Convenience Pleas

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INTRODUCTION

The convenience plea is a complicated and inescapable part of criminal law practice, particularly for those lawyers employed by the Aboriginal Legal Service. Managing convenience pleas requires not only a proper understanding of the relevant law in such matters, but also key ethical responsibilities and professional conduct expected of all legal practitioners. It is hoped that this paper can provide some practical guidance with respect to the current law and practice for those entering criminal law practice and of whom will inevitably be confronted with a client who refuses to admit guilt, but instructs to plead guilty.

PART 1 – THE CONVENIENCE PLEA

"I'm innocent but I want to plead guilty"

For those lawyers who have worked for some time with the Aboriginal Legal Service the above instructions would not be regarded as particularly uncommon or unusual. However for those newly admitted lawyers or those which choose to enter a new area of criminal law practice, the notion of acting for a client who asserts innocence but instructs to plead guilty can cause a great deal of disquiet. After all isn't one of the reasons why we choose to practice as criminal defence lawyers to assert and defend the rights of those who in fact are innocent? Moreover how does one reconcile with the ethical dilemma of appearing for a man or woman who wishes to be punished for a crime that they claim they did not commit? The reality is … it's complicated.

There are many and varied reasons why clients tell their lawyers to plead guilty notwithstanding having given instructions to the contrary. In a paper written by Peter Hidden QC entitled "Plead Guilty and Get it Over With?"[1] his Honour who was then a Public Defender made the following remarks about the difficulties faced by Barristers instructed by the Aboriginal Legal Service:

> "Many older Aborigines, especially from rural areas, have a long history of appearing without representation in magistrate's Courts, and their experience of the criminal justice system taught them that conviction follows arrest as night follows the day. Even with legal representation, they cannot break the pattern of pleading guilty "and getting it over with",

[1] Hidden, Peter QC "Plead Guilty and Get it Over With?" (1991-1992) *New South Wales Bar News* at 19.

regardless of the merits of their case; and it is understandable that they have no stomach for a fight which they are convinced they cannot win."

As demonstrably tragic as the above passage sounds, it is a reality that many lawyers employed by the Aboriginal Legal Service, particularly those working in regional areas, are faced with in day to day practice.

What is more, there are in practice, numerous other reasons given by clients when adopting these types of pleas. Some of the more common examples include:

1. Wishing to have a matter disposed of as quickly and conveniently as possible (hence the phrase "convenience" pleas) in order to avoid having to return to Court. Often this might be due to the anxiety of having a matter continually weighing on one's mind, or having to endure arduous bail conditions such as daily reporting and/or strict curfews. Alternatively it might be that one simply cannot afford to take time off from work or family commitments to attend Court on multiple occasions and after lengthy adjournment periods.

2. Some clients are too embarrassed to confess the nature of their conduct to their lawyers. This is quite common in domestic violence matters and matters involving allegations of sexual misconduct. Indeed clients will normally have great difficulty in freely admitting guilt when the alleged victim is a child or otherwise vulnerable person. Often in these types of cases a client will maintain their innocence, only conceding a plea of guilty (without an admission) once satisfied that the case against them is too strong to defend.

3. Furthermore in matters involving allegations of sexual misconduct, in particular child sex offences, a client will inevitably avoid admitting guilt, despite pleading guilty, to avoid any consequences that may flow upon being convicted of such. For example clients might be afraid of being punished in the community by family and/or friends, in which case it is easier simply to tell them that "my lawyer told me it was the only way to keep me out of gaol". Alternatively it might be to avoid punishment while in gaol from other

inmates, again by attributing the plea of guilty to pressure from legitimate legal advice.

4. Some clients are simply not able to remember the offence. This can be due to due to heavy self-induced intoxication (by way of alcohol or drugs) at the time of the alleged offence, an inability to remember a matter that happened some time ago, or perhaps as a result of a head injury or mental illness affecting the client's memory. A client should always be given an opportunity to plead not guilty in such matters in order to properly review the Crown case. However should the client choose to plead guilty it is imperative that they are made to understand that they are accepting the Police version against them without contest. It should also be noted that if a client gives instructions of head injury and/or mental illness then s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) must always be considered before the decision is made to proceed to Sentence in the Local Court.

