
Pretrial conferences and sentence indications in magistrates courts

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This article discusses the evolving views of what is acceptable in pretrial conferences and plea bargaining by considering the practice in the Magistrates Court and drawing some comparisons with the German civil code system. This leads to the conclusion that pretrial sentence indications will be an accepted part of our system and some suggestions to militate against dangers in that process.

BACKGROUND

In their seminal paper *Pleading Guilty: Issues and Practices*,¹ Professor Kathy Mack and Professor Sharyn Roach Anleu identified the following problems with plea bargaining:²

1. Invisibility – the process usually occurs outside court and this results in:
 - abandonment of power by the court to prosecution and defence counsel; and
 - loss of judicial precedent.
2. Improper factors may lead to inappropriate outcomes:
 - inducements may lead the innocent to plead guilty rather than take the uncertain risk of trial; and
 - the socially disadvantaged may receive worse outcomes.

One could add that the prosecution may accept an inappropriate lesser plea to close the file and avoid trial preparation; and issues about policing practices that should be dealt with in public are hidden.

The overwhelming view of the people they interviewed was that judicial involvement in plea bargaining was not appropriate.³ The assumption underpinning much of the criticism of judicial involvement is that it occurs in chambers in the absence of the defendant.⁴ A foundation of justice is that it is conducted in the presence of all involved and does not involve private deals. The prevailing view was also against sentencing discounts as they offer an inducement to the innocent to plead guilty for expedience. Also, a sentencing discount to those who plead guilty could be looked upon as a sentencing increase for those who go to trial. Exercising one's right to the presumption of innocence should not in effect result in an additional punishment.⁵

Views have changed in the last decade. The Australian Law Reform Commission recommended that, for federal offences, there should be discounts for sentencing after a plea of guilty and the court should specify them⁶ and a scheme of sentence indications with safeguards to protect against forum shopping, excessive lenience and inducing the innocent to plead.⁷ The safeguards included: there being only one indication; the indication being made in open court with a record kept (but if it is not

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¹ Mack K and Roach Anleu S, *Pleading Guilty: Issues and Practices* (Australian Institute of Judicial Administration, 1995).

² Mack and Roach Anleu, n 1, pp 9-11.

³ Mack and Roach Anleu, n 1, pp 135-139.

⁴ For example in *R v Pitman* [1991] All ER 468, where the judge told counsel in chambers that the defendant had no chance of acquittal.

⁵ Mack and Roach Anleu, n 1, p 167.

⁶ Australian Law Reform Commission (ALRC), *Same Crime Same Time: Sentencing Federal Offenders*, Report No 103 (2006), <http://www.austlii.edu.au/au/other/alrc/publications/reports/103> viewed 27 January 2008, Ch 11.

⁷ ALRC, n 6, Ch 15.



accepted the indication is not to be available to the trial/sentencing judge); and the judicial officer who gives the indication sentences is disqualified from further hearing of the matter if the defendant does not plead. Last year the Victorian Sentencing Advisory Council⁸ recommended: that sentencing indications be introduced in higher courts; that a long-standing (but variable) practice in the Victorian Magistrates Court of giving sentencing indications at contest mention hearings be given specific legislative authority; and that the Chief Magistrate be given power to require a magistrate to specify if the plea of guilty affected the sentence.⁹

More than 95% of criminal cases resolve without a trial and jury trials occur in much less than 1%. We should design our pretrial processes to assist the overwhelming majority of cases to reach a principled result and not design the process solely for the very few that go to trial. This is the same argument that was won 20 years ago, over spirited opposition, about court control of case flow management in civil cases. Courts have a responsibility to ensure that their processes result in prompt and fair outcomes and must exercise sufficient control to ensure that occurs. In the South Australian Magistrates Court, pretrial management of criminal cases is well developed.

THE EXPERIENCE IN THE SOUTH AUSTRALIAN MAGISTRATES COURT

Case flow management of criminal cases in the South Australian Magistrates Court is a three-stage process. In the first stage a case will be adjourned to allow the defendant to seek legal advice and to negotiate with prosecution with no involvement by the court. Two and sometimes more adjournments are permitted, usually for about one month at a time. If the court is not satisfied that the matter will resolve it will then be set for a pretrial conference. Under r 26 of the *Magistrates Court Rules 1992* (SA) this triggers a requirement for the prosecution to prepare a full brief of evidence and to disclose it to the defence. In practice the police prosecutors ask the investigating police for a full brief, but it only arrives in dribs and drabs. It can be useful if the magistrate setting the matter for a pretrial conference identifies the key areas of contention, but to do so requires knowledge of the file.

