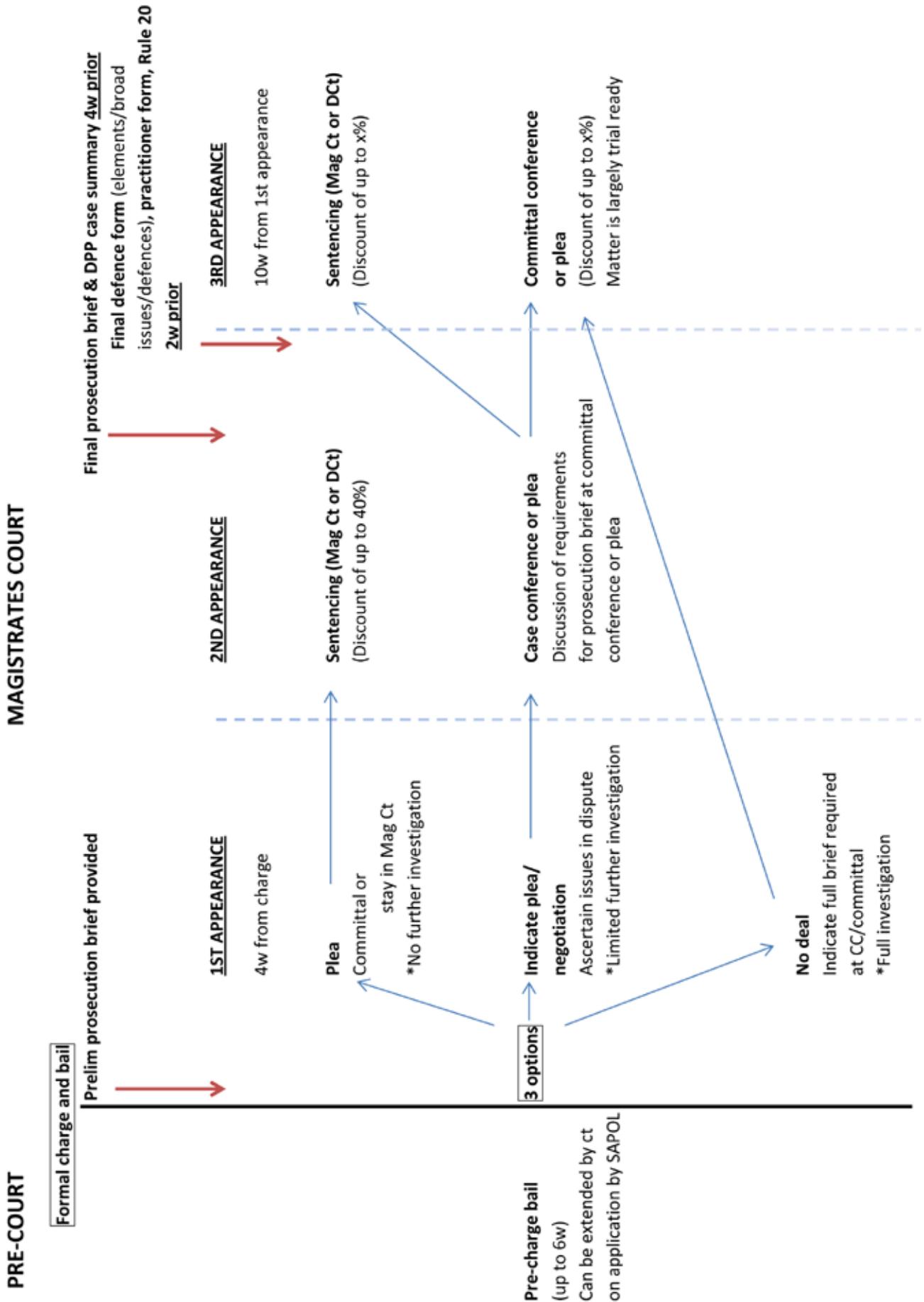
The failure to resolve what is really in issue in a criminal trial 'necessarily results in longer trials, confused juries and greater inconvenience and expense to victims, witnesses, police, prosecuting authorities and courts.'¹⁰

Questions for Consideration

1. Considering that a maximum discount of up to 40% of sentence is available to a person who enters a guilty plea at the first appearance, what is the appropriate maximum discount for:
 - a defendant entering a guilty plea at their second appearance;
 - a defendant entering a guilty plea at the committal conference (the third appearance);
 - a defendant entering into a guilty plea any time after the committal conference but prior to trial;
 - a defendant entering into a guilty plea in the higher courts;
 - a defendant found guilty at trial who has co-operated;
 - a defendant who satisfies the sentencing court that he or she could not reasonably have pleaded guilty at an earlier stage in the proceedings because of circumstances outside of his or her control?
2. Are there any operational or technical issues with the proposals as outlined?
3. Are the time scales proposed appropriate or realistic?
4. What sanctions are appropriate for defence or prosecution non-compliance?
5. Should there be a specific statutory discount scheme for pre-committal cooperation or left to the discretion of the court?
6. Should a defendant who has failed to identify any issues in dispute pre-committal be entitled to request a subpoena?

¹⁰ Paul Rofe, 'Disclosure by Both Sides', Paper presented at the Prosecuting Justice Conference, Melbourne, 18 April 1996, 23.

Appendix: Major Indictable Matters Flow Chart





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