5. Commonly on the day of Local Court defended hearings and indeed the first day of Jury trials, clients will instruct their lawyers to "settle the matter" by way of negotiating facts and/or charges but without in fact admitting their guilt. This course is often undertaken after an irresistible deal has been offered by the Crown which would likely see the client avoid a custodial penalty upon Sentence. In such circumstances a plea will often be forthcoming for purely strategic reasons and without an admission of guilt.

The abovementioned list of examples demonstrates the potentially complicated array of instructions, which are often shaped by broader sociological and cultural matters, of which the practitioner is bound and must consider carefully before providing appropriate representation in these types of matters. Accordingly the practitioner must be acutely aware of responsibilities of professional conduct, ethical obligations and moreover the reaction of the governing law to the convenience plea, a summary of which is set out in the Part 2 of this paper.

PART 2 – THE GOVERNING LAW ON CONVENIENCE PLEAS

In New South Wales when confronted with a professional ethical dilemma, Solicitors can look to the *Solicitors Rules*[2] for guidance on the duties owed by practitioners to the Courts and clients. For instance *Rule 20* explicitly deals with the obligations of a practitioner who is instructed by a client in criminal proceedings who admits to the commission of the offence as alleged, but elects to plead not guilty.

Curiously however the *Solicitors Rules* do not provide instruction as to how to conduct oneself when dealing with a client in criminal proceedings who does not admit to the commission of the offence alleged, but elects to plead guilty. The closest that the *Solicitors Rules* appear to get to the matter is Sub-rule A.17B under Rule 23 – Advocacy Rules, which sets out the following:

> "A practitioner must (unless circumstances warrant otherwise in the practitioner's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings."

Thus a client must be advised of the prospects of being Sentenced more leniently should they choose to plead guilty to an alleged offence. This appears to be so irrespective of instructions of guilt or otherwise. Accordingly one could reason that the rules implicitly permit a practitioner to represent clients in matters whereby an election to plead guilty is made for the purpose of obtaining a tactical advantage without any admission of guilt.

The difficulty, perhaps ethically speaking, with proceeding as above appears to lie in the practitioners duties owing to the Court. The Statement of Principles for Rules 17-24 which deals with Practitioners' Duties to the Court instructs:

> "Practitioners, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour.

[2] *Revised Professional Conduct and Practice Rules (Solicitor's Rules)* (1995) NSW.

> Practitioners should be frank in their responses and disclosures to the Court, and diligent in their observance of undertakings which they give to the Court or their opponents."[3]

Given the above, the question remains as to how one conducts a matter in a frank and candid way with the Court when to do so would be to reveal the client's intention to plead guilty without conceding a true consciousness of guilt? Wouldn't such conduct obligate the Court to thereafter reject the plea of guilty and remand the matter for hearing or trial? For if this was to happen, then the advantage sought in proceeding on a plea of guilty is lost and the best interests of the client are potentially squandered.

The answers to these questions have fortunately, to some extent, been answered in the Common Law as set out hereafter.

The Common Law

What is a Plea of Guilty?

'The law regards a plea of guilty made by a person in possession of all the facts and intending to plead guilty as an admission of all the legal ingredients of the offence[4] and as the most cogent admission of guilt that can be made, for the Court is prepared to act upon it and proceed to conviction or final disposition of the proceedings.'[5]

Therefore if the effect of the plea of guilty is a confession of the existence of each of the legal ingredients necessary to constitute the offence charged, does it therefore necessarily follow that a genuine consciousness of guilt be indicated before a Court will proceed to act upon the plea? And perhaps more importantly for the purposes of this paper, does an absence of consciousness of guilt fetter the legal practitioner's ability to provide representation when instructed in such matters?

