

Justice Reforms

Reasonable Cause, 24 March 2018

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Acknowledgment of Country



We acknowledge and pay our respects to the Indigenous owners and custodians on whose land we are visiting

Early Appropriate Guilty Plea Reforms



- The NSW Law Reform Commission
- In 2014
- Report 141 Encouraging
 Appropriate Early Guilty Pleas
- Conclusion = the current system is inefficient

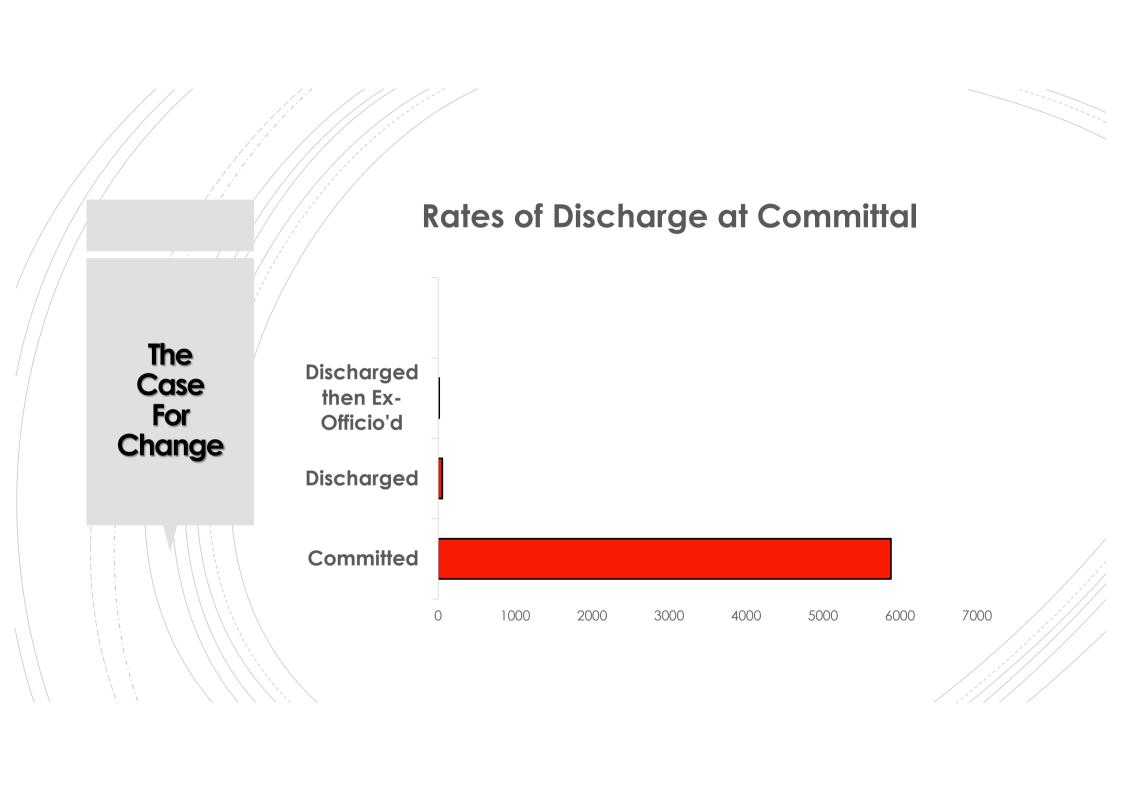
Statistics

- 83% of all committal matters end in a guilty plea.
- 35% of pleas of guilty are entered after committal.
- 62-66% of late guilty pleas are entered on the first day of trial or later
- 63% of guilty pleas on the first day of trial in the District Court in 2012 were not to the original charge