When police detect what they believe is a crime they prepare an Apprehension Report (AP) which summarises the evidence available and from this the adjudication branch prepare the charges that are laid before the court. It is usual practice to require the police prosecution to file a copy of the AP with me at least one day before the pretrial conference. This has two purposes. The first is to make the prosecution look at their files before the pretrial conference and the second is to give the magistrate information about the charges so that he or she can give direction to the conference. The magistrate needs to bear in mind that the material in the AP is of variable reliability and sometimes ambitious.

In 2005 the delay between a pretrial conference and the first available trial date in the CBD court in Adelaide was more than six months,¹⁰ and the pretrial conference system was not working well due to inconsistent approaches by magistrates and inadequate preparation by prosecution. The author approached prosecution and they agreed to provide regular and experienced prosecutors for pretrial conferences. The same magistrate conducted nearly all of the pretrial conferences in the CBD court for more than one year, and when he was on leave or not available the same experienced magistrates replaced him. Any conferences that were adjourned returned to the same magistrate. At the end of one year, the delay from a pretrial conference to the first available trial date had been reduced from 27 to 10 weeks. There was no lessening of the work coming in, nor of the “banking up” of cases in the pretrial conference (PTC) list. Indeed, by the end of the period the delay to get a PTC date was less than four weeks. This suggests that a consistent approach and following through on issues for pretrial conferences is important for these conferences to be effective.

The pretrial conferences are conducted in a closed court and the defendant normally sits behind their lawyer or, if they are unrepresented, they sit at the bar table. If the prosecution case looks good the magistrate asks for the defendant’s antecedents and any victim impact statements and, based on the

⁸ Victorian Sentencing Advisory Council, *Sentencing Indications and Specified Sentence Discounts Final Report* (September 2007).

⁹ Victorian Sentencing Advisory Council, n 8, pp 89-90.

¹⁰ 27 weeks from pretrial conference to first available trial date.



facts alleged, and the prior record, intimates a sentence. Sometimes the magistrate may discuss the possible sentencing options with prosecution and defence counsel before settling on a final intimation. When the defendant is in custody on remand and the time served is enough for the offence charged, if the matter cannot be resolved by a plea and no further penalty a very early trial date is fixed to finalise it. If the defendant is already serving a sentence, the increase in the head sentence and, importantly, the non parole period that would result from any sentence, is intimated. The non parole period is usually the defendant's primary concern. All of this discussion occurs in the presence of the defendant in court. If the defendant wants to say something it is my practice to allow him or her to do so. This is, after all, their case.

If the defendant needs time to consider his or her position the case is adjourned until later in the list or to another day and the intimation remains effective until that adjourned time. If the defendant does not accept the intimation there is no record kept of the intimation, nor even that it has occurred. If it is accepted the process is mentioned in the sentencing remarks.

There is a significant difficulty in prosecution obtaining statements from the investigating police and, sensibly enough, defendants often will not plead until they are convinced the case against them is overwhelming. The AP can be used to focus police enquiries into weaknesses in their case and encourage the accused to disclose any primary areas of dispute, to minimise police work on peripheral issues at this stage. For example, in a case of break enter and steal¹¹ which relies on DNA at the scene, the prosecution must produce statements to show the source and profile of the DNA but the victim's statement may be of secondary importance. Of course defendants have no obligation to disclose the area they contest, but most do. Defence are being required to disclose alibi defences and the calling of experts in South Australia. I predict that the defence right to disclose nothing until the end of the prosecution case will continue to be broken down, and it should be. Once a prosecution case is outlined and the defendant is legally represented there is no principled reason, that I can think of, why the defendant should not be asked to nominate particular areas of contest of the prosecution case.

If defendants have multiple files we tend to collect them all together and resolve as many as we can in a central location, rather than dealing with them on a piecemeal basis. Often, multiple files collect around defendants who are "couch surfing" around the suburbs and they will not face up to them until the major indictable matters are resolved. If they are all brought together they can be encouraged to sort out many of the minor matters, notwithstanding the outcome of major indictable offences. If it appears they will be contested, whatever happens to major indictable offences, then they are set for trial in the usual way. If it seems they will resolve, but not until a major indictable offence is finalised, they can be adjourned until after the predicted sentence date for the major indictable matters. There is always the optimistic hope that the judge might think to call for the Magistrate Court files and clean the whole lot up as part of a sentencing package. If not, we can then take the pleas and finalise them.