The leading authority on these matters comes from the decision of *Meissner v R* (1995) 184 CLR 132. *Meissner v R* was a case dealing with a charge of Attempt to Pervert the Course of Justice whereby the Crown asserted that the appellant, Mr Meissner, improperly influenced his former partner, Ms Perger, to plead guilty to a charge of making a false statutory declaration. Ms Perger had asserted in the statutory declaration that she had been photographed in sexually compromising

[3] *Revised Professional Conduct and Practice Rules (Solicitor's Rules)* (1995) NSW.
[4] *R v O'Neill* [1979] 2 NSWLR 583 cited by Lee J in *R v Sagiv* (1986) 22 A Crim R 73.
[5] *R v Sagiv* (1986) 22 A Crim R 73 at [12].

situations with a number of politicians on board Mr Meissner's boat. Mr Meissner was subsequently questioned by Police about the alleged activities on board his cruiser and denied the majority of the allegations made in the statutory declaration. Following this Ms Perger was charged, and initially pleaded not guilty to making a false statutory declaration. However Ms Perger decided to change her plea to one of guilty, after receiving some advice and financial assistance from Mr Meissener, and was subsequently convicted for the offence.

Ultimately Mr Meissner was charged with attempting to pervert the course of justice by improperly influencing Ms Perger to plead guilty to the charge and was convicted after trial in the District Court. Mr Meissner appealed to the High Court after the New South Wales Court of Criminal Appeal unanimously dismissed his appeal against conviction. One of the arguments raised on Mr Meissner's appeal, and which is germane to this paper, was whether the offence of attempting to pervert the course of justice was capable of being established without evidence showing that the Ms Perger was not in fact guilty of the offence to which she pleaded.

The High Court found that it was not necessary for the Crown to prove that Ms Perger was not guilty of the offence to which she pleaded guilty, and the majority judgment of Brennan, Toohey and McHugh JJ held as follows:

> A person charged with an offence is at liberty to plead guilty or not guilty to the charge, whether or not that person is in truth guilty or not guilty. An inducement to plead guilty does not necessarily have a tendency to pervert the course of justice, for the inducement may be offered simply to assist the person charged to make a free choice in that person's own interests. A Court will act on a plea of guilty when it is entered in open Court by a person who is of full age and apparently of sound mind and understanding, provided the plea is entered in exercise of free choice in the interests of the person entering the plea. There is no miscarriage of justice if a Court does act on such a plea, even if the person entering it is not in truth guilty of the offence[6].

Furthermore Justice Dawson propounded the following about those who plead guilty other than for reasons of actual guilt:

> It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless

[6] *Meissner v R* (1995) 184 CLR 132, Brennan, Toohey and McHugh JJ at 141.

> constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred[7].

Notwithstanding the above rulings in the year following the decision of *Meissner v R* the High Court made another ruling in respect to pleas of guilty in the decision of *Maxwell v The Queen* (1996) 184 CLR 501 whereby Dawson and McHugh JJ held at 511:

> The plea of guilty must however be unequivocal and not made in circumstances suggesting that it is not a true admission of guilt. Those circumstances include ignorance, fear, duress, mistake or even the desire to gain a technical advantage. The plea may be accompanied by a qualification indicating that the accused is unaware of its significance. If it appears to the trial judge, for whatever reason, that a plea of guilty is not genuine, he or she must (and it is not a matter of discretion) obtain an unequivocal plea of guilty or direct that a plea of not guilty be entered. But otherwise an accused may insist on pleading guilty."

The decision in *Maxwell v The Queen* gives rise to some concern given the reference to "desire to gain a technical advantage" as a feature affecting the integrity of the plea. In *R v KCH* [2001] NSW CCA 273 however, Ipp AJA opined that the use of the phrase "technical advantage" referred to in *Maxwell v The Queen* does **not**

> [a]pply to or include the situation where an accused person, without any undue or improper pressure, freely and voluntarily makes a decision to plead guilty to one offence, not because he believes that he is guilty, but because he thinks that this is a good way of avoiding the risk of being found guilty of other offences, or of receiving a reduced sentence, or of protecting his evidence with a view to bringing an appeal at a later stage.[8]

Moreover Hulme J in *R v KCH* adopted the joint judgment in *Meissner v R* whereby "provided the plea is entered in exercise of free choice in the interests of the person entering the plea … there is no miscarriage of justice if a Court does act on such a plea, … even if the person entering into it is not in truth guilty of the offence."[9] In the same passage his Honour also referred to *Maxwell v The Queen* and held that: "Whatever may have been meant by "technical advantage" where used on the last mentioned page, I do not regard it as qualifying the statement I have quoted."[10]

