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To the NSW Law Reform Commission

Please accept a copy of the Police Association of New South Wales submission regarding the NSW LRC's consultation paper on early guilty pleas.

The Police Association of NSW thanks the NSW LRC for the opportunity to submit a response to its Consultation Paper and looks forward to the release of the final copy of the Report.

Yours sincerely

SCOTT WEBER
President

Police Association of NSW

Encouraging appropriate early guilty pleas: Models for discussion

Police Association of New South Wales Submission

November 2013

Version Control

Purpose

The purpose of this document is to provide to the NSW Law Reform Commission, the Police Association of New South Wales response to its consultation paper on early guilty pleas.

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The purpose of this Consultation Paper is part of the Law Reformõs Commission review of the Crimes (Sentencing Procedure) Act 1999. The Commissionõs aim is to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters in NSW.

In summary, itõs been reported that a large number of matters are prepared as trials but do not proceed to trial. A number of factors have been identified that have shown to have influenced this outcome. These include:

- issues with the late service of parts of the brief of evidence;
- an expectation that more senior counsel will become involved closer to trial;
- a belief that there is a common practice of over-charging creating an expectation that the charge will be reduced;
- a belief that better results are obtained in negotiations prior to trial;
- the manner in which the Legal Aid Commission remunerate practitioners in assigned matters; and
- an expectation of a reasonably õflexibleõ application by the courts of the discount applied to pleas of guilty on the basis of utility pursuant to R v Thomson; R v Houlton [2000] NSWCCA 309 (õR v Thomson, R v Houltonõ) in the superior courts.

The cost to the criminal justice system as a whole of this practice is quite obvious. As was recognized by the Court of Criminal Appeal at [131] of R v Thompson; R v Houlton, late pleas of guilty have a major impact upon the criminal justice system, taking into account:

- Preparation time, for both prosecution and defence;
- Police resources ï being rostered off duty in order to attend the trial, marshalling of witnesses and exhibits for trials that end up not running;
- Court resources, court appearances and listing problems;
- stress to victims and witnesses;
- the time to jurors who are needlessly assembled for trial; and
- uncertainty to the accused, especially an accused that is on remand and awaiting classification.

All of the administrative and cost benefits to justice agencies would be meaningless unless there was a benefit to an accused person in entering an early plea. An early plea saves victims, witnesses and police officers from having to attend court to give evidence. It saves court time. The preparation for a plea of guilty by both defence lawyers and DPP solicitors is significantly less than the preparation of a matter for trial. Police Association members affirm that over 95% of pleas of guilty are entered in the local court which makes it the most effective place to make a difference in encouraging early guilty pleas.

Members of the Police Association have voiced their opinions;

> *…despite the massive cost of district and supreme court trials over 95% of pleas of guilty are entered in the local court, even if sentenced in the District Court. By far the majority of police, victim, witness, court and defence time is wasted in the local court. The raw volume of work going through the local court makes it the easiest and most effective place to make a difference in the area of early appropriate guilty pleas. Spoken by* Police Association executive officer December 2013

> *The most effective way is to have STRICT rules around the discount for an early plea, but more importantly the magistrate should clearly enunciate for all the hear the discount that is given(in terms of dollars, avoiding custody or shortening custody) not a mere percentage. Further the magistrate should have to clearly point out what discount was lost if not an early plea ie 'Had you pleaded guilty at an early stage you would be placed in a 2 year s9 Bond, however, you are now sentenced to a 3 month fixed term. Spoken by* Police Association executive officer, December 2013

> *This discussion is as old as time itself. I have been in the cops from over 23 years and it has been an issue my whole service. However could I suggest the following; Removal of further payments to Legal Aid/ALS for production of briefs of evidence and for not guilty matters. Both request the same and enter pleas of guilty on the day thus enabling them to get the early plea discount and still get paid for the extra services. In the meantime tax payers' money is wasted by having police sitting around for no reason other than to line their own pockets. We have had at times over 10 police rostered for court duty and not one of them set foot in the witness box. A request for a brief of evidence is not a plea of guilty at the earliest opportunity. The earliest opportunity is the first mention date. If they wish to examine the evidence, that is their right, however you lose the discount. Legal Aid/ALS should not be provided extra money for requesting briefs of evidence or for hearings for local court matters. I can understand District Court and Supreme Court matters requiring further payment.*

> *I have had numerous matters go to hearing only to have them change plea on the day and still receive a discount.*

The issue of reduced sentences for guilty pleas too is a crucial element of the sentencing process and has a part to play in the justice system but the said sentencing must be seen to be applied consistently and in accordance with clear principles. Accepting guilty pleas to different or lesser charges must be based on principle and reason, never expediency. In the case of John Taufahema who was sentenced to a minimum seven years jail over the 2002 shooting of Senior Constable Glenn McEnallay; Senior Constable McEnallay's family argued Taufahema was essentially rewarded for pleading guilty to the lesser charge of manslaughter to save his own neck. It cannot be forgotten, of our membersô growing dissatisfaction with the application of the plea bargaining process (at the time) had reached boiling point on hearing the killers of Senior Constable Glen McEnallay, were sentenced to just seven years ï this was even after juries had found them guilty of murder and the convictions were overturned on a technicality. Other cases at the time also involved a member who was nearly killed and other who suffered violent assaults only to see plea bargain result in offenders receiving weekend detention or a bond.

> *"They receive a discount ... when they're only trying to feather their own nest. Criminals shouldn't be allowed to "double-dip" and a sentence should only be discounted for genuine and early guilty pleas.* Spoken by Constable McEnallay's father.

> *If an offender goes straight in there and admits genuine remorse and pleads guilty we have no problems with that…It's when they sit there and see the run of the land and try and manipulate the system ... and then at the twelfth hour say 'I better plead guilty' ... that's where we have a real problem."* Spoken by President, Police Association of NSW, Scott Webber.

The law must ensure that sentences discounted due to guilty pleas for assisting police (for instance) are not unreasonably disproportionate to the nature and circumstances of the offence. Police and victim groups *do not* want to see victims neglected as criminals negotiate their way out of more serious charges. In order for the public and police to have confidence in the justice system then it is important to see offenders being held accountable for their crimes and that any discounts have a legitimate public purpose. Victim care and follow up is an important component of policing. Itôs important that a process of consultation is always available and holds a real opportunity for victims to influence the process. Also, at times, police are found to be victims of crime themselves and must be treated with the same level of care as any other member of the public. Police and victims *should* know what to expect in the prosecution process and be consulted in a real way where decisions are being taken that impact on their expectations.

In 2008 the Police Association compiled a report regarding sentencing discounts to the NSW Sentencing Council noting underlying issues that impact on the decisions of the ODPP in the consideration of plea bargains which apply in todayôs criminal justice environment. These issues could include inter alia, budgetary constraints, lack of resources and poor training.