These approaches reduce the number of adjournments. Every adjourned file involves substantial registry and in-court work; calling it on, fixing a new date, endorsing the file and signing it. Minimising this can substantially reduce overall workloads.

After pleas of guilty the suitability of the defendant for specialist court programs, such as the Drug Court and Mental Health Diversion Court can be considered. It has been suggested that some defendants who are in custody may be coerced into pleas of guilty to access the Drug Court where, if accepted into the program, they will be released into home detention. However, in my substantial work in this court I have only had one instance of that being raised in which I was convinced and set the plea aside. Family violence matters are all dealt with in a special list which has priority early trial dates available.

Victims

As a result of encouragement by the Victims Commissioner in South Australia, Michael O'Connell, police pay close attention to victims' issues and we often have victim impact statements that are read

¹¹ Termed "serious criminal trespass and steal" in South Australia.



out in court. Victims sometimes attend pretrial conferences and if they want to say something I permit them to do so. I had one difficult case of a young male Muslim refugee who touched some teenage girls inappropriately at a swim centre, one of whom attended the pretrial conference. I assured her that she did not have to speak but she was keen to do so and, with some trepidation, I let her. She made a very powerful statement about the insult and loss of confidence that she and her friends had suffered from what should have been a fun public social event. She was not seeking a punitive result, rather his apology and for him to understand the need to respect the rights of young girls. It would be better for such matters to be dealt with through victim offender conferencing, conducted by experienced court mediators as part of the sentencing process, with careful preliminary discussions and post sentence support, to provide a safe venue for victims to confront offenders who have pleaded guilty. This is a safer process than the judicial officer being directly involved, but unfortunately there is no funding for victim offender conferencing in adult matters at the moment.

Costs

Cost shifting can affect the conduct of pretrial activity. There is a cost scale for criminal cases in the South Australian Magistrates Court to provide certainty and predictability of the costs that will be awarded according to the outcome of a matter.¹² It provides proper compensation for attendance at a pretrial conference, which should discourage prosecution from causing adjournments due to tardiness in providing statements. However, defence counsel are loath to ask for costs in case that prejudices future negotiations.

It is important for legal aid and cost shifting rules not to overly reward a matter that resolves by plea on the day of trial or defendants and their advisors will be encouraged to delay pleas until then. Research by the Australian Institute of Criminology has shown that some cost incentives encourage a plea on the trial court steps.¹³

MAGISTRATES AND LOCAL COURTS IN OTHER STATES

In New South Wales, Queensland, Western Australia and the Australian Capital Territory there is no formal pretrial conference system, nor sentence indications; although in Western Australia some informal conferencing occurs to narrow the issues at trial. In Victoria there is a contest mention system in the Children's Court and the Magistrates Court where issues for trial are narrowed and, if the magistrate thinks it is appropriate, sentence indications are given. These are not binding on other magistrates. In the Northern Territory, after a full police brief has been prepared and both parties have filed a "contest mention information form" the court may give a sentence indication. The magistrate will have the facts, relevant prior convictions and details of any rehabilitation or reconciliation with the victim. A victim impact statement will be available and a plea at this stage will be regarded as a plea at the first opportunity.

SENTENCING PRINCIPLES: A MATHEMATICAL APPROACH TO INTUITIVE SYNTHESIS

At common law in Australia the dominant view at the moment in the High Court is for intuitive or instinctive synthesis. Sentencing must not be a mathematical equation with the judicial officer starting at a point and adding and subtracting a specified amount for exacerbating and mitigating factors.¹⁴ However, in South Australia, the Full Court encourages stating the value of discounts for a plea of guilty.¹⁵ Depending on how early it is, and other factors, the discount can be between 10% and one-third. As a rule of thumb at a pretrial conference stage I work on a 25% discount.

¹² *Magistrates Court Rules 1992 (SA)*, r 51, Sch 1.

¹³ Payne J, *Criminal Trial Delays in Australia, Trial Listing Outcomes* (Australian Institute of Criminology, 2007), p 26.

¹⁴ *Cameron v The Queen* (2002) 209 CLR 339 and *Markarian v The Queen* (2005) 228 CLR 357; 215 ALR 213. It follows that courts are discouraged from stating a discount for pleas of guilty: *R v Marshall* [1981] VR 725. In *Markarian* Kirby J and McHugh J supported more transparency and a clearer approach to sentencing.

