CRIMINAL CASE CONFERENCING TRIAL BILL 2008

Bill introduced and read a first time and ordered to be printed on motion by the Hon. John Hatzistergos.

Second Reading

The Hon. JOHN HATZISTERGOS (Attorney General, and Minister for Justice) [3.57 p.m.]: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Criminal Case Conferencing Trial Bill 2008. The Government has for some time been concerned with the trend in the late entry of pleas of guilty in criminal trials in this State. Despite the fact that criminal courts in New South Wales have made major improvements in reducing delay and achieving improvements in productivity, there has been a disturbing trend in the practice of late pleas of guilty and late terminations of proceedings.

The Bureau of Crime Statistics and Research "NSW Criminal Courts Statistics Annual Report for 2006" showed that in 2006 there were 1,839 cases finalised up to committal for trial to the District Court, 496 had proceeded to trial and 1,060 had proceeded to sentence. In 283 matters no charges were proceeded with at all—they were either no billed by the Director of Public Prosecutions or otherwise disposed of. The trauma and distress caused to witnesses—particularly victims—the waste in resources to the criminal justice agencies, and the uncertainty for the accused brought about by these non-starters is apparent to all.

Experience has shown that criminal trials often settle close to or on the day of trial for a number of reasons. By the time of trial the prosecution evidence has been finalised and served on the defence and the parties, including the accused, the defence representatives, the Crown prosecutor, the solicitor from the Director of Public Prosecutions, the police officer in charge of the investigation and, if applicable, the victim, are brought together to commence the trial. In this context an accused may be more inclined to face the reality of the situation they are in, and accept the advice of their counsel as to the state of the evidence and whether conviction is likely.

Alternatively, by the time of trial the Crown prosecutor may not be as confident of a conviction on the charges initially laid and be willing to offer an alternative charge. The presence and state of readiness of the parties, and the pressure of the impending trial all conspire to create an environment where agreement, as the statistics attest, is often reached prior to the commencement of the trial. Often this bringing together of the parties before the trial results in a plea being entered on the initial charges laid, sometimes an alternative charge is offered, or, on occasion, it is determined that the prosecution not proceed.

The reforms contained in this bill aim, as far as is possible, to re-create some of the factors that lead to agreement on the eve of trial, at a much earlier stage in the criminal process. The reforms will provide for the service and disclosure of prosecution material to the defence whilst in the Local Court to allow the defence to assess the case against them in a way that at present often takes place late in proceedings. The evidence from the previous trial, which was not supported by legislation, was inconclusive as to its effect. However, there was sufficient enthusiasm from legal practitioners and victims groups that the Government wanted to conduct a proper assessment before deciding whether the program should be maintained or discontinued. The new scheme under this bill will operate on a 12-month trial basis and will be rigorously evaluated by the Bureau of Crime Statistics and Research to ensure that it is achieving its aims—namely, to lead to a reduction in the number of defendants pleading guilty after being committed to stand trial, a reduction in unnecessary trauma experienced by victims of crime; and a reduction in the time and resources required to prepare for a trial.

There are three key components to this trial. The first is a compulsory conference between the parties; the second is the procedures involving the holding of a conference; and the third is the introduction of identifiable and appropriate discounts that will attach to an early plea of guilty. The first part of the scheme requires parties, whilst still in the Local Court, to attend a compulsory conference. This idea is not entirely new. Over the past two years as part of the administrative trial, the Director of Public Prosecutions and the Legal Aid Commission have been having conferences with one another at an early stage to facilitate early pleas and to identify and define relevant issues. However, under this model it will be compulsory for all practitioners, whether privately funded or funded by the Legal Aid Commission, to attend.