It is imperative that the views of the police officer-in-charge and the victim **must** be sought at the outset of formal discussions, **and in any event before** any formal position is communicated to the defence, and must be recorded on file. This and other advice is incorporated in the *Prosecution Guidelines of the Office of the Director of Public Prosecutions for NSW*; which serves to guide prosecutors and inform the community about actions taken in the name of the ODPP. It describes the procedures of criminal prosecution and the rights and responsibilities of all participants and regulations regarding their conduct.

Furthermore, the *Guidelines* states that ñWhere the appropriate authority or delegation has been obtained or is in place, a prosecutor may agree to discontinue a charge or charges upon the promise of an accused person to plead guilty to another or others. A plea of guilty in those circumstances may be accepted if the public interest is satisfied after consideration of the following matters:

a. The alternative charge **adequately reflects the essential criminality of the conduct** and the plea provides adequate scope for sentencing;
b. The evidence available to support the prosecution case is weak in any material respect; and/or
c. The saving of cost and time weighed against the likely outcome of the matter if it proceeded to trial is substantial; and/or
d. It will save a witness, particularly a victim or other vulnerable witness, from the stress of testifying in a trail and/or a victim has expressed a wish not to proceed with the original charge or charges

On face value, the guidelines are not unreasonable; however, it is crucial that the guidelines are strictly adhered to. Police Association members though maintain that the PPC model of working stations as a practice is preferable.

> *Allowing early advice from ODPP is moot as they take 6 months to give it and they deal with a tiny fraction of matters. The PPC model of working stations as a practice holds more hope for the cops.*

In *When is Plea Bargaining Justified?* Paul Gerber says,

> *It is submitted with little hesitation that in sentencing an accused who pleads 'guilty 'to an offence, the trail judge must be informed of all facts surrounding the offence…not a sanitized version in order to reduce the appropriate punishment. Courts are the sole instrument of justice in a civilized society. It is well established that plea bargaining constitutes a legitimate and generally accepted legal tactic. However, what constitutes 'mitigating circumstances' demands not only that there is an arguable defence in support of the lower charge, but, more importantly, when the case comes before the judge for sentencing, all relevant and provable facts must be given to the court to enable the judge to hand down the appropriate sentence.*

Michele Venable, in Restoration versus alienation: family group conferencing from the perspectives of victims, looked at plea bargaining in South Australia and noted is impact on victims of crime:

> *In relation to court outcomes, Shapland et al. (1985) found the practice of plea bargaining and its resulting lessening of charges to have a significant negative impact on victims satisfaction. In Gardner's (1990) discussion of plea bargaining, she notes 30% of victims felt that they should be consulted or actively involved in any decision to modify charges.*

As Gerber says, *Courts are the sole instrument of justice in a civilized society* and the principal prosecuting body should have sufficient funding to ensure that justice is seen to be done, especially for those victims unable to represent themselves in the process. In its 2008 submission, the Police Association asserted that the ODPP should be resourced to ensure that its guidelines are able to be followed. The ODPP should be held accountable to the courts and the public in this respect. Even though the ODPP is an independent body, free from the potential for corruption and political interference in the criminal justice system, nevertheless it is not unaccountable. Indeed it has been given a great responsibility by the state and should therefore be held to the highest standard of accountability.

Plea bargaining can be a valuable tool if its used properly ï if the process is not to diminish the impact of the crime but to bring the case to a quicker conclusion without eliminating the proper facts. Victims of crime or their families must be consulted and their views considered when a plea bargain is in the offing.

In relation to the issues raised in the Consultation Paper on early guilty pleas, the Police Association provides the following comments:

Introduction

> *This models paper presents approaches that other jurisdictions have taken to encourage early guilty pleas. The purpose of this paper is to stimulate discussion on what models (or combination of models) might or should be taken up and adapted to the NSW criminal justice system.*

Question 3.1

1. **Should a pre-change bail regime be introduced in NSW?**

2. **What are your views on the advantages and disadvantages of introducing a pre-charge bail regime?**

3. **If a pre-charge bail regime were introduced, should it aim to facilitate:**
    a. **Ongoing police investigation and the finalization of the police brief of evidence, and/or**
    b. **ODPP early charge advice?**

4. **What limits should be applied to any pre-charge bail regime?**

A pre-charge bail regime should be trialed in NSW. Pre-charge bail is used by police in England and Wales where a person is arrested but further investigation is required or where there is enough evidence to charge but the police are required to seek charge advice from the Crown Prosecution Service. The pre-charge bail program seeks to facilitate appropriate early guilty pleas because:

- Pre-charge bail enables the police to compile and submit a sufficient brief of evidence on charging
- Statutory charging aims to provide an appropriate and correct charge upfront.

In 2012, the Association of Chief Police Officers (ACPO) Reducing Bureaucracy Programme Board and ACPO Criminal Justice Business Area commissioned exploratory research on the use of pre-charge bail by police in England and Wales. The research was undertaken by NPIA Research, Analysis and Information (RAI) with support from ACPO and the Crown Prosecution Service (CPS). The purpose of the research was to help identify and explain sources of variation in processes relating to the use of pre-charge bail, in particular those leading to unnecessary work, and inform the development of force initiatives intended to improve the process.

In its findings, the ACPO indicated that the use of pre-charge bail was seen as a useful tool for police. Even in relatively minor cases, evidence could be difficult to gather due to unavoidable contextual factors, such as unavailability of witnesses; bail can be used to manage and reduce the time arrested individuals spend in police cells while allowing the police to conduct a thorough and robust investigation. No single aspect of the bail process in particular was seen to be overly bureaucratic or inefficient; however officers did question potential over-use of bail. The research identified four aspects of the bail process that were perceived to be driving the use of pre-charge bail, and were potentially sources of unnecessary use: unplanned arrests, insufficient quality in initial investigations, demands on limited custody space and differing perceptions on levels of evidence required for charge leading to delays in the process. Some of these aspects were also flagged in the Consultation paper.

If a pre-charge bail regime was to be trialed in NSW, processes must be in place so data can be routinely collated in the use of pre-charge bail by police in order to allow research to be conducted on how (for instance) extensively it is used and whether its use varied across regions. This then could provide scope for improvement (if the need was identified) and encourage its use in only appropriate cases, again, if the need required it. The Association supports a pre-charge bail regime of limited application where:

- Pre-charge bail is restricted to certain matters including historical sexual assaults, and cases of complex and serious fraud.
- Pre-charge bail operates subject to strict statutory time-limits.