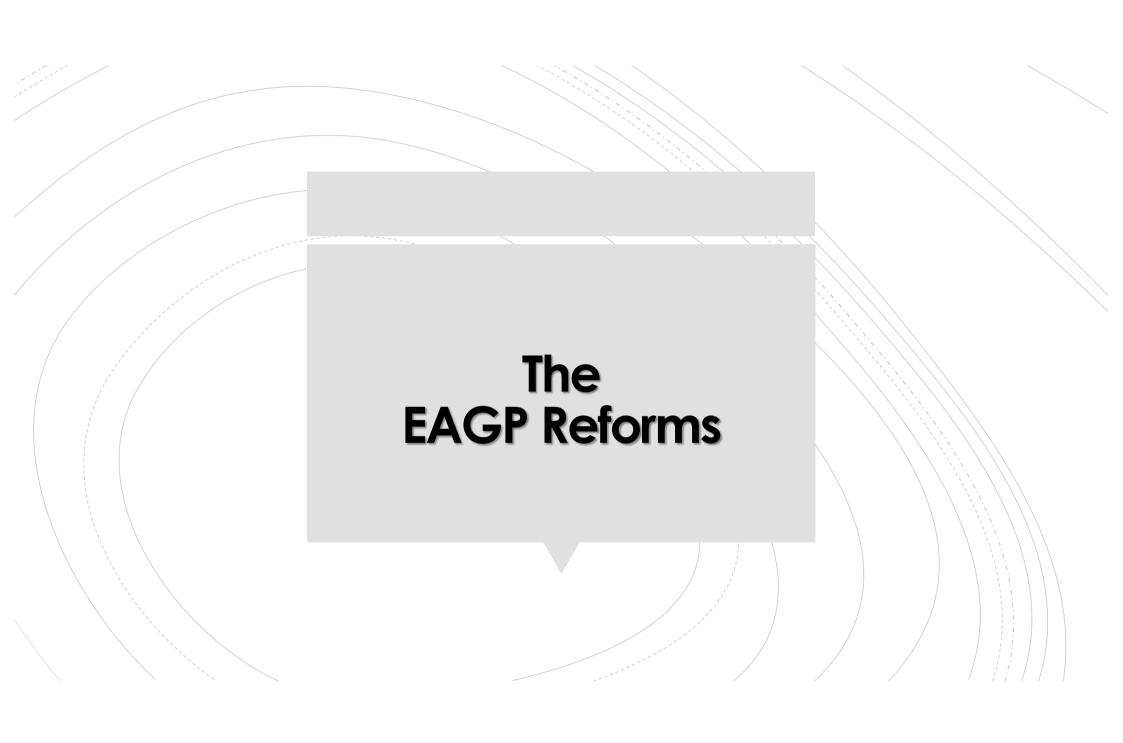
- Ten obstacles contribute to these statistics and the current delay
- 1. Late service of the prosecution brief of evidence.
- 2. Disclosure of further evidence closer to trial expected by the defence.
- 3. The defence belief that it is common practice for the prosecution to overcharge early, and charges will be reduced as proceedings progress.

- The prosecution accepts a plea to a lesser charge late in proceedings.
- 5. Prosecutors with the authority to negotiate are not briefed until late in proceedings.
- 6. Defence perception that Courts are flexible in the application of the sentence discount for the utilitarian benefit of an early guilty plea that occurred later in proceedings.
- 7. Defence scepticism that sentencing discounts will be conferred on clients.

- 8. Defence believe they will obtain better results in negotiations that occur just prior to trial.
- 9. Discontinuity of legal representation means that advice and negotiations are inconsistent.
- 10. A defendant holds back a plea because they want to postpone the inevitable penalty; denies the seriousness of their predicament until the first day of trial; and / or is hopeful that the case will fall over due to lack of witnesses or evidence.



What do we want to change?



The EAGP Reforms

OVERVIEW

- Significant changes to the NSW criminal justice system
- Amendments to
 - Criminal Procedure Act 1986
 - Children (Criminal Proceedings) Act
 1987
 - Crimes (Sentencing Procedure) Act
 1999 and
 - Other Acts
- Commence 30 April 2018

The EAGP Reforms

DOES THE EAGP SCHEME APPLY TO MY CLIENT?

