



**New South Wales
Law Reform Commission**

**Consultation
paper**

15

**Encouraging appropriate
early guilty pleas:**

Models for discussion

November 2013
www.lawreform.lawlink.nsw.gov.au



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- The District Court of NSW
- The Magistrates' Court of Victoria
- NSW Bureau of Crime Statistics and Research
- NSW Police
- The Office of the Director of Public Prosecutions (NSW)
- Legal Aid NSW
- Victoria Police

Terms of reference

Pursuant to section 10 of the Law Reform Commission Act 1967, the Law Reform Commission is to review the Crimes (Sentencing Procedure) Act 1999. In undertaking this inquiry, the Commission should conduct an inquiry aimed at encouraging early pleas of guilty in all criminal matters dealt with in NSW.

Specifically, the Commission is to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters.

In undertaking this review the Commission should have regard to:

- The organisational capacities and arrangements for the courts, police, prosecution and defence
- The Trial Efficiency Working Group
- Developments in Australia and overseas
- Any related matters the Commission considers appropriate

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 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?

1. Introduction

In brief

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. The introduction to the paper provides background on the models paper. We highlight the obstacles that any reform would need to overcome and summarise the approaches or “models” of cognate jurisdictions that are detailed in the following chapters.

Background to the review	1
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Background to the review

- 1.1 The NSW Law Reform Commission received terms of reference from the Attorney General for this review in March 2013. In July 2013 the terms were updated to clarify that the inquiry covered all criminal matters.
- 1.2 The terms of reference require us to:
- Conduct an inquiry aimed at encouraging early pleas of guilty in all criminal matters dealt with in NSW.
- Specifically, the Commission is to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in criminal proceedings for all criminal matters.
- In undertaking this review the Commission should have regard to:
- The organisational capacities and arrangements for the courts, police, prosecution and defence
 - The Trial Efficiency Working Group
 - Developments in Australia and overseas
 - Any related matters the Commission considers appropriate
- 1.3 In June we invited preliminary submissions to the terms of reference. We received 11 submissions, which can be viewed on our website. Between June and October 2013, we engaged with 15 stakeholder groups, including the NSW Police Force; the Office of the Director of Public Prosecutions (ODPP); Legal Aid NSW and Public Defenders NSW; the Local Court and District Court of NSW; the Law Society of NSW and NSW Bar Association; and local and international academics with expertise in the area. The submissions and consultations have been instructive to our research and prompted us to develop this publication.

- 1.4 The Models Paper is our first publication on encouraging appropriate early guilty pleas.

Why encourage early guilty pleas?

- 1.5 The practical, financial and emotional benefits of obtaining guilty pleas early in criminal proceedings are well established.¹
- 1.6 Criminal proceedings are most commonly resolved by a guilty plea.² In 2012, 82% of criminal matters proved in the District Court of NSW were resolved via a guilty plea.³ This laudable statistic is, however, undermined by the fact that 35% of all guilty pleas were submitted after the matter had been committed for trial⁴ and, most tellingly, of these approximately 61% occurred on the day of trial.⁵
- 1.7 Late guilty pleas take up resources and impact upon the efficiencies of the criminal justice system. In 2012 over 800 matters resolved in a guilty plea after the matter had been arraigned in the District Court. This generally means that the relevant proceedings had appeared at least twice in the Local Court prior to committal, had undergone committal proceedings in the Local Court, and had been arraigned in the District Court before being finalised in a guilty plea. This puts an obvious and unnecessary strain on the criminal justice system.
- 1.8 When a plea is received on the first day of trial, the court's sitting time is often wasted and jurors will have been called up and may already have been empanelled. Police undergo additional work and police witnesses attend court unnecessarily. Legal practitioners needlessly complete trial preparation, including engaging with experts and other witnesses.⁶
- 1.9 In human terms, the stressful effects of prolongation, repeated attendance at court and ongoing uncertainty can be disruptive and distressing to victims, witnesses, relatives and others concerned with the proceedings, including the defendant.⁷

1. A Flynn and K Fitzgibbon, "Bargaining with Defence Homicide: Examining Victoria's Secretive Plea Bargaining System Post Law Reform" (2012) 35 *Melbourne University Press* 905, 906.

2. K Mack and S Roach Anleu "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-266.

3. 2428. This includes matters where a person entered a plea of guilty to some but not all of the charges: NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics (2012)* (Table 3.6).

4. See para [2.4].

5. Information provided by the Office of the Director of Public Prosecutions (3 July 2013).

6. K Mack and S Roach Anleu "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-266.

7. LJ Auld, *Review of the Criminal Courts of England and Wales* (September 2001) 408; K Mack and S Roach Anleu "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-266.

Approaches to early guilty pleas in NSW (1990 – 2013)

- 1.10 Finding methods to discourage late guilty pleas and facilitate appropriate early resolutions has been described as the “central question for reform of pre-trial criminal procedure”.⁸
- 1.11 In NSW, addressing the issue of late guilty pleas has been for many years an ongoing concern for government, stakeholders and the courts. A recent history of criminal procedure and activities relevant to encouraging appropriate early guilty pleas is chronicled below.

Table 1.1: Approaches to early guilty pleas in NSW 1990 - 2013

Year	Event
1990	Legislation is introduced that directs sentencing judges to consider early guilty pleas in sentencing. ⁹
1991	The District Court of NSW introduced a scheme of early arraignment hearings to encourage appropriate guilty pleas earlier. ¹⁰
1991	The Director of Public Prosecutions assumed responsibility for prosecuting committal proceedings. ¹¹
1993-1996	A sentence indication pilot scheme is implemented at the District Court. The scheme is discontinued on evidence that it does not increase early guilty pleas or guilty pleas. ¹²
2000	NSW Bureau of Crime Statistics and Research (BOCSAR) release report “Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Court”. ¹³ Research results highlight, among other things, a perception that there is no clear sentence benefit to the accused in pleading guilty early.
2000	<i>Crimes (Sentencing Procedure) Act 1999</i> (NSW) (CSPA) s 22 “Guilty plea to be taken into account” replaces the repealed s 439 of the <i>Crimes Act 1900</i> .
2000	In <i>R v Thomson; R v Houlton</i> ¹⁴ the NSW Court of Criminal Appeal delivers a guideline judgment indicating that the utilitarian value of an early plea can result in a sentencing discount of 10-25%, depending upon the timing of the plea.
2002	<i>Cameron v The Queen</i> ¹⁵ High Court judgment. Not applicable to NSW due to CSPA.
2004	Attorney General established the Criminal Case Processing Committee to formulate a statutory model to reduce the number of matters committed and prepared for trial that did not eventuate.
2006-2008	Administrative model of the Criminal Case Conferencing Trial put into place in some city courts. ¹⁶

8. K Mack and S Roach Anleu “Reform of Pre-Trial Criminal Procedure: Guilty Pleas” (1998) 22 *Criminal Law Journal* 263, 264.
9. *Crimes Act 1900* (NSW) s 439.
10. D Weatherburn, J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, (NSW Bureau of Crime Statistics and Research, 2000) 8.
11. D Weatherburn, J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, (NSW Bureau of Crime Statistics and Research, 2000) 8.
12. D Weatherburn, E Matka and B Lind, *Sentence Indication Scheme Evaluation: Final Report* (NSW Bureau of Crime Statistics and Research, 1995); NSW, Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.33]. See Chapter 8.
13. D Weatherburn, J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, (NSW Bureau of Crime Statistics and Research, 2000).
14. *R v Thomson; R v Houlton* [2000] NSWCCA 309. See Chapter 9.
15. *Cameron v The Queen* (2004) 209 CLR 339.
16. See District Court of NSW, Practice Note 5 of 2005. See Chapter 5.

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Year	Event
2008	Criminal Case Conferencing Trial (CCC) begins, pursuant to the <i>Criminal Case Conferencing Trial Act</i> (NSW). The aim of the CCC is to bring forward the plea negotiation process and encourage early guilty pleas where appropriate. An early guilty plea, received before committal proceedings commence, is to result in a 25% reduction of sentence. After committal would receive 12.5%. ¹⁷
2009	<i>R v Borkowski</i> ¹⁸ outlines the general principles to be considered when applying the utilitarian value to an early guilty plea.
2009	The Trial Efficiency Working Group report is released. ¹⁹
2009	The NSW Sentencing Council releases a review on reduction in penalties at sentence. ²⁰ The review is directed not to consider the CCC.
2010	Pursuant to the Sentencing Council review, amendments are made to CSPA. ²¹ Section 22 is to include the circumstances in which an offender pleads guilty, and to prescribe that a lesser penalty imposed must not be reasonably disproportionate to the nature and circumstances of the offence. ²²
2010	The Bureau of Crimes Statistics and Research releases a review of CCC, which concludes that the CCC trial is not meeting its stated objective of increasing the rate of early guilty pleas. ²³
2012	The <i>Criminal Case Conferencing Trial Act 2008</i> (NSW) is repealed.
2012	The Local Court of NSW releases a practice note which sets a strict timeframe of up to 6 weeks for service of the police brief in indictable matters. ²⁴
2013	The Attorney General refers "encouraging appropriate early guilty pleas" reference to the Law Reform Commission.
2013	The <i>Criminal Procedure Amendment (Mandatory Pretrial Defence) Disclosure Act 2013</i> (NSW) commences in September and expands mandatory defence disclosure requirements. The Attorney General notes: "The reforms will narrow the points in dispute early and might lead people to plead guilty sooner, rather than waiting until the first day of the trial when witnesses, lawyers and jurors are ready to go." ²⁵

1.12 It is an unfortunate aspect of the criminal justice system that, despite these developments, the statistics in NSW show that past attempts to encourage early guilty pleas have not been particularly successful.²⁶

17. See Chapter 5.

18. *R v Borkowski* [2009] NSWCCA 102; See Chapter 9.

19. Criminal Law Review Division, *Report of the Trial Efficiency Working Group*, Final Report (2009).

20. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009).

21. *Crimes (Sentencing Procedure) Amendment Act 2012* (NSW).

22. *Crimes (Sentencing Procedure) Act 1999* s 22(c) and s 22(1A).

23. YW Wan, C Jones, S Moffat and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 2010). See Chapter 9.

24. Local Court of NSW, Practice note Comm 1.

25. The Sydney Morning Herald "NSW Accused Warned Not to Withhold Defence" March 13, 2013 <<http://news.smh.com.au/breaking-news-national/nsw-accused-warned-not-to-withhold-defence-20130313-2fz88.html>>.

26. See statistics in Chapter 2.

Ten obstacles to early guilty pleas

1.13 Drawing on the research and past material, the Commission identified at least ten obstacles to defendants pleading guilty earlier in criminal proceedings. The stakeholders we consulted have all confirmed these should be the focus of our work.

- 1 The prosecution serves parts of the brief of evidence late.²⁷
- 2 The defence expects further evidence will be disclosed closer to the trial.²⁸
- 3 The defence believes that it is common practice for the prosecution to overcharge early, and that the charges will be reduced as the proceedings advance.²⁹
- 4 The prosecution accepts a plea to a lesser charge late in the proceedings.³⁰
- 5 Senior Crown Prosecutors with the authority to negotiate are not briefed until late in the proceedings.³¹
- 6 The defence perceives the court to be flexible in the way it applies a sentence discount for the utilitarian benefit of an early guilty plea that occurred later in the proceedings.³²
- 7 The defence is sceptical that sentencing discounts will be conferred to their client.³³
- 8 The defence believes that they will obtain better results in negotiations that occur just prior to trial.³⁴
- 9 Discontinuity of legal representation means that advice and negotiations are inconsistent.³⁵

27. S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008); NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6]; NSW Young Lawyers, *Preliminary Submission PEGP10*, 10.

28. S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008).

29. S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008); NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6].

30. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [8.6]; YW Wan, C Jones, S Moffat and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 2010) 1.

31. K Mack and S Roach Anleu "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-269; The Public Defender, NSW, *Preliminary Submission PEGP02*, 1; Legal Aid NSW, *Preliminary Submission PEGP04*, 3.

32. NSW, *Parliamentary Debates*, Legislative Assembly, 9 April 2008, 39 (Greg Smith); S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008).

33. *R v Thomson; R v Houlton* [2000] NSWCCA 309 [126]; YW Wan, C Jones, S Moffat and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court*, (NSW Bureau of Crime Statistics and Research, 2010) 1.

34. S Beckett, *Criminal Case Conferencing Trial Act 2008* (NSW Bar Association, 2008).

35. K Mack and SR Anleu "Reform of Pre-Trial Criminal Procedure: Guilty Pleas" (1998) 22 *Criminal Law Journal* 263, 264-269.

- 10** The defendant holds back a plea because the defendant wants to postpone the inevitable penalty; denies the seriousness of his or her predicament until the first day of trial;³⁶ and/or is hopeful that the case will fall over due to lack of witnesses or evidence.
- 1.14 Other issues include whether the defendant had legal advice, and the influence that the remuneration practices of Legal Aid NSW may have on the way private practitioners run matters.³⁷
- 1.15 These barriers are generic to all cases. There may be some variations among offences. For example:
- Some stakeholders have pointed out that sexual assault and domestic violence are two areas where late guilty pleas may occur as defendants wait to see if the victim/witness will not appear on the day of trial.
 - By contrast, some defendants, such as those in white collar crime or corporate fraud cases, may be used to applying risk management strategies and may be more likely to see the benefit of a sentence discount and engage the prosecution in plea negotiations.
- 1.16 This paper does not take an offence-based approach. We recognise, however, that it is an important line of inquiry, and we are currently working towards incorporating it in our final report.

These issues are not confined to NSW. Many Australians and overseas jurisdictions have faced these barriers and instituted reforms in an attempt to overcome them. In this paper we present these models for reform, and the evidence that underpins them. In this presentation we follow the course of criminal procedure, and explain the various procedural steps designed to improve timely guilty pleas and the efficiency of criminal proceedings.

3. Pre-charge bail and statutory charging: Pre-charge bail is an initiative of England and Wales that seeks to address the imperative that initial charges brought by police are correct and that the police brief of evidence is sufficient. In this chapter we ask if any part of the pre-charge bail program can be appropriated for use in NSW.

4. Plea negotiations: This chapter presents three differently constituted models of plea negotiation for consideration from England and Wales, Canada and the USA. We ask whether an increase in prosecutorial discretion, judicial oversight and transparency in NSW would further encourage early plea agreements.

5. Case conferencing: This chapter considers the case conferencing trial in NSW and reviews three distinct approaches to criminal case conferencing from WA, Victoria and Canada. We ask whether NSW should consider introducing a modified case conferencing program.

36. NSW, *Parliamentary Debates*, Legislative Assembly, 9 April 2008, 38 (Greg Smith).

37. A Flynn, "Victoria's Legal Aid funding structure: Hindering the ideals inherent to the pre-trial process" (2010) 34 *Criminal Law Journal* 48. This issue may be further canvassed in the final report.

6. Fast-Tracking: This chapter canvasses the Early Guilty Plea Scheme in England and Wales, and the fast-track scheme in WA. It asks whether NSW would benefit from a similar case management program.

7. Abolition of committals: In England and Wales, New Zealand and WA traditional committals have been abolished in favour of an administrative process. Abolition of committals has occurred in concert with other case management initiatives, and Chapter 7 reviews these for consideration.

8. Sentence indication schemes: Chapter 8 reviews the failed sentence indication scheme of NSW and presents recent approaches to sentence indication schemes from Victoria, England and Wales and New Zealand for consideration.

9. Sentence discounts: Sentence discounts are the crux of most schemes that aim to encourage early appropriate guilty pleas. This chapter presents the statutory and case law models of other Australian jurisdictions, and asks whether it is necessary to increase the rigour of the NSW approach.

10. Early guilty pleas in summary proceedings: Chapter 10 reviews the case conferencing programs currently operating in courts of summary jurisdiction throughout Australia and asks whether NSW would benefit from a similar approach.

New and innovative models for reform are required

- 1.17 Looking at criminal procedure overall, we have concluded there is a clear case for change in NSW. Our stakeholders told us that the problems are embedded in the criminal justice system, and appear at critical junctures. They are systemic, cultural and cross disciplinary; they arise from deeply embedded practices from all participants.
- 1.18 The data we review in Chapter 2 shows a system where there are too many guilty pleas at the door of the court in NSW. We see the District Court of NSW facing significant efficiency issues in disposing of its caseload. The Office of the Director of Public Prosecutions (ODPP) and Legal Aid NSW report continuing difficulty in effectively managing caseloads within resources.³⁸
- 1.19 There have been many attempts in NSW at implementing programs and policies to encourage appropriate early guilty pleas. The most recent criminal case conferencing initiative was delivering value, however the government concluded that it did not clearly result in successful outcomes and measurable efficiency gains. Our reference asks us to take a fundamental look at criminal procedure and look at evidence based models of what works to produce real efficiency gains. We consider that breaking down the obstacles that currently prevent the submission of early guilty pleas in NSW will require a significant law reform response.

38. Office of the Director of Public Prosecutions, *Preliminary Submission PEGP6*, 1; Legal Aid NSW, *Preliminary Submission PEGP4*.

- 1.20 We do not think that a change in one factor will necessarily overcome the overall systemic issues. Any solution will need to be multifaceted and include consideration of:
- legislative frameworks
 - case management practices in the ODPP, Legal Aid, private legal practices, courts and police
 - funding and remuneration models, and
 - lawyers' training and mindsets.
- 1.21 The challenges of the NSW criminal justice system are shared among cognate jurisdictions, which have responded with various programs and policies. This paper is structured to present an objective overview of some these approaches – or “models” – that are attached to critical junctures of the criminal justice system. The presented models are not exhaustive, and we are also interested in other relevant models that stakeholders may be familiar with. For example, programs of restorative or transformative justice are not canvassed in this paper.
- 1.22 This paper seeks to use the models to provoke debate and discussion, and to generate insights on how best to reform criminal procedure in NSW to encourage appropriate early guilty pleas. Specifically we hope to:
- Stimulate discussion on the extent to which criminal proceedings in NSW require reform.
 - Identify the critical points in criminal proceedings where an opportunity exists to change procedures.
 - Receive commentary on the extent to which any of the presented models can or should be adopted in NSW.
 - Identify any practical and cultural barriers on the pathway to reform, including resource considerations, and invite stakeholders to suggest methods to address these barriers.

2. Guilty pleas in NSW: Current status

In brief

This chapter presents data on the status of late guilty pleas in NSW. We find that the rate of late guilty pleas in the District Court of NSW has stayed fairly steady over the last ten years, with a slight increase in 2012. While it has remained constant, the late guilty plea – especially day-of-plea – rate in NSW has been high when compared to Victoria and the UK. In light of the recent surge in incoming District Court cases committed for trial, a further increase in late guilty pleas in NSW could be expected.

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- 2.1 This chapter presents statistics relevant to guilty pleas in indictable matters, including the current case flow of the District Court of NSW. We trace the entry of guilty pleas from committal in the Local of Court of NSW to trial in the District Court of NSW, and provide a limited comparison of the proportion of day-of-trial guilty pleas in NSW to that of Victoria and the UK which shows that, in this area, NSW has been performing poorly.

Late guilty pleas in the District Court of NSW

Snapshot

Below we collate statistics from various sources to find that in 2012 just over half of matters committed for trial resolved instead in a late guilty plea (840). This constituted 35% of all guilty pleas entered in NSW during that time. Of these late guilty pleas, approximately 61% were entered on the first day of trial, where the majority of pleas (63%) were not to the original charge.

2.2 In NSW, all matters heard on indictment are committed from the Local Court of NSW to a higher court. A guilty plea has been entered in matters that are committed for sentence, which constitute “early” guilty pleas. Matters that are committed to trial may proceed to a defended trial, may be discontinued or may resolve in a guilty plea. We consider this last group to be “late” guilty pleas.

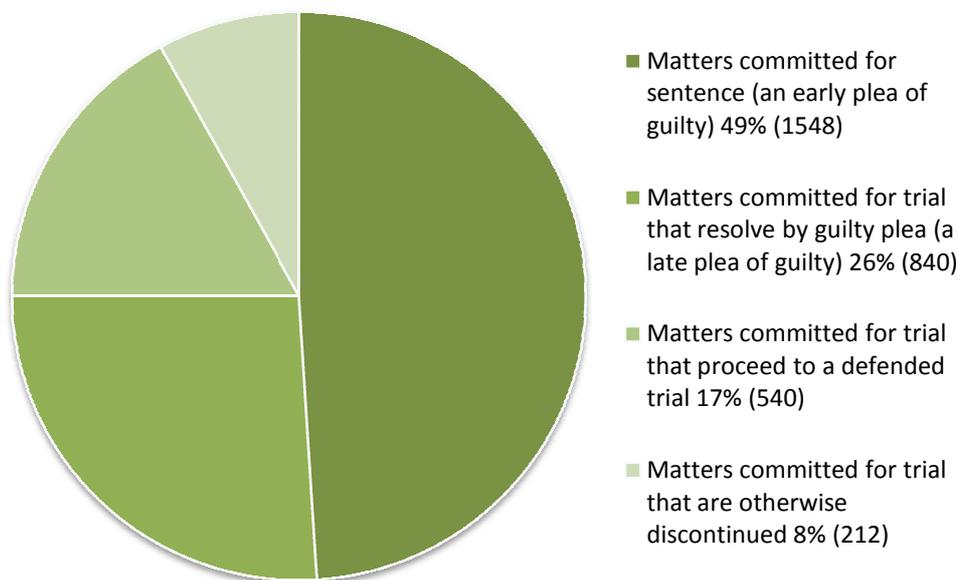
2.3 Of matters finalised in 2012, 49% (1548) of indictable matters were committed for sentence and 51% (1592) were initially committed for trial,¹ of which 53% eventually entered a plea of guilty.²

How many matters resolve by a plea of guilty?

2.4 In 2012, 2388 of all indictable matters in NSW resolved by a guilty plea.³ Of these:

- **65% were entered on or before committal:** these are pleas of guilty entered while a matter is in the Local Court of NSW, at or before committal proceedings are finalised.
- **35% were entered after the matter was committed for trial:** these pleas are received after committal proceedings have been finalised in the Local Court. These pleas may have been received on arraignment or on or before the trial began in the District Court of NSW.

Figure 2.0: A snapshot of all indictable matters resolved in 2012 District Court of NSW



Source: NSW Bureau of Crime Statistics and Research, *Criminal Court Statistics (200 2-2012)*

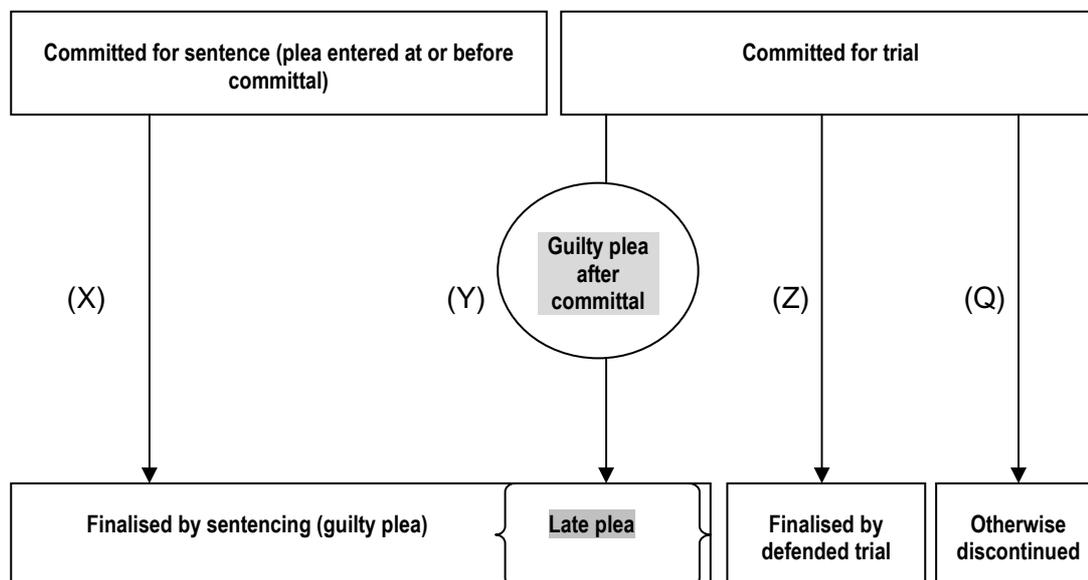
2.5 Further analysis of this breakdown is supplied below.

1. See Figure 2.16 below.
2. See Figure 2.1 below.
3. NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics (2012)* (Table 3.6).

How many matters resolve by a late guilty plea?

- 2.6 A “late” plea is generally defined as any guilty plea entered after a person has been committed for trial in the District Court of NSW, as illustrated by Y the diagram below.

Figure 2.1: Data measures



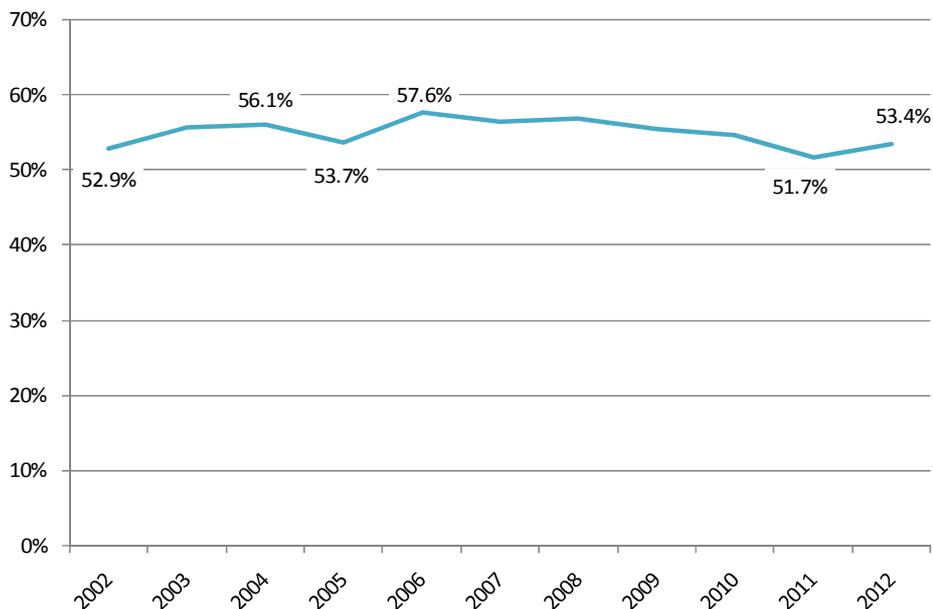
Measuring late guilty pleas

- 2.7 We look at two different measures to ascertain the extent of late pleas in NSW. The first measure reports on the proportion of matters initially committed for trial that resolve in a guilty plea. In Figure 2.2 we calculate $Y/(Y+Z+Q)$. In a system that has successfully encouraged early guilty pleas, the proportion of matters initially committed to trial that are actually finalised by sentencing instead of by defended trial should be low. This measure, however, is influenced by the number of matters committed for trial that result in a defended trial (changes in Z (the number of defended trials)), which is not a variable of concern to this reference. The number of matters discontinued (Q) will also affect the final proportion.
- 2.8 A more revealing way of looking at the issue is to compare the number of late pleas with the number of early pleas. This involves a calculation of $Y/(X+Y)$ (shown in Figure 2.3 below). This measure attempts to ascertain the true extent of the problem by asking what proportion of all guilty pleas are “late” pleas.

Late pleas measured by matters committed for trial that resolve in a guilty plea

- 2.9 The below chart shows the proportion of cases initially committed for trial that were finalised through sentencing (rather than trial or otherwise). See Figure 2.2.