As mentioned already, Police Association put forward the following view:

> *Allowing early advice from ODPP is moot as they take 6 months to give it and they deal with a tiny fraction of matters. The PPC model of working stations as a practice holds more hope for the cops.*

Question 3.2

1. **Should a more extensive scheme of early charge advice between the police and the ODPP be introduced in NSW?**

2. **If such a scheme were introduced:**
    a. **What features should be adopted**
    b. **How could it interact with a pre-charge bail regime, and**
    c. **What offences should it relate to?**

3. **How could such a regime encourage early guilty pleas?**

According to UK reports, Statutory Charging has been operating successfully on a national basis since 2006. Statutory Charging is the most significant change to the way the Crown Prosecution Service handles criminal cases since its inception. Statutory Charging, as a joint initiative by the CPS and the Association of Chief Police Officers (ACPO), means that the CPS in England and Wales determines the charge to be brought against a suspect in all but the most minor routine cases. The police and CPS work in partnership as "The Prosecution Team" at a much earlier stage in an investigation to achieve the common goal of bringing cases to the right outcome, by building robust cases from the outset.

Statutory Charging was introduced in response to recommendations made by Lord Justice Auld in his "Review of the Criminal Courts in England and Wales" published in October 2001. He recommended that the CPS should determine the charge to be brought against a suspect in all but minor routine cases, ensuring the correct charge from the outset, weeding out non-viable cases at an early stage and ensuring that the remaining cases are trialï ready at the point of charge.

Early pilot and "shadow" schemes demonstrated significant benefits could be achieved for the criminal justice system by adopting this scheme nationally. February 2006 figures indicated that the overall discontinuance rate in magistrates' courts has reduced to 16% from a baseline of 36% before Charging was introduced. This represents a 56% improvement overall. The guilty plea rate has risen to 68% from a baseline of 40% - a 70% improvement; and the attrition rate has dropped to 23% from a 40% baseline ï an improvement of 42%. Improvements have also been recorded for Crown Court activity.

The CPS insists that statutory charging has been a success, with the conviction rate rising from 78 per cent in 2003 to 83 per cent this year. However, there is concern that the CPS was "cherry-picking" the cases most likely to succeed, or reducing the severity of a charge in order to ensure a conviction. There were reports that it was causing inordinate delays in custody suites, resulting in more people being let out on bail while the police look for more evidence. For instance, the CPS will charge someone with common assault rather than grievous bodily harm because they will easily secure a conviction rather than taking the hard option and getting a conviction for what the offence actually was. It was also reported that officers were concerned about CPS Direct, an out-of-hours service established to allow CPS lawyers, who work at police stations only during normal office hours, to instruct police from home. Computer problems that make it difficult to transfer vital information were too reported.

As the LRC states, the closest model NSW has to England and Wales statutory charging regime is the recently implemented NSW Police Practice Management Model (PMM), operational in summary matters. The key objectives of the PMM are to provide for more robust and sufficient police briefs of evidence, and to limit incorrect charging or overcharging.

Under the PMM:

- Police prosecutors are assigned to a Local Area Command instead of a court.
- Police prosecutors consult with police in their Command during an investigation and prior to charge.
- The police prosecutor who provides the advice is the prosecutor who conducts any resulting prosecution.

If a more extensive scheme of early charge advice were to be trialed in NSW then it must be noted that currently it is in indictable proceedings, that the imprecision of the original charge has been identified as a key obstacle to early guilty pleas. It is this very element that needs to be addressed when contemplating improvisations to a regime that encourages early guilty pleas. The statutory charging regime in England and Wales is a fully-formed response to correcting serious or indictable charges at an early stage, which transfers the charging decision on complex or serious matters from the police to the CPS. British Columbia has a similar scheme. In NSW, all initial charging decisions remain with the police. This remains so under the PMM recently implemented in summary jurisdictions.

Plea negotiations

> *Plea negotiations aim to resolve issues in dispute and bring about an early resolution of matters through the prosecution and defence agreeing to terms of a guilty plea.*

Question 4.1

1. **How could charge negotiations in NSW be more transparent?**

2. **If charge negotiations are made more transparent, what impact would this have upon the likelihood that defendants will seek out a plea agreement?**

Charge negotiation or charge bargaining is a largely non-transparent process. It is a process by which the prosecutor agrees to withdraw a charge or charges upon the promise of an accused to plead guilty to others. It needs to be firstly made clear, (and in the words of the Honorable Gordon Samuels QC), the public and the media often seem to perceive this (ie charge bargaining) as a kind of *Dutch auction or horse-trading session* in which bids and counterbids are exchanged until a deal is done, and a charge is found to which the defendant is prepared to plead guilty. In practice, the process is not like this or rather should not be viewed as such. Plea discussions and agreement in Australia do not really involve a bargaining or bidding though participants and observers alike sometimes use such language. It is *not* to be a process in which the prosecutor merely reduces the gravity of the charges in return for a plea of guilty.

The process is and must be seen to be designed to establish the appropriate charge, that is, the charge which the prosecutor believes can be proved beyond reasonable doubt, which adequately reflects the criminality which those facts reveal, and which provides for the sentence an adequate range of penalty. The charge bargain therefore must be seen to be the product of informed and professional discussion between advocates for the prosecution and the defence intended to reach an outcome satisfactory to both, by obtaining a plea of guilty to the charge (or charges) ultimately identified.

The purpose of charge bargaining is that guilty pleas provide very substantial benefits to the community by the saving in time and cost which would otherwise be consumed by contested trials. Apart from enabling substantial savings of resources, a plea of guilty, once the conviction is recorded, is a conclusive determination of guilt, save in exceptional circumstances. It satisfied the victims (provided that the sentence is seen to be appropriate) and save them and other witnesses from the necessity to give evidence in court. Also, it must be mentioned that a charge bargain must depend upon the balanced satisfaction of two public interests. One is the interest of the community in ensuring that criminal conduct is punished according to its deserts. The other is the interest of the community in reducing, so far as possible, (as mentioned) the expenditure of resources in the criminal justice system, and the delay between charge and arraignment and arraignment and trial.

Some idea of the utility of charge negotiation can be gained from the following statistics. For the financial year 2005/06 in NSW:

- 1,694 matters were committed for trial of which about 222 were discontinued and 240 pleaded guilty at arraignment
- 1,308 matters were committed for sentence and a further 678 committal for trial became pleas of guilty
- 604 trials were run in the District Court and 66 in the Supreme Court

As much as $15 million of public moneys (as at 2002) was saved each year by accused personsô pleading guilty rather than going to trial. The savings to victims and witnesses and others involved in the trial process in human terms is very significant.

Although offering such benefits, charge negotiation is as mentioned, a largely non-transparent process. Across most Australian jurisdictions, plea bargaining is not recognised in or controlled by any legislation, and no external data is kept as to when or why plea bargaining occurs, which limits public understanding of the process and can raise doubts over the motivations underpinning the deals and the subsequent legitimacy of the agreements made. This is largely because plea bargaining falls under the discretionary powers of the prosecution, which means the public is left to trust that the parties involved in the process have upheld the same judicial principles that would apply to a conviction reached after trial. When a matter is resolved by a guilty plea, the full circumstances surrounding the offence are generally not publicly available.