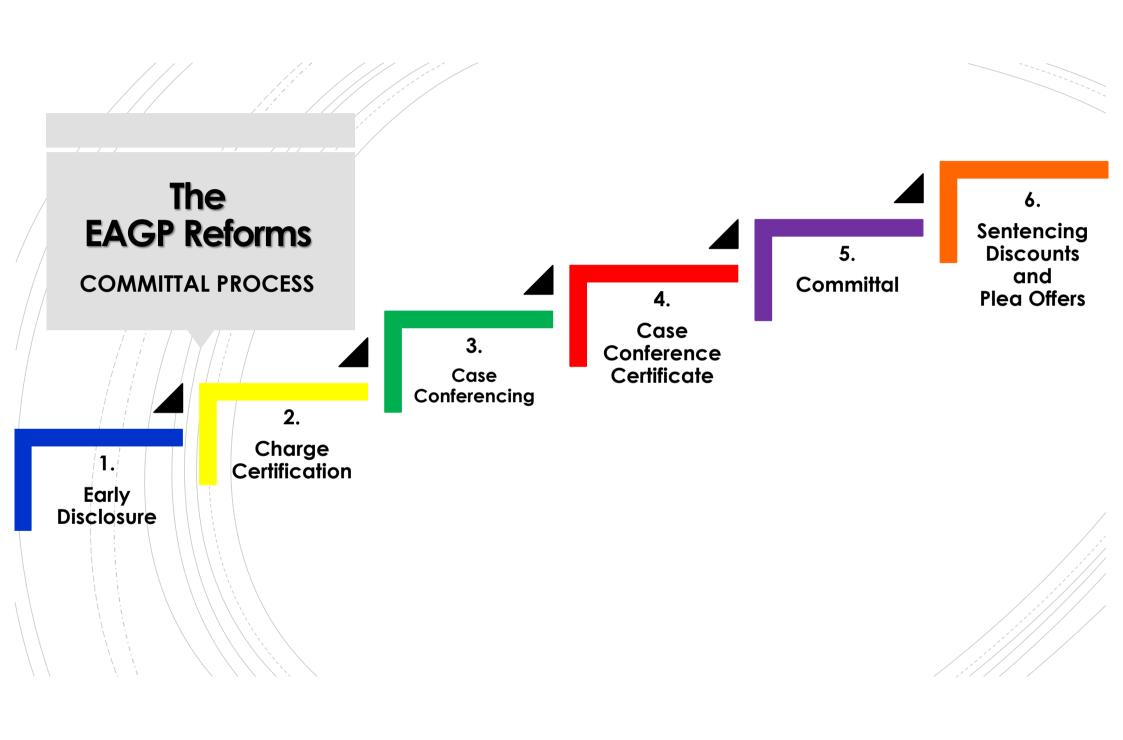
EAGP matters are:

- Strictly indictable offences where proceedings are commenced <u>after</u> 30 April 2018
- Table offences the subject of an election charged <u>after</u> 30 April 2018

The EAGP Reforms DOES THE EAGP SCHEME APPLY TO MY CLIENT?

NON-EAGP matters are:

- Charges laid after 30 April 2018 which are related to indictable proceedings commenced <u>before</u> 30 April 2018
- Matters commenced by an ex-officio indictment post-30 April 2018 which were initially charges commenced and finalised <u>before</u> 30 April 2018
- Strictly indictable and elected Table offences charged <u>before</u> 30 April 2018





WHAT IS EARLY DISCLOSURE?

Section 62(1) Contents

- All material obtained by the prosecution that forms the basis of the prosecution's case
- Any other material obtained by the prosecution that is reasonably capable of being relevant to the case for the accused person
- Any other material obtained by the prosecution that would affect the strength of the prosecution's case.

WHAT WILL BE SERVED?

<u>Alternative Forms of Evidence</u>

- Significant change
- "may be, but is not required to be" in admissible form: s 62(2)
- Only evidentiary material to be served unless requisition material or matter proceeds to trial

BRIEF PROTOCOL

- Agreement between Police and ODPP
 - Appendix A sets out what can be in alternative form
- Disclosure obligations s15A, ODPP Act do not change

ALTERNATIVE FORMS
OF EVIDENCE

Example

ADMISSIBLE FORM

Drug Analysis Certificate

ALTERNATIVE FORM of EVIDENCE

 Presumptive drug testing result identifying the drug and quantity

ALTERNATIVE FORMS
OF EVIDENCE

Example

ADMISSIBLE FORM

= Fingerprint evidence and an expert statement

ALTERNATIVE FORM of EVIDENCE

Result from the EFIMS & ForensicSummary Report

ALTERNATIVE FORMS
OF EVIDENCE

Example

ADMISSIBLE FORM

 Audio and transcripts of telephone intercepts

ALTERNATIVE FORM of EVIDENCE

 Audio of telephone intercepts with a detailed synopsis, a summary of calls and key calls identified

WHO IS INVOLVED?