¹⁵ *R v Place* (2002) 81 SASR 395 following a similar approach in New South Wales: *R v Thomson* (2000) 49 NSWLR 383; 115 A Crim R 104.



Sentencing in the Drug Court raises particular issues that suggest recourse to both a mathematical approach and intuitive sentencing is appropriate. To be accepted into the Drug Court in South Australia, defendants must have pleaded guilty to offences for which in total they will receive a sentence of immediate imprisonment to serve for one year or more, and which were in part caused by an illegal addictive drug habit. Defendants with this profile have often amassed a dozen or more files. The magistrate works with the defendants for up to one year if they are successful, meeting them fortnightly for the first phase of three months to discuss their problems and progress, and less often as they progress through the program. If they fail they are terminated from the program, remanded in custody and sentenced, almost invariably to serve a quite lengthy term of imprisonment. Between 60% and 70% fail. By the time they are sentenced the magistrate knows them quite well. Personally, I cannot just give them an intuitively synthesised result. I prefer to explain, briefly, what I am notionally imposing for each offence. For example, I will say that for a residential break with no-one home, with not much taken and no trashing, it is one year; but if the next one is worse because of the large quantity of goods taken, it will be 18 months, and so on with each offence to arrive at the total head sentence. I then deduct 25% off for pleas of guilty, look at the totality, which permits some adjustment, and deduct time served, and thus the result is explained for all to understand. If it is outside the usual parameters, an appeal court can readily see the point of error. Anything less is doing ourselves a disservice because it obscures the intellectual rigour in this important part of our work. Of course before pronouncing the sentence one does the calculation to make sure the end total “feels right”. If I am not happy with the total so calculated, then there is enough flexibility in our guidelines, in combination with the totality principle, to adjust the individual sentences to arrive at a result one can live with in the “lonely room of conscience”.¹⁶ We do not need to choose either a mathematical approach or intuitive sentencing but rather we should use both.

THE GERMAN CIVIL CODE SYSTEM

The German criminal law system is inquisitorial.¹⁷ The purpose of a criminal investigation is to seek the actual truth. The first phase is the investigation under the direction of the State Attorney who decides whether to file charges.¹⁸ If necessary an investigating judge may be involved at the stage,¹⁹ especially to conduct inquiries into the charged person’s mental capacity.²⁰ Any charges are laid with the appropriate count in an indictment,²¹ and at this point control over the proceedings shifts from the State Attorney to the court and the change of the nature of the proceedings is recognised in the change of description of the charged person to the accused.²² Once a charge is formulated the matter proceeds under the direction of the court in an investigation phase, and the court reviews the evidence and decides if it is sufficient to commit the matter for trial. If it is, the court then prepares the case for trial and conducts the trial on the basis of the indictment that was laid.

Sentencing is based on principles that are familiar to us. Each offence has a statutory range of penalty provided. General sentencing principles require attention to specific and general deterrence. There is a prohibition against short sentences, but there are no suspended sentences.

¹⁶ A term I heard from a colleague whose identity I regrettably do not recall.

¹⁷ The following detail is from Danneker G and Roberts J “The Law of Criminal Procedure”, Ch 15 in Ebke W and Finkin M, *Introduction to German Law* (Kluwer, 1996).

¹⁸ § 160 StPO (*Strafprozeßordnung – the Code of Criminal Procedure*).

¹⁹ Ermittlungsrichter – § 161 StPO.

²⁰ § 160 III StPO.

²¹ § 170 StPO.

²² § 157 StPO, Beschuldigter to Angeschuldigter, per Danneker and Roberts, n 17, p 418.



The German system faces similar resource pressures to ours. Due to pressure on the prosecution authorities,

the practice has grown up *praeter legem* of concluding more and more criminal cases consensually at the investigative stage or even at the trial. As a result the principle of investigation is under threat.²³

The defendant makes admissions to avoid the need to call evidence and the court may agree to find certain aspects unproven. This shortens the trial and fixes the factual basis for sentencing.

Sentence intimations are given during the trial process by judges. Last year I watched the first morning of a trial of five defendants charged with dealing in one kilogram of amphetamines and a large quantity of ecstasy tablets. The trial was conducted by a panel of two professional judges and two lay judges. The junior of the professional judges had prepared the case for trial. The defendants have no obligation to say anything but, as often occurs, they each decided to give their version of the facts at the commencement of the trial. This is to make sure that their version is in consideration, bearing in mind that the docket of prosecution evidence is before the court. The chair of the panel of judges²⁴ questioned them and then, in turn, the other professional judge,²⁵ one of the lay judges and the prosecutor and their own attorneys asked questions.