The absence of disclosure is concerning, because it means in many instances where plea bargaining is used, it is impossible to tell if a more or less serious conviction may have been appropriate. This raises the risk that offendersôconvictions may not match their culpability, and that the public cannot then determine if these offenders were convicted and sentenced appropriately. This is concerning from the perspective of the victim and the accused, given that plea agreements can alter the seriousness of the conviction and sentence imposed, and can remove the opportunity for the victim to provide testimony or for the prosecution to prove its case within the confines of the rules of evidence applied at trial.

Consideration should be given to greater external transparency of plea bargaining, even simply introducing a register to keep track of when these deals occur. It would be quite a significant achievement to see informed and considered changes to plea bargaining across Australian criminal jurisdictions. As the LRC suggests as well, other jurisdictions have increased transparency and accountability throughout the process (and are worth considering in NSW) include:

- Statutory rules to plea negotiations as in the US where statutory rules oversee conduct and content within plea negotiations and court submission agreements.
- Filing plea agreements in the court such as the US and UK where sentencing judge reviews and rejects terms of agreement.
- Public access to the signed agreement such as in the US where content of a plea bargain is available for public viewing.

Question 4.2

1. **Should NSW Crown prosecutors be able to incorporate sentencing outcomes into plea agreements?**

2. **How could NSW Crown prosecutors incorporate sentencing outcomes into plea agreements?**

3. **What would be the impact of incorporating sentencing outcomes into plea agreements on the number of early appropriate guilty pleas?**

Yes NSW Crown prosecutors should be able to incorporate sentencing outcomes into plea agreements. As mentioned by LRC, in England and Wales the defendant is able to seek a sentence indication prior to agreeing to a guilty plea. Though, negotiation on sentence would not be appropriate for all offence types. As mentioned too by the LRC (which is worth considering for a NSW model), incorporating a prosecutorial discretion to negotiate regarding sentence in the course of plea negotiations also occurs in other jurisdictions which include:

- The prosecution agreeing not to disagree with the defendantôs proposal of sentence, on the understanding that the defendantôs proposal cannot bind the court.
- The prosecution agreeing to submit a non-binding joint proposal on sentence with the defence.
- The prosecution agreeing to recommend a sentence that can be non-binding or binding on the court once the court has accepted the agreement.

In align with these advices; victims should be kept informed of the progress of their case arraignment and trial. It is beyond question that a victim should be informed when any charge bargain is initiated, and the views of the victim must be obtained before any formal decision about guilty pleas, for example, is made. The victim must not only be informed that any negotiation of this sort is contemplated; the victimôs views as to the acceptance of a contemplated plea to a particular charge must also be ascertained. Policy and guidelines must ensure that adequate consultation with victims is established as is often difficult due to the lack of resources that often prevent conversations with victims being conducted the Crown Prosecutor for instance.

Just as in keeping the victim informed and obtaining the victimôs views applies also to the police officer in charge of the matter. Issues such as the role of the prosecution and the desirability of a negotiated plea should be easier to explain to police officers than to some victims. However, it is still essential to inform the police of all phases of the charge negotiation and to seek the views of the police as to any proposed charge agreement and as to any proposed Statement of Agreed Facts. The process of informing the police and seeking and receiving their views should be recorded in writing. Police should also be asked to sign the Statement of Agreed Facts by way of acknowledgement. Because this may sometimes cause delay in the process, defence representatives need to be aware of what is required to be done.

Question 4.3

4. **Should the courts supervise/scrutinize plea agreements?**

If the courts did supervise/scrutinize plea agreements, would it lead to a compromise of judicial independence and integrity? And would the courts have the knowledge of the strength and weaknesses of the case on either side of which is necessary for the proper exercise of such functions for instance? The question really to ask is would the integrity of the judicial process, its independence and impartiality and the public perception be compromised if the courts were to be in any way concerned with decisions as to plea agreements?

If the courts were to supervise/scrutinize plea agreements then the intention should be to protect the victims or at least ensure compliance with the victimsô right to be consulted. As a suggestion, it could be a means of ensuring consultation with the victim eg that written confirmation signed by the victim that a prosecutor had consulted the victim before formalizing the plea and the statement of agreed facts, should be tendered to the trial judge or in another suggestion; the judge should be asked to look at the victimôs original statement to the police and compare it with the statement of agreed facts.

Case Conferencing

> *Case conferencing aims to bring the prosecution and the defence together early in the criminal process to identify key issues and encourage disclosure and appropriate early guilty pleas.*

Question 5.1

1. **Should NSW reintroduce criminal case conferencing? If so should case conferencing be voluntary or compulsory?**

2. **What are your views on the advantages and disadvantages of reintroducing criminal case conferencing?**

3. **If criminal case conferencing were reintroduced, how could it be structured to improve efficiency?**

It is not uncommon in New South Wales criminal courts for pleas of guilty to be entered on the eve or the morning of trial, or for the DPP to ñno-billò or direct no further proceedings on or close to the date of trial. Only 30% of all criminal matters registered for trial in the NSW District Criminal Court actually proceed to trial. In more than half of cases, the defendant changes their plea sometime after being committed for trial. And as mentioned, it is in about one in ten cases, the Office of the Director of Public Prosecutions (ODPP) requests that a trial be ño no billedô (2009).

The uncertainty created by late plea changes and withdrawal of proceedings can have significant adverse effects on both crime victims and defendants. Delays also have significant financial and human resource implications for all parties involved in the trial process. Among other things, there are significant prosecutorial and District court costs associated with committal and arraignment hearings, jury members have to be called and empanelled for the trial, the Crown Prosecutor and defence have to prepare for the trial, police have to organize witnesses and exhibits for the trial and solicitors often have to invest time conferencing witnesses prior to the trial.

This is why in 2005 consideration was given by the AGôs Department to the concept of criminal case conferencing (CCC) prior to committal whilst the matter was still in the Local Court in the hope of obtaining early pleas of guilty in respect of this target group, that is those matters that were being committed for trial that underwent trial preparation, but did not ultimately proceed to trial. The aim was to have the charge negotiation that was taking place on the eve of trial take place whilst the matter was still before the Local Court.

The CCC scheme was a multi-faceted case management approach to District Court criminal trials. The key feature of the scheme required representatives of the defence and prosecution to convene a compulsory conference prior to the committal hearing. The aim was to bring much of the plea negotiation between defence and prosecution forward in the process, rather than leave it until the days or weeks before the trial began. Unlike the UK or Canadian schemes, the NSW program did not involve the use of mediators or judicial officers to chair these conferences, nor did it involve any negotiations that could be described as ñplea bargainingò The conferences were formal meetings of the parties, but were organised and run by the parties themselves.