- The <u>Magistrate</u> makes brief orders
- The Officer in Charge will prepare the brief
- Police Prosecutors will appear until they
 - Indicate brief is served and complete, and
 - Seek orders for filing of the Charge Certificate
- ODPP / CDPP will appear thereafter

WHEN IS THE BRIEF SERVED?

<u>Practice Note Comm 2</u>

- Brief Service 8 weeks
- Charge Certification 6 weeks
 - (Legislation to up 6 months)
- Case Conference
 - Adjourned 8 weeks
 - Held within 6 weeks



WHAT IS THE PURPOSE OF CHARGE CERTIFICATION?

Provides **earlier charge certainty** to defendants to encourage earlier guilty pleas where appropriate

AND

Involves those prosecutors with delegation who will remain in matters to finalisation at an earlier stage

WHAT IS IT?

- The charge certificate
- Completed by a prosecutor
- To certify the evidence available is capable of establishing each of the offences that are to be the subject of the proceedings against the accused
- Section 66
- Prescribed by Regulations



HOW IS A CHARGE CERTIFIED?

- The prosecutor must file the charge certificate with the Local Court registry
- A copy must be served on the accused

HOW IS A CHARGE CERTIFIED?

- A charge certificate is not required when:
 - All charges laid by Police are withdrawn
 - Charges are un-elected or replaced by summary charges returned to Police for prosecution

WHEN IS A CHARGE CERTIFIED?

- After the brief is served
- Six month time limit for filing
- Can be extended,
 - If accused consents; or
 - Magistrate considers it is in the interests of justice
- If not filed, Magistrate can,
 - Discharge the accused
 - Adjourn the proceedings

WHAT IS THE PURPOSE OF CASE CONFERENCING?

The principal purpose of a case conference is,

"to determine whether there are any offences to which the accused person is willing to plead guilty"

WHAT IS THE PURPOSE OF CASE CONFERENCING?

The secondary purposes are to facilitate:

- The provision of additional material which may be reasonably necessary to enable an accused to determine whether or not to plead guilty to 1 or more offences
- The resolution of other issues, including identifying key issues for trial and any agreed or disputed facts to shorten any trial

WHEN IS A CASE CONFERENCE HELD?

- After charge certificate filed
- Not required if,
 - Guilty plea to certified charge/s
 - Committal for trial where fitness is in issue
- Otherwise a case conference is mandatory

WHEN IS A CASE CONFERENCE HELD?

- Eight week adjournment
- Case conference held within first six weeks
- Case conference certificate finalised in final two weeks

BRIEFING COUNSEL

Briefing counsel can occur:

- Pre-committal (where appropriate)
- Match the ODPP allocation
- Submit an extension for Counsel
- Challenges with Local Court timeframes

3. Case Conferencing WHO ATTENDS A CASE CONFERENCE?

ODPP signatory of charge certificate

+

Defence representative including Counsel

with

Client available to provide instructions

3. Case Conferencing

YOUR OBLIGATIONS

Section 72 requires you to explain to your client:

- The operation of the mandatory sentence discount scheme;
- The penalties applicable to the offences certified in the Charge Certificate;
- The penalties applicable to any other offences the subject of offers; and
- The effect on the applicable penalty if your client was to plead guilty to any offence at different stages of the proceedings.