Figure 2.2: Proportion of cases initially committed to trial actually finalised by sentencing (i.e. a late guilty plea after committal) 2002-2012

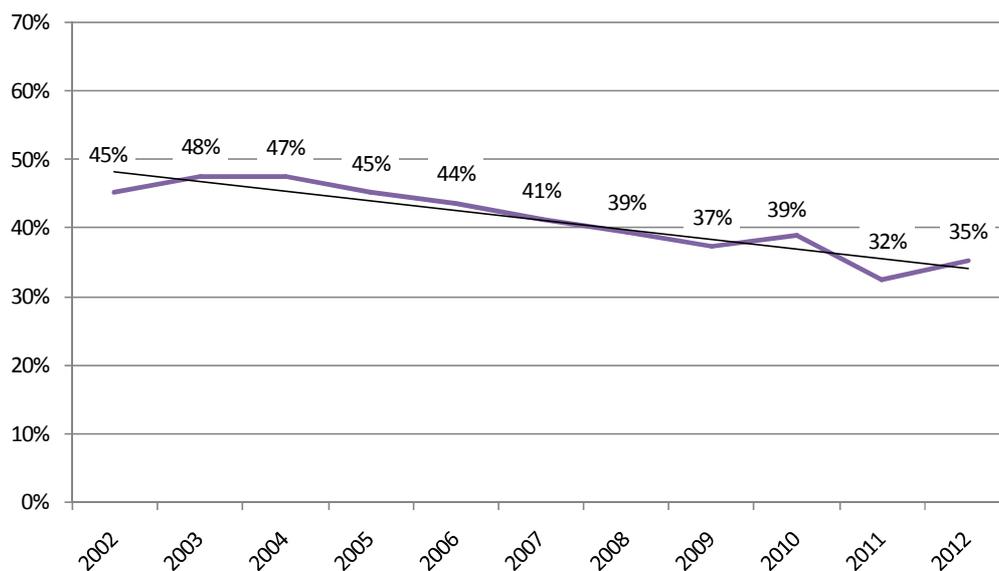


Source: NSW Bureau of Crime Statistics and Research, Criminal Courts Statistics (2002-2012).

2.10 Figure 2.2 shows that, since 2002, more than half of the matters committed for trial in NSW actually resolved in a late guilty plea.

Late pleas measured by guilty pleas entered after committal

Figure 2.3: Of cases finalised by a guilty plea in the District Court of NSW, the proportion where a guilty plea was entered late 2002-2012



Source: NSW Bureau of Crime Statistics and Research, Criminal Courts Statistics (2002-2012).

- 2.11 This measure shows an increase in late guilty pleas in 2012 only when compared to 2011. In 2011, 32% of all guilty pleas were received “late”. In 2012, it was slightly higher at 35%.
- 2.12 The slight increase in 2012 needs to be contextualised against a backdrop of gradual and steady improvement in late guilty pleas. When measured as a proportion of all guilty pleas, the number of late guilty pleas has been steadily falling. The black trend-line in Figure 2.3 indicates that the 2011 figures could be an aberration, rather than the 2012 figures. Once data is available for 2013 it may confirm whether the downward trend is continuing or reversing.

How many matters resolve by a guilty plea on the day of trial?

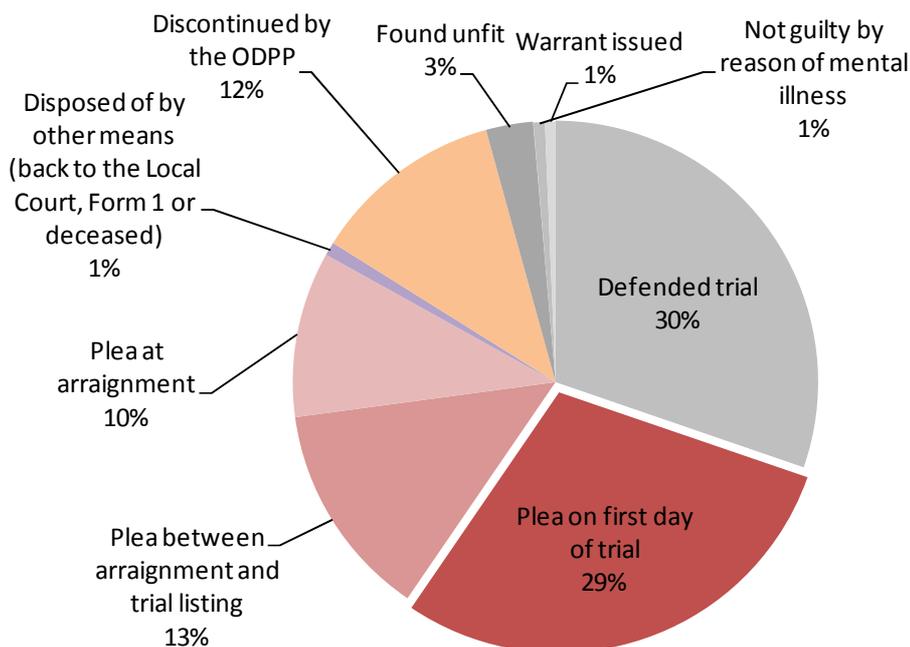
- 2.13 Day of trial guilty pleas – commonly referred to as pleas that occur “on the steps of the court” – epitomise the issues caused to the criminal justice system by late guilty pleas. Pleas that are submitted on the steps of the court are particularly resource intensive, especially if the court is sitting and any jury has been empanelled. Below we outline the extent of the issue in NSW.

Timing of late pleas

- 2.14 The NSW Bureau of Crime Statistics and Research (BOCSAR) does not report when in the criminal process a guilty plea occurs in matters that have been committed for trial. The below chart is instead derived from figures supplied by the Office of the Director for Public Prosecutions (ODPP).⁴
- 2.15 Of the matters that the ODPP recorded as committed for trial in 2011/12, it recorded the outcomes shown in Figure 2.4 (below). We note that matters discontinued by the prosecution are often discontinued due to a lack of evidence – an issue that may also be addressed by a program of early charge advice as discussed in Chapter 3.

4. We note that the numbers from the ODPP vary from those supplied by BOCSAR due to, among other things, differences in counting rules. Additionally, BOCSAR data will include Commonwealth matters where as the NSW ODPP data will not.

Figure 2.4: ODPP data on the progression of matters committed for trial 2011/12



Source: *The Office of the Director of Public Prosecutions, Annual Report (2011/12) 38; unpublished data provided by the Office of the Director of Public Prosecutions.*

- 2.16 According to ODPP data, just over half the matters committed for trial were actually finalised by a plea in 2011/12. This aligns with the proportion reported by BOCSAR (shown in Figure 2.1). Over one quarter of all committed matters resolved in the 12 month period were finalised by guilty plea on the first day of the trial.
- 2.17 The above figure shows the proportion of day-of-trial pleas received to the outcome of all of matters that proceeded after committal. We can also use the ODPP data to find out when in proceedings late pleas were entered, and the proportion of late pleas that were received on the day of the trial.

Figure 2.5: ODPP data on precise timing of late guilty pleas 2011/12



2.18 The 2012/13 ODPP data shows a slight increase in day-of-trial guilty pleas, at 66% of all late guilty pleas.

Figure 2.6: ODPP data on precise timing of late guilty pleas 2012/13

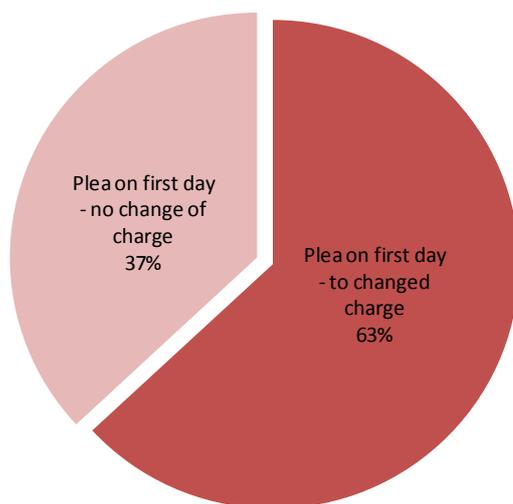


Source: unpublished data provided by the Office of the Director of Public Prosecutions.

The constitution of day-of-trial pleas

2.19 Figure 2.7 was generated from data supplied to us by the District Court of NSW. It shows that the majority of pleas received “on the steps of the court” are entered to an amended charge.

Figure 2.7: Of all day-of-trial pleas, the proportion to a changed charge (2012)



Source: unpublished data provided by the District Court of NSW

Comparison with Victoria and England and Wales

Snapshot

Below we look at available data to compare NSW with relevant jurisdictions over time. In 2009, day-of-trial guilty pleas in NSW comprised 22% of guilty pleas. In Victoria day-of-trial pleas comprised 17%. In 2011, over 18% of late pleas in NSW occurred on the day of trial, compared with fewer than 6% in England and Wales.

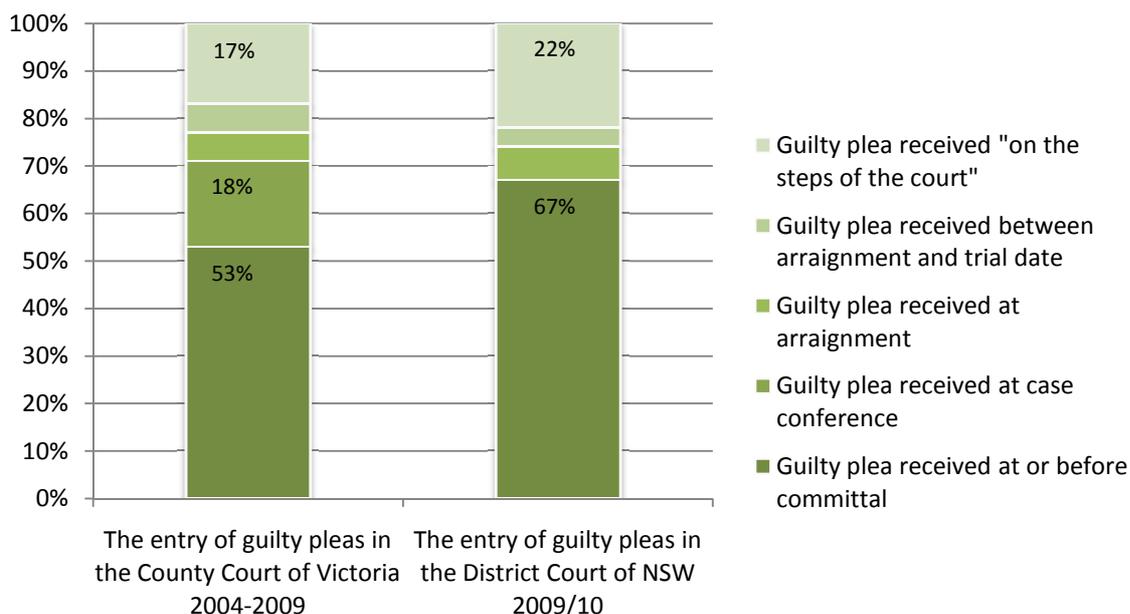
2.20 The charts below aim to compare the status of guilty pleas in NSW with cognate jurisdictions. Direct comparisons between jurisdictions is, however, extremely difficult. The relevant data is not readily accessible and of the data that is, variations in counting methods, time scales and recorded categories make comparisons unreliable.

2.21 However, even when applying a careful reading of the data, the following charts are able to illustrate that in NSW early guilty pleas (pleas before committal) were high but day-of-trial pleas were more likely in NSW than in Victoria and England, and – as is apparent in the above charts – remain a sustained problem.

Victoria and NSW: Occurrence of late guilty pleas in 2009

- 2.22 The below data for Victoria is drawn from a 2010 Victorian Sentencing Advisory Council (VSAC) report, which presented an overview of guilty plea rates in Victoria using consolidated data from 2004-2009.⁵ The report contains the only available comparable dataset for Victoria relevant to our field of inquiry.
- 2.23 Victorian criminal case management at that time included a criminal case conference that occurred before arraignment about 10 weeks after committal.⁶ Figures 2.8 below uses the 2004–09 data to show when in proceedings guilty pleas were entered in the County Court of Victoria. It includes guilty pleas received at case conferencing, and compares this with NSW data that has been retrieved from unpublished information supplied to us by the ODPP, which covers the financial year of 09/10.
- 2.24 The data is not directly comparable, but it does form a picture of the landscape at that time in NSW and Victoria. We continue to collect and mine data in an attempt to establish a more current comparison.

Figure 2.8: Comparison between occurrences of guilty pleas submitted in NSW and Victoria



Source: unpublished data provided by the Office of the Director of Public Prosecutions; Victorian Sentencing Advisory Council (2010) 3

5. Sentencing Advisory Council, *Sentence Indication: A Report on the Pilot Scheme* (2010)
 6. See Chapter 5.

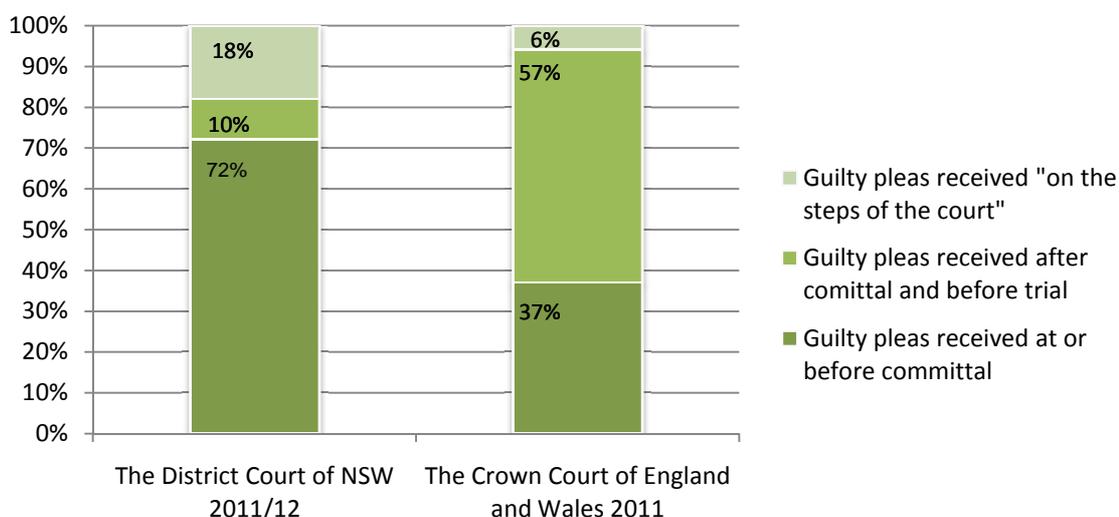
England and NSW: Occurrence of late guilty pleas in 2011

2.25 England and Wales collect data on “cracked trials”; these are trials that do not proceed past the first day, usually due to an entering of a guilty plea. Comparison with NSW is problematic because:

- since 2001, committal proceedings for strictly indictable matters has been replaced with a transfer procedure that sees matters promptly transferred to the Crown Court⁷
- the UK publishes figures by calendar, instead of financial, year, and
- data on exactly when in proceedings from arraignment to trial late guilty pleas are entered is not published.

2.26 Below we present the most relevant available data to trace “late” guilty pleas and the proportion of day-of-trial pleas. “Late” pleas are any guilty plea entered after the matter had left the Magistrates’ Court (whether committed, allocated or sent to trial in the Crown Court).⁸ We compare this with NSW data from 2010/11 financial period, supplied by the ODPP.

Figure 2.9: Comparison between occurrences of guilty pleas in NSW and England and Wales 2011



Source: unpublished data provided by the Office of the Director of Public Prosecutions; Ministry of Justice (UK) *Judicial and Court Statistics 2011 (2012)* 41-53.

2.27 The proportion of late guilty pleas that occurred “on the steps of the court” in England and Wales was considerably less than in NSW. However, in England in 2011 late guilty pleas made up 63% of all guilty pleas,⁹ compared with the ODPP

7. See para [7.8].

8. See chapter 7.

9. Of matters finalised by a guilty plea in 2011, 42 829 were committed for sentence, 72 875 entered a plea of guilty in the Crown Court (including 7103 that were entered on the first day of trial): Ministry of Justice, *Judicial and Court Statistics 2011 (July 2012)* 41-53.

reported 28% in NSW, and the current BOCSAR confirmed proportion of 35%. This could be attributed to different case management practices in the UK, specifically the rapid progression of indictable offences from the Magistrates' Court to the Crown Court.

The District Court of NSW: Case flows

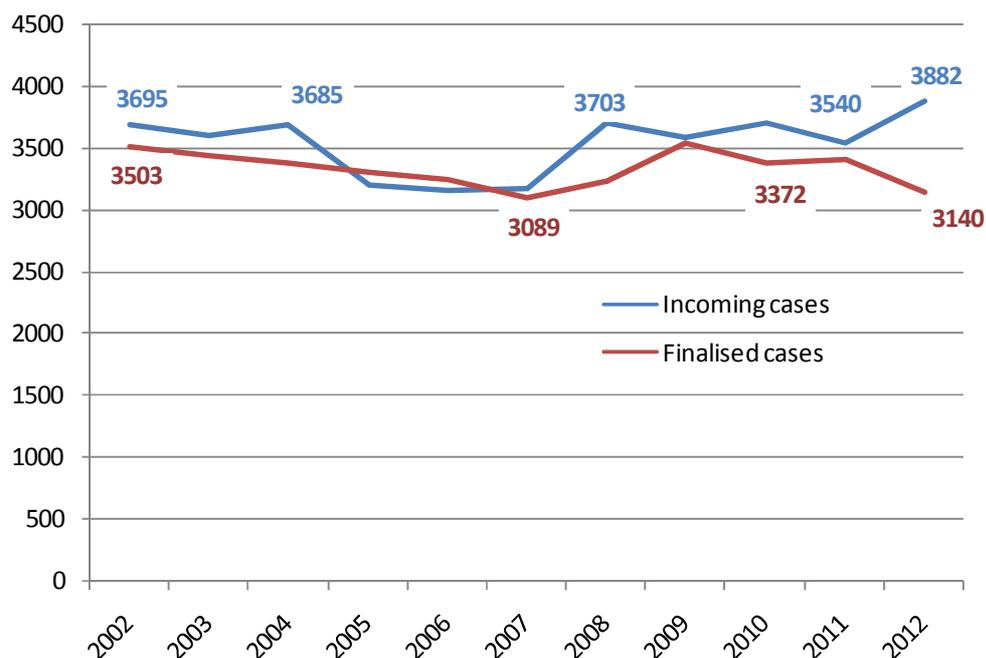
Snapshot

There has been a recent increase of incoming cases to the District Court of NSW, with a decrease in matters that are finalised. Of matters committed to trial, there has been an increase of over 5%. The length of delay in the court is also rising.

Inflows and outflows: The District Court of NSW

- 2.28 Stakeholders have expressed concern to us over a recent spike in District Court caseload. It is reported that in the past 18 months there has been an increase in the number of matters listed for trial in the Court. Stakeholders have attributed this spike to, among other things, increased trial committals, and suspect that this means there has also been an increase in late guilty pleas.
- 2.29 Figure 2.10 shows the number of cases coming into the District Court each year between 2002 and 2012. It also shows the number of cases that the District Court dealt with and finalised each year. A "finalised" matter is any matter that has finished from the point of view of the court, whether through sentencing, trial, "no charges proceeded with" or "all charges otherwise disposed of".

Figure 2.10: Incoming cases and finalised cases in the District Court 2002-2012

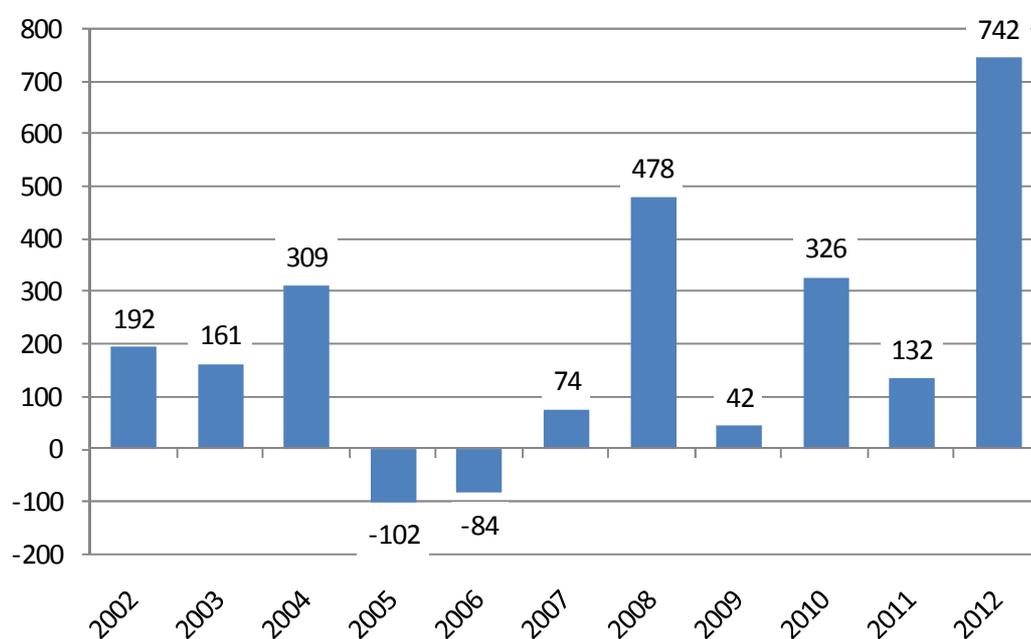


Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2002-2012)*.

2.30 These figures show that the number of cases coming into the District Court each year has fluctuated over the study period. The number of incoming cases in 2012 (3882) was 9.7% higher than it was in 2011 (3540 cases). Early statistics from 2013 indicate a slight downturn in the number of incoming matters for trial.

2.31 The number of cases finalised in the District Court started to decrease from 2009. This has widened the gap between the (larger) number of cases coming into the District Court and the (smaller) number of cases the Court has been able to finalise. Figure 2.11 focuses on the difference between the incoming cases and the finalised cases since 2002.

Figure 2.11: Difference between number of incoming cases and number of finalised cases in the District Court 2002-2012



Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2002-2012)*.

2.32 In 2005 and 2006, the District Court was able to finalise more cases than were coming in from committals. However, from 2007 onwards, the trend has reversed and the difference has increased. In particular, in 2012 the District Court received 742 more cases than it finalised. This difference is a result of both an increase in incoming cases and a decrease in the number of cases finalised.

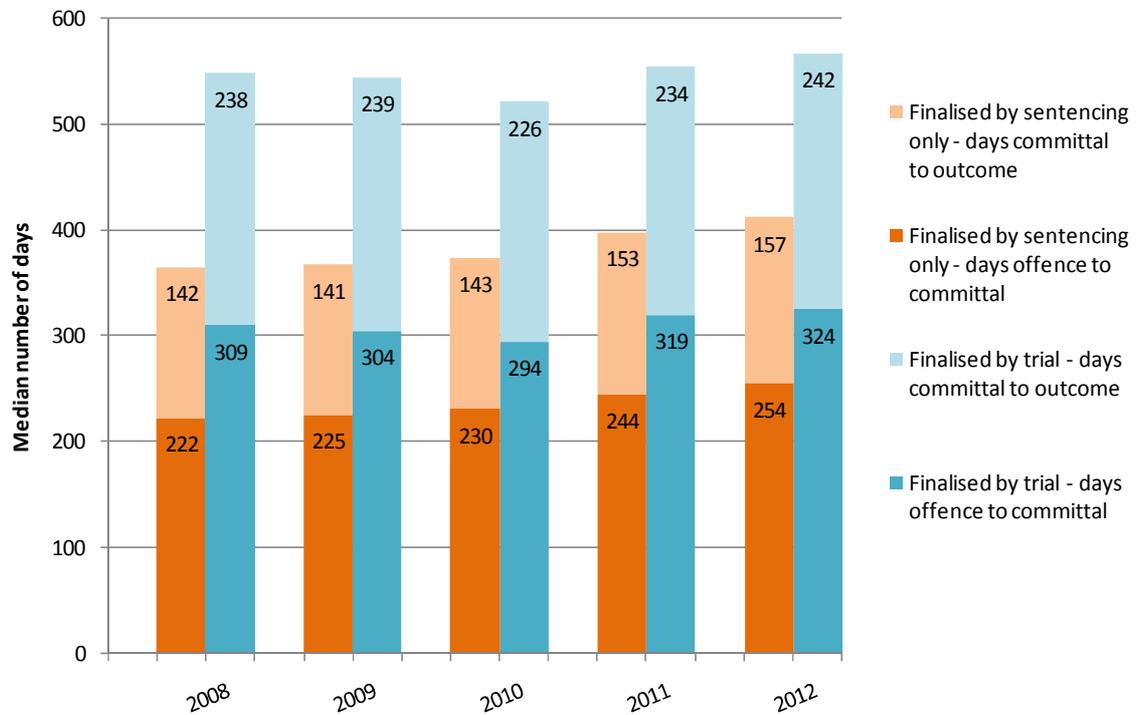
2.33 The presented data confirms reports that District Court case flows are increasing. Increased inflows with falling outflows may have also caused an increase in case delay – a concern that was confirmed in consultation with the Court.

Delay for District Court finalisations

2.34 BOCSAR tracks delay for all matters finalised in the District Court. It records the median number of days between the recorded date of the offence and the committal hearing, and also the median number of days between the committal hearing and the outcome (whether trial or sentencing).

2.35 Figure 2.12 below shows this information according to whether the matter was finalised by a trial (the blue column) or finalised by sentencing only (the orange column). The darker colours show the median number of days between the offence and the committal hearing. The lighter colour represents the median number of days between the committal hearing and the outcome in the matter.

Figure 2.12: Delay in the NSW District Court 2008-2012



Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2008-2012)*.¹⁰

2.36 Delay marginally increased in 2012 for matters that proceeded to trial, taking a median 566 days from the offence date to the outcome, compared to a median of 547 days in 2008.

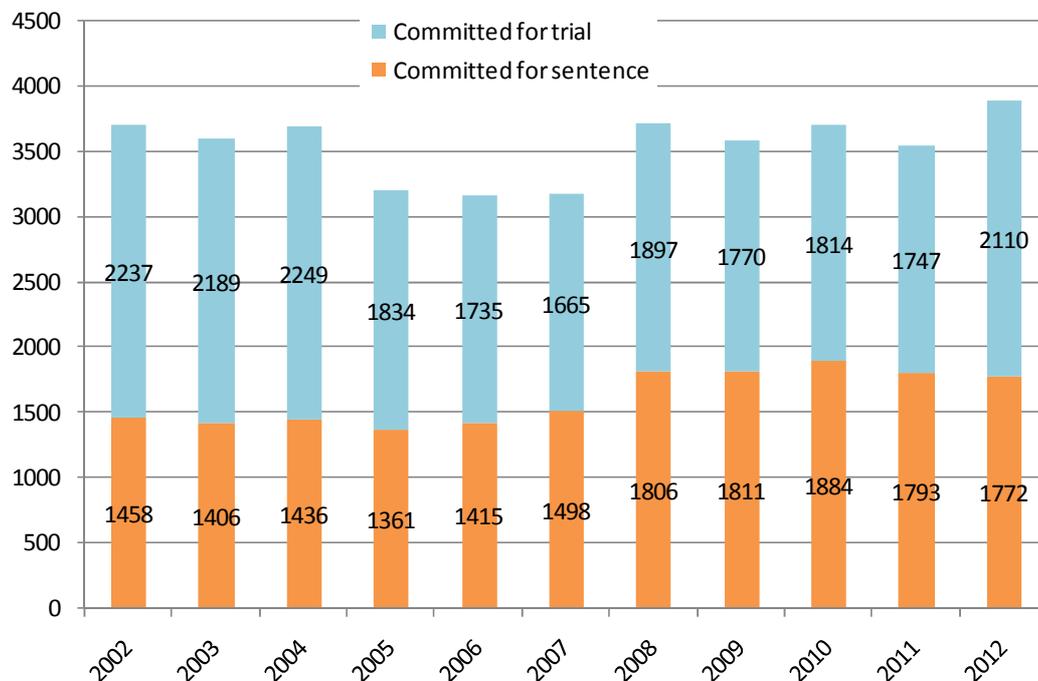
2.37 Delay has steadily increased for matters finalised by sentencing only. In 2008, these matters took a median of 364 days from offence to sentencing, compared to 411 days in 2012.

10. Data was published for years prior to 2008, but the data used different counting rules, and is not comparable.

Nature of inflows: Initially trial or sentence?

2.38 All of the 2012 increase in incoming cases to the District Court came from an increase in the cases that were committed for trial (see Figure 2.13).