In 2010, when the Bureau of Crime Statistics and Research (BOCSAR) released a review of CCC, it concluded that the CCC trial was not meeting its objective of increasing the rate of early guilty pleas. The only outcome that might have been attributable to the CCC scheme was a decrease in the number of matters committed for trial from the two Local Courts feeding into the Sydney District Court. This effect however was comparatively small. BOSCAR proposed three main possibilities as to why the CCC trial had little effect:

- First, the legislative scheme may have not been significantly different from the widely applied administrative scheme that preceded it and that operated in both Sydney and non-Sydney courts.
- Secondly, the trial may not have been implemented consistently enough to influence the outcomes being measured. Despite it being compulsory, conferences were not always held in matters where they should have been.
- Thirdly, scepticism regarding the promise of significant sentence discounts for plea of guilty may have persisted. It is after all, impossible for any defendant to know what sentence would have been imposed had the discount not been applied. Defendants may prefer to hold onto a plea of not guilty in the hope of being listed for trial before a judge know or thought to be a lenient sentence.[1]

If NSW was to reintroduce criminal case conferencing once again, it will need to revise these (above mentioned) 3 problematic elements of CCC when it was first introduced into NSW in 2006. Case conferencing should probably be voluntary as this aspect has shown to be successful in other jurisdictions such as Western Australia where it has operated a voluntary criminal case conferencing program (VCCC) in the Supreme Court since 2006. As we know the compulsory approach of the NSW legislative trial has already been tested and proved to be not quite a success. In WA for instance, between 2007 and 2011, the median trial delay in criminal matters fell from 33 weeks to 22.5 weeks as a result of the voluntary criminal case conferencing program.

Also, if criminal case conferencing was to be reintroduced in NSW, it should take into consideration the successful elements of other jurisdictional models in order to improve its

[1] Wai Yin Wan, Craig Jones, Steve Moffatt, Don Weatherburn, The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court, NSW Bureau of Crime Statistics and Research, Issue Paper no. 44, June 2010.

efficiency from when it was first introduced in 2006 and lacked in thereof. Some of these elements (as mentioned in the LRC report) that have proved to work for other jurisdictions include the following:

- **Voluntary**: as in Western Australiaôs voluntary criminal case conferencing program (VCCC) make it a strictly voluntary procedure that requires mutual consent.
- **Flexible**: case conferencing in NSW occurred prior to committal; the VCCC on the other hand is a more flexible process. Though VCCC will usually occur before the disclosure/committal hearing, it may take place at any point before commencement of the trial. An accused can opt to undergo VCCC at any time prior to the trial.
- **Facilitated**: rather than allowing conferences to be guided by the parties, two retired District Court judges function as conference ñfacilitatorsò
- **Limited application**: VCCC only operates in the WA Supreme Court. It is a small-scale project affecting a small number of matters.

Fast-track schemes

Fast-track schemes provide a distinct pathway for people who plead guilty in the court of summary jurisdiction to an indictable matter to be sentenced in the higher court.

Question 6.1

1. **Should NSW adopt a fast-track scheme for cases likely to be resolved by a guilty plea?**

2. **If a fast-track system were to be introduced in NSW, how would it operate?**

3. **How would sentence discounts apply to a fast-track scheme?**

The Early Guilty Plea Scheme in the UK aims to reduce delays and unnecessary paper work and increase productivity for all criminal justice partners. The principle of the Early Guilty Plea Scheme is to identify those cases where a defendant is likely to plead guilty and to expedite those cases to an early guilty plea hearing. The aim is not to deter defendants from pleading at the magistrateôs court, but to provide another opportunity for defendants to plead at an earlier point in the process.

It was reported in the UK that over 10,000 cases in 2009, defendants pleaded guilty at the door of the court. In most instances the defendant could have done so, and been sentenced, in the magistratesô court. Their not doing so meant that court, police, prosecution and legal aid resources are wasted on cases that did not need to progress any further. Moreover, and most importantly, victims and witnesses have longer to wait before they discover whether they will have to give evidence, and the outcome of their case. This can increase their stress and worry at having to give evidence and is unfair on them.

It is important though that if there is any change in what goes on in court, it is at the best endeavors of the Crown Prosecution Service to consult the victim and their family before any change is made. The victim needs to get a reasonable say in what goes on. While the discretion for magistrates to refer cases to the higher court where necessary must be preserved, this should only happen when there are clear and compelling reasons. Itôs been reported in the UK (and this is not far from the truth in NSW as well) that cases are being tried in costly ways, even when there is a choice. Over 55% of defenders in either way cases sentenced in the Crown Court receive a sentence which could have been imposed by magistrates.

In short, the EGPS, is intended to streamline trials with a defendant receiving a third off any potential custodial sentence, if they indicate a guilty plea as early as possible in order to prevent delaying justice unnecessarily. This then limits the need for detailed case preparation by police and the Crown Prosecution Service (CPS). Prosecutors allocate which cases might be suitable for EGPS by looking at the strength of evidence against defendants. If a case appears sufficiently strong, they approach the defendantôs legal team to see if they wish to participate. Judge Rupert Mayo, who is senior circuit judge for Northamptonshire, said: ñ*A very high proportion of cases (73 per cent) dealt with in the Crown Court are eventually disposed of by way of a guilty plea.*

In other words, the EGPS aims to identify these cases early and the result being a somewhat far quicker conclusion to the case. Another advantage of this scheme is that it also saves money. It brings clarity to the statutory discount available to a defendant because it offers a ófirst reasonable opportunityô to admit guilt. According to the UK law advisors, late pleas mean wasted resources, anxiety and inconvenience for potential witnesses and insufficient use of the time available to the court, jurors and advocates.

Therefore, when the two sides agree, the prosecution will only prepare enough evidence necessary to convince the defence that the case is strong enough to get a conviction. This means the CPS and police do not have to prepare cases as if they are going to a full trial, which requires more evidence to be collated and served on the defence.

As the LRC states as well, WA has a fast-track procedure as well that has proven to be successful. Unlike the NSW system which has not developed a separate stream for cases which have been identified as likely to plead guilty. As the LRC recommends, this type of program may have efficacy in NSW where 53% of defendants committed to trial end up pleading guilty, and 61% of these do so on the first day/s of trial. A fast-track system in NSW could provide for:

- Early identification of cases likely to plead guilty.
- Creation of a hearing that combines sentencing and arraignment, where appropriate.
- Confirmation that the highest possible sentence discount is to apply to offenders in this stream.

If NSW was to adopt a fast-track scheme for cases likely to be resolved by a guilty plea, it could be modelled on the UK scheme where the Early Guilty Plea Scheme allows the defence and CPS to identify those cases likely to plead guilty and offers a credit on sentence for the defendant where they plead guilty at the Early Guilty Plea Hearing. The Scheme encourages discussion between the CPS and defence practitioners before the Early Guilty Plea Hearing takes place where any issues such as basis of plea can be agreed. This discussion can be undertaken using secure email as a way of ensuring that the CPS are able to respond quickly to any queries. This ensures that all parties are ready for the Early Guilty Plea Hearing where, providing the National Offender Management Service have a pre-sentence report, sentencing can occur at the Early Guilty Plea Hearing avoiding additional hearings for sentence. Though it must be noted that while the scheme may be beneficial for victims of crime who do not wish to go to court, it may deny some a fair say in how offenders are sentenced, this aspect needs to be monitored.