3. Case Conferencing ARRANGING A CASE CONFERENCE?

- Defence practitioner to arrange the case conference
- Via the Legal Aid NSW Case
 Conferencing Hub (when using a Legal Aid resource)

3. Case Conferencing HOW TO CONDUCT A CASE CONFERENCE?

First conference

By AVL (or in person), unless exceptional circumstances

Any second conference

By telephone

When

During business hours

3. Case Conferencing

CLIENT AVAILABLE

Client must be available in person or by AVL to provide instructions



Taking full instructions on the day of the Case Conference



Connected to AVL with you and ODPP

3.
Case
Conferencing
DOES MY CLIENT
PARTICIPATE?

If on remand, the case conference will be held when Correctional Centre AVL studios are available





3. Case Conferencing

RESTRICTIONS

- Restrictions as to <u>use</u>, <u>access</u> and <u>publication</u> of case conference material
- 'Case conference material': s 78(5) includes:
 - A CCC
 - Anything said or any admission during or after a case conference for the purpose of negotiations
- A CCC is confidential

3. Case Conferencing

RESTRICTIONS

- Case conference material is not
 - admissible in any proceedings
 - required to be produced under subpoena or request
- But is 'not inadmissible' in
 - Sentence proceedings (State and Cth)
 - Appeal proceedings
 - Traversal of plea
 - Legal disciplinary proceedings
- Prohibition on publication and penalties apply



4. Case Conference Certificate WHAT IS A CASE CONFERENCE CERTIFICATE?

A case conference certificate (CCC)

a formal record of any offers made by the prosecution and defence before, during and after the case conference (including late offers (\$77))



CONTENTS

- Form prescribed by the Regulations
- What the CCC will certify (s 75)

SIGNED DECLARATIONS

- Both parties to sign the CCC
- Includes defence declaration as to s 72 obligations
- Client to declare and sign that explanation received when not guilty plea maintained

FILING

- Prosecutor to file
- As per Magistrate's orders
- After all case conferences, if more than one held
- Even if resolution reached

FILING

- If not filed, Magistrate to consider interests of justice and any "unreasonable failure" by prosecutor or defence representative
- Can discharge, adjourn or commit



5. Committal

CHANGES

- Power to discharge an accused is abolished
- Role of Magistrate:
 - Case manage committal matters
 - Direct the attendance of prosecution witnesses at "witness hearings", and
 - Commit an accused for trial or sentence



What is a Witness Hearing?

- Division 6, CPA
- Purpose?
- To assess the strength of Crown case



WITNESS HEARINGS

The Test

Substantial Reasons

(former s 91)

and

Special Reasons

(former s 93)

Note: Witnesses who cannot be

directed to attend: s 83

5. Committal

WITNESS HEARINGS

When can I apply for a witness hearing?

- Legislation says after Charge Certification.
- Practice Note requires it early
- Adjourn for four weeks
 - Two weeks for submissions

4

■ Two weeks for ODPP consideration



 Unless a guilty plea is accepted an accused will be committed for trial

Pleas can be accepted or rejected by a Magistrate

5. Committal

FITNESS

What is un/fitness?

Fitness =

the capacity of the defendant to plead to the indictment and to comprehend the course of the trial proceedings in order to make a proper defence

- <u>Test</u>: *R v Presser* [1958] VicRp 9
- Common law principles remain

5. Committal FITNESS

- Division 7
- Can be raised at any time
- Committal only <u>after</u>:
 - A charge certificate is filed and a case conference is not required, or
 - A charge certificate is filed and a case conference has not yet been held, or
 - A CCC has been filed following a case conference.

5. Committal FITNESS

Who Can Raise Unfitness?

- Committal for trial can occur if unfitness is raised by
 - An accused or a prosecutor, or
 - A Magistrate
- The Magistrate must be satisfied unfitness has been raised in good faith by an accused or prosecutor



6. Sentencing Discounts

THE SCHEME

- Division 1A, Crimes (Sentencing Procedure) Act 1999
- Mandatory
- For utilitarian value of a guilty plea

6. Sentencing Discounts

APPLICATION

- Apply to all offences dealt with on indictment
- Exceptions for Cth, Children, Extreme Culpability and Disputed Facts
- Onus on defence for establishing grounds for discount
- Standard of proof = balance of probabilities

6. Sentencing Discounts

THE DISCOUNTS

25%

Guilty plea entered in the Local Court

10%

Guilty plea entered after committal but at least 14 days before trial

5%

Guilty plea entered less than 14 days before trial

6. Sentencing Discounts and Plea Offers

REASONABLY EQUIVALENT
OFFENCE

Where:

- You make an offer to plead guilty to a different offence
- The offer is not accepted by the ODPP
- You are <u>found guilty</u> of a different offence that has the same or lesser max penalty as that offered where 'the facts of the offence are capable of establishing the different offence'
- You get the discount based on the time of that offer (25% or 10% or 5%)

6. Sentencing Discounts and Plea Offers

REFUSED OFFERS LATER
ACCEPTED

Where:

- You make an offer to plead guilty which is recorded
- The offence is not the subject of the proceedings
- The offer is initially rejected by ODPP, but then accepted after committal
- You <u>plead guilty</u> at the "first available opportunity able to be obtained"
- You get the discount based on the time of the offer (25% or 10% or 5%)

6. Sentencing Discounts and Plea Offers

NEW COUNT OFFENCES

- You cannot get a 25% discount if: "the facts or evidence that establish the elements of the new count offence are substantially the same as those contained in the brief of evidence... and the penalty for the new count offence is the same as, or less than, the offence set out in the original indictment" (s25D(4))
- Unless you made the offer to plead to it or a 'reasonably equivalent offence' in Local Court

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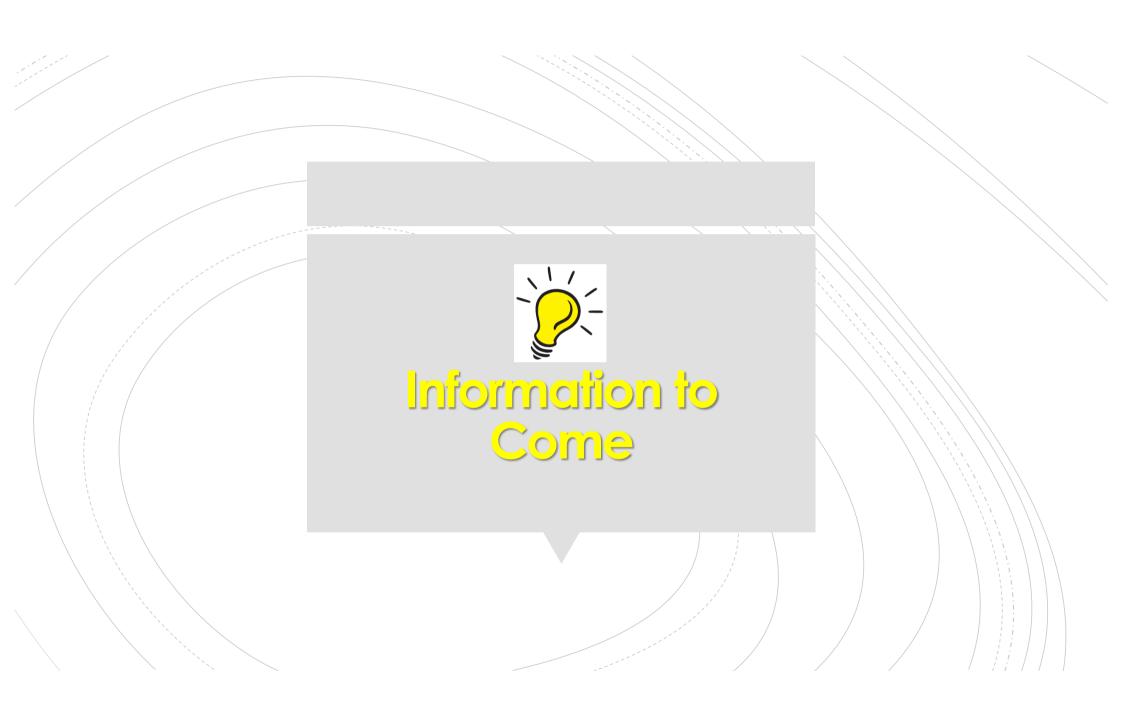
CHILDREN

- Children (Criminal Proceedings) Act
 1987 and Regulations
- For <u>serious children's indictable</u> offences only
 - The EAGP committal process applies
 - Some operational differences
 - Sentencing discounts do not apply to offences if committed when < 18 years and charged when < 21 years