It is apposite to say that *Maxwell v The Queen* can be distinguished from *Meissner v R* as it was a case concerning a plea of guilty to an alternative charge of manslaughter as opposed to murder, whereby the Crown urged the Court to reject the plea once evidence was established that the partial

[7] *Meissner v R* (1995) 184 CLR 132, Dawson J at 157.
[8] *Regina v KCH* [2001] NSWCCA 273, Ipp AJA at [93].
[9] *Regina v KCH* [2001] NSWCCA 273, Hulme J at [162].
[10] *Regina v KCH* [2001] NSWCCA 273, Hulme J at [162].

defence of Diminished Responsibility no longer applied. The High Court held that it was erroneous and not within the trial judge's discretion to reject the plea once the Crown had accepted such provided that the plea was genuine.[11] Importantly Mr Maxwell in this case never disputed having committed a homicide and thus there was no suggestion that he did not wish to plead guilty to manslaughter.

Thus *Meissner v R* has become authority for the proposition that a genuine consciousness of guilt is not a prerequisite for a Court in accepting and acting on a plea of guilty, so long as the decision is made in the exercise of free choice and in the interests of the person entering the plea. For example in *R v KCH*, Ipp AJA held that "insofar as the cases to which I have referred suggest that a genuine consciousness of guilt is always necessary, …those decisions are inconsistent with what was said in the passage from *Meissner v R* which I have quoted in the immediately preceding paragraph."[12]

In relation to the obligations of lawyers acting for accused persons in these matters some comfort can be taken from the remarks of Justice Deane in *Meissner v R* who stated that " ... a degree of pressure which would be quite legitimate if exerted by an accused's own lawyer acting solely in the accused's interests may be completely unacceptable if exerted by a stranger acting for a collateral and selfish purpose of his or her own."[13]

Accordingly a lawyer would not be said to be acting improperly in advising a client to plead guilty (notwithstanding instructions of innocence) in a matter, so long as the client's best interests are the sole consideration in so doing.

In *Wong v Director of Public Prosecutions*[14] Howie J referred to *Meissner v R* in holding that "[A] Court is entitled to accept a plea of guilty that is given in the exercise of a free choice in a defendant's own interests and there will be no miscarriage resulting from reliance on a plea even though the person entering the plea is not in truth guilty of the offence".[15]

[11] *Maxwell v R* [1996] HCA 46 at [29].
[12] *Regina v KCH* [2001] NSWCCA 273 at [163].
[13] *Meissner v R* (1995) 184 CLR 132, per Deane J.
[14] *Wong v DPP* (2005) 155 A Crim R 37 at [33].
[15] *Wong v DPP* (2005) 155 A Crim R 37 at [33].

In addition Howie J considered the ethical obligations of legal representatives in such matters in propounding that:

> [t]here is no difficulty, either ethically or otherwise, with a solicitor appearing for a defendant on a plea of guilty notwithstanding that the person has given instructions denying guilt. If it were otherwise, the defendant could avoid the consequences of a plea of guilty simply by changing legal representatives. Meissner makes it quite clear that there is nothing necessarily inconsistent in the fact that a person pleads guilty and yet asserts that he is innocent of the crime charged.[16]

In Queensland the Court of Appeal also applied the ruling in *Meissner v R* and urged the following course to be adopted by lawyers representing clients in such matters:

> [e]xperience shows that some people charged with serious offences (and particularly offences of incest or indecently dealing with children) wish both to maintain to their lawyers that they are actually innocent, and also to plead guilty. In those circumstances it is imperative that these lawyers ensure that no plea be taken until (written) instructions have been obtained in which the person charged describes a wish or willingness to plead guilty, and an understanding that by so doing, he or she will be admitting guilt. If those instructions are obtained and adhered to a lawyer may properly appear on the plea.[17]

In *R v KCH* Ipp AJA, in applying the decision of *Meissner v R*, made these comments about the conduct of lawyers appearing in these types of matters:

> It follows that legal practitioners who represent accused persons owe a duty to the Court not to bring improper pressure to bear on their clients to plead guilty … Such a duty is part of the general duty not to corrupt the administration of justice which in turn is derived from the public interest in ensuring that the administration of justice is not subverted or distorted by dishonest or negligent practices.[18]

It perhaps goes without saying that any pressure placed upon a client to plead guilty must be legitimate, in that it is given only after very careful consideration of the available evidence, and is conducted solely within the best interests of the client, so as to avoid being regarded as improper.