Question 6.2

1. **Should NSW adopt a program of differential case management?**

2. **If a program of differential case management was introduced**
    a. **What categories could be created, and**
    b. **How should each of these categories be managed?**

As we know, every case that goes to court imposes a unique set of demands on court resources. With the increasing volume and diversity of criminal and civil cases in most courts, and the broad range of case types and case processing requirements presented, the traditional first-in/ first-out, one-track-fits-all approach to case management is no longer either feasible or desirable. Differentiated Case Management (DCM) is a technique courts can use to tailor the case management process to the requirements of individual cases.
DCM provides a mechanism for processing each case in accordance with the timeframe and judicial system resources required. Thus, each case can move as expeditiously as possible toward disposition, rather than waiting in line. It is worth considering adopting a program of differentiated case management in NSW.

If a program of differential case management was implemented in NSW, the following prerequisites are but some of the elements in the US that have proved the scheme successful, these include:

- Commitment of major players in the judicial process (i.e., judges, prosecutors, and defense attorneys) to developing a system that differentiates among cases for processing purposes.
- Leadership of a key judge throughout the development and implementation of the DCM system and of an experienced administrator assigned to coordinate the effort.
- Willingness on the part of the court and the participating agencies to reorganize existing staff responsibilities, if necessary, and to dedicate senior staff, at least initially, to screen cases at the time of filing.
- An information system that supports the operation, monitoring, and evaluation of the DCM system. For a large volume of cases, an automated information system may be necessary, but many jurisdictions have found a personal computer based system to be adequate, at least initially.

International jurisdictions that have implemented DCM systems, as in the US, have had the following benefits attributed to DCM:

- Significantly greater scheduling certainty and more efficient use of resources, including:
    - Reduced disposition times
    - Greater judicial productivity
    - Fewer continuances
    - Lower witness costs, including less police overtime
    - Reduced pretrial detention costs
    - Fewer bench warrants due to failures to appear

- Increased coordination and cooperation among justice agencies, including:
  - More efficient coordination of individuals and tasks
  - Earlier discovery and other information exchanges among attorneys
  - Earlier availability of information needed for accurate case scheduling (for instance, the need for an interpreter and pre-sentence investigations)

- Improved quality of the judicial process, including:
  - Better attorney preparation due to more reliable court schedules
  - Fewer witnesses ñlostòdue to delays or continuances
  - Improved public respect for the judicial process

So, as a suggestion for a NSW program, the differentiated case management program could be modelled on the US model or trialed as far as is applicable in NSW.

Abolition of committal proceedings
Committal proceedings in NSW operate in indictable matters to test the evidence against a person prior to that person being committed for trial.

Question 7.1

1. **Should NSW maintain, abolish or change the present system of committals?**

2. **If a case management system were introduced, what would it look like?**

A committal hearing, which is also known as an initial proceeding or preliminary examination, is held in the Local Court, and is used for the purpose of determining if there is sufficient evidence to send a defendant to trial in the District or Supreme Court. Prior to a committal hearing, it is the duty of the police to investigate the case, and record witness statements from the version of events of each witness. During a committal hearing, the prosecution will present their case against the defendant and call upon witnesses to give their testimony. The defence may cross-examine the witnesses prior to the defence re-examining them. The magistrate then decides if there is enough evidence to support the case and put the defendant on trial. If there is insufficient evidence, the Magistrate will dismiss the case, meaning the defendant is free to leave. If there is sufficient evidence, the defendant may plead guilty, which will prompt the Magistrate either to charge the defendant immediately, or to commit them to a later sentencing date. If the defendant pleads not guilty, the defendant will be committed to trial in the District or Supreme Court.

Itôs been said that the committal proceeding is a signiýcant step in the criminal prosecution process. Committal proceedings as they appear today were created in England in 1848 by the Indictable Offences Act. Historically, the purpose of the committal hearing was to determine whether there was sufficient evidence to justify sending the defendant to stand trial before a judge and jury in the District or the Supreme Court. In this way, the committal hearing was an important means of preventing the executive branch of Government abusing its power of prosecution.

However, there are costs involved in committal hearings. For the defence, publicity can be a major issue. Some committal hearings attract a considerable amount of attention which can be prejudicial and jeopardise the fairness of the trial. Costs to the criminal justice system include added demand on Local Court time, and a possible lengthening of the period between arrest and finalization of a case where indictable charges are concerned. It has also been argued that the advent of the independent Director of Public Prosecutions has removed some of the historical justification for committal proceedings. The Government of the day no longer has direct control over the prosecutorial process.

As mentioned, of the 2,200 cases are committed for trial per year in NSW, less than 600 actually go to trial. Roughly 700 results in a plea of guilty, while the remainders are "no-billed," adjourned or aborted. This involves a vast waste of resources at the most expensive end of the process and also involves additional uncertainty and stress for victims, witnesses and often the accused. In particular, guilty pleas made just before or on the opening day of the trial. These late pleas had risen from 49 per cent to 58 per cent last year. Delays at the committal stage and after were caused by defence lawyers attempting to negotiate the charge, issues not being settled before the committal, and a tendency to focus on the trial.

There does need to be prior to committal in the Local Court an opportunity for the parties to consider the evidence and charges laid in an informed and fair fashion. Committal proceedings in NSW are the last process to occur in the Local Court. As the LRC states, the last process in the Local Court need not be a committal hearing especially if committals are no longer performing an effective screening function. In NSW up to 85% of committal occur on the "the papers" and that it is rare that the evidence does not reach the standard to commit.
Importantly, over half of the matters committed for trial do not result in a defended trial. The LRC suggests as a result of the said issues, by replacing committals with a more robust case management system.

In align with the above arguments, the abolition of committals in England and Wales, Western Australia and New Zealand have occurred in order to address issues of expediency and court efficiency. For instance, in Western Australia committals were replaced with:

- a "fast-track" sentencing procedure upon a guilty plea
- a committal/disclosure hearing, and
- an "administrative committal"

When determining the nature of any changes, the NSW model could look to Western Australia's ways to retain the best aspects of its committal proceedings whilst overcoming the problems perceived to exist in the present system or as far as is applicable to NSW.

Question 7.2

1. **When in criminal proceedings should full prosecution and defence disclosure occur?**

In NSW, disclosure requirements are managed to varying degrees by the case management practices of the Local and District Court. Again, according to the Western Australia model, prosecution disclosure must occur before the matter moves to the higher court. WA has replaced committals with disclosure hearings and courts play an active role in ensuring that prosecution disclosure requirements have been met. The UK has implemented a staggered disclosure system, where the extent of disclosure requirements depend on, among other things, whether the matter has been identified as likely to enter a guilty plea. In both jurisdictions, disclosure requirements work in concert with programs developed to encourage early guilty pleas.