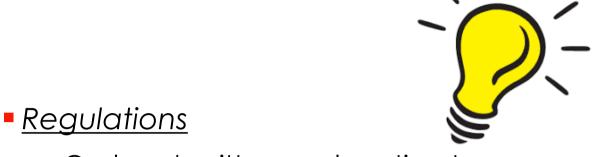
The EAGP Reforms

CHILDREN

- Indictable offences (other than serious children's indictable offences)
 - Will continue to be dealt with summarily in the Children's Court unless the defendant elects to have their matter committed, or the Court exercises its discretion to commit under s 31
 - The committal procedures will be mostly akin to those which currently apply.



Information to Come



- Oral and written explanation to accused (s 59)
- Charge Certificate and Case Conference Certificate
- Case Conferencing
- ODPP business processes

Commencement Dates

DATE	REFORM
2017	Parole phase 1 High risk offenders
26 February 2018	Parole phase 2
30 April 2018	EAGP
28 May 2018	Parole phase 3 (reintegration home detention)
24 September 2018	Sentencing

Feedback

CONTACT US

Your feedback after 30 April 2018 will be essential

- Both quantitative and qualitative feedback.
- Quantitative feedback will involve your input of correct data in applications for Legal Aid and work item reports.
- Qualitative feedback as to your positive and negative experiences regarding the new process can also be forwarded to eagpreform@legalaid.nsw.gov.au.



Sentencing reforms

- Crimes (Sentencing Procedure)
 Amendment (Sentencing Options) Act 2017
- Will make substantial amendments to:
 - Crimes (Sentencing Procedure) Act 1999
 - Crimes (Administration of Sentences) Act
 1999
- Monday 24 September 2018 (TBC)
 - Some existing sentences will be converted on that date



Should your client be sentenced before or after the changes?

Overview of key reforms

- Abolition of Home Detention Orders, Community Service Orders, good behaviour bonds (sections 9 and 10(1)(b)) and suspended sentences
- Creation of a range of community-based sentencing options with supervision by Community Corrections
- 3. Strengthening of Intensive Correction Orders ('ICOs')
- 4. Conversion of existing sentences into new forms of sentence order
- New provisions relating to domestic violence offenders

What is not changing

- Section 10(1)(a)
- Section 10A
- Fines
- Section 11 remand

New Sentencing Options

	Existing sentence	Converted sentence
/	Conditional Release Order	 Up to 2 years 'instead of imposing fine/imprisonment With or without conviction No HD or electronic monitoring
	Community Correction Order (CCO)	Up to 3 years'instead of imprisonment'No HD or electronic monitoring
	Intensive Correction Order (new)	 Up to 2 years (single) or 3 years (multiple) Community Service not mandatory HD can be imposed At least one additional condition to be imposed Community safety paramount

Existing and converted sentences

	Existing sentence	Converted sentence				
	Home Detention Order		New ICO with home detention condition			
	Intensive Correction Order	New ICO				
	Community Service Order	New Community Correction Order (CCO) with community service condition				
	Section 9 good behaviour bond ———		New CCO			
	Section 10(1)(b) bond	New Conditional Release Order (CRO)				
	Suspended sentence (s 12)*	* not converted – remain in force unless revoked				

Suspended sentences remain in force unless revoked

- Existing suspended sentences remain in force unless breached & revoked
- Section 98 still applies to breach proceedings.
- But if a court revokes a suspended sentence after the commencement date, the court will be required either to:
 - Resentence the offender to fulltime imprisonment or
 - 2. Impose an ICO



			/ '/'				
	Conditions	ICO		ССО		CRO	
/	Supervision (can be suspended)	! Mandatory				V	
	Home detention			X		X	
	Electronic monitoring		+ at	X		X	
	Non-association (can be suspended)		least				
7711	Place restriction (can be suspended)		one				
1	Curfew (can be suspended)		other			X	
1	Program(s) and treatment		condition				
	AOD abstention						
	Community Service Work	V	< 750 hours		< 500 hours	X	



Appeal against sentence lodged before the commencement date but determined on or after commencement

will be dealt with under the new sentencing legislation



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