It should be noted that the majority judgment in *Meissner v R* refers to an accused person who is of "full age"[19]. The question therefore arises as to how one may deal with a juvenile client who gives instructions to plead guilty without an admission of guilt. Perhaps an appropriate way to deal with this problem is to have the client's parent/carer, adult family member or juvenile justice officer,

[16] *Wong v DPP* (2005) 155 A Crim R 37 at [40].
[17] *R v Allison* [2003] QCA 125, Jerrard JA at [26].
[18] R v KCH [2001] NSWCCA 273, Ipp AJA at [101].
[19] *Meissner v R* (1995) 184 CLR 132, Brennan, Toohey and McHugh JJ at 141.

present and able to assist the client in properly understanding the course about to be taken and the consequences that flow thereon.

Ultimately it appears to be arguable however that a juvenile client would have a relevant ground of appeal against conviction if a plea were to be entered without evincing a true consciousness of guilt, on the basis that *Meissner v R* deals implicitly with adult accused persons.

I will return to the practical considerations of dealing with juveniles in Part 3 of this paper.

PART 3 – PRACTICAL CONSIDERATIONS

Instructions

When a client proposes to have their matter dealt with upon a plea of guilty without admitting the offence or agreeing with the Facts proposed by the Crown I would endorse the language used by Jerrard JA in *R v Allison*[20] in that it is **imperative** that no plea be entered until written (and of course signed) instructions have been obtained from the client.

The reason for obtaining written signed instructions is of course so that there is a record of documentary evidence of your client indicating a willingness to accept the allegation of criminal conduct against them. In addition it is evidence of your client admitting the elements of the offence and asking that the Court to Sentence them according to the Facts proposed.

Should a client change their mind before being Sentenced and traverse the plea, then there needs to be evidence that the client was of sound mind and understanding, and entered the plea in exercise of their own free choice and in their own interests (to use the words of the High Court in *Meissner v R*).

When obtaining signed instructions from a client it is essential that the client demonstrates an understanding of what it is that they are pleading guilty to. Often this can simply be achieved by having the client sign each page of the proposed facts as having read and understood the nature and extent of the allegations against them.

[20] *R v Allison* [2003] QCA 125, Jerrard JA at [26].

However it is often the case for lawyers working for the Aboriginal Legal Service, that clients are unable to read, or if they can, only at a very basic level. Often even seasoned criminal advocates can have difficulty in understanding the peculiar vocabulary and awkward grammatical expression that appears to be taught at Goulburn Police Academy. In those circumstances I find it most useful for a witness (such as a family member, Correctives Officer or colleague) to be present when the Facts are read to the client, and to have the witness sign the Facts sheet and written instructions. If a client traverses their plea for want of understanding of the Facts, then at least a witness can be called to confirm that the client listened and appeared to understand the Facts when they were signed.

When drafting written instructions I also find it useful to use plain language that a client will obviously understand. For instance it is unlikely that a client would be found to be of full understanding if the instructions signed were: "I understand that by pleading guilty I admit that I assaulted the victim and that as a consequence of the assault, the victim suffered actual bodily harm which was more than merely transient or trifling." Perhaps a more appropriate example would be "I understand that by pleading guilty I admit to the Police, the Court and the whole world that on x date I punched Mary Smith once in her face really hard and that I caused her to have a black eye."

If plain language is used and the Facts are signed, then it is difficult to see how a client could traverse their plea on the basis that their lawyer improperly pressured or tricked them into doing it.