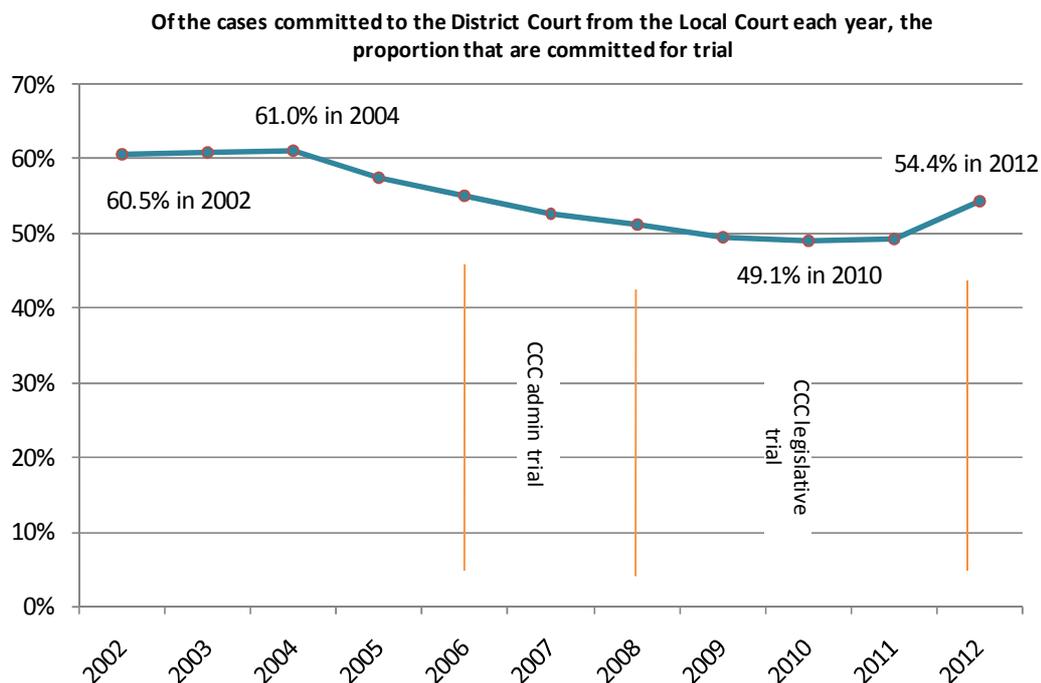
Figure 2.13: Number of cases committed for trial or sentence in the District Court 2002-2012



Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2002-2012)*.

2.39 Figure 2.14 looks at this increase in terms of the proportion of all incoming cases that were initially committed for trial in the District Court from 2002 to 2012

Figure 2.14: Type of incoming cases in the District Court 2002-2012: whether initially committed for trial or sentence



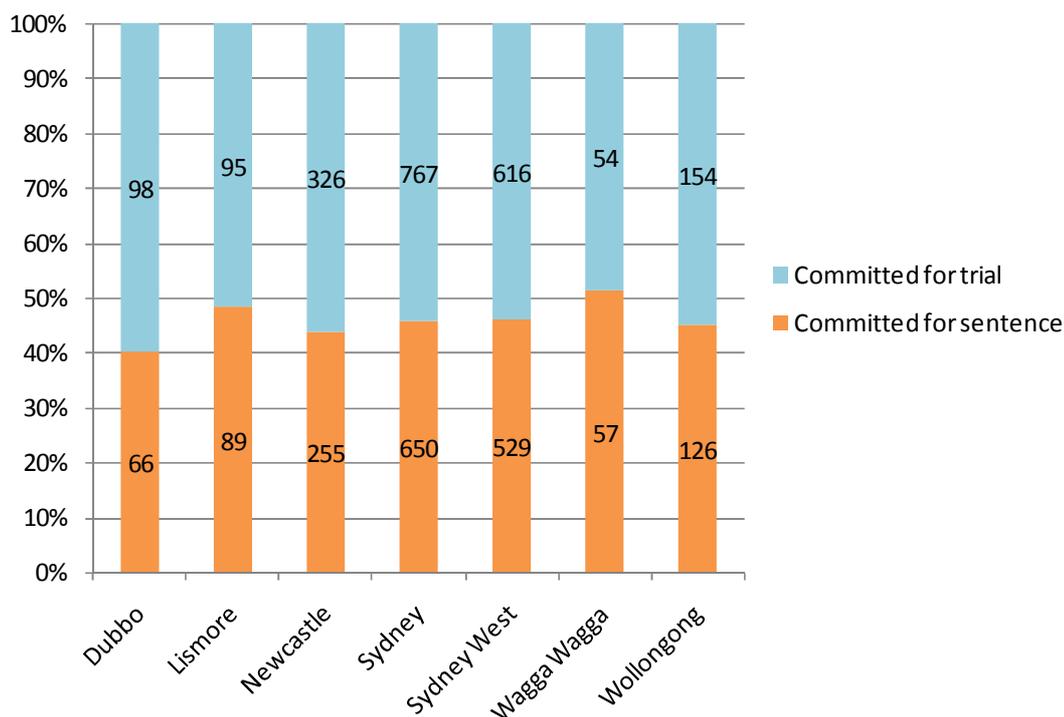
Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2002-2012)*. CCC = criminal case conferencing.

- 2.40 In 2004, 61% of the incoming cases to the District Court were committed for trial. This proportion gradually decreased to a low of 49.1% in 2010; that is, by 2010, just under half of all incoming cases to the District Court were committed for trial. The proportion remained stable between 2010 and 2011 but sharply increased in 2012. In 2012, 54.4% of all incoming cases were committed for trial.
- 2.41 Criminal case conferencing and the effect this program had on the proportion of matters committed for trial is discussed in Chapter 5.

Regional variation

- 2.42 In 2012, there was a small amount of regional variation between District Court registries in the proportion of inflows that were committed for trial compared to cases committed for sentence.

Figure 2.15: Type of incoming cases to different District Court registries in 2012

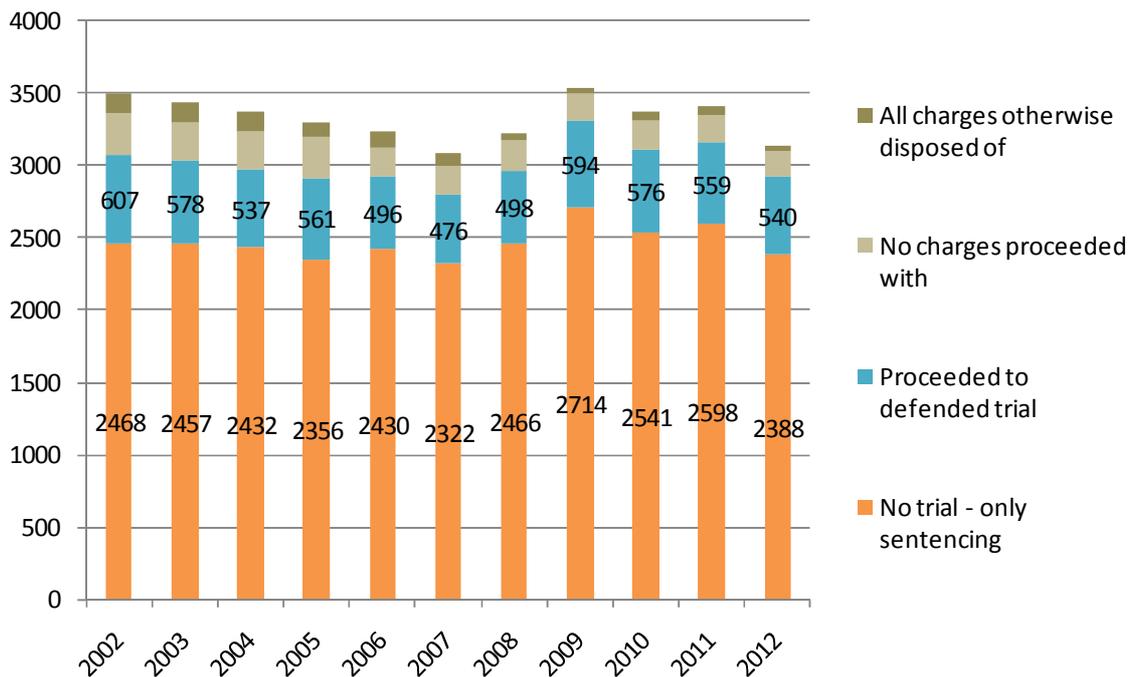


Source: NSW Bureau of Crime Statistics and Research (Hc1311432dg).

Outflows (finalisations)

2.43 Finalisation statistics report the number of matters finalised in the District Court each year and record the methods of finalisation (*proceeded to defended trial, no trial – only sentencing, no charges proceeded with and all charges otherwise disposed of*). Figure 2.16 shows District Court finalisations each year between 2002 and 2012.

Figure 2.16: Method of finalisation of cases in the District Court 2002-2012



Source: NSW Bureau of Crime Statistics and Research, *Criminal Courts Statistics (2002-2012)*¹¹.

2.44 Note that the finalisation (outflow) data for 2012 does not relate to the same cases or mix of cases as the inflow data.

Conclusion

2.45 Statistics for 2012 indicate that the District Court of NSW has been under considerable stress. Figures we have seen from 2013 show an easing of incoming matters for trial; however the Court remains under pressure. Late guilty pleas especially day-of-trial pleas – strain the resources of the Court and are an ongoing concern for reform of criminal procedure.

11. “Proceeded to defended trial” means that a trial was held and the case was finalised by a verdict. Matters that were listed for trial but resulted in a plea on the first day are counted as “no trial – only sentencing”.

3. Pre-charge bail and statutory charging in England and Wales

In brief

Pre-charge bail can be 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 (termed “statutory charging”). These programs were introduced to address the imperative that initial charges brought by police against an accused were correct, which was seen as a necessary concomitant to increasing the rate of appropriate early guilty pleas. This chapter provides background information on pre-charge bail and the statutory charging regime. It presents the limited program of pre-charge advice currently available in NSW, and asks whether a differently constituted pre-charge bail and statutory charging program would be appropriate in NSW.

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Pre-charge bail and statutory charging

- 3.1 Pre-charge bail is a UK initiative in place in England and Wales. It is a form of police bail which enables police to arrest and bail a suspect with or without conditions prior to charge. Pre-charge bail can be used in two situations relevant to encouraging early guilty pleas. First, bail can be used where the police have sufficient evidence to charge, but must refer to the Crown Prosecution Service (CPS) for charge advice. The program of bailing a suspect to facilitate CPS charge advice was legislated for in 2003, and has been termed “statutory charging”.¹ Second, bail can be used where there is as yet insufficient evidence for referral on charge advice, and the police are to investigate further.²
- 3.2 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.
- 3.3 This chapter presents pre-charge bail as a distinct model for consideration. We then give an overview of statutory charging, which is linked to pre-charge bail, as a person arrested for an offence that requires pre-charge advice must be detained or bailed under the pre-charge bail regime.³
- 3.4 We ask whether a similar regime would encourage appropriate early guilty pleas in NSW.

How is pre-charge bail applied?

- 3.5 There are three scenarios where the police may decide to grant bail after arresting, but before charging, a suspect:⁴
1. **Street bail:** A person is arrested and bailed “on the street” to appear at a police station at a later date.⁵ This is likely to occur for minor offences where it is a more appropriate and efficient use of the arresting police officer’s time not to return to the police station, and is not explored in this chapter.
 2. **Further investigation required:** A person is arrested and brought to the police station. There is as yet insufficient evidence to charge a person with

1. The scheme introduced by the *Criminal Justice Act 2003* (UK) Pt 4 (amending the *Police and Crime Evidence Act 1984* (UK) s 37).

2. Pre-charge bail can also be used where a suspect is bailed on the street. See *Police and Crime Evidence Act 1984*, (UK) s 30A. However, “street bail” is not connected to the inquiry on encouraging early guilty pleas, and is not explored in this chapter. For more information regarding street bail see A Hucklesby, “Not Necessarily a Trip to the Police Station: The Introduction of Street Bail” (2004) *Criminal Law Review* 803-813.

3. *Police and Crime Evidence Act 1984* (UK) s 37(7)(a).

4. This excludes bail under *Police and Crime Evidence Act 1984* (UK) s 34(5).

5. *Police and Crime Evidence Act 1984* (UK) s 30A, s 30A(3B).

an offence but it is necessary to continue to investigate without that person being held in custody.⁶

3. **Statutory charging:** A person is arrested and brought to the police station. The police consider that there is enough evidence to charge and the case is one that must be referred to the CPS for a charging decision.⁷ Here pre-charge bail facilitates the statutory charging program, which is outlined in detail below.

- 3.6 An arrested person can be bailed under option 2, to have his or her bail status changed to option 3 once the investigation is finalised and a charge decision is sought.⁸

Breach of pre-charge bail

- 3.7 Pre-charge bail can be applied to a suspect with or without conditions. Bail conditions can be imposed to prevent the commission of an offence or interference with witnesses or the administration of justice. Conditions can be imposed for the person's own protection.⁹ Pre-charge bail conditions can include non-association with specified people, not going to specified locations and abiding by a curfew. Conditions can be imposed for an indefinite period of time.¹⁰
- 3.8 Failing to submit to any form of pre-charge bail is an offence, and a person who does not submit to bail can be rearrested.¹¹ A person can also be arrested for breaching conditions of pre-charge bail, although breaching a condition is not an offence.¹²
- 3.9 Depending upon the circumstances, after a breach the Custody Officer may either:
 - (i) charge and detain the suspect for a remand application
 - (ii) release the suspect without charge and without bail, or
 - (iii) release the suspect without charge, subject to the same bail conditions which applied before the arrest.¹³
- 3.10 The number of arrests for breach of pre-charge bail or bail conditions is not known.

6. *Police and Crime Evidence Act 1984* (UK) s 37(2).

7. *Police and Crime Evidence Act 1984* (UK) s 37(7)(a).

8. See Figure 3.1 below.

9. *Police and Crime Evidence Act 1984* (UK) s 30A(3B),s 47(1A); E Cape, "Police Bail and the Decision to Charge: Recent Developments and the Human Rights Deficit" (2007) *Arch News* 6, 9.

10. R Edwards, "Police bail without charge: the human rights implications" (2010) 69(3) *Cambridge Law Journal* 529, 529; *Police and Crime Evidence Act 1984* (UK) s 47(1A).

11. *Police and Crime Evidence Act 1984* (UK) s 46A(1).

12. The penalties available for breaching police bail conditions have been described as a "toothless tiger", see J Hillier and J Kodz, "The Police Use of Pre-Charge Bail: An Exploratory Study" (2012) *National Policing Improvement Agency* 28.

13. *Police and Crime Evidence Act 1984* (UK) s 37C.

What are the benefits of pre-charge bail?

- 3.11 Pre-charge bail was introduced to improve the rigour of the initial charge. A careful selection of the appropriate charge/s addresses some of the obstacles to early guilty pleas identified in the introduction,¹⁴ including:
- 3.12 **Waiting for a sufficient police brief of evidence:** During the investigative period of pre-charge bail, the police have time and can allocate resources to complete a brief of evidence appropriate to the charge.¹⁵
- 3.13 **Mitigating the belief that the charge will be changed later in the process:** Where the charge is appropriately defined, the defendant should be encouraged to enter a guilty plea early because:
- A carefully constructed charge is less likely to be changed through negotiation or the late participation of senior counsel.
 - An early plea submitted to an appropriate charge will mean that the defendant can take advantage of the highest available sentence discount.¹⁶

What are the key criticisms attached to pre-charge bail?

- 3.14 Criticisms of pre-charge bail are inter-related and revolve around the unnecessary expansion of police powers, the potential for police misuse and the rights of suspects.
- 3.15 Canvassed below are two arguments commonly raised against pre-charge bail: first, that pre-charge bail is misused, leading to an overuse by police; second, that people can be subject to pre-charge bail for an undue length of time.

Pre-charge bail has the potential to be misused

- 3.16 Pre-charge bail can be misused by the police in the following ways:
- **Pre-charge bail can facilitate a fishing expedition:** Professor Anthea Hucklesby argued in 2004 that pre-charge bail for the purposes of furthering an investigation provides an opportunity for the police to investigate offences other than those for which the suspect has been arrested. It may also be a tool for “fishing expeditions” regarding suspects that the police believe are guilty, but where they do not have enough evidence to support that belief.¹⁷
 - **Pre-charge bail can applied inappropriately, resulting in an overuse:** A 2012 report on the police use of pre-charge bail in England and Wales conducted by the National Policing Improvement Agency concluded that pre-charge bail was being applied inappropriately, leading to overuse. Overuse was said to be caused by unplanned arrests, insufficient quality in initial

14. See para [1.13].

15. <<http://www.cps.gov.uk/about/charging.html>>.

16. See Chapter 9.

17. A Hucklesby, “Not Necessarily a Trip to the Police Station: The Introduction of Street Bail” (2004) *Criminal Law Review* 803, 804.

investigations, demands on limited custody space, and differing perceptions on the required evidence for arrest.¹⁸

The report identified a police culture that rewarded high arrests, and suggested that the culture exacerbated inappropriate and excessive use of pre-charge bail.¹⁹

- **There are too many people subject to pre-charge bail:** Criticisms regarding the number of people on pre-charge bail have been raised by the media and key stakeholders. An article published by the BBC in May 2013 reported that over 57 000 people were then subject to pre-charge bail. This statistic formed part of an editorial that canvassed the negative effects pre-charge bail can have on an arrested person's life and wellbeing.²⁰

On the CPS website, the Acting Deputy Commissioner of Police blamed the long waiting times for CPS advice on a backlog of pre-charge bail cases. According to the Commissioner, long waiting times have resulted in an unwanted and unmanageable situation where "too many" people are on pre-charge bail at the one time.²¹

Pre-charge bail requires a statutory time-limit

- 3.17 English legal academic Edward Cape has observed that pre-charge bail originated at a time when arrest occurred at the end of the investigation, and police bail was a "short-term convenience." Arrest has since "migrated within the investigative phase of criminal investigation" so that it is exercised at the inception, rather than end, of an investigation.²² Accordingly, Cape argues that pre-charge bail in its current form has the potential to be used by the police to control suspects for lengthy periods of time.²³
- 3.18 In May 2013, the Law Society of England and Wales called for changes to pre-charge bail. The Law Society claimed that the current system leaves people subject to lengthy pre-charge bail "out in the wilderness", and advocated for a system of bail capped at 28 days, and any extension to be granted by a magistrate.²⁴

18. J Hillier and J Kodz "The Police Use of Pre-Charge Bail: An Exploratory Study" (2012) *National Policing Improvement Agency* 5.

19. J Hillier and J Kodz, "The Police Use of Pre-Charge Bail: An Exploratory Study" (2012) *National Policing Improvement Agency* 35.

20. See para [3.21].

21. <http://www.cps.gov.uk/about/right_person_right_charge_right_time.html>.

22. E Cape, "Police Bail Without Charge: The Human Rights Implications" (2010) 69(3) *Cambridge Law Journal* 529, 538.

23. E Cape, "Police Bail and the Decision to Charge: Recent Developments and the Human Rights Deficit" (2007) *Arch News* 6; see *R. (C) v Chief Constable of A and A Magistrates' Court* [2006] EWHC 2352.

24. <<http://www.lawsociety.org.uk/news/stories/law-society-calls-for-28-day-limit-on-police-bail/>>; also see Law Society of England and Wales, *Response of the Law Society of England and Wales to 'Swift and Sure Justice: The Government's Plans for Reform of the Criminal Justice System* (2012) 4-6.

Current pre-charge bail use

- 3.19 The 2012 report on pre-charge bail use noted that “data on the use of pre-charge bail by police in England and Wales is not routinely collated centrally, and therefore there is no national picture on how extensively it is used and whether its use varies across forces.”²⁵ This observation was supported in our research findings and confirmed in consultation with Professor Anthea Hucklesby from Leeds University, who is conducting an extensive study in the area.²⁶
- 3.20 The 2012 report tentatively stated:
- In 2011, one third of individuals brought into custody were released subject to pre-charge bail. *The report identified that the data relied upon was incomplete. Information was collected from 24 stations out of an available 43, and the data was recorded differently across precincts.*²⁷
 - Three offence types generated the most instances of pre-charge bail with the highest reported average length of bail: possession of indecent images; grievous bodily harm; and sexual offences. *However, the report did note that the average length of time that a person will be on pre-charge bail changes depending on local practices. Additionally, some arrests may have been planned to occur following an extensive investigation, and may require only a short period of pre-charge bail or none at all.*²⁸
- 3.21 In May 2013, BBC news reported that more than 57,000 people in England, Wales and Northern Ireland were subject to pre-charge bail. The BBC had accessed police data through freedom of information laws but not all precincts participated,²⁹ so the data is also incomplete.

A pre-charge bail regime for NSW?

- 3.22 The ODPP submitted to this reference:

...under the current system a major impediment to a plea being entered before trial is the absence of a brief of evidence at the beginning of the proceedings. One way to achieve a change in this time line is to postpone the commencement of proceedings, so the proceedings commence at the same time as the evidence is made available. The UK pre-charge bail system is one such mechanism to align the opportunities to resolve the matter. We note that Australia is one of the only common law jurisdictions that does not have a pre charge bail scheme.³⁰

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25. J Hillier and J Kodz, “The Police Use of Pre-Charge Bail: An Exploratory Study” (2012) *National Policing Improvement Agency* 12.
26. *Consultation EAGP04*, 12 June, 2013.
27. J Hillier and J Kodz, “The Police Use of Pre-Charge Bail: An Exploratory Study” (2012) *National Policing Improvement Agency*. The data set issues are examined at pages 57 – 58 of the report.
28. J Hillier and J Kodz, “The Police Use of Pre-Charge Bail: An Exploratory Study” (2012) *National Policing Improvement Agency* 57.
29. BBC News, “Law Society calls for 28 day limit on police bail” 28 May 2013: <<http://www.bbc.co.uk/news/uk-22624648>>. The data was collected from 34 of 44 forces.
30. The Office of the Director of Public Prosecutions, *Preliminary Submission EAGP06*, 5.

3.23 In consultation, other stakeholders supported 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.

Question 3.1

- 1) Should a pre-charge 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 investigations and the finalisation 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?

What is statutory charging?

3.24 Statutory charging is the term given to the scheme whereby an early charge decision on certain cases is given by the Crown Prosecution Service (CPS) to the police, prior to charges being laid. The early charge decision is facilitated by police detaining, or conditionally or unconditionally bailing an arrested person before the person is charged.³¹

3.25 Prior to the introduction of statutory charging, the process adopted in the UK to arrest and charge a person where the police had sufficient evidence to charge was similar to that currently in NSW. An arrested person would have been subject to immediate charge by the custody officer and then released, where appropriate, into conditional post-charge bail.³²

How did statutory charging come about?

3.26 Early CPS involvement was recommended in the 2001 Review of the Criminal Courts of England and Wales (the Auld report). The Auld report observed that in 2000, 22% of police charges relating to assault, public order and road traffic offences were incorrect.³³ It noted that a “significant contributor to delays in the entering of pleas of guilty and... the prolonged and disjointed nature of many criminal proceedings is ‘over charging’ by the police and failure by the Crown

31. I D Brownlee, “The Statutory Charging System in England and Wales: Towards a Unified Prosecution System?” (2007) *Criminal Law Review* 896, 900; *Police and Crime Evidence Act 1984* (UK) s 37.

32. I D Brownlee, “The Statutory Charging System in England and Wales: Towards a Unified Prosecution System?” (2007) *Criminal Law Review*, November, 896, 900.

33. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 409.

prosecutor to remedy it at an early stage".³⁴ This resulted in the defence tendering, and the prosecution accepting, last minute changes of plea to lesser offences.³⁵

3.27 The Auld report recommended early prosecutorial involvement in the criminal process. It noted that incorporating charge advice by the CPS prior to charging a suspect would

...require greater use of police bail to complete the investigation before charge. But this should be offset by: earlier involvement of the Service with the police in the investigation of the more serious cases; in consequence, a better understanding by the police of the evidential test governing decisions to prosecute; early pleas of guilty to properly investigated and charged prosecutions; a general increase in the speed with which cases proceed to trial; and a greater confidence of victims, witnesses and the general public in the process as a result of fewer cases being discontinued after charge or continuing on reduced charges.³⁶

3.28 The government responded to the Auld report by implementing an early CPS involvement pilot scheme. The pilot ran within the existing legal framework in five regions from February - August 2002.³⁷ It was evaluated in 2003.³⁸

3.29 The evaluating agency observed that the inability for police to place conditions on pre-charge bail at that time limited the scope of the pilot. During the pilot period, if the police considered the suspect should be subjected to conditions on bail, the police had to charge the individual and then bail them to the next available court. Accordingly, if the police were not prepared to grant unconditional bail on arrest prior to charge, CPS advice could only be sought if the CPS were available on the spot or on the phone, which was not then available in all regions. The agency commented that the number of cases where advice could be offered would be much higher either if bail conditions could be imposed pre-charge; suspects could be remanded in custody pre-charge; and CPS office hours or the availability of on-the-spot advice be extended.³⁹

3.30 In 2003, access to charge advice via the telephone was widened. Police powers were extended so that police could place conditions on pre-charge bail, and PACE was amended so that police could hold a person in custody pre-charge.⁴⁰ In 2004, statutory charging in its current form was introduced into legislation,⁴¹ and a program of staggered implementation began. Statutory charging was fully

34. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 408.

35. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 408.

36. Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (2001) 412.

37. Including Avon and Somerset, Essex, Kent, North Wales and West Yorkshire. See A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) iii.

38. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003)

39. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) recommendation 1-3.

40. Pre-charge detention is tightly governed and subject to limitations: *Police and Criminal Evidence Act 1984* (UK).

41. *Criminal Justice Act 2003* (UK) Pt 4; *Police and Criminal Evidence Act 1984* (UK) s 37.

implemented across England and Wales in 2006.⁴² In 2011, police were handed back charging decisions for some offences, equating to a further 3% of all matters,⁴³ and in 2012, the CPS made 367 067 charge decisions.⁴⁴

How does statutory charging work?

- 3.31 The *Director's Guidance on Charging*⁴⁵ sets out arrangements for the joint working of police officers and prosecutors during the investigation and prosecution of criminal cases. It outlines the responsibilities of police and prosecutors, including the police requirement to refer serious cases involving death, rape or serious sexual offence to the CPS for early advice, and disclosure and evidentiary requirements.
- 3.32 Compliance with the Director's Guidance is compulsory for police officers and prosecutors, and a charge decision by a prosecutor must be adhered to unless the case is escalated for management review.⁴⁶

How do the police assess if a case is ready for charge advice?

- 3.33 There are now three circumstances where the police are able to charge without CPS advice. This includes summary-only offences; shoplifting offences suitable for sentence in the Magistrate's Court; and any "either way" offence where a guilty plea is anticipated and where it is suitable for sentence in the Magistrate's Court.⁴⁷ This amounts to about 68% of offences, and the CPS makes charge decisions on the remaining serious or complex cases.⁴⁸
- 3.34 Prior to case referral from the police to the CPS, the police are obliged to assess a case to determine the sufficiency of the evidence. To determine whether there is enough evidence to charge, police and prosecutors use the same evidentiary tests.
- 3.35 **The Full Code Test:** Under the Full Code Test, police must decide if there is "sufficient evidence to provide a realistic prospect of conviction". If so, the CPS must

42. <<http://www.cps.gov.uk/about/charging.html>>; <http://www.cps.gov.uk/about/right_person_right_charge_right_time.html>; see Appendix 3.1 for a detailed timeline of events relevant to pre-charge bail and statutory charging.

43. Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 9.

44. See para [3.59].

45. Pursuant to *Police and Criminal Evidence Act 1984* (UK) s37A: Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013).

46. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [24]. It has been noted that under CPS early charge advice "guidance" is in effect "instruction": I D Brownlee, "The Statutory Charging System in England and Wales: Towards a Unified Prosecution System?" (2007) *Criminal Law Review* November 896, 901.

47. With some exceptions, see Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [19]. The CPS is to review all police charged cases prior to the first hearing: Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [25].

48. <http://www.cps.gov.uk/about/right_person_right_charge_right_time.html>; Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 9.

determine if it is in the public interest to prosecute.⁴⁹ In considering the public interest, options for diversion are to be canvassed.⁵⁰

- 3.36 The Full Code Test is to be applied unless the arrested person presents a substantial bail risk if released, and not all the evidence is available at the time when he or she must be released from custody unless charged.⁵¹
- 3.37 **The Threshold Test:** In cases where the required evidence is not available but it has been determined by the police that it would be inappropriate for a detained suspect to be released on bail, the police and CPS may apply the “Threshold Test”.⁵² The Threshold Test may be used to charge a person who may justifiably be detained in custody to allow evidence to be gathered to meet the Full Code Test realistic prospect of conviction evidential standard.⁵³ The Threshold test requires an overall assessment of whether in “all the circumstances there is reasonable suspicion against the suspect of having committed an offence”.⁵⁴ This test has a lower standard than the Full Code Test, primarily so that prompt charging can occur and the person can be remanded in custody.
- 3.38 A decision by the CPS to charge under the Threshold Test must be kept under review. The evidence must be regularly assessed to ensure that the charge is still appropriate and that the continued objection to bail is justified. A matter charged under the Threshold Test cannot proceed to trial until the Full Code Test is satisfied.⁵⁵

What are the file requirements for statutory charging?