At the morning break one of the judges told me that they would now have discussions with the defence attorneys and tell them that in the view of the judges two of the defendants would only be found guilty of lesser charges and would receive a non custodial sentence, and he expected their cases would be finalised that day, but the three main offenders faced a jail penalty of five years. He did not expect that those defendants would accept that outcome and so then the trial would continue. Because the defendants were in custody the trial had to commence within six months of them being taken into custody,²⁶ and proceed expeditiously once it was commenced,²⁷ otherwise the defendants would have to be released.

SOME CONCLUSIONS

Recent reports suggest that sentence indications should become a regular feature of our criminal justice system and in fact they already are in some lower courts. We might draw some comfort from the fact that they are accepted in the German system. It seems likely too that a system of discounts for early pleas of guilty will be accepted to encourage pleas of guilty for the expedient reasons of taking the pressure off prosecution and the trial courts and to reduce the inconvenience for police and civilian witnesses. I am not aware of any evidence as to whether victims are better served by a plea or by giving evidence but, given our adversarial process, which can be hard on witness victims, I expect that often a plea may be kinder and the acknowledgement of guilt more satisfying.

As long as the process occurs in the open it can be done in ways that provide appropriate protections against the risks inherent in private deal making. There must be a principled distinction between a statement of the penalty on a basis of given facts and a bargaining over how low do we have to go to get rid of this and how can the facts then be massaged to reach that result. This can only occur if there is greater transparency in sentencing generally so that it can be seen that the penalties are realistic. So a corollary of sentence indications and discounts for pleas is the need to end intuitive synthesis as the sole method of sentencing.

Intuitive synthesis is a valiant attempt to retain a mystery around sentencing so that the judiciary retain control over it. The tide of history is likely to sweep it aside as the sole sentencing method, and so it should, otherwise it is likely to have the opposite effect. The judiciary will only be able to retain control over sentencing if they are open about the basis and method of sentencing in order to justify

²³ Dannecker and Roberts, n 17, p 428.

²⁴ The vorsitzender Richter.

²⁵ The beisitzender Richter, the assessor who had prepared the brief of evidence for the trial.

²⁶ § 121 StPO.

²⁷ No break must exceed three weeks or else the trial must be started again because the immediacy of the impression of witnesses is lost.



their conclusions to the community. Otherwise the legislature is likely to impose a formula to ensure consistency and transparency with a much worse result than a little transparency now.

Done properly, a system of pretrial intimation of sentence is likely to be more transparent than rushed pleas agreed on the court steps with all the attendant waste of the resources in having prepared the matter for trial.

I identify three dangers in the court being involved in pretrial conferences and in the process of intimating sentences:

- the defendant may get too much (by being induced to plead to something he or she did not do) and as a collateral loss bad police practices may remain hidden; or
- the offender may get too little (because facts are minimised, due to the prosecution and the court having coincident incentives to close the file for pragmatic reasons); and
- the court is involved in the process so it is exposed to increased risk.

Each of these can occur in the present process. As to the last, once the matter is before the court inappropriate outcomes reflect badly on the court anyway and trying to shed the blame to the prosecution or defence is not credible in the eyes of the public. These are our processes and if they do not achieve appropriate outcomes that reflects poorly on us. It follows that courts should be willing to be more interventionist to ensure they have the information they need to achieve a just result.

Some safeguards to guard against the other risks are obvious:

- the prosecution must supply sufficient information to establish the strength of its case and the provable factual basis for the plea. With assistance from the court, and often the defence, this need not be a full brief;
- there should only be one sentence intimation;
- the judicial officer giving the intimation should not hear the trial;
- the discussion leading to the indication should be in the presence of the defendant;
- victims should be aware that the process is occurring and be permitted to attend. Whether victims attend or not, appropriate information about the effect of the crime on the victims should be available to the judicial officer;
- the opportunity should be used to explore therapeutic options such as drug court, mental health issues and other rehabilitation and also victim offender mediation;
- the court should accept responsibility to ensure that the process does not miscarry and, to that end, be willing to be more interventionist than we are in our traditional role; and
- for pretrial conferences to work effectively there needs to be a consistent approach.