Sometimes on a busy list and/or hearing day, there can be quite a bit of pressure to have the matter ready when Court commences. When taking final instructions on the morning of Court is a reality that we all must deal with, it is tempting to hurry the written instructions so as to avoid being admonished by the Bench for delay. In my experience however, if a Magistrate or Judge can be told early on that it is likely that a matter listed for hearing is likely to now be settled and shortened considerably and that you are seeking the Court's indulgence so as to obtain signed instructions from your client, the natural relief that flows from such a proposed course will normally encourage some extra time being allowed.

Juvenile Clients

Juvenile clients will often express a desire to do anything that will see a curfew or reporting condition deleted from bail orders. In many cases this may mean instructing a Solicitor to enter a plea of guilty, without an admission of guilt, so as to finalise a matter more quickly, thus relieving themselves of the burdens of bail.

One should be very careful however in accepting convenience plea instructions in juvenile matters, particularly if the client is between the ages of 10 and 14, whereby the doctrine of *Doli Incapax* must always be considered notwithstanding the strength of the Crown case.

Juvenile clients will often have Parents or other family members with them at the time of instructions, and while we may only take instructions from the client and act according to their best interests, it can be helpful to include the family if the client decides to enter a plea of guilty without accepting guilt. This will ensure that the decision is made after the client has considered legal advice from his/her lawyer, as well as family advice from a parent or sibling etc. Moreover there will be someone to verify the instructions given, should the plea be traversed at a later stage.

Given the ruling in *Meissner v R*, in my view, juvenile convenience pleas should be approached with utmost caution until the law in this area is conclusively settled.

Probation and Parole and Other Third Parties

"What do I tell Probation and Parole when they ask me about the offence?"

This area of dealing with convenience pleas is difficult and potentially fraught with disaster. As officers of the Court, and according to the Solicitors Rules we must act at all times with honesty and candour. Obviously one should never tell a client that they should tell Probation and Parole that they committed the offence and that they are sorry for such, if that is in direct conflict with the client's instructions.

It should be noted however that on occasion a client may decide after having given the matter some consideration, that before being interviewed by Probation and Parole, that they wish to accept their guilt and confirm the offence before being Sentenced. In my view this would not cause the lawyer to have a conflict of interest so long as signed instructions as to guilt were given at conference. Indeed this is no different to a client changing their instructions on, for instance a Reply to Brief date, whereby they are confronted with the strength of the Crown case and thereafter conceded that they are in fact guilty of the offence.

If however in the normal course of these types of matters, when the client chooses not to accept guilt at any stage, then perhaps the appropriate course is to instruct them to not make any comment when asked about the offence and the question of remorse and/or contrition. In these circumstances

it is important that the signed instructions include a passage whereby the client accepts that they will not be given any extra credit or leniency for evidence of genuine remorse or contrition.

Evidence

The tendering of documentary evidence, such as references, letters of support and educational or work achievements and qualifications should not normally cause a great deal of concern as they are generally directed at the client's subjective case. It should be noted however, that normally a referee should acknowledge that the client has pleaded guilty to the offence charged and therefore this should be explained to the client before they request references.

Often a client would not be called to give oral evidence (for the most part relevant in District Court proceedings) so as to avoid traversing the plea. Alternatively if sworn oral evidence is necessary then a client may be called and asked questions only about their background and subjective case so as to avoid any cross-examination about the offence. This tactic can be quite effective so long as the Crown agrees not to ask your client questions about the offence. However it can also be a dangerous course particularly given the unpredictable behaviour of witnesses having to give sworn evidence before a Judge in open Court. It only takes one simple question, or perhaps a comment or question about the gravity of the offence by the Judge, to unravel your client and bring all of the hard work undone. If a client is to traverse the plea in evidence, it is open to argue the decision in *Meissner v R* before the Judge chooses to reject the plea and remand the matter for trial. The client need only confirm that the plea was entered on the basis of a free choice in his/her own interests without any coercion or improper pressure from anyone else (without having their will overborne) and there will be no miscarriage of justice if the Court acts upon such a plea.

Indeed if you are afraid, upon taking instructions on a convenience plea, that your client would not be able to help themselves in making comments about their guilt throughout the course of the Sentence hearing, or in their dealings with Probation and Parole/ Juvenile Justice etc, then perhaps the safest course is to tell them that you would no longer be able to represent them and withdraw from the matter and refer them to new legal representation.