- 3.39 Where a case is referred for a charging decision, the police are to compile a pre-charge report. Below is a table that sets out the minimum requirements.

49. If this is a case that the Police can charge, then the police must determine the public interest element.

50. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [10].

51. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [11].

52. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [4.21]-[4.24].

53. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [11].

54. I D Brownlee, “The Statutory Charging System in England and Wales: Towards a Unified Prosecution System?” (2007) *Criminal Law Review* November, 896, 901.

55. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [13].

Table 3.1: Contents of Charging Reports and the National File Standard

Anticipated guilty plea cases		Anticipated NOT guilty plea cases		Contested and 10 cases
Pre-charge reports for charging decisions to CPS	Post-charge national file standard for 1 st court hearing	Pre-charge reports for charging decisions to CPS	Post-charge national file standard for 1 st court hearing	Upgrade file Magistrates' Court trial or sending to Crown Court for trial
<p>MUST INCLUDE:</p> <p>All reports to Crown prosecutor</p> <p>PNC Print of suspect and key prosecution witnesses</p> <p>Any material that may undermine the prosecution case or assist the defence</p> <p>IF APPLICABLE, INCLUDE:</p> <p>Key witness statements</p> <p>Drink/drive forms</p> <p>Other key evidence: CCTV, medical or forensic records, photos, documentary exhibits etc</p> <p>Other relevant material: Domestic violence/hate crime incident reports etc</p>	<p>MUST INCLUDE IN ADDITION TO PRE-CHARGE REPORT:</p> <p>Charge sheet</p> <p>Police report</p> <p>List of witnesses</p> <p>IF APPLICABLE:</p> <p>Special measures assessment</p> <p>Bail sheet</p> <p>Remand application</p> <p>Breach of bail conditions</p> <p>All key witness statements</p> <p>Interview record</p> <p>POCA review</p> <p>Offences TIC</p> <p>Compensation documentation</p> <p>If not guilty plea is entered or case sent to Crown Court for trial commence proportionate upgrade according to the "real issues" in the case as identified at the Case Management hearing</p>	<p>MUST INCLUDE:</p> <p>All reports to Crown prosecutor</p> <p>PNC Print of suspect and key prosecution witnesses</p> <p>Key witness statements</p> <p>Any material that may undermine the prosecution case or assist the defence</p> <p>IF APPLICABLE, INCLUDE:</p> <p>Key witness statements</p> <p>Drink/drive forms</p> <p>Other key evidence: CCTV, medical or forensic records, photos, documentary exhibits etc</p> <p>Other relevant material: Domestic violence/hate crime incident reports etc</p>	<p>MUST INCLUDE IN ADDITION TO PRE-CHARGE REPORT:</p> <p>Charge sheet</p> <p>Police report</p> <p>List of witnesses</p> <p>Witness non-availability</p> <p>Key witness statement</p> <p>IF APPLICABLE:</p> <p>Special measures assessment</p> <p>Bail sheet</p> <p>Remand application</p> <p>Breach of bail conditions</p> <p>Interview record</p> <p>Bad character/dangerous offender</p> <p>POCA review</p> <p>Offences TIC</p> <p>Forensic submissions</p> <p>If not guilty plea is entered or case sent to Crown Court for trial commence proportionate upgrade according to the "real issues" in the case as identified at the Case Management hearing</p>	<p>MUST INCLUDE IN ADDITION TO THE POST-CHARGE NATIONAL FILE STANDARD</p> <p><i>Mag Court Trial:</i></p> <p>Schedule of non-sensitive unused material</p> <p>Schedule of sensitive material</p> <p>Disclosure officer's report</p> <p>IF APPLICABLE INCLUDE:</p> <p>Special measures assessment</p> <p>Police Officer's disciplinary record</p> <p>Other relevant key statements</p> <p>Exhibits list</p> <p>Interview record</p> <p>Compensation form and support docs</p> <p>Forensic submissions</p> <p><i>Plus for Crown Court Trials:</i></p> <p>All statements including corroborative, continuity etc</p> <p>Interview record</p>
<p>Once a charging decision has been made, the Pre charge report becomes the post-charge national file standard for 1st hearing at Magistrates' Court</p>		<p>Once a charging decision has been made, the Pre charge report becomes the post-charge national file standard for 1st hearing at Magistrates' Court</p>		

Source: CPS, *The Director's Guidance on Charging* (4th ed, 2011) 16.

What are prosecutors to provide?

- 3.40 For early charge advice, prosecutors are to:
- provide advice on the most appropriate charge/s
 - identify and, if possible, rectify evidential deficiencies, or
 - close those cases that cannot be strengthened by further investigation or where the public interest clearly does not require a prosecution.
- 3.41 Prosecutors are also able to supply advice during the course of an investigation of a serious, sensitive or complex matter. Specific cases involving a death or serious sexual offence should always be referred to a prosecutor for advice on evidence during the course of the investigation. Prosecutors can also provide advice on any case where a police supervisor considers it would assist to determine the evidence that will be required to support a prosecution or to decide if a case can proceed to court.⁵⁶

How do police and prosecutors communicate?

- 3.42 Police and prosecutors primarily communicate via a telephone service called *CPS Direct*. This service has a dedicated network of Duty Prosecutors based throughout the country, linked to the police via IT and telephony. The CPS website states that to receive a charging decision, police officers and other investigators call a single national number and are connected to the next available Duty Prosecutor. In some cases, officers can submit and receive charging decisions electronically.⁵⁷

Face to face consultations take place in the most serious, sensitive and complex matters including;

- any case involving a death
 - rape and serious sexual offences
 - child abuse
 - large scale or long term fraud
 - cases with substantial or complex video or audio key evidence
 - cases expected to take longer than 90 minutes in consultation, and
 - any other cases agreed with the CPS locally.⁵⁸
- 3.43 Written advice only occurs in “exceptional cases”.⁵⁹

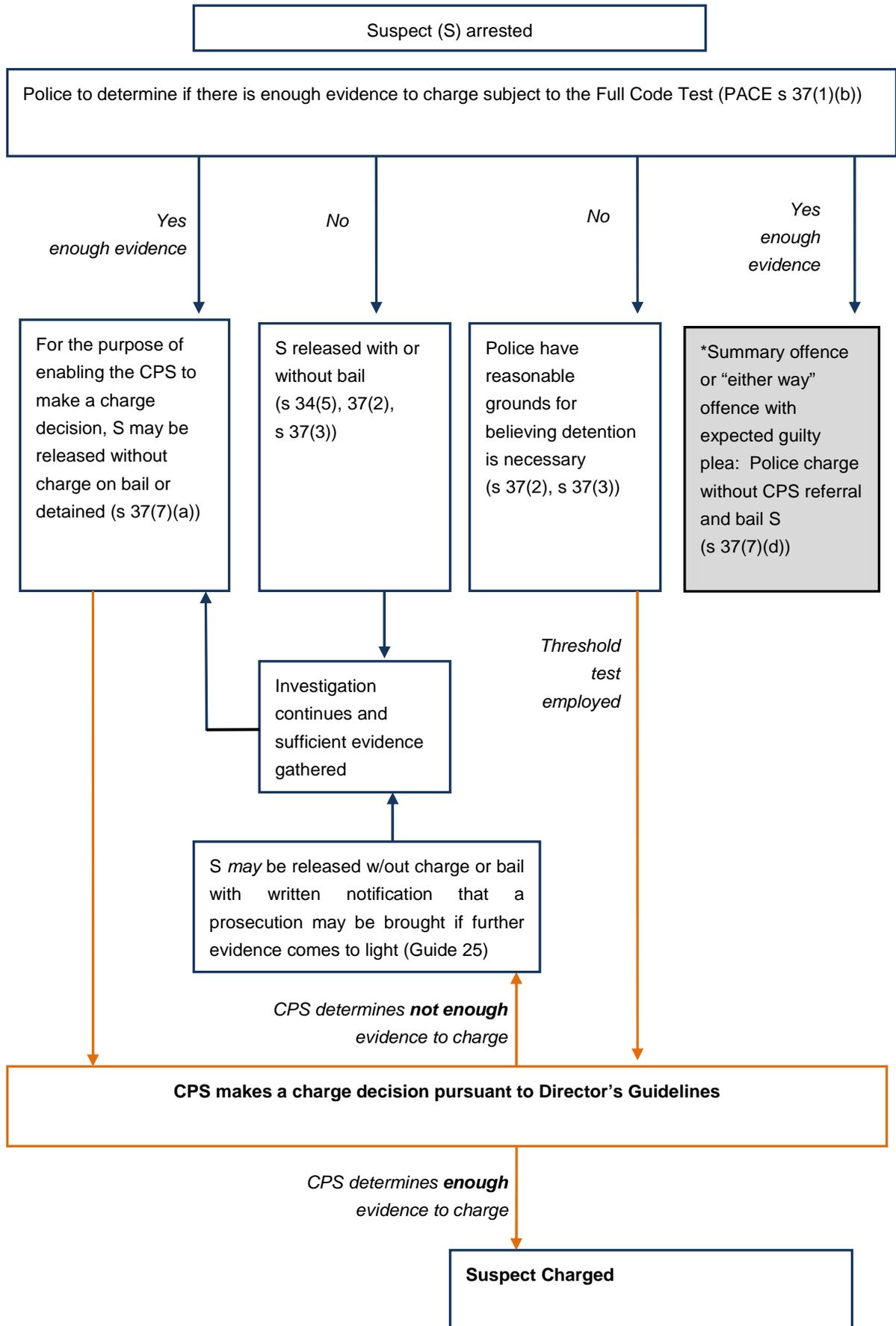
56. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [7]: wherever practicable, this should take place within 24 hours in cases where the suspect is being detained in custody or within 7 days where released on bail.

57. <<http://www.cps.gov.uk/direct/about/>>.

58. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [29].

59. Crown Prosecution Service, *The Director's Guidance on Charging* (5th ed, 2013) [30].

Figure 3.1: Pre-charge bail and statutory charging flow chart



Evaluations and incidence of statutory charging

3.44 Below we draw information on the incidence and effect of statutory charging from numerous sources over time. There are no accessible dedicated statistics regarding statutory charging, so we instead use available information to form a picture of statutory charging in England and Wales.

2003 trial findings of the statutory charging pilot

3.45 The statutory charging pilot ran in five regions from February - August 2002. During the pilot period 4781 statutory charging decisions were supplied by the CPS. Of these, 1924 were initially rejected (told not to proceed) by the CPS: 1674 for lack of evidence, and 250 on public interest grounds. In 241 cases the CPS requested further evidence.

3.46 The total number of charges made under the pilot following written advice represented 7% of the charging caseload of the pilot period.⁶⁰

3.47 In 2003, an independent agency issued its findings on the pilot scheme.⁶¹ It was noted that as each region had its own administrative guidelines, there were issues with the data and limitations to the findings. However, the agency reported that the scheme had resulted in:

- A significant increase in conviction rates of between 45-100% in the piloted areas.⁶²
- An average decrease in the number of cases that were discontinued of 69%.⁶³
- An average decrease in the number of cases where a charge was changed or dropped of 64%.⁶⁴
- An average increase in pleas at first hearing of 33% and a trebling in the proportion of defendants who entered a guilty plea at first hearing (in the best region).⁶⁵
- An average decrease in the number of occurrences where the defendant enters a plea of guilty on the day of the trial of up to 27%. Where late pleas did occur, it was to the original charge, suggesting that the police were getting the charge right from the outset.⁶⁶

60. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 2-2.

61. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003)

62. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-9.

63. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-13.

64. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-18.

65. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-15 – 3-16.

66. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-19 – 3-20.

- An increase from the time from arrest to charge of around 24 days (from 31 to 55 days). The time from charge to completion decreased by 10 days in the Magistrates' Court (79 to 69 days) and 2 days overall.⁶⁷
- A cultural shift towards enhanced working relationships and transference of skills between police and prosecutors.⁶⁸

2008 review of statutory charging

3.48 This comprehensive review was conducted by the HM Crown Prosecution Service Inspectorate and the HM Inspectorate of Constabulary in 2008. The review supported the conclusions of the 2003 review to find that statutory charging had contributed to better discontinuance rates; improved guilty plea rates; a decrease in ineffective trials,⁶⁹ and an increase of the number of offences brought to justice.⁷⁰ The review also observed that greater improvements could have been achieved in the following operational areas:

- **Ensuring that only matters that met the criteria for referral were submitted for a charge decision:** The review noted that in 29% (158 975) of matters the CPS advised the police that no further action should be taken. While it was not possible to say how many of these cases the custody officer would have rejected prior to the scheme, the review concluded that in some cases "CPS prosecutors are called upon to take decisions that the police could have properly made".⁷¹ The review called for greater consideration by the police of a matter before it is referred to the CPS.
- **Providing the CPS with enough material to make an effective decision:** 37% of police files submitted during the course of the review did not meet the prescribed standard.⁷²
- **Monitoring the value of the investment.** From 2006-2008, the CPS had allocated over £150 million to the scheme. As there was no robust monitoring system, there was no reliable way to track the return on investment.⁷³

3.49 The review made recommendations on the processes required to address the issues raised above, including clearly defining the role of evidence review officer

67. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 3-22.

68. A Hooke, N Banham and B Caffin, *Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation* (PA Consulting Group, 2003) 4-25.

69. "Ineffective trials" occur when the hearing is adjourned on the day sent down for the contest to another trial date.

70. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008): See table at paragraph [3.25].

71. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [3.27].

72. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [3.9], [3.42].

73. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [3.33].

and setting national training standards for the role. It also included a recommendation to implement certain quality assurance systems.⁷⁴

- 3.50 The review found that the time from arrest to charge varied significantly. Some matters took one day (mainly where a person was detained and the Threshold Test was employed) and the longest took up to 369 days.⁷⁵ The average time from arrest to charge was reported to be 41 days.⁷⁶

Current impact of statutory charging in England and Wales

- 3.51 For consistency, the below findings attempt to measure the current impact of statutory charging on criminal procedure by using the key performance indicators (KPIs) set by the 2003 pilot review. The statistics were sourced from various government departments including the Ministry of Justice, the CPS and the Crown Court, and generally show that the indicators remain steady.
- 3.52 **KPI: Increase in conviction rates** In 2007, when full implementation of statutory charging was complete, the CPS had a 77% conviction rate of all cases where a charge decision was made prior to charge. By the 08/09 reporting period the conviction rate rose to 81%.⁷⁷ In 2011/12 the rate was steady at 80.8%.⁷⁸ (This includes guilty pleas and convictions of guilty after a defended trial).
- 3.53 **KPI: Decrease in cases that were discontinued** The number of “judge ordered acquittals”⁷⁹ due to, among other things, evidential deficiency, in the Crown court has stayed stable at around 12% since 2009/10. Judge directed acquittals where a successful submission of “no case” or “unsafe” is made by the defendant remains at about 1%. Discontinuances in the Local Court have remained stable at 9%.⁸⁰
- 3.54 **KPI: An increase in guilty pleas at first hearing** The guilty plea rate (the number of defendants pleading guilty to all counts as a proportion of all defendants with a plea) increased from 56% in 2001 to 70% in 2008 and has stayed stable since.⁸¹ It is not known at what point in the proceedings these pleas are submitted.
- 3.55 The Ministry of Justice considers statutory charging to be a key contributor to the increase in the guilty plea rate.⁸²

74. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [3.48].

75. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [14.24].

76. Criminal Justice Joint Inspection, *The Joint Thematic Review of the New Charging Arrangements* (2008) [14.26].

77. <http://www.cps.gov.uk/about/right_person_right_charge_right_time.html>.

78. Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 85.

79. These are cases where a problem is identified after the matter has been sent or allocated to the Crown Court. The prosecution offers no evidence and the judge orders a formal acquittal of the defendant: Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 85.

80. Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 82-85.

81. Ministry of Justice, *Court Statistics Quarterly October to December* (2012) 34.

82. Ministry of Justice, *Judicial and Court Statistics* (2011) 47.

- 3.56 **KPI: A decrease in the number of occurrences where the defendant pleads guilty on the day of the trial** The Ministry of Justice publishes the number of “cracked trials”, that is trials that are resolved on the first day/s of trial. In the Crown Court there has been a recent decline in cracked trials – from 45% of all trials in 2010 to 36% in the first quarter of 2013. In 2001, however, 34% of trials cracked.⁸³ The main reason for cracked trials during the first quarter of 2013 was defendants entering a late guilty plea (63% of all cracked trials).⁸⁴
- 3.57 **KPI: Timeliness** The length of time a person may be subject to pre-charge bail pending a charge decision is a key criticism of the scheme. There is, however, no current statistic on the average time taken from arrest to charge available from evaluating or government agencies.
- 3.58 The Ministry of Justice (UK) reports an average of 90 days from *offence* to charge, longer for complex cases of fraud or sexual assault.⁸⁵ Timeliness reporting does not provide an insight as to when a person was arrested, so it cannot be used to gauge the time between arrest and charge. Statistics published by the BBC show that, in May 2013, 6% of all people subject to pre-charge bail had been subject to bail for longer than six months.⁸⁶ The data was, however, collected by the BBC, and has not been authenticated by the police or CPS.

Incidence of statutory charging

- 3.59 The CPS Annual Report publishes the number of charge decisions made in a financial year per defendant – a person in a single set of proceedings that can involve one or more charges. In 2011/12, the CPS prosecuted 787 547 defendants. It made 367 067 charging decisions. This had decreased from the two preceding years where in 2010/11 it was 466 611, and 477 572 in 2009/10. The decrease is aligned with a general decrease in the number of cases prosecuted.⁸⁷
- 3.60 All people who are arrested and then subject to CPS advice must be either detained or bailed under s 37 of PACE. It can be estimated then that, in the course of the financial year, up to 367 000 people in England and Wales were either detained or bailed pending pre-charge advice.

The current scope of pre-charge advice in NSW

- 3.61 NSW has an existing but not compulsory scheme of pre-charge advice, formalised in a protocol between the ODPP and NSW Police, and outlined in the ODPP Guidelines.⁸⁸ The scheme in NSW is distinguished from the UK scheme of pre-charge advice because:

83. Ministry of Justice, *Judicial and Court Statistics* (2011) 49.

84. Ministry of Justice, *Court Statistics Quarterly Reports* (2013) 37.

85. Ministry of Justice, *Judicial and Court Statistics Q1* (2013) 41.

86. 3172 of 57 428: see: <<http://www.bbc.co.uk/news/uk-22624648>>.

87. Crown Prosecution Service, *Annual Report and Accounts 2011-12* HC48 (2012) 82.

88. All information is drawn from the Office of the Director of Public Prosecution, *ODPP Guidelines* (2010) 22-24.

- ODPP charge advice is not a fully-formed scheme – it does not include telephone hotlines and embedded resources like the UK model.
- ODPP charge advice is not part of a pre-charge bail scheme.
- Seeking ODPP charge advice is not mandatory nor is it mandatory for the NSW Police to follow any advice given.

3.62 The ODPP Guidelines prescribe that the ODPP is to provide written advice to the police, where sought, in regards to:

1. Matters that are strictly indictable
2. Matters that involve allegations of child sexual assault, and
3. Matters that are table offences where the ODPP elects to proceed on indictment.

Advice given during an investigation

3.63 The ODPP may provide advice to police during an investigation of an indictable offence. Advice can be given on:

- The admissibility of any obtained or yet to be obtained evidence, and
- The legal implications of alternative or proposed courses.

3.64 Advice will usually be given within 3 working days.

Advice given pre-charge

3.65 Where the police have determined the evidence is sufficient for a CAN, the ODPP can review cases for sufficiency of evidence and the appropriateness of a CAN.

3.66 Advice will usually be given within 4 weeks, with a shorter period able to be negotiated. The advice will include reasons why charges are not recommended, the draft wording of charges that are recommended and requisitions for any additional material considered appropriate.

Certain matters to be referred to the Director or Deputy Director

3.67 Unless matters have been specifically delegated to other ODPP officers, requests for advice on any of the below matters must be referred up to the Director or Deputy Director:

- Whether to proceed following a proposed international extradition
- Whether an immunity should be requested
- Whether an appeal should be lodged
- Whether a police officer should be prosecuted for an indictable offence
- Whether an *ex officio* indictment should be filed

- Where the Director's approval is needed to commence proceedings
- Where the matter is of particular sensitivity, including allegations of corruption by public officials, and
- In all matters of homicide, including dangerous driving causing death.

Incidence of pre-charge advice in NSW

- 3.68 The ODPP Annual Report notes that in the 2011/12 reporting period, the ODPP received and completed 201 referrals for advice as to sufficiency of evidence or appropriateness of charges. 40% of "Advising Briefs" required further information, and the time to complete ranged from 30 – 90 days.⁸⁹

Police practice management model: Summary jurisdiction

- 3.69 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 over-charging.
- 3.70 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.⁹⁰
- 3.71 The PMM is not reliant upon a pre-charge bail regime, and operates instead alongside an active investigation.
- 3.72 This change in the command structure is in the early stages, and no evaluative material has been released.

Pre-charge assessment: Canada

- 3.73 Three provinces in Canada incorporate a program of mandatory pre-charge assessment into criminal procedure: British Columbia, Quebec and New Brunswick. Except that its operation is not dependent upon a pre-charge bail framework, pre-charge assessment is analogous to the statutory charging regime.
- 3.74 Broadly speaking, in British Columbia pre-charge assessment operates as:

89. The Office of the Director of Public Prosecutions, *Annual Report 2011/12* (2012) 42.

90. Information supplied by the NSW Police, *Preliminary Submission PEGP11*, 5 (confidential submission).

- A person is arrested for an offence.
 - The police can either:
 1. Hold the person for up to 24 hours and then bring the person before the court for a bail hearing.
 2. Release the person with an “appearance notice” to appear in court.
 3. Release the person with a “promise to appear” form, which can require the person to give an undertaking to meet conditions similar to those under pre-charge bail.
 - The police recommend the offence/s that the person should be charged with to Crown counsel.
 - Crown counsel review the evidence to determine whether there is a reasonable prospect of conviction and whether the public interest would be served by the case proceeding to court. Crown counsel can approve or not approve a charge recommended by police. Counsel can recommend a variation of charge.
 - Police then “lay the information” (charge the person and file the charges with the court).⁹¹
- 3.75 Pre-charge assessment has been an active program in British Columbia in some form since 1974.⁹² It is considered responsible for the low level of matters that are stayed or withdrawn in the province, as well as the high portion of cases that result in a guilty finding (73% compared with 62% from non pre-charge assessment provinces).⁹³
- 3.76 At this stage in our research, we do not have statistics from British Columbia that reflect when guilty pleas are entered in the criminal process. We are also interested in the use of conditional undertakings, and are seeking the number of people who are released subject to conditions under a promise to appear. This data would be compared against the number of arrested people released under court-ordered bail, arrested people released with an appearance notice or people detained.

Statutory charging for NSW?

- 3.77 In indictable proceedings, the imprecision of the original charge has been identified as a key obstacle to early guilty pleas. The statutory charging regime in England and Wales is a fully-formed response to correcting serious or indictable charges at

91. See: Criminal Justice Branch, Ministry of Attorney General, *Crown Counsel Policy Manual* (2009); Justice BC, “British Columbia Criminal Justice Information and Support” <http://www.justicebc.ca/en/cjis/you/accused/what_to_expect.html>; G McCuaig, *British Columbia Charge Assessment Review* (2012); K Tilley, *Justice Denied: The Causes of B.C.’s Criminal Justice System Crisis* (2012) 15-17.

92. G McCuaig, *British Columbia Charge Assessment Review* (2012) 10.

93. In February 2012 it was reported that 17% of matters are stayed or withdrawn in British Columbia, whereas 36% of matters are stayed or withdrawn in provinces that do not have pre-charge assessment. K Tilley, *Justice Denied: The Causes of B.C.’s Criminal Justice System Crisis* (2012) 15.

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, which differs in two key ways:

1. In British Columbia it is mandatory for Crown prosecutors to assess all charging decisions.
 2. The scheme operates without pre-charge bail. Police can, however, employ a procedure similar to pre-charge bail, where an arrested person released before charge must give an undertaking to meet certain conditions.
- 3.78 In NSW, all initial charging decisions remain with the police. This remains so under the PMM recently implemented in summary jurisdictions.

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?

Appendix 3.1: England and Wales timeline of significant events

Date of event	Occurrence
1925	Police are granted the power to release a person suspected but not charged with a criminal offence on bail (pre-charge bail). ⁹⁴
1984	Police and Evidence Act 1984 (PACE) comes into force.
1995	Pursuant to recommendations made by the Royal Commission on Criminal Justice (Runciman Commission), legislation that permits a surety and or conditions where a person was granted bail by police following charge is implemented. ⁹⁵
2001	The Review of the Criminal Courts of England and Wales (Auld Report) is released. The Report recommends the introduction of "statutory charging".
2002	A non-statutory pilot scheme of CPS statutory charging as per the Auld Report in implemented.
2002	Government white paper, "Justice for All" expressed support for a statutory charging scheme.
2003	Evaluation of the pilot scheme is published and recommends full implementation of CPS statutory charging. ⁹⁶
2003	The Criminal Justice Act 2003 receives Royal Assent and implements statutory charging.
2004	Sections 37(7)(a)-(d) of PACE are introduced, permitting pre-charge bail for the purpose of receiving charge advice from the CPS. ⁹⁷ It is first implemented in West Yorkshire and Kent.
2004	Police are granted the power to place conditions on pre-charge bail where person is bailed under s 37 (including bailed pending a statutory charge decision). ⁹⁸
2006	Full implementation of statutory charging is completed across all CPS and police force areas. ⁹⁹
2007	PACE is amended permitting suspects to be detained pending a charge decision by CPS. ¹⁰⁰
2008	The Joint Thematic Review of the New Charging Arrangements and the Inspection of CPSD reports are released.
2008	The Flanagan Review recommends reducing the authority of the CPS to decide whether to charge being passed back to the police in all summary offences and to additional offences which can be tried in the magistrates' courts or the Crown Court. ¹⁰¹
2011	The Director's Guidance on Charging directs police to charge certain offences, implementing the Flanagan review recommendations. ¹⁰²

94. *Criminal Justice Act 1925*.

95. *Criminal Justice and Public Order Act 1994*, s27(2)(a)

96. A Hooke, N Banham, B Caffin "Charging Suspects: Early involvement by CPS. A Pilot. Final Evaluation" (PA Consulting Group, 2003).

97. *Criminal Justice Act 2003*, c 44, s 28.

98. *Criminal Justice Act 2003 Sch 2, Para 6(3); PACE s 47(1A)*. Note excludes bail under s 34(5) when released after detention on bail, where conditions cannot be attached.

99. <<http://www.cps.gov.uk/about/charging.html>>;
<http://www.cps.gov.uk/about/right_person_right_charge_right_time.html>

100. *Police and Justice Act 2006* (UK) c 48, ss.11.

101. R Flanagan, *The Review of Policing: Final Report* (2008) [5.54]

102. Crown Prosecution Service, *The Director's Guidance on Charging* (2013), 5th ed [19].

4. Plea negotiations

In brief

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. This chapter reviews the current process and practice of charge negotiation in NSW and presents three differently constituted models for consideration. We ask whether an increase in prosecutorial discretion, judicial oversight and transparency in NSW would further encourage early plea agreements.

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What is a plea agreement?

- 4.1 A plea agreement is an early resolution mechanism whereby the prosecution offers a charge or sentencing concession in exchange for a guilty plea by the defendant.¹ Plea agreements are drawn from negotiations between the prosecution and defence, which can occur informally or via structured case conferencing.² Plea negotiation is a practice widely adopted in NSW and cognate jurisdictions. In NSW, plea negotiations for indictable matters are encouraged by the criminal practice notes of the Local Court.³ The practice is recognised in case law⁴ and has garnered support from criminal justice stakeholders.⁵
- 4.2 The terms of a plea agreement will vary across jurisdictions, depending upon the scope of prosecutorial discretion and the extent of judicial oversight. Generally plea negotiations can lead to an agreement by the prosecution to reduce the charge/s or refrain from prosecuting some charges in return for a plea of guilty. The agreement will rely upon an agreed set of facts in support of the charge/s. In some jurisdictions the prosecution can agree to recommend to the court a sentence type, range or quantum in return for a guilty plea. Negotiations can also include an undertaking by the prosecution not to proceed against the defendant or another in return for assistance in a matter.⁶
- 4.3 Plea negotiations aim to bring about an early resolution of the matter by generating an agreement by which a defendant pleads guilty to certain charges prior to a criminal trial. Plea negotiations also produce an agreed set of facts, which may limit the need for adjournments prior to sentencing, and further streamlines the sentencing process.