At the time of writing, the pretrial defence and prosecution disclosure has been resolved in the main by the new legislation. It really is a moot point now.

> **Sentence Indication Schemes**
> *Sentence indication schemes enable a defendant to request from the court an indication of the penalty he or she is likely to receive before pleading guilty to an offence.*

Question 8.1

1. **Should NSW reintroduce a sentence indication scheme?**

2. **If a sentence indication scheme were introduced, what form should it take?**

As we know, an early guilty plea has a particularly signiýcant impact on the cost and eýciency of criminal proceedings. It spares counsel and witnesses the cost and time involved in preparing the case and frees up the time and resources of the courts for other matters.

At the commencement of the first law term in 1992, the NSW Parliament passed legislation allowing the Chief Judge of the NSW District Court to introduce a óSentence Indicationôscheme. The scheme provided for an accused person committed for trial in the NSW District Court to seek an indication of the sentence that will be imposed if a guilty plea is entered.

The aim of the scheme was said to be ñto obtain earlier pleas of guilty and more pleas of guiltyô The earlier the guilty plea is identiýed, the greater the beneýts to both the participants.

A 2007 report by the Australian Institute of Criminology (AIC) found that late guilty pleas were ñthe single most common reason that criminal trials do not proceed on the day of listingô The Institute interviewed more than 60 stakeholders from 42 Australian criminal justice agencies and reported: *It was the unanimous opinion of all respondents to this review that late guilty pleas remain of most concern to criminal trial procedure in Australia, both in the higher and lower courts.*

While late guilty pleas were a prime cause of delay, the AIC found that the measures most useful in targeting delay did not necessarily target guilty pleas directly. The AIC found general agreement among the legal community on the need for ñfront endingô, in other words, measures to encourage participants in the proceedings to discuss the case fully and openly at an early stage. The AIC identiýed a need for improved communication between the police, prosecution, defence and the court, between defence counsel and the defendant and with victims and witnesses generally.

Having a mechanism for identifying and streaming cases in which the defendant is likely to plead guilty allows the courts to ýnalise these cases expeditiously, thus reducing the burden that avoidable contested hearings place on the resources of the justice system. Such measures have the potential to deliver real savings to the criminal justice system.

One such example is in the sentence indication schemes that have lead towards increasing court efficiencies and the rate of guilty pleas in other jurisdictions. This is worth revisiting once again since the NSW criminal justice landscape in 2013 is quite different to the landscape in 1993 when sentence indications were first introduced.

There needs to be a consideration of the advantages and disadvantages of a sentence indication scheme in todayôs criminal justice landscape, having particular regard to its likely impact on the courts, victims of crime and the general community. As mentioned, other jurisdictions which have a sentence indication scheme include Victoria, New Zealand and the UK:

- **Victoria** has a sentence indication scheme operating in the County and Supreme Courts and is now embedded in statute.
- **New Zealand** has a sentence indication scheme prescribed by the Criminal Procedure Act 2011.
- The **United Kingdom**, sentence indications are only available in indictable proceedings and are normally made at the first or second appearance at the Crown Court.

Some *advantages* of sentence indications include:

- When it was first introduced in NSW in 2002, sentence indication did garner stakeholder support for is ability to generate early guilty pleas. The scheme appeared to be highly effective in particular courts.
- The scheme was a preferred alternative to plea negotiations. According to the Judicial Commission of NSW review, it observed the primary benefit of the scheme was its transparency.

On the other hand, some of its *disadvantages* to the scheme include:

- inappropriately lenient sentences
- the prioritisation of expediency over fairness
- undue inþuence on the defendant to plead guilty; and
- not providing sufýcient scope for the victimôs views to be taken into account at sentencing

Such factors as those mentioned above must be taken into account if NSW was to revisit a sentence indication scheme. When ascertaining what form it should take, the Victorian model is quite a good indication as the said model has undergone an evaluation by the Victorian Sentencing Council (VSAC) in 2010.

Question 8.2

1. **Once a defendant accepts a sentence indication, in what circumstance should it be possible to change it?**

As the LRC states, generally sentence indications operate so that a sentenced offender cannot be put into a worse position than that which was indicated. In the NSW system, a judge was bound by the quantum of sentence indicated if there was no further evidence or facts that affected the indication. The defendant was able to withdraw a plea if the indication changed at sentence or on appeal.

In Victoria the court is bound by a non-custodial indication, but not by a custodial one. The UK approach also does not permit a more onerous sentence than the one indicated to be imposed at sentence if the indication is accepted.

> **Sentence discounts for early pleas**
> *Sentence discounts provide a key incentive for defendants to enter a plea of guilty early.*

Question 9.1

1. **Should NSW introduce a statutory regime of sentence discounts?**

2. **If a statutory regime of sentence discounts were introduced:**
   a. **What form could it take, and**
   b. **To what extent should it be a sliding scale regime?**

Just as an offender can receive a reduction in sentence for assisting the police with their investigations, an offender who pleads guilty can receive a reduction in sentence for the óutilitarian valueôof the guilty plea. The Crimes (Sentencing) Procedure Act 1999 NSW (CSPA) presently prescribes that a guilty plea is to be regarded as a mitigating factor for which a lesser penalty may be given by a sentencing court. The result is that a defendant may receive a variation of the sentence that would otherwise be imposed.

In 2000 after the Crown requested a guideline judgement from the Court of Criminal Appeal (CCA), it outlined the key considerations to be made when courts consider the impact of a guilty plea on sentence. These include the utilitarian value of the plea, the timing of the plea and the nature of the offence. The guideline judgements also outline the practical requirements a sentencing court must meet.

As the LRC states, except in Tasmania, all state and territory jurisdictions in Australia have enacted legislation enabling sentence discounts to be given for guilty pleas with several notable variations in how the discount must be applied. Other Australian jurisdictions have not generally followed the NSW approach by distinguishing one part of the effect of the plea of guilty and treating it as a separate matter of mitigation.

In **Western Australia** the Court maintains an instinctive synthesis approach to sentencing so that ñattempts to specify the extent of the discount for a plea of guilty should be addressed with care. In **South Australia** a five-judge bench considered the discount for the plea of guilty in ***R v Place***. The Court saw no difficulty in continuing the practice that had existed in that State by indicating a discount for the plea of guilty. However, the discount includes all aspects of the plea including remorse and contrition and active assistance to the police. There is a statutory requirement that the court take into account the plea of guilty but it does not indicate the manner in which it is to do so.

It can hardly be said that the decision has added to transparency in sentencing in New South Wales when a judge is not required to nominate the discount and judges frequently do not do so. Nor does it seem to have much assisted consistency when the discount is discretionary despite the very limited factors upon which it is based and the variations discernable in the discounts given even when the discounts are disclosed. There are cases where the sentence imposed appears to be inconsistent with the stated discount notwithstanding that there will be a degree of rounding out of the numbers.