The aim of the conference is to provide a formal setting for the parties to meet, consider the evidence and to discuss the prospects of entering an appropriate plea, or reaching agreement on the facts. In other words, it will replicate as much as possible the environment of the eve of a trial, but much earlier in the process. The bill sets out the procedures to be followed with respect to the holding of a conference. Before holding a conference there are certain requirements that must be met concerning the service of a brief of evidence and a pre-conference disclosure certificate. Magistrates will be required to give a defendant a statement in writing, which explains the effect of participating in a compulsory conference and how the outcome of the conference can be used in

sentencing proceedings. Finally, after the conference a conference certificate, which sets out matters such as the offences to which the defendant has agreed to plead guilty, is to be signed and filed with the court.

Lastly, the reforms will allow for an identifiable and appropriate discount to attach to an early plea of guilty. This discount will account for all the benefits of an early guilty plea: the utilitarian value of the plea and the savings that the plea incurs by not requiring a listing for trial, the empanelling of the jury and the running of the trial itself; the minimising of unnecessary stress and trauma to victims of crime; and any contrition demonstrated by an early guilty plea. As part of the trial, the discount will be clearly set out and, except in certain exceptional cases, will be mandatory following a plea of guilty entered in the Local Court. Where a plea of guilty is entered in the superior court a lesser discount may be applied. The discount in the superior court will, except in certain very limited circumstances, at most, be half the discount that was available for a plea in the lower court. The discount provided must be articulated on sentence and the judge will be required to specify what they would have sentenced the offender to but for the discount allowed for the early plea. Any discount given by the court is to be proportionate to the remaining benefit of the guilty plea as determined by reference to matters such as savings in time and resources, avoidance of additional trauma to victims and the demonstration of contrition.

I state from the outset that these reforms are not intended to apply to people who have always intended to plead not guilty and who wish to go to trial. Going to trial is a right of every person charged with an offence in New South Wales and the law in this State does not punish a person for exercising their right to defend themselves against criminal accusations. Consequently, a plea of not guilty, despite a finding of guilt, is not an aggravating factor on sentence. The aim of the reforms is rather to front-end the resources in the proceedings in order to encourage those who at present enter their pleas on the eve or morning of trial to do so earlier in the process.

I now turn to the bill in detail. The bill provides for the scheme to apply to proceedings in relation to an indictable offence—other than an indictable offence being dealt with summarily—if committal proceedings for the offence will be heard in the Local Court sitting at the Downing Centre, Sydney or at Central Sydney and the accused is charged between 1 May 2008 and 1 May 2009. A compulsory conference is to be held between the legal representative of an accused person and the prosecution before the accused is committed for trial. A conference does not have to be held where the accused person has pleaded guilty or agrees to plead guilty before a conference is held; the offence is an offence for which a compulsory conference need not be held, such as offences carrying life imprisonment; the accused does not have a legal representative; the prosecution is not conducted by the Director of Public Prosecutions; or where a magistrate has made an order that a conference need not be held because it is impossible to hold a conference.

The purpose of the conference is to determine whether there is any offence or there are any offences to which the accused person is willing to plead guilty and other matters on which the participants are able to reach agreement. These are to be recorded in a compulsory conference certificate after the conference and filed with the court. Before the compulsory conference is held, a copy of a brief of evidence is to be served on the accused person, or his or her legal representative, and a pre-conference disclosure certificate is to be similarly served and is to be filed. The pre-conference disclosure certificate must certify that a full brief of evidence has been served on the accused. The legal representative of the accused person and the prosecution are to be present at a compulsory conference, whether in person or by audiovisual link or telephone. The legal representative of the accused is to obtain written instructions from the accused before the conference unless reasonably able to obtain instructions personally, by audiovisual link or by telephone at the time of the conference.

After the conference, a compulsory conference certificate must be completed, signed and filed with the court. The certificate is to set out certain matters, including, for example, the offences to which the accused person has agreed to plead guilty. The compulsory conference certificate is to be treated as confidential and cannot be required to be produced by a subpoena in any proceedings before a court, tribunal or body. It is admissible as evidence before a sentencing court only for certain limited purposes relating to the imposition of a lower penalty for a guilty plea. The accused must also sign the certificate.