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1. A Flynn, "Fortunately we in Victoria are not in that UK Situation": Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform" (2011) 16 *Deakin Law Review* 361; S N Verdun-Jones and A A Yijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Reform* (Policy Centre for Victim Issues: Research Statistics Division, 2002) vi; Verdun-Jones and Yijerino define a plea agreement as an "agreement by the defendant to plead guilty in return for the prosecutor's agreeing to take or refrain from taking a particular course of action."
 2. See Chapter 5 for a detailed discussion on criminal case conferencing.
 3. See Local Court of NSW, Practice Note Crim 1 (May 2012).
 4. *Maxwell v The Queen* (1996) 184 CLR 501; *GAS v The Queen* (2004) 217 CLR 198; *Ahmad v R* [2006] NSWCCA 177.
 5. See Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37; See P Shaw, *Preliminary Submission PEGP02*, 2.
 6. This is not the case in NSW, where assistance to authorities may be a mitigating factor at sentencing: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(m), s 23; Director of Public Prosecutions, *Prosecution Guidelines* (2007) 17. However, the Director can submit a request to the Attorney General to grant indemnity from prosecution or to give an undertaking that an answer, statement or disclosure will not be used in evidence. The Director may decline to give an indemnity or give an undertaking: See the *Criminal Procedure Act 1986* (NSW), Ch 2; *Director of Public Prosecutions Act 1986* (NSW) s 19.

The current status in NSW

- 4.4 Negotiations between the prosecution and defence that lead to plea agreements in NSW are termed “charge negotiations”.⁷ In 2009, the Sentencing Council of NSW described charge negotiation as:

Negotiation between the prosecution and the defence in criminal court matters with a view to reaching an agreement on charges, the contents of the statement of facts provided to the sentencing court and/or procedural matters such as whether to proceed with a matter in the District or Local Court.⁸

- 4.5 Charge negotiations are an accepted element of criminal prosecutions in NSW. From 2006 - 2012 the process of charge negotiation was formalised by the criminal case conferencing administrative and statutory trials.⁹ Today charge negotiation on indictable matters continues to occur.¹⁰ Charge negotiation is recognised by the *Criminal Procedure Act 1986* (NSW),¹¹ and prosecutorial practice in charge negotiations is governed by the NSW Director of Public Prosecutions Guidelines (the Guidelines).¹²
- 4.6 Generally, charge negotiations occur between Crown prosecutors and the defence before a defended trial proceeds, but this does not prevent negotiations from occurring at an earlier time in the criminal process.¹³ It is a fluid process that may occur once or be ongoing. It can carry across different prosecutors having carriage of the matter.

The scope of prosecutorial discretion

- 4.7 Crown prosecutors have discretion to decide the appropriate charge/s in matters dealt with on indictment.¹⁴ Under the Guidelines, an appropriately authorised Crown prosecutor can negotiate on three areas relevant to the charge in return for a guilty plea. The prosecutor may agree to discontinue or downgrade the charge/s; to amend or enlarge the statement of facts; and/or to put some charge/s on a Form 1.

Option 1: A Crown prosecutor agrees to discontinue a particular charge if the defendant undertakes to plead guilty to another charge

- 4.8 Under this option, the Crown prosecutor can undertake to discontinue a charge and replace it with a lesser charge. This can include an agreement not to elect on a

7. G Samuels, *Review of the NSW Director Public Prosecution's Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002) [41.1].

8. NSW Sentencing Council, *Reduction in Penalties at Sentence* (2009) [6.1].

9. See Chapter 5.

10. See Local Court of NSW, Practice Note Crim 1 (May 2012) which allocates 6 weeks for negotiation between the parties.

11. *Criminal Procedure Act 1986* (NSW) s 153.

12. Director of Public Prosecutions, *Prosecution Guidelines* (2007) Ch 20.

13. Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37.

14. Within the jurisdiction of the ODPP, including table offences and downgrading to summary charges. See *Maxwell v The Queen* (1996) 1584 CLR 501; *GAS v The Queen* (2004) 217 CLR 198.

table offence or to downgrade an indictable offence so that it may be heard summarily.¹⁵

- 4.9 A Crown prosecutor cannot agree to a charge negotiation unless the public interest is satisfied. This requires consideration of whether:
- the alternative charge adequately reflects the “essential criminality” of the conduct
 - the plea provides adequate scope for sentencing
 - the evidence available to support the prosecution is weak in any material respect
 - the savings of cost and time weigh against the likely outcome of the matter if it proceeded to trial
 - the plea saves a witness, particularly victims and vulnerable witnesses, from the stress of testifying, and
 - the victim has expressed a wish not to proceed with the original charge/s.¹⁶
- 4.10 The views of the victim and the charging officer need to be sought and considered at the outset of negotiations. If the police officer or victim objects to the proposed charge/s, a senior or deputy senior Crown prosecutor must be consulted, and the trial advocate having conduct of the matter should submit the matter to the Director’s chambers.¹⁷

Option 2: A Crown prosecutor agrees to a revised summary of facts

- 4.11 Charge negotiations can also include negotiating the agreed summary of facts on the basis of which the defendant will be sentenced. This can constitute an independent agreement or it may be coupled with any charge downgrade.
- 4.12 The scope to change an agreed summary of facts is limited. An alternative plea will not be considered where its acceptance would produce a distortion of the facts and create an artificial basis for sentencing, or where facts essential to establishing the criminality of the conduct would not be able to be relied upon.¹⁸
- 4.13 Where reference to any substantial and otherwise relevant and available evidence is to be omitted from a statement of facts, the views of the police officer-in-charge and the victim must be sought before the statement of agreed facts is adopted. The prosecutor must submit a certificate (referred to as a “section 35 certificate”), signed by or on behalf of the Director of Public Prosecutions,¹⁹ to the court to verify that a consultation with the victim took place on the charge and facts, and that any

15. A Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009) 25; The Local Court of NSW, *Preliminary Submission PEGP05*; Sentencing Council of NSW, *Reduction in Penalties at Sentence* (2009).

16. Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37.

17. Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37-38.

18. Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37-38.

19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A(3), s 35A(4).

statement of agreed facts “arising from the negotiations tendered to the court constitutes a fair and accurate account of the objective criminality of the offender having regard to the relevant and provable facts or has otherwise been settled in accordance with the applicable prosecution guidelines”.²⁰

- 4.14 As to the extent of the victim’s influence, the Guidelines note:

The view of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made; *but those views are not alone determinative*. It is the general public, not any private individual or sectional, interest that must be served.²¹

Option 3: The Crown prosecutor agrees to put some charges on a Form 1

- 4.15 When sentencing an offender for an offence (referred to as the “principal offence” in this context) the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the court may take into account one or more further offences for which the offender admits guilt.²² This is commonly referred to as “taking matters into account on a Form 1”. Both parties must agree to the further offences being placed on a Form 1.²³
- 4.16 This procedure is often employed as part of charge negotiations between the prosecution and defence. The further offences are generally of similar or lesser seriousness compared to the principal offence and the court takes them into account with a view to increasing the sentence on the principal offence.²⁴ Separate sentences are not imposed for the further offences, but the increase in sentence for the principal offence may be significant in some cases, particularly if the matters on the Form 1 are numerous or serious in themselves.²⁵ The rules about consultation with the victim and police officer apply.²⁶
- 4.17 The court can refuse to take an offence into account if, in its opinion, it is not appropriate to be dealt with in this way.²⁷ This is reportedly rare, but if it were to occur the offence must then be dealt with separately, and may be dropped by the prosecution or put on indictment.

20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A.

21. Director of Public Prosecutions, *Prosecution Guidelines* (2007) 38: *Emphasis added*.

22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 32. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 139.

24. *Abbas v R* [2013] NSWCCA 115.

25. The CCA has issued a guideline judgment on the appropriate way for courts to take into account matters on a Form 1: *Attorney General's Application under s 37 of the Crimes (Sentencing Procedure) Act 1999 (No 1 of 2002)* [2002] NSWCCA 518; 56 NSWLR 146, which builds on earlier decisions such as *R v Barton* [2001] NSWCCA 63. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 139.

26. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 35A.

27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 33(2)(b).

Sentence bargaining?

- 4.18 The prosecution cannot give an undertaking as to sentence type or quantum as part of a plea agreement. In NSW, a sentence submission pursuant to an agreement would carry the same weight as any other defence or Crown submission made in the sentencing process. The sentencing judge is to decide the sentence to be imposed, and in deciding the sentence, the judge must apply the facts as found, the relevant law and sentencing principles.²⁸
- 4.19 This does not mean that sentencing considerations do not enter into charge negotiations. Sentence discounts provide a key incentive for defendants to enter charge negotiations early in the proceedings, and the Guidelines instruct prosecutors to point out the “benefits available pursuant to s 22 of the CSPA and *R v Thomson and Houlton* (2000) and the significance of the time at which a plea is entered”.²⁹
- 4.20 Furthermore, sentence bargaining may not be explicitly permitted in charge negotiations but, as the nature and quantum of the sentence is derived from the charge/s bought upon the defendant, charge negotiations effectively shape the sentence outcome. The ODPP points out that this is especially so where the offence is downgraded to a summary offence and becomes subject to the jurisdiction of the Local Court.³⁰

Incidence and effect upon early guilty pleas

- 4.21 In 2012, 82% of all matters dealt with on indictment in the District Court of NSW resolved in a guilty plea.³¹ Of these 65% occurred prior to committal and 35% occurred between committal and trial.³² It is not known how many of these matters resolved due to charge negotiations – that is, the proportion of pleas that were to the original charge or those that were a result of a plea negotiation.
- 4.22 **Measuring plea negotiations by the number of offences that are downgraded:** There are, however, some indicators in ODPP data regarding the amount of likely successful charge negotiations occurring prior to committal. In the 2011/12 financial year, the ODPP reported that of the 6016 matters listed for committal, nearly one-half of these were downgraded to a summary offence and dealt with in the Local Court.³³ While some of the matters may have been Table offences, it is estimated by the ODPP that the majority of these matters were initially charged as strictly indictable offences and consequently negotiated to a summary offence.³⁴

28. *GAS v The Queen* (2004) 217 CLR 198 [31]; *Ahmad v Regina* [2006] NSWCCA 177 [22].

29. The Office of the Director of Public Prosecutions, *Prosecution Guidelines* (2007) 37. See Chapter 8 for a discussion on the sentence discounts.

30. The Office of the Director of Public Prosecutions, *Submission PEGP06*, 7.

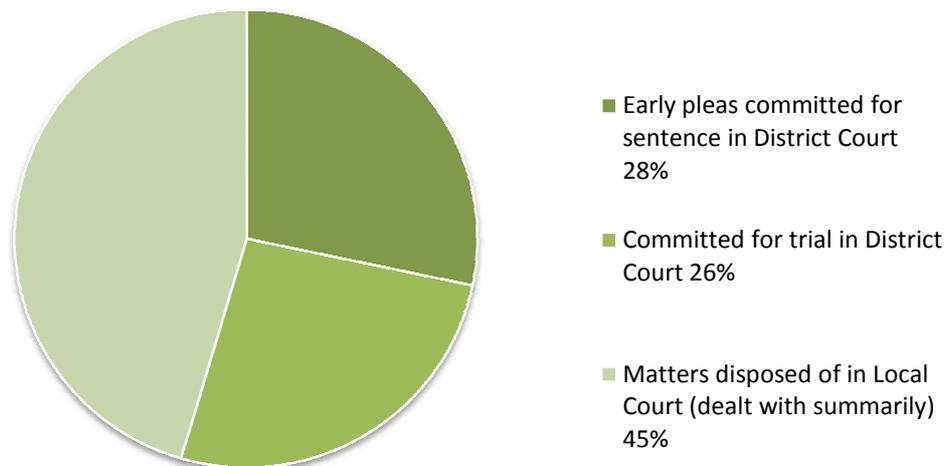
31. This includes matters where a person entered a plea of guilty to some but not all of the charges: NSW Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics* (2012) (Table 3.6).

32. See para [2.4]

33. 2703 matters were disposed of in the Local Court: See the Office of Director of Public Prosecutions, *Annual Report* (2011/12) 40.

34. Information provided by the Office of the Director of Public Prosecution (7 August 2013).

Figure 4.1 Committal disposals in 2011/12 (excluding Supreme Court matters)



Source: ODPP Annual Report 2011/12, 40.

- 4.23 It is also estimated by the ODPP that the majority of matters committed for sentence in the District Court involved some degree of charge negotiation.³⁵ This would mean that a considerable amount of matters that are resolved early (before committal) do so through charge negotiation.
- 4.24 **Measuring the success of plea negotiations by its continual practice:** Criminal case conferencing is no longer a legislated practice. Some regions of NSW, however, are piloting a similar, but informal, process where Legal Aid and ODPP solicitors review cases on file and flag those for early resolution. After an appropriate plea is discussed, the matter is referred for approval by a Crown prosecutor. These trials are in their infancy, and are not generally documented for evaluation. However, anecdotal evidence suggests that, at least in one regional area (Newcastle), matters that undergo negotiation are being resolved earlier than prior to the pilot.

Plea negotiations in other jurisdictions: a snapshot

- 4.25 Most Australian jurisdictions incorporate plea negotiations into prosecutorial practice,³⁶ and the practice does not vary widely between jurisdictions.
- 4.26 In order to review how plea negotiations can be employed to further the early submission of guilty pleas, we present three jurisdictions where plea negotiation practices differ to that of NSW model. Firstly we review England and Wales, which has a comparable criminal justice system but employs different procedures in

35. Information provided by the Office of the Director of Public Prosecution (7 August 2013).

36. See: *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, rule 6.14–6.21 (Cth); DPP Prosecutions Policy 2, *The Prosecutorial Discretion*, rule 2.6 (Plea Negotiation) (Vic); *Director's Guidelines*, rule 16. Charge Negotiations (Qld); *Prosecution Policy and Guidelines*, rule 2 (Charge-Bargaining) (SA); *Statement of Prosecution Policy and Guidelines 2005*, [73]–[81] (WA); *Prosecution Policy*, rule 2.13 (ACT); *Guidelines*, rule 6 (NT).

negotiations. Secondly, we look at Canada where the Crown prosecutors have greater discretionary powers to negotiate than prosecutors in NSW. Finally we overview plea negotiations in the USA, where plea agreements form the “the defining feature of the federal criminal justice system”.³⁷ The USA is known and widely criticised for its prolific use and dependence upon plea agreements. However, the operation of wide prosecutorial discretion; the strict regime of court review; and the policy of public access to plea agreements in the federal jurisdiction render the USA a valuable comparative jurisdiction.

England and Wales

- 4.27 England and Wales has various mandatory guidelines in place to oversee plea negotiations, termed “plea bargaining”. The primary publication is the *Attorney General’s Guidance on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise* (2009) (the Guide).³⁸ This is supplemented by a guide on plea discussions in cases of serious or complex fraud, published in 2010 and 2012.³⁹ The Guides apply to prosecutions conducted in England and Wales.

Comparing England and Wales to NSW

- 4.28 Plea bargaining in England and Wales is similar to charge negotiation in NSW in that plea bargaining includes charge bargaining and the negotiation of facts when in the public interest, and excludes an explicit undertaking as to the sentence type, range or quantum.⁴⁰ The basis of a plea must not be agreed on a misleading or untrue set of facts,⁴¹ and must take into account the interests of the victim.⁴²
- 4.29 The UK model differs from the NSW approach in five ways relevant to early guilty pleas.

37. US Department of Justice, *Plea and Charge Bargaining: Research Summary* (2011) 1.

38. Other publications in support of the key guidelines include the *Farquharson Guidelines on the Role and Responsibility of the Prosecution Advocate* (2002); the *Code for Crown Prosecutors* (2010); the *Code of Practice for Victims of Crime* (2006); the *Prosecutor’s Pledge* (2005) and the *Consolidated Criminal Practice Direction*. Legislation includes *Criminal Procedure Rules* 2013, and case law, *R v Underwood* [2004] EWCA Crim 2256 [2005] 1 Cr.App.R.(S.) 90.

39. Serious or complex fraud is defined as allegations of fraud containing two or more of the following: amount exceeds 500,000 pounds; there is a significant international dimension; case requires specialised financial knowledge; involves numerous victims or a public body; is of widespread public concern; the misconduct endangered the economic well-being of the UK: see *Consolidated Criminal Practice Direction* IV.45.18.

40. *Attorney General’s Guidance on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise* (2009) B4-B5: At sentencing, prosecutors can make submissions as to the appropriate sentencing range, and are to draw the court’s attention to: victim impact statement/s; any evidence of the impact of the offending on a community; relevant statutory provisions, sentencing guidelines and guideline cases; the aggravating and mitigating factors.

41. See *Consolidated Criminal Practice Direction* IV.45.44(b).

42. *Attorney General’s Guidance on the Acceptance of Pleas and the Prosecutor’s Role in the Sentencing Exercise* (2009) C1: The Guide asserts that the victim must be at “the heart of the criminal process”. Prosecutors are reminded that they have a role in protecting the interests of victims, and are required to adhere to the standards set out in the *Victim’s Charter* and the *Code of Practice for Victims of Crime*.

1. Plea agreements must be in writing, signed and submitted to the court.⁴³
2. Defendants are able to request a sentence indication prior to signing the agreement.
3. In cases of serious or complex fraud an agreement to present a joint submission on sentence is permitted as part of negotiations.⁴⁴
4. There is the capacity for court review of the terms of the agreement.
5. A guideline has been produced specific to plea negotiations in cases of complex or serious fraud. This guideline outlines a specific process for negotiations, and represents an attempt to formalise plea agreements in this field.

Incorporating certainty of sentence into plea negotiations

- 4.30 While the prosecution generally cannot give an undertaking as to sentence, the defendant may seek a sentence indication on an agreed⁴⁵ charge from the court prior to finalising a plea negotiation.⁴⁶ A sentence indication comprises an indication by the judge of the maximum sentence if a plea of guilty were to be tendered at that stage.⁴⁷ The judge may decline to give an advance indication of sentence⁴⁸ but, once given, the court is bound not to exceed the indicated sentence.⁴⁹ Sentence indications are discussed in Chapter 8.
- 4.31 Under this model, the defendant can consider the indication prior to consenting to the plea agreement.⁵⁰ The defendant cannot, however, ask the judge to indicate levels of sentence depending upon possible different pleas.⁵¹
- 4.32 In cases of serious and complex fraud, once the parties have agreed upon the charge/s in respect to which a plea or pleas are to be entered, the parties are to discuss the appropriate sentence with a view to presenting a non-binding joint written submission to the court. The submission should list the aggravating and mitigating features arising from the agreed facts, set out any personal matters of

43. *Attorney General's Guidance on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2009) C2-C3.

44. Consolidated Criminal Practice Direction, IV.45.18(b); *Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud* (2010). The judge retains "absolute discretion to refuse to accept the plea agreement and to sentence otherwise than in accordance with the sentencing submissions": Consolidated Criminal Practice Direction IV.45.23.

45. A sentence indication should not be sought where there is any uncertainty between the prosecution and defence about an acceptable plea or if there are any material facts still in dispute: *R v Goodyear* [2005] EEWCA Crim 888; *Attorney General's Guidance on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2009) D1; Consolidated Criminal Practice Direction IV.45.31.

46. Consolidated Criminal Practice Direction IV.45.29.

47. See Crown Prosecution Service Guidelines on sentence indication: <http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a05>.

48. This does not prevent the defendant from seeking a sentence indication at a later stage.

49. Although a less onerous sentence may be imposed: *R v Mustafa Nour Kulah* [2007] EWCA Crim 1701.

50. See <<http://www.hse.gov.uk/enforce/enforcementguide/court/crown-court.htm#advance>>.

51. *R v Goodyear* [2005] EEWCA Crim 888.

mitigation available to the defendant, and refer to any relevant sentencing guidelines or authorities. It should then make submissions as to the applicable sentencing range in the relevant guideline. Prosecutors are encouraged to include measures that achieve redress for the victim and protection for the public (such as directors' disqualification orders, serious crime prevention orders or financial reporting orders).⁵²

- 4.33 The scope of the sentencing submission in cases of serious or complex fraud has been narrowly defined by the courts.⁵³ In *R v Dougall*, where the plea agreement submitted that a 12 month suspended sentence was warranted, it was observed by the Lord Chief Justice that:

a plea agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle...⁵⁴

... Accordingly, although the prosecution should be involved in the process by which the sentencing court is fully informed about any matters arising from the evidence which may reflect on the defendant's criminality and culpability (including, of course, matters of mitigation) and of any positive assistance given to the investigating authorities by him, this process does not involve an agreement about the level of sentence. Indeed, look where we may, in our criminal justice structure, agreements between the prosecution and the defence about the sentence to be imposed on a defendant are not countenanced.⁵⁵

Court oversight and review

- 4.34 In England and Wales, negotiations are subject to court oversight and review throughout the process.⁵⁶ This can occur where:

- the prosecution is considering whether to accept a plea to a lesser charge, and the judge is invited by the prosecution to approve the proposed course of action,⁵⁷ and
- there is a factual dispute regarding the plea agreement⁵⁸ and the judge resolves it by reference to a "Newton" hearing (a hearing that most commonly occurs where a defendant pleads guilty but disagrees with the prosecution's version of events and the disputed facts are likely to affect sentencing).⁵⁹

52. *Attorney General's Guidance on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2009) D9-D12.

53. *R v Innospec Ltd* [2010] Crim LR 665; *R v Dougall* [2010] All ER (D) 11.

54. *R v Dougall* [2010] All ER (D) 11 [19].

55. *R v Dougall* [2010] All ER (D) 11 [23].

56. *Attorney General's Guidance on the Acceptance of Pleas and the Prosecutor's Role in the Sentencing Exercise* (2009) C10; Consolidated Criminal Practice Direction IV.45.10.

57. The advocate must abide by the decision of the judge: Consolidated Criminal Practice Direction IV.45.6.

58. Consolidated Criminal Practice Direction IV.45.6.

59. See *R v Newton* [1983] Crim LR 198.

- 4.35 All plea agreements are to be put into writing, signed by both parties and submitted to the judge prior to the prosecution's opening.⁶⁰ In cases of serious or complex fraud, where a joint submission on sentencing is submitted, all material relied upon and the minutes of any meetings between the parties and any correspondence must accompany the agreement.⁶¹ The agreement is lodged as part of the court records.⁶² The judge may accept or disregard the agreement. If rejected, the judge may direct that a Newton hearing be held to determine the proper basis on which sentence should be passed.⁶³

Incidence and the effect on early guilty pleas

- 4.36 The Ministry of Justice (UK) does not record pleas of guilty that are to *alternative* charges separately from all pleas of guilty received (this may include a plea to the original charge/s or a plea to some but not all of the charges).⁶⁴ Published statistics can, however, give an indication of use, especially regarding late plea negotiations.
- 4.37 **Measuring negotiation activity close to trial:** The Ministry of Justice publishes the number of "cracked trials", that is trials that are resolved on the first day/s of trial. In the Crown Court there has been a recent decline in cracked trials – from 45% of all trials in 2010 to 36% in the first quarter of 2013. The main reason for cracked trials during the first quarter of 2013 was defendants entering a late guilty plea (63% of all cracked trials). The prosecution accepting a plea of guilty to an alternative charge accounted for 18% (3,205) of all reasons for cracked trials.⁶⁵ So, it can be deduced that some form of late negotiation occurred in 3,205 indictable matters in the first quarter of 2013.
- 4.38 **Rise in guilty pleas:** The number of guilty pleas sharply increased from 56% of all matters in 2001 to approximately 70% in 2008, and it has remained steady since that time. The Ministry attributes the encouragement of early negotiations, among other things, to the rise in guilty pleas.⁶⁶
- 4.39 The available data is limited and does not directly respond to the questions in point: To what extent are plea negotiations used in criminal matters? Are plea negotiations successfully attaining early appropriate guilty pleas? However, the available data does show an increase in effective trials (trials that run), a corresponding decrease in cracked trials, and a steady increase in the rate of guilty pleas, which has been connected to plea negotiations.

60. Consolidated Criminal Practice Direction IV.45.11(f); Or 7 days prior in cases of serious or complex fraud: Consolidated Criminal Practice Direction IV.45.20.

61. *Attorney General's Guidance on the Acceptance of Pleas in Cases of Serious or Complex Fraud (2009)* E4-E5.

62. A Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009).

63. The Consolidated Criminal Practice Direction IV.45.12 notes: "Any view formed by the prosecution on a proposed basis of plea is deemed to be conditional on the judge's acceptance of the basis of plea"; Also see *R v Underwood* [2004] EWCA Crim 2256 [2005] 1 Cr.App.R.(S.) 90.

64. See Ministry of Justice, *Court Statistics Quarterly Reports* (2013).

65. Ministry of Justice, *Court Statistics Quarterly Reports* (2013) 37.

66. Ministry of Justice, *Court Statistics Quarterly Reports* (2013) 38.

The Canadian Federal jurisdiction

- 4.40 In Canada, the *Federal Prosecution Service Bench Book* (the Bench Book) outlines the process that a federal prosecutor should adopt when undergoing plea negotiations, termed “resolution discussions”. It notes:

Though not defined in the *Criminal Code*, resolution discussions embrace several practices: which charges an accused may plead guilty to, how the case may proceed, what an appropriate sentence might be, what the facts of the offence are for the purposes of a guilty plea, and, if the case is to proceed to trial, how the issues might be narrowed so as to expedite the trial. Counsel are to make their best efforts to reach agreements on such issues as soon as possible. It must be emphasized, however, that any recommendations made to the court as part of a plea or sentence discussion are subject to the overriding discretion of the court to accept or reject any submission by counsel.⁶⁷

Comparing Canada to NSW

- 4.41 In the Canadian federal jurisdiction charge negotiations canvas a similar field as NSW. Counsel can agree to proceed summarily; reduce, withdraw or stay charges; amend the statement of facts,⁶⁸ and agree to stay certain counts and proceed on others, relying on the material facts that support the stayed charges as aggravating factors for sentencing purposes in a manner analogous to the NSW Form 1 option.⁶⁹ The Crown is to solicit the views of victims and investigating agencies, but the final responsibility for assessing the appropriateness of a plea agreement rests with Crown counsel.⁷⁰ Crown counsel must keep a record of any offers made or agreements reached.⁷¹
- 4.42 Prosecutorial discretion exceeds that available in NSW and includes agreeing to not proceed on a charge against others; agreeing to dispose of the case at a specified future date if, on record and in open court, the defendant is prepared to waive the right to a trial within a reasonable time; and agreeing to a waiver of charges from another jurisdiction.⁷² The prosecution is also able, in certain circumstances, to repudiate a plea agreement.⁷³ Importantly, the prosecution may incorporate sentencing outcomes into the agreement.

Incorporating certainty of sentence into plea negotiations

- 4.43 Crown counsels who conduct sentence negotiations have full authority to enter into binding agreements.⁷⁴ In the Canadian federal jurisdiction, this may include:

67. The Federal Prosecution Service Bench Book: See <<http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch20.html>>.

68. The Federal Prosecution Service Bench Book, 20.3.4.

69. The Federal Prosecution Service Bench Book, 20.3.1.

70. The Federal Prosecution Service Bench Book, 20.3.8.1.

71. The Federal Prosecution Service Bench Book, 20.2; 20.3.7.

72. The Federal Prosecution Service Bench Book, 20.3.2.

73. *R v Nixon* 2011 SCC 34. In NSW this may be done with leave of the court. See *Maxwell v The Queen* (1996) 184 CLR 501.

74. The Federal Prosecution Service Bench Book, 20.3.3.

- The prosecution undertaking to recommend a sentence range or a specific sentence.
- An agreement to submit to the court a joint recommendation by the prosecution and defence for a range of sentences or a specific sentence.
- An undertaking by the prosecution not to oppose a sentence recommendation by defence counsel which has been disclosed in advance.
- An agreement by the prosecution not to seek additional optional sentencing measures (but this cannot occur where measures apply by operation of the law).
- An agreement by the prosecution not to seek more severe punishment.
- An agreement by the prosecution not to oppose the imposition of an intermittent sentence rather than a continuous sentence.
- An agreement as to the types of conditions to be imposed on a conditional sentence.