Submissions

Submissions upon Sentence should be confined to the categorisation of the objective seriousness of the offence and how it relates to assessing criminality based on the "agreed" facts alone. Obviously

one cannot proffer an explanation for the commission of the offence, because on instructions one does not exist.

If you are asked by the Magistrate or Judge as to why the offence is committed I find that simply replying that we are unable to assist in this regard seems to be the correct approach. Remembering, of course, the dual obligations of pursuing the best interests of our clients while remaining honest and candid with the Court. If however the Magistrate or Judge asks your client directly (whether or not in evidence) about the explanation for the offence then perhaps the right approach would be to politely raise the proposition that you are not relying on remorse or contrition or explanation in relation to the plea and therefore an enquiry into such would not be relevant to how the matter should be dealt with (hopefully at this point the Magistrate or Judge might realise the nature of the plea that is being relied upon).

Remember that the Court cannot simply assume the worst interpretation of the facts in the absence of an explanation from your client, and that any matters of aggravation must be proved beyond reasonable doubt.[21]

The Client's Family

Dealing with the families of those who instruct to plead guilty can be particularly difficult when the family members are not present when the instructions are given (which in reality should always be the case). For instance if the client is in custody and can only speak to you in the holding cells or by phone (if appearing via AVL), then the family is left out of the decision making process. What naturally follows is family members accusing the lawyer of "rubber hosing" the client and forcing him/her into pleading guilty to something that they didn't do.

For those Solicitors in the Aboriginal Legal Service who are fortunate enough to have a field officer attend Court with them, I would strongly suggest that if this is a course of which the client wishes to take, to have the field officer present as a witness to such and be available to explain the situation to the family.

[21] *R v Olbrich* [1999] HCA 54 at [31].

If however this is not an available option, I would suggest speaking with the family (of course with the client's permission) before the plea is entered, so they are not caught by surprise in Court. Thereafter perhaps it can be made abundantly clear in Court that you are acting only according to the client's instructions e.g. "Mr Smith your Honour has instructed me to enter a plea of guilty to offence x and does not wish to object to the tender of the Police facts".

CONCLUSION

All matters involving clients pleading guilty without admitting guilt to the legal practitioner should be handled with care. With careful written instructions and detailed legal advice however, they can be managed effectively and indeed in many circumstances, operate to accord within the client's best interests.

Please email me on ben.bickford@alsnswact.org.au or phone me on 0447620346 should you wish to discuss any of the matters discussed in this paper.

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Instructions to Plead Guilty

I, John Smith, instruct my Solicitors at the Aboriginal Legal Service to plead guilty to the offence of Wound with Intent to do Grievous Bodily Harm that arose out of an incident on 30 April 2011 at Armidale.

I deny committing this offence.

Despite my denial to my Solicitors in committing this offence, I wish to plead guilty so as to receive a more lenient Sentence then if I was found guilty after a trial (or hearing).

I understand that by pleading guilty I am telling the Court, the Police and the whole world that upon the above date I stabbed Jack Smith once in his face and once in his arm with a butcher's knife which wounded him, and that I intended to cause him really serious harm as a result.

I have read and signed the facts prepared for my Sentence and I want the Judge to rely on those facts in determining what will be my Sentence.

I understand that the maximum Sentence for this offence is 25 years in gaol, and that this offence carries a standard non-parole period of 7 years in gaol.

I understand that by pleading guilty I will be Sentenced to gaol.

I understand that I have a right to plead not guilty to the offence and let a jury consisting of 12 members of the community decide whether I am guilty or not.

I understand the case against me and have discussed all of the evidence at length with my Solicitors at the Aboriginal Legal Service.

I understand that my Solicitors will not be able to lead evidence or make submissions about my remorse, contrition or explanation for the offence. I understand that I will not receive any discount for remorse or contrition upon being Sentenced.

I wish to plead guilty however and have the Court Sentence me accordingly. This has been my decision after carefully considering the matter. Nobody has pressured me or told me what to do. This is what I want to do.