The bill provides for a discount of 25 per cent if the offender pleads guilty at any time before committal. A discount of only up to 12.5 per cent will be allowed if the offender pleads guilty at any time after committal. The Government recognises that there may be some limited instances when an offender may be entitled to a significant discount after the committal. However, in order to prevent the abuse of the scheme, those grounds must be strictly limited. Under the scheme an offender must establish, before being entitled to a discount of between 12.5 per cent and 25 per cent, that she or he has substantial grounds for allowing the discount. Substantial grounds exist if, and only if, one of these four given grounds is satisfied—it is an exhaustive list. There is no scope for wiggle room here. We expect offenders, through their legal representatives, to show full and frank engagement in the conference process. Importantly, the burden of establishing that the ground has been made lies with the offender.

The first circumstance for meeting the substantial ground test arises when an offender offers, prior to committal for trial, to enter a plea of guilty to a statutory alternative to the offence charged and where that offer is rejected by the prosecution and the accused is subsequently convicted of it at trial. The second situation arises when an accused offers to plead to an alternative offence at conference and where the offer is refused by the prosecution prior to committal for trial but is accepted in the superior court. Thirdly, it allows for a situation where the offer to

plead guilty to an alternative offence is made for the first time and accepted after committal for trial, and the offender had no reasonable opportunity to offer to plead guilty to such an offence before the committal. Lastly, substantial grounds may be established when the offender was found unfit to be tried and pleaded guilty when subsequently found fit to be tried.

Certain offences are excluded from the trial, such as life sentences offences—which at present include the offence of murder, certain serious heroin or cocaine trafficking offences and an offence under section 61JA of the Crimes Act 1900—and offences under Commonwealth law. The regulations allow for the inclusion of Commonwealth offences at a later time. An offence may be excluded by the Director of Public Prosecutions if the director is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can be met only by imposition of a penalty with no allowance for discount and that it is highly probable that a reasonable jury, properly instructed, would convict the accused person of the offence.

There is nothing new in the concept of declining to allow a discount for plea in certain extreme cases. The current wording of section 22 allows for the exercise of discretion in imposing a discount following a plea of guilty. The guideline judgement of *R v Thomson; R v Houlton* [2000] NSWCCA 309 itself recognises that there are some rare cases where no such discount will apply, and indeed it was a matter referred to in the second reading speech before this House on 4 April 1990 concerning amendments to the Crimes Act by the Crimes Legislation (Amendment) Act 1990 regarding discount provisions that would attach to a plea of guilty.

The effect of the power to exclude a particular matter from the scheme by the Director of Public Prosecutions will simply mean that section 18 and the common law apply to the issue as to what, if any, discount should be imposed following a plea of guilty. It will mean that in such matters no automatic discount will attach to a plea entered in the Local Court, and should a plea of guilty be entered the prosecution will be free to make any submissions it thinks appropriate as to the discount, if any, that should attach to the plea. The extent of the discount will simply be a matter for discretion for the court after hearing submissions from both parties.

A significant part of the trial involves the DPP providing the police with pre-charge advice as to the appropriateness of a charge. This will help to ensure that the correct charges that fit the evidence are laid in the first place. The bill provides for the Director of Public Prosecutions and the Commissioner of Police to enter into a memorandum of understanding in relation to requests for advice by police officers to the director on any matter that could be the subject of a compulsory conference.

The New South Wales criminal justice system, and particularly the court system, are the biggest in Australia and handle more cases than any other jurisdiction. The New South Wales court system is also recognised as the best and most efficient in Australia. Even the Opposition has recognised it as "one of the best in the world.". That is a quotation from the member for Epping, Mr Greg Smith. I believe these reforms demonstrate the Iemma Government's ongoing commitment to worthwhile reform of the criminal justice system to continue to ensure timely justice for all parties concerned. I commend the bill to the House and, in so doing, I acknowledge the presence of Martha Jabour, the Executive Director of the Homicide Victims Support Group, in the gallery.