Court oversight and review

- 4.44 Judges are not bound by recommendations on sentence,⁷⁵ and a sentencing judge may reject a joint sentencing recommendation, but must give “clear and cogent reasons” for rejecting it.⁷⁶ To maintain the utility of plea bargaining, it is reported that judges usually impose a sentence within range of the joint submission.⁷⁷
- 4.45 The reluctance to reject joint sentencing submissions was highlighted by the Alberta Court of Appeal’s statements of principle concerning joint-sentencing submissions. In *R. v. G.W.C. (2000)*,⁷⁸ the Court articulated the view that trial courts should be reluctant to undermine the plea bargaining process by rejecting a joint sentencing submission that has been agreed upon by both Crown and defence counsel. Justice Berger stated that

[T]he obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court’s role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence.⁷⁹

75. Cf *R v F (J.K)* 2005 Carswell Ont 816, 195 O.A.C. 141 (Ont C.A.) where the Court of Appeal for Ontario held that where a judge imposes a sentence greater than that recommended by the Crown “without an adequate evidential foundation” that judge commits a sentencing error in principle. Reviewed by K Chasse, “The Triumph of Plea Bargaining” (2011) 85 *Criminal Reports* 29.

76. A Linds, “A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v Nixon*” (2012) 38 *Queens Law Journal* 297, 307.

77. A Linds, “A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after *R v Nixon*” (2012) 38 *Queens Law Journal* 297.

78. *R. v. G.W.C.*, [2000] ABCA 333 (Alta. C.A.).

79. S N Verdun-Jones and A A Yijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Reform* (Policy Centre for Victim Issues: Research Statistics Division, 2002) 23.

- 4.46 Judges in Canada also have a role in the development of plea bargains. Pre-trial conferences, which involve the judge overseeing and advising on matters in dispute, are now an “entrenched step in most criminal proceedings” and often produce a plea agreement from the parties.⁸⁰

Incidence and effect on early guilty pleas

- 4.47 The Adult Criminal Court Statistics in Canada 2011/12 notes that the “extent to which plea negotiations are utilized in Canada is unknown”⁸¹ and there is no published data which connects guilty pleas with plea agreements in Canada. It is reported, however, to be a generally accepted notion that across Canada about 90% of indictable criminal matters are resolved via a guilty plea, and that a majority of these involved plea negotiations.⁸²

The USA Federal jurisdiction

- 4.48 Plea agreements in the USA federal jurisdiction are overseen by numerous rules, policy documents and guidelines including the *Federal Rules of Criminal Procedure*⁸³ (the Rules); the *Sentencing Guidelines*; *Office of Attorney General Memorandum on Department Policy on Charging and Sentencing*,⁸⁴ and the *Principles of Federal Prosecution*⁸⁵ (the Principles).
- 4.49 Plea agreements are contractual in nature and disputes are determined by objective standards. Unlike Canada, government promises that are part of the inducement to plead must be fulfilled. Courts recognise that the government ordinarily has advantages in bargaining power and hold the government to a higher degree of responsibility than the defendant.⁸⁶
- 4.50 A plea agreement will generally contain:
- An outline of the jurisdiction in which the agreement is valid.
 - An outline of the defendant’s obligations, such as to appear before the court to plead guilty to the charge at the first available opportunity; to not contest the facts as laid out in the agreement; abide by the agreement; and make any restitution.

80. A Linds, “A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after R v Nixon” (2012) 38 *Queens Law Journal* 297, 306: The Federal Prosecution Service Bench Book, 20.3.5. See Chapter 5.

81. See: <<http://www.statcan.gc.ca/pub/85-002-x/2012001/article/11646-eng.htm>>.

82. S N Verdun-Jones and A A Yijerino, *Victim Participation in the Plea Negotiation Process in Canada: A Review of the Literature and Four Models for Reform* (Policy Centre for Victim Issues: Research Statistics Division, 2002); A Linds, “A Deal Breaker: Prosecutorial Discretion to Repudiate Plea Agreements after R v Nixon” (2012) 38 *Queens Law Journal* 297, 304.

83. The Federal Rules of Criminal Procedure, r 11.

84. May 19, 2010.

85. USA Attorney’s Manual, Chapter 7, [400]-[650]. There are also rules of professional conduct that oversee disclosure requirements: See E.P Mazur, “Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor’s Role as a Minister of Justice” (2002) *Duke Law Journal* 51, 1333, 1334.

86. DT Shannon, “Making your deal with the Devil: Plea agreements under the Federal Rules, Federal Sentencing Guidelines, and Department of Justice policies” (2007) Federal Public Defender, Arizona, 9-10.

- An outline of the government’s obligations, such as the agreed recommended sentence range, and an agreement not to further prosecute against an itemised list of the charges dropped.
- The statutory maximum sentence/s for the offence charged.
- An outline of the constitutional or other rights waived by the agreement.
- An advisement that the agreement forms part of the record of the guilty plea hearing.
- An appendix containing the relevant facts.

4.51 Plea agreements are generally understood to cover two categories: Charge and sentence bargaining.⁸⁷ Sometimes a plea agreement is a combination of both charge and sentence bargaining.⁸⁸ The prosecution may also decide not to prosecute⁸⁹ or to negotiate in return for assistance in a criminal matter.

Comparing the USA to NSW

4.52 Similar to NSW, charge bargaining enables the prosecution to dismiss counts in favour of a lesser offence⁹⁰ in exchange for a plea.⁹¹ This is commonly referred to as an 11(e)(1)(A) agreement, or an “A” agreement. Judges are not permitted to participate in charge bargaining.⁹²

4.53 In the USA, the prosecution is encouraged to enter into charge negotiations before indictment (analogous to committal in NSW), where the most serious readily provable offence should be charged. Charge bargaining can occur after indictment if there has been a change in the case that affects the strength of the indictment.⁹³

4.54 Unlike NSW, the court is not bound to accept a plea agreement derived from charge bargaining, and can accept the agreement, reject it, or defer a decision until the court has reviewed the pre-sentence report.⁹⁴ If the court rejects the agreement the court must then on record in open court:

- inform the parties that the court rejects the plea agreement⁹⁵

87. B Boss & NL Angarella, “Negotiating Federal Plea Agreements Post-Booker: Same as it Ever Was?” (2006) *Criminal Justice* 22, 23.

88. Principles of Federal Prosecution, 9-27.400 [USAM 9-27.400].

89. Where it is impossible or impractical to employ alternative methods to secure necessary information or other assistance in which the person is willing to cooperate only in return for an agreement not to be prosecuted, the Principles enable an authorised prosecutor to do so when there are no other means and there is a strong public interest in cooperation over prosecution. In these circumstances, the government’s commitment not to prosecute is limited to the pending charge or a specific offence then known. The Principles urge “extreme caution” against providing blanket immunity. A detailed written record of the agreement must be lodged: USAM 9-27.600; USAM 9-27.630; USAM 9-26.650.

90. Federal Rules of Criminal Procedure, r 11 (c)(1)(A).

91. USAM 9-27.400.

92. *US v Daigle*, 63 F.3d 346 (5th Cir. 1995); *US v Casallas*, 59 F 3d 1173 (11th Cir. 1995).

93. USAM 9-27.400.

94. Federal Rules of Criminal Procedure, r 11 (c)(3)(A).

95. Federal Rules of Criminal Procedure, r 11 (c)(5)(A).

- advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea,⁹⁶ and
 - advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favourably toward the defendant than the plea agreement contemplated.⁹⁷
- 4.55 The defendant may then withdraw the plea. Pleas can be withdrawn before the court accepts the plea, for any reason or no reason.⁹⁸ Pleas can also be withdrawn after the court accepts the plea, but before it imposes sentence if:⁹⁹
- the court rejects a plea agreement,¹⁰⁰ or
 - the defendant can show a fair and just reason for requesting the withdrawal.¹⁰¹
- 4.56 After the court imposes a sentence, the defendant may not withdraw a plea of guilty,¹⁰² and the plea may be set aside only on direct appeal or collateral attack.¹⁰³

Incorporating certainty of sentence into plea negotiations

- 4.57 Under sentence bargaining, the prosecution may make one of two recommendations to the court. First, the prosecution can agree to recommend a sentence range or not to oppose the defendant's request that a particular sentence or sentence range be appropriate, or that Sentencing Guidelines or a particular factor does or does not apply.¹⁰⁴ This agreement is referred to as a 11(e)(1)(B) agreement, or a "B" agreement. The request is non-binding on the court, and the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.¹⁰⁵
- 4.58 Second, the prosecution may offer to agree that a specific sentence or sentencing range is the appropriate disposition of the matter or that a particular provision or factor should not apply. This request binds the court once the court accepts the plea agreement.¹⁰⁶ This agreement is referred to as a 11(e)(1)(C) agreement, or a "C" agreement. If the court rejects this agreement, the court must follow the same process as para [4.54] above.

96. Federal Rules of Criminal Procedure, r 11 (c)(5)(B).

97. Federal Rules of Criminal Procedure, r 11 (c)(5)(C).

98. Federal Rules of Criminal Procedure, r 11 (d)(1).

99. Federal Rules of Criminal Procedure, r 11 (d)(2).

100. Federal Rules of Criminal Procedure, r 11 (d)(2)(A).

101. Federal Rules of Criminal Procedure, r 11 (d)(2)(B).

102. Or *nolo contendere*.

103. Federal Rules of Criminal Procedure, r 11 (e).

104. Federal Rules of Criminal Procedure, r 11 (c)(1)(B).

105. Federal Rules of Criminal Procedure, r 11 (c)(3)(B).

106. Federal Rules of Criminal Procedure, r 11 (c)(1)(C), r 11 (c)(3)(A), r 11(4). This practice has been criticised because judges are not required to review the presentencing report prior to approving a plea agreement. Once accepted, the stipulated sentence within the agreement cannot be changed. See NJ King, "Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment" (2005) 58 *Stanford Law Review* 293.

- 4.59 The prosecution can agree to recommend the low end of a guideline sentence, or the prosecution can agree to depart from the guidelines.¹⁰⁷ This may occur where the defendant provided substantial assistance in the investigation or prosecution of another.¹⁰⁸

Court oversight and review

- 4.60 As judges must approve agreements, all plea agreements must be disclosed in open court¹⁰⁹ and filed with the court.¹¹⁰ Plea agreements are generally available to the public, online or within the courthouse. Plea agreements may be closed to the public where the defendant aided the prosecution's case and the defendant may be endangered by public access to this information.

Incidence and the effect on early guilty pleas

- 4.61 Federal convictions make up about 6% of all convictions in the USA.¹¹¹
- 4.62 **Number of Federal trials held:** There has been a sharp decrease in the number of federal trials held in the USA. In 2010, of all criminal defendants convicted in US District Courts, only 2.5% underwent a trial. In 2000, this was 10%, and in 1990 it was 13%. In 1980, 19% of all criminal defendants convicted underwent a trial.¹¹² The decrease in court activity has been widely attributed to the adoption of plea bargaining in almost every Federal case.¹¹³
- 4.63 **Proportion of guilty pleas:** Of convictions in the Federal jurisdiction in 2012, 97% were concluded via a guilty plea.¹¹⁴ The percentage of guilty pleas drawn from plea agreements has been estimated to be between 90-95%.¹¹⁵ It is, however, unknown exactly how many matters were resolved by way of plea agreements. For example, in contradiction of the estimated figure, in 2012 the United States Sentencing Commission reported that a written plea agreement was received by the courts in approximately 73% of all convicted matters.¹¹⁶
- 4.64 **Measuring the number of early guilty pleas:** The United States Sentencing Commission tracks sentences that fall outside of the Sentence Guideline. The Sentence Guideline is not the only consideration for the sentencing court, but it

107. USAM 9-27.400.

108. USAM 9-27.400; the Sentencing Guidelines, s 5K1.1.

109. Federal Rules of Criminal Procedure, r 11(c)(1).

110. USAM 9-27.450.

111. See: US Department of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2009* (December 2011) Table 14.

112. See the Albany University Source Book of Criminal Justice Statistics at <<http://www.albany.edu/sourcebook/pdf/t5222010.pdf>>.

113. Bureau of Justice Assistance, *Plea and Charge Bargaining: Research Summary* (January 24, 2011).

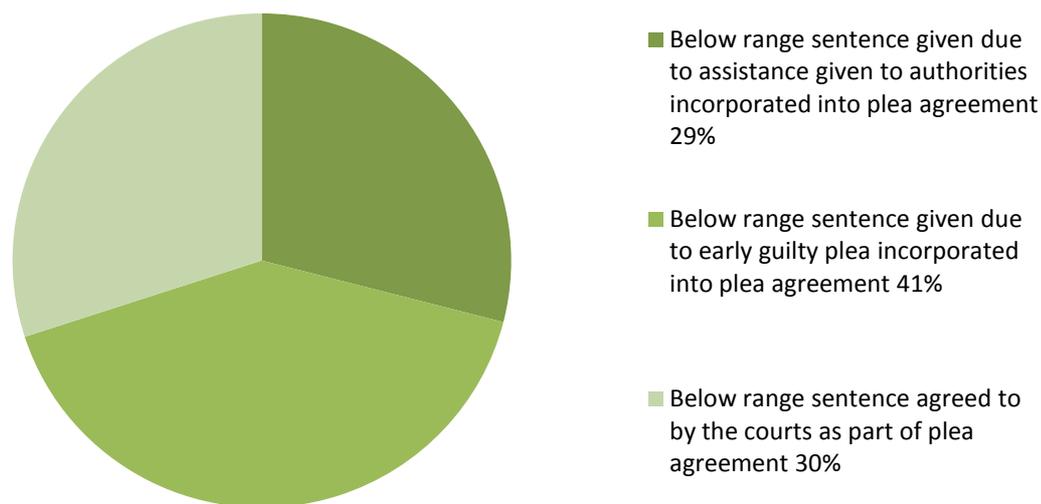
114. See: US Department of Justice, Bureau of Justice Statistics, *Federal Justice Statistics 2009* (December 2011) Table 7; US Sentencing Commission, *Final Quarterly Data Report* (2012) Table 22.

115. Bureau of Justice Assistance, *Plea and Charge Bargaining: Research Summary* (2011) 1.

116. 61 648 plea agreements were submitted: US Sentencing Commission, *Final Quarterly Data Report* (2012) Table 27.

remains authoritative.¹¹⁷ Sentences may fall below the Guideline range where a person has given substantial assistance to an investigation or gave an early plea. In 2012, 22987 matters were sentenced below range of the Sentence Guideline pursuant to a plea agreement. Of these, 41% received a sentence lower than the guidelines specifically due to the early submission of a plea.¹¹⁸ Early disposition matters had a median percent decrease from the guideline minimum of 34% (approx 8 months).¹¹⁹

Figure 4.2: Plea agreements resulting in disposition below the Sentencing Guidelines



Source: US Sentencing Commission, *Final Quarterly Data Report (2012)*

The key criticisms of plea negotiations

- 4.65 Using plea negotiations to exact an early resolution in criminal proceedings has garnered criticism across jurisdictions. Critics point out that a system of plea negotiation excludes the public and victim from the process, and that the “principle of efficiency suppresses other central values, such as the presumption of innocence, public trial and fair labelling”.¹²⁰ Other concerns include:
- 4.66 **The practice of plea negotiation is inconsistent with open and transparent justice:** Plea agreements are understood to develop “behind closed doors”, and lack the transparency and public scrutiny of a trial.¹²¹ For this reason, the practice of

117. *United States v. Booker*, 543 U.S. 220 (2005); B Boss, NL Angarella, “Negotiating Federal Plea Agreements Post-Booker: Same as it ever Was?” (2006) *Criminal Justice* 22, 22-27.

118. US Sentencing Commission, *Final Quarterly Data Report (2012)* Table 6.

119. US Sentencing Commission, *Final Quarterly Data Report (2012)* Table 8.

120. R Rauxloh, “Plea Bargaining in National and International Law” (Routledge 2012) 3.

121. A Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009).

charge negotiation has been described as occurring under a “veil of secrecy”,¹²² which produces unease regarding whether justice is done or seen to be done.¹²³

- 4.67 As observed by Commonwealth Assistant DPP, Mr Paul Shaw, the opaque nature of plea negotiation can generate inconsistent outcomes for offenders charged with similar offences.¹²⁴
- 4.68 **Accused people who engage in successful plea negotiations benefit twice:** Victims’ groups and commentators have noted that people who plead guilty early as part of a plea agreement effectively receive a double discount. They plead guilty to a lesser charge and, if they plead early, receive a sentence discount of up to 25% on the already reduced charge. There is concern that this could have a negative effect upon deterrence.¹²⁵ There are also concerns that repeat offenders, who are familiar with the system and benefits of plea agreements, are more likely to engage in and accept plea negotiations.¹²⁶
- 4.69 **Plea negotiations are asymmetrical:** Defendants who go to a defended trial are more likely to receive harsher sentences than those who accept a plea for comparable offences. This is especially so in the USA.¹²⁷ It is argued that the greater the gap between the two sentencing outcomes (at plea or at trial) the more dangerous and coercive plea bargaining practices become,¹²⁸ especially as it may result in innocent people pleading guilty.¹²⁹

The attributes of the plea negotiation models

- 4.70 The approaches of the UK, USA and Canada produce three key points of departure from NSW relevant to early guilty pleas. First, the overseas models have introduced, to varying degrees, policies and procedures to ensure that the process of plea negotiation is transparent. Transparency aids the legitimacy of the practice and can provide consistent outcomes. Secondly, all jurisdictions have greater prosecutorial discretion regarding the substance of the agreement, particularly agreements on sentence. Finally, judicial oversight and review regarding the content and effect of plea agreements occurs across the jurisdictions. Court review may ameliorate some of the concerns regarding the coercive powers of the prosecution in plea negotiations.

122. A Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009).

123. ABC radio, “Deals outside the Courtroom” (September 2012) <<http://www.abc.net.au/radionational/programs/lawreport/plea-negotiation/4239626>>.

124. Mr Paul Shaw, *Preliminary Submission PEGP03*.

125. Sentencing Council of NSW, *Reduction in Penalties at Sentence* (2009) [6.6].

126. Bureau of Justice Assistance, *Plea and Charge Bargaining: Research Summary* (2011) 2.

127. A phenomenon titled the “trial penalty”.

128. K Chasse, “Plea Bargaining is Sentencing” (2009) *Canadian Criminal Law Review* 55, 1.

129. L E Dervan and V A Edkins “The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem” (2013) 103 *The Journal of Criminal Law and Criminology* 1, 1-7. The authors note “It is unclear how many of the more than 96% of defendants who are convicted through pleas of guilt each year are actually innocent of the charged offences, but it is clear that plea bargaining has an innocence problem”.

Table 4.1: Plea negotiation comparative table

Jurisdiction	Prosecutorial Guidelines	Statutory rules that prescribe conduct in negotiations	Court oversight of negotiations	Court review of agreement	Charge bargaining	Sentence bargaining	Sentence indication
NSW	✓				✓		
England and Wales	✓		✓	✓	✓		✓
Canada	✓		✓	✓	✓	✓	
USA	✓	✓	✓	✓	✓	✓	

Increased accountability

- 4.71 In NSW, plea negotiations often constitute an informal exchange between the prosecution and defence. Written agreements are not on the public record. Accordingly, the number of matters resolved by negotiation is not able to be substantiated, and terms of agreements are not open to public scrutiny. This “veil of secrecy”¹³⁰ undermines public faith in the justice system and could be producing inconsistent outcomes for similar offences.¹³¹
- 4.72 Other jurisdictions have increased transparency and accountability throughout the process:
- **Statutory rules to plea negotiations:** In NSW, there are no statutory rules that prescribe the conduct of plea negotiations, though the detailed DPP Guidelines are issued pursuant to statute.¹³² The USA has developed statutory rules that oversee conduct within plea negotiations; the content and form of plea agreements; and court submission of agreements.
 - **Filing plea agreements in the court:** With the exception of filing an s 35 certificate, NSW has no requirement to submit or file a written plea agreement in the court. In Canada, the prosecution is encouraged to present the proposal to the trial judge in open court and on the record.¹³³ In the UK and the USA the sentencing judge reviews and may reject the terms of the agreement.
 - **Public access to the signed agreement:** Unlike published judgments, the terms of plea agreements are not publicly accessible in NSW. In the USA, the

130. A Flynn, *Secret Deals and Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* (PhD Thesis, Monash University, 2009).

131. Mr Peter Shaw, *Preliminary Submission PEG03*.

132. *Director of Public Prosecutions Act 1986* (NSW) s 13.

133. The Federal Prosecution Service Bench Book 20.3.8.1.

content of a plea bargain is generally available for public viewing either at the courthouse or online.¹³⁴

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?

Sentence bargaining

- 4.73 In NSW, charge negotiations omit explicit negotiations on sentence and the High Court has found that any undertaking by the prosecution as to sentencing will not bind the court.¹³⁵
- 4.74 Incorporating a prosecutorial discretion to negotiate regarding sentence in the course of plea negotiations has occurred in other jurisdictions, and includes:
- The prosecution agreeing not to disagree with the defendant's proposal of sentence, on the understanding that the defendant's 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.
- 4.75 The ODPP maintains that prosecutors should be able to negotiate the quantum and type of a sentence, whether custodial or non-custodial. It noted that negotiation on sentence would not be appropriate for all offence types but that:
- [I]f the agreement is accepted by the court, it would cut back on the number of reports that are prepared for sentencing and the costs associated with those reports. It would be a more effective incentive than the advice given concerning a discount on sentence, because of the inherent illusoriness of a discount on sentence.¹³⁶
- 4.76 In England and Wales the defendant is able to seek a sentence indication prior to agreeing to a guilty plea. The High Court observed in *Gas* that an accused in NSW currently makes a decision to plead guilty without any "foreknowledge of the sentence that will be imposed".¹³⁷

134. See <<http://www.pacer.gov/>>. Each District Court has an independent policy regarding public access to plea agreements, and courthouse and online plea agreements may be made available on a case-by-case approach: B Westly, *Secret Justice: Online Access to Plea Agreements* (The Reporters Committee for Freedom of the Press, 2010).

135. *GAS v The Queen* (2004) 217 CLR 198 at [27]–[32]; *Ahmad v R* [2006] NSWCCA 177 [23]–[26].

136. The Office of the Director of Public Prosecutions, *Submission PEGP06*, 8.

137. Although the decision to plead guilty will often be made in light of professional advice as to what might reasonably be expected to happen: *GAS v The Queen* (2004) 217 CLR 198 [29].

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?

Court oversight and review

- 4.77 In NSW, a judge does not participate in charge bargaining. A judge cannot revise the terms of a plea agreement, and generally sentences on the agreed facts and charge. Judicial involvement in charge negotiations is limited to the ability to reject a count on a Form 1.
- 4.78 In the presented models, prior to a plea agreement:
- A judge can be invited to adjudicate on issues in dispute that are preventing the plea agreement from progressing; and
 - A defendant can request a sentence indication from the judge.
- 4.79 In the presented models, judicial review of a plea agreement can include:
- A judge refusing to adopt a sentence recommendation; and
 - A judge refusing to accept the terms of a plea agreement.
- 4.80 Judicial intervention to progress a stalled matter has received stakeholder support.¹³⁸ The ODPP also supports prosecutorial submissions on sentence, with the court having discretion to reject the recommendation.¹³⁹

Question 4.3

Should the courts supervise/scrutinise plea agreements?

138. Mr Peter Shaw, *Preliminary Submission PEG03*.

139. The Office of the Director of Public Prosecutions, *Preliminary Submission PEGP06*, 7.

5. Case Conferencing

In brief

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. NSW trialled case conferencing schemes from 2006-2012; however these were discontinued following a review which suggested they were not increasing the rate of early guilty pleas. This chapter considers three different approaches to criminal case conferencing in other jurisdictions and asks whether NSW should consider re-introducing a modified case conferencing program.

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What is case conferencing?

- 5.1 Criminal case conferencing aims to assist the resolution of matters by facilitating discussion between the defence and prosecution. Unlike the fluidity of charge negotiations,¹ case conferencing gives structure to the discussions between the parties.² This may be because a conference is guided by a judge or mediator, or because the topics to be canvassed during a conference are provided by legislation.
- 5.2 The case conferencing process varies significantly between jurisdictions. It can be compulsory or voluntary; it can be attended by the parties only or managed by a third party; it may involve only legal counsel or require the attendance of the accused; and it can occur at one or various stages of criminal proceedings.

1. See Chapter 4.

2. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 99.

- 5.3 Most case conferencing models, however, share similar features. They are non-binding, confidential and operate without prejudice. Case conferencing is generally not intended to replace other elements of the pre-trial case management process, such as committal or directions hearings. Instead, case conferencing is designed to complement these procedures and increase their effectiveness.
- 5.4 Case conferencing is often paired with other procedural initiatives designed to encourage early pleas of guilty and reduce trial delay, such as:
- Early disclosure requirements
 - Case management programs, including specialised court lists (known as differential case management)
 - The “fast tracking” of cases for sentencing following an early guilty plea, and
 - Sentence discounting.

Case conferencing in NSW (2006-2012)

- 5.5 Criminal Case Conferencing (CCC) for indictable proceedings was first introduced in the NSW Local Court in 2006 as a court led initiative.³ The process was later legislated and expanded by the *Criminal Case Conferencing Trial Act 2008*. A BOCSAR review of CCC in 2010 found that the legislative program was having little positive impact, and the *Criminal Case Conferencing Trial Act 2008* was repealed in 2012.

How criminal case conferencing operated

- 5.6 CCC was intended to bring forward plea negotiations and encourage early guilty pleas where appropriate. It operated as an informal discussion between the prosecution and defence prior to committal, to be held out of court and without the assistance of an independent third party. The CCC structure was designed to solve problems leading to late resolution of a matter, such as the late finalisation of the prosecution’s evidence, at an earlier stage in the criminal process.⁴
- 5.7 Under the *Criminal Case Conferencing Trial Act 2008*, CCC was compulsory for indictable matters heard in Sydney and was designed to occur between the prosecution and defence prior to committal.
- 5.8 The key elements of CCC were as follows:
- Prior to the conference, the ODPP was required to serve the brief and disclosure certificate on the defence.
 - The conference was attended by an officer of the ODPP and the legal representative of the accused.

3. The Local Court of NSW, Practice Note 5 of 2005.

4. NSW, *Parliamentary Debates*, Legislative Council, 2 April 2008, 6243.

- At the conference, the parties would consider the evidence, the prospects of the case, and any material facts in agreement.
 - Following the conference, the prosecution would sign and tender to court a compulsory conference certificate.
 - Where the conference resulted in a guilty plea, a sentence discount applied. A guilty plea entered before committal proceedings received a 25% reduction of sentence, while a plea received after committal received a 12.5% reduction in sentence.
- 5.9 Though CCC was intended to be compulsory, a conference would not occur if:
- the offence carried a sentence of life imprisonment
 - the accused had no legal representation
 - the prosecution was not conducted by the ODPP, or
 - a Magistrate otherwise ordered that the CCC process should be dispensed with.⁵

Evaluation of case conferencing in NSW

- 5.10 In 2010, the Bureau of Crime Statistics and Research (BOCSAR) released a review of CCC, which concluded that the CCC trial was not meeting its objective of increasing the rate of early guilty pleas.⁶ The trial was measured by asking:

Was there any reduction in trial case registrations from the Central and Downing Centre Local Courts to the Sydney District Court?

A. There was an estimated reduction of 23 trials in the year following the introduction of the CCC trial.

Was there any increase in the proportion of sentencing case registrations from the Central and Downing Centre Local Courts to the Sydney District Court?

A. Any increase in sentencing case registrations was not statistically significant.

Was there any increase in the proportion of committal trials from the Central and Downing Centre Local Courts to the Sydney District Court that actually proceed to trial?

A. The study period was not long enough to establish any significant increase.

Was there any decrease in the number of cases where the accused changes his or her plea on or about the first day of trial?

A. Some cases had not been finalised, so any decrease could not be confirmed.

5. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 92.

6. Y W Wan, C Jones, S Moffat and D Weatherburn, *The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court* (NSW Bureau of Crime Statistics and Research, 2010).

- 5.11 BOCSAR concluded that any effect the trial had on encouraging early guilty pleas was “very subtle”.
- 5.12 In discussion, 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. Secondly, the trial may not have been implemented consistently enough to influence the outcomes being measured. Thirdly, scepticism regarding the promise of significant sentence discounts for plea of guilty may have persisted.

Case conferencing in other jurisdictions

- 5.13 Below we assess three jurisdictions that have adopted case conferencing. First, we review the Supreme Court of Western Australia’s Voluntary Criminal Case Conferencing program, where two retired judges act as “mediators” to resolve the issues in dispute at the pre or post-committal stage. Secondly, we assess the judge-led facilitation conferences in Quebec, which enable the parties to remove themselves from the adversarial process at any point in the pre-trial process. Finally, we consider case conferencing models that have been trialled in Victoria. We ask if any of these models are appropriate for application in NSW.