In light of the experience in other jurisdictions a specified reduction in sentence could have two undesirable consequences: it might unfairly induce guilty pleas and it might give rise to disproportionate and unduly lenient sentencing. Prescribing the value to be given to one mitigating factor, the guilty plea, is also problematic when the weight given to other sentencing factors is still left to the court to determine at its discretion. Further, it is questionable whether a specified reduction in sentence would deliver the expected benefits within the current sentencing framework.

In NSW the sentencing range applicable for any given offence is quite broad. Even if the maximum reduction allowable for a guilty plea were specified or a sliding scale prescribed, the courts would be able to adjust the starting point to ensure that the reduction did not result in the imposition of a disproportionate sentence. In these circumstances, providing explicit guidance on the reduction available for a guilty plea would probably not provide the degree of certainty and consistency needed to justify confining the courtôs discretion at sentencing. It is probably more preferable to retain the discretion to determine whether an offender should receive a reduction in sentence for pleading guilty and if so, how this reduction should be applied on a case-by-case basis.

> **Encouraging early guilty pleas in summary proceedings**
> *To resolve issues and finalise matters prior to trial, most courts of summary jurisdiction in Australia have introduced case conferencing programs.*

Question 10.1

1. **Should the Local Court of NSW introduce case conferencing as part of its case management processes?**

2. **Should the Local Court of NSW incorporate a summary sentence indication scheme?**

3. **If a summary sentence indication scheme were introduced:**
   a. **what form should it take; and**
   b. **what type of advance indication would be appropriate?**

4. **What effect will case conferencing have on the Local Court's efficiency and guilty plea rate?**

As the LRC states, most courts of summary jurisdiction in Australia have instituted a case management system to encourage consultation between the parties prior to trial. These conferences can be held in court and may include a sentence indication, or they may occur offsite between the parties. Case conferences are designed to resolve issues and bring about an early resolution of the matter.

At the outset it needs to be made clear that the central concern is to assist and encourage those who wish to plead guilty to do so at the earliest possible opportunity, achieving an improved experience for victims, and realising efficiency gains for the criminal justice system while continuing to protect the fundamental rights of the accused. And as mentioned, for those who intend to plead guilty, an early plea avoids the need for a trial thus saving any witnesses and the victim from having to give evidence, and reducing the costs to the public. It also condenses the time between the commission of an offence and sentence; providing the offender with certainty and, importantly, facilitating an earlier intervention to offending behavior. Earlier and more guilty pleas mean fewer trials which will reduce the backlog of cases waiting to be tried. A reduction in waiting time assists offenders, victims and witnesses, particularly those who may be young and or vulnerable. It may also allow a re-allocation of resources to other cases. This clearly benefits everyone.

So, as we know, achieving the benefits of early guilty pleas requires a number of inter-dependent factors to be considered. These inter-dependencies are significant and exist across a range of areas, from police to the prosecution to the defence and the courts as well as a range of factors influencing and creating the landscape in which early guilty pleas operate. A very significant cornerstone of encouraging early guilty pleas is the effective and consistent use of case management. This is evident from the LRCôs comparative analysis of the said practice in other jurisdictions and is worth considering as a quite beneficial instrument in terms of creating the landscape that would assist in early guilty plea schemes to work well/at sufficient volume. These have included:

- Summary proceedings in **Victoria** have 2 stages in the pre-contested hearing phase (Summary Case Conference and Contest Mention System) that aim to bring about an early resolution of matters.
- The **Queensland** Magistrates Court case conference encourages early unmediated negotiations between the prosecution and defence to discuss issues in dispute in order to bring about an early resolution to proceedings.
- In **South Australia**, if after the second return, a defendant advises the court that he or she wishes to plead not guilty, the parties are directed to confer ófully and franklyôwith the aim of disposing of the case other than by way of trial.
- The Magistrates Court of **Tasmania** introduced a Contest Mention System (CMS) based on the Victoria CMS in 1996.
- In the **Northern Territory** during contest mention, the parties are to identify the matters in dispute, and provide the court with a realistic estimated time for hearing the matter if it were to proceed.
- In the **Australian Capital Territory**, following a plea of not guilty in the Magistrates Court, a Case Management Hearing (CMH) date is set. At the CMH, the magistrate will hear the nature of the evidence to be called, invite a response from the defence and canvass with the prosecution the acceptability of nay pleas offered.

The purpose of a case management hearing is to address a common objective which all concerned share and that is, the quickest and least expensive means of resolving a case, consistent with the interests of justice. Court rules need to provide a framework for flexible and bespoke management of individual cases by reference to their particular facts and circumstances. The focus of case management needs to be upon the early identification of the real matters in contention between the parties, and the quickest, most efficient and inexpensive means of resolving those issues, while ensuring justice is achieved. Itôs important to note that the skills required of judicial case managers will critically include the capacity to discriminate between those cases that are likely to resolve without trial, and those cases in which a trial is likely. Only the latter cases will be subjected to the full range of pre-trial processes.

Another skill required of case managers will be the capacity to ensure that case management processes do not become the cause of cost and delay which they are designed to reduce. There is a line to be drawn between appropriate levels of judicial supervision, ensuring that the cases move forward in an appropriate way and at an appropriate rate, and hounding the parties into frequent appearances before the court, which are expensive and can be a distraction from case preparation.

The scheduling of a face-to-face conference prior to committal aims to shift the activity that usually occurs in the weeks before the trial, to the weeks before the committal. The factors needed to achieve meaningful negotiation as this stage are:

- The service of a complete brief of evidence;
- that practitioners seriously analyse the brief and in the case of the defence obtain full instructions; and
- that the practitioners be of sufficient seniority, on both sides, to have the confidence to make an assessment of the brief and any prospective trial, and to be in a position to come to a binding agreement.

Again, as the LRC states, the NSW Local Court does not incorporate any programs or systems specifically designed to address late guilty pleas. Options that could be adopted include:

- Unmediated case conferencing between police and defence representatives: This can occur formally via statute, as seen in Victoria or as an informal practice such as adopted by SA. Unmediated case conferencing can assist the parties to resolve issues in dispute, and, in Victoria, has impacted upon the caseload seen later in the mediated contest mentions. Unmediated case conferencing will require a preliminary police brief.
- Magistrate managed case conferencing: This usually occurs after a first mention, and requires a fuller police brief than unmediated case conferencing. It can happen in open or closed court.
- Sentence indication: In over half of the jurisdictions that have court managed case conferencing, the defence can request a sentence indication from the magistrate. Sentence indications can include:
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    a) An indication as to sentence type (custodial or non-custodial), and/or
    b) An indication as to quantum of sentence.

These recommendations are worth considering and utilized where possible and appropriate to help facilitate and reinforce the effective delivery of early guilty pleas.

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