Western Australia

- 5.14 Western Australia has operated a voluntary criminal case conferencing program (VCCC) in the Supreme Court since 2006. It aims to reduce the length of criminal proceedings, and remove the need for trial by facilitating early guilty pleas.⁷ VCCC was introduced as part of a package of reforms that were implemented from 2004, including early disclosure requirements and the establishment of a case management body, the Stirling Gardens Magistrates Court, in 2007.
- 5.15 VCCC comprises an informal discussion between the parties that takes place within the Supreme Court and is overseen by a retired judge. VCCC is available for all matters heard in the Supreme Court of Western Australia. It is not supported by legislation, but is enforced in accordance with the Supreme Court of Western Australia’s governing Protocol for Voluntary Criminal Case Conferencing.⁸

Key attributes

- 5.16 Like the case conferencing trial in NSW, VCCC is designed to facilitate communication regarding appropriate or alternative pleas, the factual issues in dispute and the presentation of evidence.⁹ The prosecution and defence must

7. Supreme Court of Western Australia, *Criminal Case Conferencing* <www.supremecourt.wa.gov.au/C/criminal_case_conferencing.aspx>.

8. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.

9. R Mazza, “Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia” *AJJA Criminal Justice Conference* (2011) 5.

comply with the disclosure requirements contained in the *Criminal Procedure Act 2004 (WA)* prior to undertaking VCCC.¹⁰

- 5.17 VCCC differs from the NSW case conferencing model in a number of respects:
- **Voluntary:** unlike the compulsory approach of the NSW legislative trial, VCCC is a strictly voluntary procedure, and requires mutual consent.¹¹ VCCC has however become established as an “accepted part of the criminal trial process in the Supreme Court”.¹²
 - **Flexible:** case conferencing in NSW occurred prior to committal; the VCCC 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. Upon the first appearance of an accused in the Supreme Court, the parties are asked if they wish to proceed to case conferencing. Alternatively, an accused can opt to undergo VCCC at any time prior to the trial by directing a request to the judge presiding over the criminal list.¹³
 - **Facilitated:** rather than allowing conferences to be guided by the parties, two retired District Court judges function as conference “facilitators”. The facilitators may conduct the conferences alone or in partnership.¹⁴
 - **Limited application:** VCCC only operates in the WA Supreme Court. It is a small-scale project affecting a small number of matters (see below).

The Stirling Gardens Magistrates Court

- 5.18 The Stirling Gardens Magistrates Court was created in 2007 as a case management body sitting within the Supreme Court. It works in tandem with VCCC by managing criminal matters that come to the Supreme Court and offering case conferencing to the parties. The court, consisting of two magistrates, operates to reduce delay by streamlining committal/disclosure proceedings,¹⁵ facilitating the transfer of cases between jurisdictions, and providing case management for all Supreme Court indictable matters. This includes matters originating outside of Perth, which are managed by the Stirling Gardens Magistrates Court through use of video link at regional prisons or court houses.¹⁶
- 5.19 Where the accused pleads not guilty upon his or her first appearance at the Stirling Gardens Magistrates Court, the magistrate manages the case by scheduling further

10. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.

11. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.

12. R Mazza, “Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia” *AJJA Criminal Justice Conference* (2011) 5.

13. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.

14. Supreme Court of Western Australia, *Protocol for Voluntary Criminal Case Conferencing* <www.supremecourt.wa.gov.au/P/protocol_for_voluntary_criminal_case_conferencing.aspx>.

15. See Chapter 7.

16. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 44.

court appearances, including listing the case for trial, and ensuring disclosure in accordance with the *Criminal Procedure Act 2004 (WA)*.¹⁷ As part of the case management process, the parties are encouraged to undertake VCCC. Generally, the period of time between an accused's first appearance and the trial date is under six months.¹⁸

Judge-led facilitation

- 5.20 A key feature of the VCCC process is its use of retired District Court judges as conference "facilitators". Due to their experience in criminal law, the facilitators can operate more effectively in guiding the parties to clarify the issues in dispute and assessing the strength of the evidence.
- 5.21 Retired judges are employed for two key reasons. First, owing to the disclosure requirements under the *Criminal Procedure Act 2004 (WA)*, the mediators are briefed in considerable detail prior to the conference. Ex-judges are familiar with complex case material and are able to assess the viability of each case and encourage agreement between the parties. Second, the status of the mediators as experienced members of the judiciary lends the program credibility and respect among the legal profession.¹⁹

Incidence and effect on early guilty pleas

- 5.22 The combined effect of the reforms instituted in WA has been a "process of change whereby the defence and the prosecution share more information and share it earlier in the process."²⁰ VCCC and early disclosure are complementary measures used to enforce the disclosure requirements of the *Criminal Procedure Act 2004 (WA)*. VCCC is used primarily where disclosure procedures have not been followed by the prosecution, or where the parties otherwise experience communication problems.²¹
- 5.23 Since the official VCCC scheme commenced in 2007, there has been a notable reduction of delay in matters within the criminal jurisdiction of the Supreme Court:
- Between 2007 and 2011, the median trial delay in criminal matters fell from 33 weeks to 22.5 weeks.²² This improvement has been attributed to the combined operation of VCCC and the Magistrates Court Stirling Gardens.²³

17. R Mazza, "Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia" *AJJA Criminal Justice Conference* (2011) 6.

18. Supreme Court of Western Australia, *Magistrates Court Stirling Gardens* <www.supremecourt.wa.gov.au/M/magistrates_court_stirling_gardens.aspx>.

19. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 43.

20. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 45.

21. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 46.

22. Supreme Court of Western Australia, *Annual Review* (2011) 16.

23. Department of the Attorney General of Western Australia, *Annual Report 2010/11*, 89. See also *Annual Report 2009/10*, 84 which states that the improvement in time to trial is "primarily due" to VCCC and the Magistrates Court Stirling Gardens.

- Between 2007 and 2011, the number of cases that proceeded to trial fell from 47 to 30 per year.²⁴
 - Between 2007 and 2011, the median number of criminal matters in backlog fell from 34 to 19.²⁵
 - In 2010-11, 62% of defendants who underwent VCCC pleaded guilty before the trial date.²⁶
- 5.24 Chief Justice Wayne Martin of the WA Supreme Court has observed that the VCCC program “continues to achieve success in resolving cases without need for trial, or reducing the length of trial required.”²⁷ Consequently, the response of the local legal profession to the reforms has been “universally positive”, and the VCCC process and Stirling Gardens Magistrates Courts are “considered successes”.²⁸

Quebec

- 5.25 Criminal case conferencing was first introduced in 2004 as an optional alternative dispute resolution program in the Court of Quebec, Superior Court, and Court of Appeal. The Courts of Quebec offer either “facilitation” or “management” conferences. The aim of the conferencing process is to avoid procedural delay, identify the key issues, and achieve a “partial or definitive resolution” of the dispute.²⁹ The conferences take the form of voluntary, confidential discussions between counsels, and are led by specially trained judges, rather than private mediators.
- 5.26 Case conferencing operates through use of two separate processes:
- **Facilitation conferences** are designed to encourage communication between the parties and resolution of the matter, particularly in relation to plea bargaining and sentencing.³⁰ The term “facilitation” refers to the fact that “criminal mediation is oriented more toward *facilitating* exchanges between the parties than necessarily finding a solution to the dispute.”³¹
 - **Management conferences** are designed to encourage the prompt and efficient resolution of the matter.³² During the process, a judge assists the parties to

24. Supreme Court of Western Australia, *Annual Review* (2011) 15.

25. R Mazza, “Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia” *AJJA Criminal Justice Conference* (2011) 7.

26. R Mazza, “Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia” *AJJA Criminal Justice Conference* (2011) 7.

27. W Martin, “The State of Justice: The Truth about Crime and Sentencing” *Law Week Opening Address* (2008) 19.

28. R Mazza, “Pre-Committal Procedures and Voluntary Criminal Case Conferencing in Western Australia” *AJJA Criminal Justice Conference* (2011) 5.

29. Rules of the Court of Appeal of Quebec in Criminal Matters, (SI/2006-142), Part 1(1).

30. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 56, 66.

31. JJM Robert, *Judges as Mediators in Criminal Matters: the Canadian Experience* (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006) 8-9.

32. JJM Robert, L Lemieux, and G Gagnon, *Establishment of a Pilot Program in Criminal Matters* (2004).

delimit the issues, review the available evidence, and achieve faster methods of concluding the matter.³³

Management conferences resemble direction hearings in Australian jurisdictions, rather than the case conferencing models under discussion. Consequently, facilitation conferencing is the focus of this discussion.

5.27 Facilitation conferencing has been formalised in legislation for the Court of Appeal.³⁴ Though the Court of Quebec, Superior Court, and Court of Appeal follow separate procedural rules, there are multiple similarities between their facilitation conferencing programs:

- They take the form of a voluntary mediation whereby the parties request a judge to mediate discussion and “facilitate the attainment of a solution”.³⁵
- They aim to “resolve” rather than “manage” a criminal matter.³⁶
- The accused is not involved in the conference.³⁷
- Unlike other conferencing models, facilitation conferences are designed to stand outside the adversarial process as a mode of alternative dispute resolution unconnected with the criminal litigation. This means that facilitation conferences operate “an opportunity to withdraw – voluntarily and temporarily – from the formal adversarial process”.³⁸ If key issues remain unresolved after conferencing, the matter proceeds to trial.³⁹
- Since facilitation conferences are not part of the adversarial legal system, the two streams of dispute resolution remain separate. Facilitation conference files are kept separate from other court documents and are shredded after use.⁴⁰ If the matter does not settle during mediation, the presiding judge-mediator is excluded from hearing the matter in court. The judge hearing the matter will not be informed that a criminal facilitation conference has occurred.⁴¹

33. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 56.

34. See the Rules of the Court of Appeal of Quebec in Criminal Matters, (SI/2006-142), Prt 8-9.

35. JJM Robert, L Lemieux, and G Gagnon, *Establishment of a Pilot Program in Criminal Matters* (2004).

36. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 56.

37. See for example *Rules of the Court of Appeal in Quebec in Criminal Matters* (SI/2006-142), Part 8 s 62.

38. JJM Robert, *Judges as Mediators in Criminal Matters: the Canadian Experience* (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006), 5.

39. Court of Quebec, *The Facilitation Conference in Criminal and Penal Matters* <http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_depliant_crim_ang.html>; Court of Appeal of Quebec, *Judicial Mediation: Service Program* <<http://www.tribunaux.qc.ca/c-appel/English/Altres/mediation/pamphlets/medpam.html>>.

40. JJM Robert, *Judges as Mediators in Criminal Matters: the Canadian Experience* (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006) 6.

41. Court of Quebec, *The Facilitation Conference in Criminal and Penal Matters: Operating Rules* <http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_CRACriminel_FonctionnementAng.html>.

Key attributes

- 5.28 Quebec's facilitation conferences share several features with the NSW CCC model. For example, under both systems the accused is not involved in the conference, and the facilitation conference is confidential and without prejudice to the court proceedings.⁴²
- 5.29 There are differences between the two systems, including:
- **Voluntary:** facilitation conferencing is voluntary, and only occurs once counsels contact one another and prepare and file a joint request for a facilitation conference.⁴³ Like VCCC in WA, the parties determine the scope of the conference and may revoke their consent at any time and return to the traditional criminal process.⁴⁴
 - **Flexible:** in Quebec, the conference will ideally occur following the preliminary inquiry, which operates in place of the committal hearing used in Australian jurisdictions. The conference may extend over a number of sessions and may be adjourned to allow the prosecution to make further inquiries.⁴⁵ Unlike NSW, where case conferences occurred prior to committal, a facilitation conference can occur at any point in the criminal process, including during the hearing of the matter, which may occur concurrently with facilitation conferencing.⁴⁶
 - **Managed:** facilitation conferences are mediated by a judge, who steps out of the court system to facilitate the conference. "Judge-mediators" are also used extensively in civil, commercial and family law matters in Quebec, and are required to undertake extensive training to ensure they are capable of switching from an "adjudicative" to a "facilitative" context.⁴⁷
 - **Review:** since the conference procedure occurs outside the adversarial criminal process, any agreement reached during the conference needs to be submitted to another judge or panel of judges for review. The court must provide reasons when confirming the parties' agreement so as to maintain the transparency of the legal process. The parties may also be required to file written submissions setting out their arguments in favour of the agreement.⁴⁸ The judge or panel of

42. *Rules of the Court of Appeal in Quebec in Criminal Matters* (SI/2006-142), Part 8 s 62-63.

43. *Rules of the Court of Appeal in Quebec in Criminal Matters* (SI/2006-142), Part 8 s 61. Court of Quebec, *The Facilitation Conference in Criminal and Penal Matters* <http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_depliant_crim_ang.html>.

44. L Otis and EH Reiter, "Mediation by Judges: a New Phenomenon in the Transformation of Justice" (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351, 352, 381.

45. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 60-61.

46. Court of Quebec, *The Facilitation Conference in Criminal and Penal Matters* <http://www.tribunaux.qc.ca/mjq_en/c-quebec/Modes_alternatifs_de_reglement_anglais/fs_depliant_crim_ang.html>; Court of Appeal of Quebec, *Judicial Mediation: Service Program* <<http://www.tribunaux.qc.ca/c-appel/English/Altres/mediation/pamphlets/medpam.html>>.

47. L Otis and EH Reiter, "Mediation by Judges: a New Phenomenon in the Transformation of Justice" (2006) 6(3) *Pepperdine Dispute Resolution Law Journal* 351, 367.

48. JJM Robert, "Judges as Mediators in Criminal Matters: the Canadian Experience" (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006) 9-10, 14.

judges are not required to accept the proposed agreement, though refusal to confirm the agreement is rare.⁴⁹

Incidence and effect on early guilty pleas

- 5.30 The limited application of Quebec's case conferencing program makes any assessment problematic. Since Quebec already has a strong and successful culture of plea negotiation, facilitation conferencing is intended not to replace plea bargaining, but to supplement the process where it has failed to produce a result. It is generally reserved for more complex cases or cases involving several accused people, known as "mega-process" cases.⁵⁰
- 5.31 There has been no review of facilitation conferencing, and since its usage and impact vary between the three courts, it is difficult to evaluate Quebec's criminal conferencing programs.⁵¹ For example, when conferencing was initially trialled in the Superior Court in 2004, the program reportedly "produced more than satisfactory results", with eight months of criminal facilitation saving the court an estimated 16 months' hearing time.⁵² However, consultations held in the Superior Court in 2009 indicated that facilitation conferences were infrequently used. As a result, the Superior Court has not incorporated facilitation conferencing into its rules of practice.
- 5.32 Anecdotal evidence has suggested that the program works more effectively in the Court of Appeal, possibly because criminal appeals involve a more defined set of issues, which simplifies the parties' discussions. However, even in the Court of Appeal the process has had only a limited impact. The court processes approximately 400 criminal appeals per annum, of which only an estimated 5% (20) request a conference. Among those 20 cases, it is expected that 15-16 will resolve the matter through the facilitation process. It is estimated that this saves the court two weeks of hearing time per year.⁵³

Victoria

- 5.33 Case conferencing has existed in various formats in Victoria since 1999 in the Magistrates, County, and Supreme Courts.
- **The Magistrates' Court** has been operating a "committal case conference" since 2004. The conference procedure was codified by the *Courts Legislation*

49. JJM Robert, *Judges as Mediators in Criminal Matters: the Canadian Experience* (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006) 10.

50. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 66, 73.

51. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 72.

52. JJM Robert, "Judges as Mediators in Criminal Matters: the Canadian Experience" (Conference of the International Society for the Reform of Criminal Law, Brisbane, 2-6 July 2006) 15.

53. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 73-74.

(*Jurisdiction*) Act 2006 (Vic), partly in order to increase efficiency by identifying early guilty pleas.⁵⁴

- **The County Court** used post-committal case conferences between 1999-2010 as part of its Case List Management System (CLMS). The aims of CLMS included increasing procedural efficiency and facilitating the early identification of guilty pleas.⁵⁵ In 2010, the program was replaced with a tiered system of directions hearings.
- **The Supreme Court** has offered pre-trial conferences in certain cases since 1999. These conferences are not intended to encourage early pleas of guilty, but rather “to facilitate an efficient trial”.⁵⁶

5.34 The case conferences held by the Magistrates’ Court are designed to facilitate early guilty pleas, and are the central focus of discussion. This section will first evaluate the committal case conferences held in the Magistrates’ Court, before considering case conferencing in the County Court.

Magistrates’ Court

5.35 The Magistrates’ Court has operated committal case conferences for indictable offences since July 2004.⁵⁷ This process was formalised by the *Criminal Procedure Act 2009* (Vic),⁵⁸ and operates as follows:

- A magistrate may direct the parties to a committal proceeding to participate in a committal case conference. When filing the Case Direction Notice as required by *Criminal Procedure Act 2009* (Vic) s 118, the parties must indicate whether they will proceed to a committal case conference. The Case Direction Notice form requires the parties to identify the issues to be addressed in conference.⁵⁹
- The committal case conference is presided over by a magistrate and should occur, where practicable, on the date of the committal mention hearing.
- The conference functions as a “management tool” to create an informal setting for discussion and identification of the key issues.⁶⁰
- All discussions during, or documents prepared for the purpose of the conference are privileged.⁶¹
- The magistrate may record details of the issues in dispute and any facts which the defence is prepared to admit, and may recommend to the trial court that a directions hearing is required.⁶²

54. Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006.

55. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 83-84.

56. *Supreme Court (Criminal Procedure) Rules 2008* (Vic) r 4.08.

57. Magistrates’ Court of Victoria, *Committal Case Conference Hearings Protocol*.

58. *Criminal Procedure Act 2009* (Vic) s 127.

59. Magistrates’ Court of Victoria, *Case Direction Notice Form* <<http://www.magistratescourt.vic.gov.au/sites/default/files/Default/Case-Direction-Notice-Form-32.pdf>>.

60. M Beazer, M Humphreys and L Fillipin, *Justice and Outcomes* (Oxford University Press, 2010) 390.

61. *Criminal Procedure Act 2009* (Vic) s 127.

- If an accused enters a plea following the committal case conference, the court will regard it as entered “at the earliest opportunity”. It therefore attracts a sentence discount in accordance with the utilitarian value of the plea.⁶³

Incidence and effect on early guilty pleas

5.36 Following the introduction of committal case conferencing, the Annual Reports of the Magistrates’ Court noted improvements in the early resolution of cases. Case conferencing has been variously described as “assisting in resolution” and “an effective means of bringing about early resolution and savings in hearing time”.⁶⁴ In 2006 the Court noted that “[r]esolution rates for matters which are the subject of Committal Case Conference continue to grow, which illustrates that this is an effective means of achieving early resolution and thus significant savings in hearing time.”⁶⁵

5.37 **Increase in guilty pleas:** the Victorian Office of Public Prosecutions (OPP) has recently recorded an increase in guilty pleas:

- In 2008-2009, 69% of cases were resolved by a guilty plea, of which 58.3% occurred pre-trial and 10.8% at trial.
- In 2009-2010, 71.8% of cases were resolved by a guilty plea, of which 60.4% occurred pre-trial and 11.4% at trial.
- In 2010-2011, 75.3% of cases were resolved by a guilty plea, of which 63.5% occurred pre-trial and 11.8% at trial.
- In 2011-2012, 73.8% of cases were resolved by a guilty plea, of which 61.7% occurred pre-trial and 12.1% at trial.

The majority of these pleas were reported as having been achieved in the Magistrates’ Court at the committal stage.⁶⁶

County Court (1999-2010)

5.38 In 1999, the County Court developed a Case List Management System (CLMS) for criminal matters. The aims of CLMS included facilitating implementation of the *Crimes (Criminal Trials) Act 1999* (Vic), and increasing procedural efficiency, including the early identification of guilty pleas.⁶⁷

5.39 The CLMS process included a case conference, which occurred in all cases where a plea was reserved at committal. The conference took place 10 weeks after the committal under the guidance of the Listing Judge. The aim of the case conference was to determine whether the matter was to proceed by way of trial or plea by

62. Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure*, Report (1999).

63. See e.g. *DPP v Klein* [2012] VCC 899 [14]. See Chapter 9.

64. Magistrates’ Court of Victoria, *Annual Report 2005-2006*, 16, 22, 25

65. Magistrates’ Court of Victoria, *Annual Report 2005-2006*, 25.

66. Office of Public Prosecution Victoria, *Annual Report 2010-2011* 13, 88.

67. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 83-84.

encouraging “full, frank and informed discussion” between the parties. The County Court released Practice Note 1 of 1999 to consolidate the case conference procedure.⁶⁸

5.40 Dr Fiona Hanlon reviews the early implementation of CLMS in her 2010 study of case conferencing, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* Hanlon’s research indicates that case conferencing was used “intensively” following its introduction to the County Court in 1999-2001, achieving positive outcomes:

- In 1999-2000, 230 accused persons underwent case conferencing; of these, 53% pleaded guilty following the case conference.
- In 2000-2001, where the accused reserved his or her plea, case conferencing was resolving 60% of cases. Where the accused had pleaded not guilty, case conferencing was resolving 40% of cases.
- As a result of the broader implementation of CLMS, there was an overall pre-trial resolution of 50% for all contested matters, which constituted a 15% improvement on the resolution rate prior to CLMS.
- The overall rate of guilty pleas entered at trial dropped from 36% pre-CLMS to 20%.

Hanlon concludes that the conferencing process was achieving its aim of resulting in early identification of guilty pleas.⁶⁹

5.41 The statistics offered by the OPP’s Annual Reports also support an overall improvement in early guilty pleas from 1999-2003. In 1998-1999, 59% of cases were resolved by a pre-trial guilty plea; by 2001-2002, this figure had increased to 68%.⁷⁰

5.42 Practice Note 1 of 1999 was retired by Practice Note 2 of 2010, which was introduced following the *Criminal Procedure Act 2009* (Vic). Practice Note 2 of 2010 replaced case conferencing with a tiered system of directions hearings.⁷¹ Victorian legal academic Dr Asher Flynn suggests that CLMS was disbanded as it may have become ineffective for several reasons:

- **Increase in workload:** workloads in the County Court increased, creating problems with effective judicial management.
- **Decrease in participation:** judges stopped reading the brief of evidence or preparing for case conferencing. As a result, the conference procedure no longer constituted a genuine attempt to settle the matter and instead was being used to simply set a trial date.

68. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 85.

69. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 88-89.

70. Office of Public Prosecution Victoria, *Annual Report 2001-2002*, 21.

71. County Court of Victoria, Practice Note No. 2 of 2010 (PCNR 2-2010).

- **Legal Aid Fee Structure:** Legal Aid grants were structured so that there was a significant difference between fees paid to Legal Aid counsel for attendance and preparation of pre-trial proceedings and fees paid for trial proceedings.⁷²

Re-introduction of Case Conferencing in NSW?

5.43 Preliminary submissions indicate ongoing support for case conferencing in NSW from stakeholders.

5.44 Legal Aid NSW questioned the BOCSAR finding that CCC had failed to meet its aim of increasing early guilty pleas:

During the years of CCC ... there were fewer committals for trial and more committals for sentence in comparison to respective periods before and after abolition. Therefore, more early pleas of guilty at the committal stage than before or after CCC.

Importantly it is observed that the trial backlog increased by 50% in just over 12 months since the abolition of CCC.⁷³

5.45 The ODPP's preliminary submission also suggested that the CCC trial should be reconsidered, since the relatively brief length of the trial may have been insufficient to shift established practice:

In relation to CCC the ODPP's assessment was that there was an improvement in the early plea rate and a change in culture was emerging. In our submission CCC was regrettably terminated before it reached its potential and achieved its objectives.⁷⁴

5.46 The NSW Bar Association also advocated reconsidering case conferencing:

Wherever possible, judges and magistrates should encourage the parties to reach agreement about an appropriate guilty plea. This can be done through appropriate judicial intervention in case management contexts including through the court's encouragement of case conferencing ...

In some cases it may be appropriate for the parties to engage in mediation. ... Alternative dispute resolution procedures are now tried and tested in most civil litigation contexts. There is no reason why they could not work in a criminal case to enable the facilitation of pleas of guilty to appropriate charges with appropriate agreed facts. Indeed, the courts could formalise such a mediation process in appropriate cases through Practice Notes, guidelines and judicial encouragement.⁷⁵

5.47 The views represented by these submissions have been iterated by stakeholders in the majority of consultations held on this reference.

72. A Flynn, "Victoria's Legal Aid Funding Structure: Hindering the Ideals Inherent to the Pre-trial process" (2010) 34, *Criminal Law Journal* 48, 51, 54.

73. Legal Aid NSW, *Preliminary Submission PEGP04*, 6.

74. Office of the Director of Public Prosecutions, *Preliminary Submission PEGP06*, 3.

75. NSW Bar Association, *Preliminary Submission PEGP08*, 3.

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?

6. Fast-track schemes

In brief

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. The schemes aim to streamline the case management of these matters and to encourage early pleas by prescribing that the maximum sentence discount be given to fast-tracked matters. This chapter canvasses the Early Guilty Plea Scheme in the UK and the fast-track procedure of WA, and asks whether NSW would benefit from a similar program of case management.

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What are fast-track schemes?

- 6.1 Fast-track schemes aim to encourage defendants who are likely to plead guilty late in the criminal process to plead guilty while the indictable matter is still in the Local Court. Under fast-track schemes, a matter where the defendant pleads guilty in the lower court is directed to a specialised sentence hearing, which usually combines arraignment and sentencing. Matters that enter this early guilty plea stream will usually qualify for the highest available sentence discount.

UK: The Early Guilty Plea Scheme

- 6.2 The Early Guilty Plea Scheme (EGPS) is a judicially led initiative designed to facilitate the early disposition of guilty pleas in the Crown Court.¹ The scheme has three facets:

1. See Practice Note, Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol (March 2012).

1. It creates a mechanism for the early identification of cases where the defendant is likely to plead guilty, and permits a magistrate to order a person whose matter is identified to enter into the early guilty plea stream.
 2. It provides for a distinct early sentencing hearing, which combines arraignment and sentencing in the Crown Court.
 3. It creates a presumption that the hearing is “the first available opportunity” the defendant has to plead, meaning that offenders who participate in the scheme will generally receive the maximum sentence discount.²
- 6.3 The scheme does not attempt to replace pleas received before venue or in the Magistrates’ Court. Instead, it aims to provide a practical way to encourage defendants who may plead at or just before trial, to plead earlier in the Crown Court.³
- 6.4 The first EGPS was implemented in the Liverpool Crown Court in 2010. A pilot scheme running across four Crown Courts followed in 2011. Since April 2013 all Crown Courts have had an EGPS in place.
- 6.5 Below we provide a concise overview of the scheme.

How does the EGPS operate?

- 6.6 The EGPS operates within the current legislative framework via practice notes developed across Crown Court localities. There are variations in the procedures adopted by the courts, but some key elements remain constant.

Early Identification

- 6.7 The scheme allows the Crown Prosecution Service (CPS) and defence to identify indictable matters where a guilty plea is likely. Cases are determined based on the advocates’ experience and judgement, as well as with regard to:
- The strength of the evidence (including corroboration by reliable witnesses and police).
 - Admissions.
 - Partial admissions (which may result in amended charges or basis of plea).
 - Other evidence (e.g. CCTV, medical evidence etc).
 - Information from the defence as to plea.

2. As prescribed by the Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007).

3. Practice Note, Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol (March 2012).

- 6.8 The CPS is generally responsible for identifying indictable or “either way” (matters that can be heard summarily or on indictment) cases appropriate for the EGPS,⁴ and for requesting at the first hearing that the Magistrate send the case to an early guilty plea hearing (EGPH). A defendant can also request an EGP, and defence advocates have a duty to ensure that only appropriate pleas are put to the court.⁵
- 6.9 The Magistrate can list the case even when the defendant does not agree to the EGP. When this occurs, the Magistrate will send the matter to an EGP and the defence can write to the court and prosecution within a set time to state that a guilty plea will be entered at the EGP or to request the hearing be cancelled.⁶ Defendants have a right to opt out of the scheme at any time if they feel a guilty plea is no longer likely.⁷
- 6.10 On cases that are identified, the prosecution need only to serve the “initial details of the prosecution case”. This is the same level of disclosure required for a first hearing in the Magistrates’ Court, and includes key evidence and initial disclosures sufficient to facilitate the expedited disposal of cases.⁸ The timeliness of disclosure and service is tightly governed and there are rules governing the content of notifications by the prosecution or defence that are prescribed in the practice notes of each court.

The fast-tracked hearing

- 6.11 The EGP can take place at a dedicated EGP or within a preliminary hearing, where a defendant enters a guilty plea. Where possible, the hearing can encompass both arraignment and sentencing. The aim is to circumvent the process where a defendant likely to plead would have otherwise undergone arraignment, possible adjournments, and have had a trial date set.⁹
- 6.12 Prior to this system, a person who had entered a plea of guilty would be directed to a preliminary hearing or a Plea and Case Management Hearing,¹⁰ which would then be adjourned for sentencing. Under the EGPS, cases are generally disposed of a number of weeks sooner than in non-EGP case areas.¹¹

Applying the sentencing discount

- 6.13 Unless satisfied that it would be contrary to the interests of justice to do so, courts are compelled to follow the *Reduction in sentence for a guilty plea guideline*

4. The CPS review of a case must occur within 72 hours of the Allocation hearing (see Chapter 6) in the Magistrates’ Court: Directors Guidance on the Preparation of Crown Court Casework (September 2012) 4.

5. Information supplied by the Crown Prosecution Service (03 July 2013).

6. See Wood Green Crown Court, *Early guilty plea scheme: Protocol* (July 2012).

7. Information supplied by the Crown Prosecution Service (03 July 2013).

8. Directors Guidance on the Preparation of Crown Court Casework (September 2012). See also Chapter 7.

9. Practice Note, *Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol* (March 2012).

10. See Appendix A for an overview of criminal procedure in the UK.

11. Information supplied by the Crown Prosecution Service (03 July 2013).

produced by the Sentencing Council.¹² The plea guideline stipulates that a plea submitted at the “first available opportunity” is to receive a discount of one third of the sentence. The various practice notes - and the crux of the scheme – prescribe that the EGPH is to be presumed the “first available opportunity”, and, with some exceptions, the maximum discount is to be given to a plea entered at this time.¹³

- 6.14 The discount for a guilty plea decreases on a sliding scale the further into the process that the plea is entered.¹⁴

EGPS and the abolition of committals

- 6.15 In 2001, England and Wales abolished committals for all strictly indictable offences, replacing committals with a “sending up” procedure. As of mid-2013, all Magistrates’ Courts in the UK no longer commit applicable either way offences to the Crown Court. Instead the role of the Magistrates’ Court is to allocate (the process of “Allocation”) either way offences to be tried in the Crown or Magistrates’ Court with regard to whether, if the defendant is convicted, the powers of punishment that the Magistrates’ Court has is sufficient to deal with the offence. This process is further discussed in Chapter 7.
- 6.16 The EGPS intentionally coincided with the abolition of committals for either way offences. The early identification procedure serves a dual purpose, with the prosecution reviewing matters both for EGPS and Allocation. EGPS assists with the process of Allocation by providing an early CPS Crown Advocate Review to ensure that venue decisions are reviewed and that cases which proceed to the Crown Court are appropriate in charge and seriousness for that venue.¹⁵

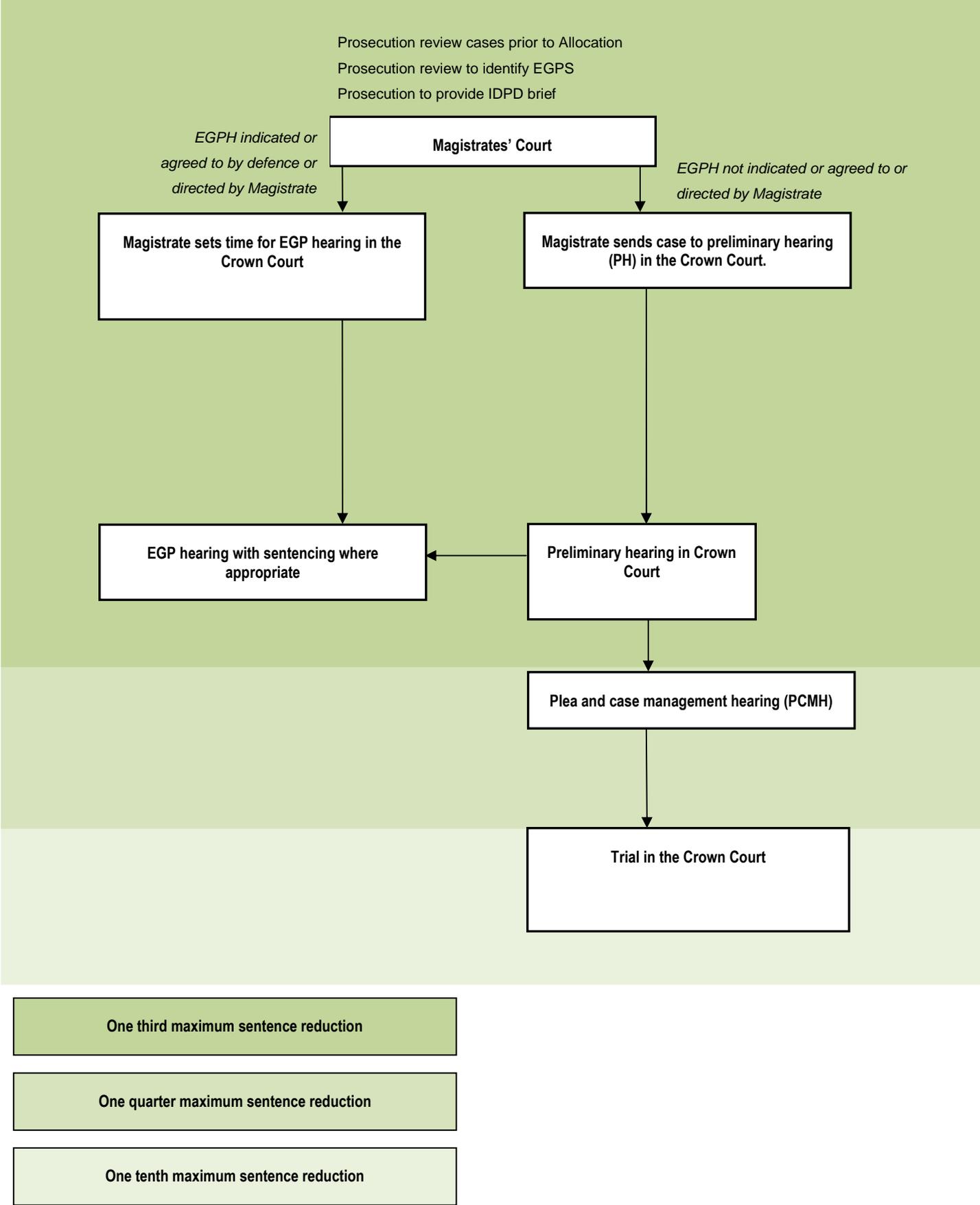
12. *Coroners and Justices Act 2009* (UK) s 125.

13. This is subject to exceptions: it can be reduced to 20% where the prosecution case is overwhelming; and reduced to 30% on an offence triable either way where no plea was indicated at the Magistrates’ court. To obtain the maximum reduction a defendant must request the Magistrates’ court to fix an EGP hearing or agree to a prosecution request for an EGP hearing see Practice Note Guide, *Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol* (March 2012) 7.

14. See figure 6.1 below.

15. Information supplied by the Crown Prosecution Service (03 July 2013). Also see the *Directors Guidance on the Preparation of Crown Court Casework* (September 2012).

Figure 5.1: The Early Guilty Plea Scheme



What are the key objectives of the EGPS?

- 6.17 The EGPS was developed to encourage the defendant to plead guilty in the Crown Court at the first reasonable opportunity and to be sentenced at the same time.¹⁶ This fulfils various objectives including to:
- **Decrease the amount of time and resources required for case preparation.** A case identified for EGPS only needs to be prepared “in a manner proportionate to the plea anticipated”.¹⁷
 - **Increase early communication between the prosecution and the defence.** The scheme requires discussion between the prosecution and the defence before the EGPH takes place. The EGPS requires work to be completed by the CPS and defence earlier than in non-EGPS Crown court cases. This “front ending” means that disclosure and reports such as probation reports occur before the hearing commences. Email communication is encouraged.
 - **Decrease the number of guilty pleas occurring “on the door of the court”.** By providing a clear opportunity and incentive for this group to plead earlier, EGPS aims to mitigate late guilty pleas.¹⁸ Any plea received at or before the EGPH is presumed to have occurred at the first available opportunity and attracts the highest sentence discount for entering a plea.¹⁹ Sentencing discounts diminish the further along the criminal process that a plea is entered, to a one-tenth reduction for a plea at the door of the court.²⁰
 - **Increase court efficiencies.** Where appropriate, arraignment and sentencing occur together at an EGPH.

Crown Prosecution Service evaluation of EGPS

- 6.18 We understand that the scheme has had positive results on the number of “cracked trials”. We are awaiting further information from the CPS

Key criticisms of the EGPS

- 6.19 **Pressuring more people to plead guilty:** Legal commentators have foreseen this to be especially prominent where a person with a low income cannot afford to pay for legal costs and is not eligible for Legal Aid.²¹ Under the EGPS, low income defendants can cut legal costs by fast-tracking their sentencing hearing.

16. Practice Note Guide, *Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol* (March 2012) 1.

17. Leeds Crown Court, “Early guilty plea scheme: Listing policy” (April 2012).

18. Practice Note Guide, *Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol* (March 2012) 1.

19. This is subject to exceptions, see footnote 13 above.

20. Practice Note Guide, *Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol* (March 2012) 6.

21. BBC News, “Efficiency savings force more guilty pleas, lawyer says” 28 October 2012.

- 6.20 **Victims denied expression in court:** Victims advocates have raised concern over the lack of victim participation when a case is fast tracked on the EGPS.²²

WA: fast-track procedure

- 6.21 WA has a “fast-track” procedure where defendants who plead guilty before committal proceedings are transferred to the District Court for sentencing. Defendant’s who take the fast-track stream generally attract a sentence discount of up to 25%.

How does the fast-track model operate?

- 6.22 A fast-track guilty plea to an indictable offence functions as follows:
- At first appearance in a court of summary jurisdiction, the prosecution should serve on the defendant a written statement of the material facts of each charge, a written notice of the existence of any confessional material, and notification of any criminal record.²³
 - If the defendant then pleads guilty to the charge, the magistrate will, without convicting the defendant, commit the defendant for sentencing to the District or Supreme Court.²⁴ The Magistrate may order a pre-sentence report at this time.²⁵ The prosecution may collect further evidence relevant to sentencing.²⁶
 - The defendant will be remanded to appear before the District or Supreme Court for sentencing within 6 weeks.²⁷
 - A sentence mention is then held, and 3 – 6 weeks later the sentencing hearing occurs.²⁸
 - At sentencing, a defendant who has pleaded guilty under the fast-track procedure is entitled to a sentence discount of up to 25% under s 9AA of the *Sentencing Act 1995 (WA)*.²⁹ The sentencing judge is to specify the extent of the discount awarded. The sentencing judge has discretion in granting the sentence discount, and errors in applying the discount are not generally valid grounds of appeal.³⁰

22. BBC News, “Efficiency savings force more guilty pleas, lawyer says” 28 October 2012. We note that the Victim’s Personal Statement remains an integral part of sentencing.

23. *Criminal Procedure Act 2004 (WA)* s 35(4).

24. *Criminal Procedure Act 2004 (WA)* s 41(3).

25. Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) 38.

26. The Office of the Director of Public Prosecutions (WA), *Annual Report* (2011/12) 14.

27. Practice Direction CRIM 2 (2008).

28. Circular to Practitioners CRIM 2008/3.

29. Prior to 2012, the sentencing discount under the common law was up to 35%: See *Moody v French* [2008] WASCA 67.

30. *Vagh v Western Australia* [2007] WASCA 17 [76].

Evaluation

- 6.23 The only publicly available evaluation of the fast-track procedures occurred 14 years ago. In 1999, the Working Group on Criminal Trial Procedure concluded that fast-tracking had been successful in increasing early guilty pleas and recommended the WA fast-track system for implementation in other Australian jurisdictions. The Working Group further suggested that a similar system should exist for defendants who plead not guilty, but do not require the provision of full documentary evidence.³¹
- 6.24 Comparisons between the WA and NT criminal justice systems reported by the Working Group pointed to how, in Western Australia, only 18% of defendants who entered the higher courts with a not guilty plea changed their plea to guilty, while 76% did so in the NT. In WA, 55% entered the higher court with a plea of guilty compared with 5% in the NT. The Working Group asserted that these figures “provide strong support for the efficacy of the Western Australian Fast Track Procedure which results in a public and significant discount.”³²

A fast-track system for NSW?

- 6.25 In NSW, a plea of guilty at or before committal will result in the offender being committed for sentence in the District Court. The offender will qualify for a sentence discount due to the utility of the early guilty plea, which *may* be up to 25%.³³ However, the NSW system has not developed a separate stream for cases which have been identified as likely to plead guilty. This type of program may have efficacy in NSW where 53% of defendants committed for trial end up pleading guilty, and 61% of these do so on the first day/s of trial.³⁴
- 6.26 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.

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?

31. Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) 39.

32. Standing Committee of Attorneys-General, *Working Group on Criminal Trial Procedure Report* (1999) 36.

33. See Chapter 9.

34. See Chapter 2.

Question 6.2

- 1) Should NSW adopt a program of differential case management?
- 2) If a program of differential case management were introduced
 - a) what categories could be created, and
 - b) how should each of these categories be managed?

7. Abolition of committal proceedings

In brief

Committal proceedings in NSW operate in indictable matters to test the evidence against a person prior to that person being committed for trial. To generate court efficiencies, and often in concert with other programs designed to bring about an early resolution of the matter, some jurisdictions have abolished committal proceedings and replaced them with administrative procedures. This chapter asks whether in the context of encouraging early guilty pleas, committals in NSW are necessary. It raises the issue whether committal proceedings might be replaced with a case management system.

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Committals in NSW

- 7.1 Committal proceedings occur in the Local Court when a person is charged with an indictable offence that is not to be heard summarily.¹ These proceedings are a generally understood as a non-judicial preliminary assessment of the evidence against the defendant to determine whether there is sufficient evidence to warrant the person being required to stand trial.²

1. *Criminal Procedure Act 1986* (NSW) Div 2.

2. *Criminal Procedure Act 1986* (NSW) s 3 (definition of "committal proceedings").

- 7.2 Committal proceedings provide an opportunity for early discharge³ and allow the defence, to a limited degree, to screen and test the evidence in appropriate cases.⁴ Committal proceedings are also the last indictable proceeding to occur in the Local Court, and provide a trigger for negotiations between the prosecution and defence,⁵ and for guilty pleas to be entered. Guilty pleas entered at or before committal are generally considered to be “early” guilty pleas⁶ and attract an appropriate discount at sentencing.⁷

Form of committals in NSW

- 7.3 Where a person pleads guilty to an indictable offence in the Local Court, and the plea is accepted by the magistrate,⁸ the court will commit the person for sentence.⁹
- 7.4 If a person pleads not guilty or does not enter a plea, the matter will proceed to a committal, where there are three options:
- **A full committal hearing:** A full committal hearing is preceded by s 91/93 applications.¹⁰ These applications relate to the attendance of witnesses,¹¹ whose written statements are to be tendered as evidence at the committal hearing. If granted, the witness is required to give oral evidence and may be questioned.¹²

After considering the prosecution evidence at a committal hearing, the magistrate must find that a jury, properly instructed, could find the defendant guilty beyond a reasonable doubt.¹³ If the magistrate does find this, then the defendant has an opportunity to answer the charge.¹⁴ When all the prosecution evidence and any defence evidence is taken, the magistrate must consider the whole of the evidence and determine whether there is a reasonable prospect that a jury, properly instructed, would convict the defendant of an indictable offence. If this is the opinion reached, the magistrate must commit the defendant for trial.¹⁵ Otherwise, the magistrate must order the defendant’s discharge.¹⁶ The Director of Public Prosecutions can file an *ex officio* indictment where a charge has been dismissed.

3. *Criminal Procedure Act 1986* (NSW) s 66.
4. *Grassby v The Queen* (1989) 168 CLR 1.
5. See Chapter 4.
6. The Office of the Director of Public Prosecutions Annual report defines early pleas in this way.
7. See Chapter 9.
8. *Criminal Procedure Act 1986* (NSW) s 100.
9. *Criminal Procedure Act 1986* (NSW) s 102.
10. *Criminal Procedure Act 1986* (NSW) s 91, s 93.
11. A victim in an offence involving violence is generally excluded from giving oral evidence at committal hearings: *Criminal Procedure Act 1986* (NSW) s 93, s 94.
12. *Criminal Procedure Act 1986* (NSW) s 74, s 91(1).
13. *Criminal Procedure Act 1986* (NSW) s 62.
14. *Criminal Procedure Act 1986* (NSW) s 63.
15. *Criminal Procedure Act 1986* (NSW) s 65(1).
16. *Criminal Procedure Act 1986* (NSW) s 66.

A defendant must attend all pre-committal hearings and the committal in person or by video link.¹⁷ There are rules for the committal of co-defendants.¹⁸

- **A paper hearing:** If no application is made for the attendance of a witness under s 91/93, the committal hearing proceeds with the tendering of the police brief of evidence by the prosecution. This is called a paper committal, the procedure is the same as a full committal hearing except that it is all done “on the papers”.

At a paper committal hearing, the magistrate reads the brief of evidence and makes a determination as to whether there is sufficient evidence for the matter to proceed to trial.

- **The defence agrees to waive committal:** This can occur if the defendant applies to waive a committal hearing and the prosecutor consents to this course of action.¹⁹

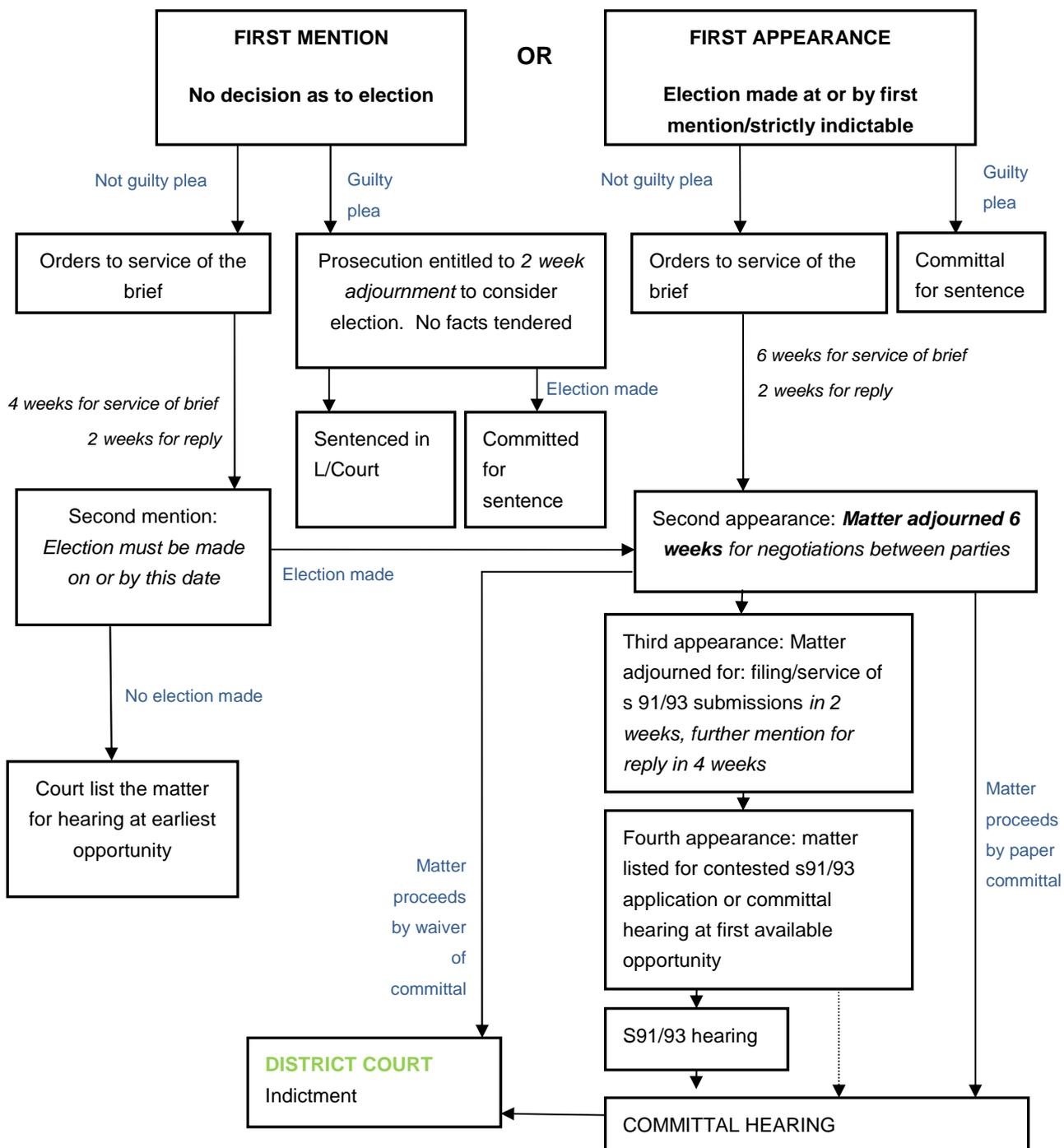
17. *Criminal Procedure Act 1986* (NSW) s 54(3A); Local Court of NSW, *Practice Note COMM 1* (2012) [10].

18. Local Court of NSW, *Practice Note COMM 1* (2012) [11].

19. *Criminal Procedure Act 1986* (NSW) s 68.

Figure 7.1 Committal proceedings in NSW

7.5 As per the Local Court of NSW Practice Note Crim 1²⁰ and the Local Court of NSW Practice Note Comm 1.²¹ Including election process.²²



20. Commenced 1 May 2012, amended 1 July 2012.

21. Commenced 1 May 2012.

22. *Criminal Procedure Act 1986* (NSW) s 260.

Incidence of committals in NSW

- 7.6 2110 matters were committed for trial in 2012. We do not know how many of these matters waived committal or were “on the papers”, although it has been estimated to us that only 15% of committals were full committal hearings.
- 7.7 The charts below illustrate that the majority of matters committed for trial do not result in a defended trial, instead a guilty plea is entered and the matter proceeds to sentencing.

Figure 7.2: Number of cases committed for trial or sentence in the District Court 2002-12

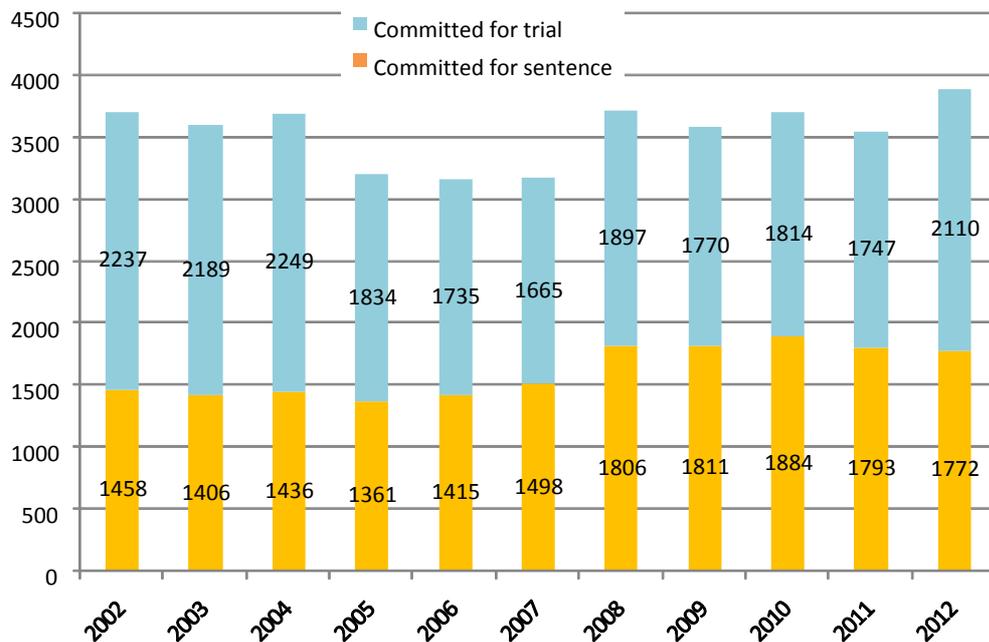
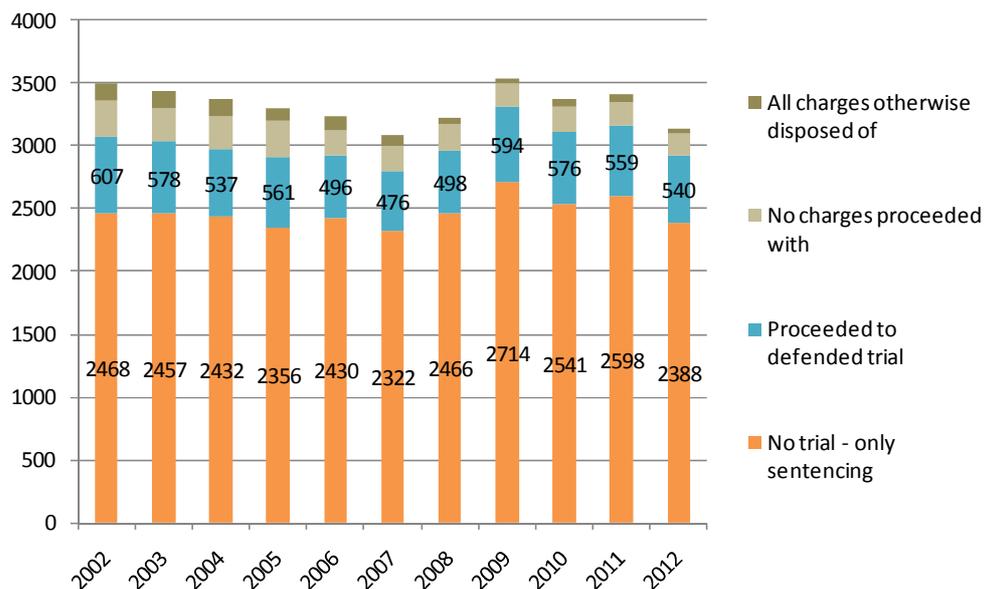


Figure 7.3: Method of finalisation of cases in the District Court 2002-12



Source: NSW Bureau of Crime Statistics and Research, Criminal Courts Statistics (2002-2012).

Abolition of Committals in England and Wales

- 7.8 In 2001, committals for indictable-only matters were abolished in England and Wales and replaced with a system that **sent** indictable matters automatically to the Crown Court.²³ As an accused in an indictable-only matter could not remain in the Magistrates' Court, it was rationalised that committals for this group were an expensive and inefficient use of key resources.
- 7.9 In 2012, for purposes of expediency,²⁴ committal hearings in the Magistrates' Court for "either-way" offences were abolished in stages.²⁵ (Either-way offences are matters that can be heard on indictment or summarily).²⁶ Before 2012, all either-way offences that were elected to be heard in the Crown Court were committed for trial. Committal could occur without consideration of the evidence with the consent of the parties²⁷ or, on application of the defence, the court could consider the evidence.²⁸
- 7.10 Since mid 2013, Magistrates' Courts in England and Wales no longer commit applicable either-way offences to the Crown Court. Instead the role of the Magistrates' Court is to **allocate** either-way offences to be tried in the Crown or Magistrates' Court. The determining factor is whether, if the defendant is convicted, the powers of punishment of the Magistrates' Court are sufficient to deal with the offence.

What is the jurisdiction of the Magistrates' Court?

- 7.11 The Magistrates' Court is presided over by a District judge in serious or complex matters, and by a bench of three magistrates in other matters. Magistrates/District judges can impose a sentence, generally of up to six months' imprisonment for a single offence (12 months in total), or a fine, generally of up to £5,000. The court can also impose a community sentence.²⁹
- 7.12 If the court decides that the sentence should exceed 6 months, then it can send a matter heard in the Magistrates' Court up to the Crown court for sentencing.³⁰

What criminal procedure replaced committals in "either-way" matters?

- 7.13 Either way offences that are to be heard on indictment are now **allocated** to the Crown Court. Allocation processes are:

23. *Crime and Disorder Act 1998* (UK) s 51, s 52.

24. See <<https://www.gov.uk/government/news/faster-justice-as-unnecessary-committal-hearings-are-abolished>>.

25. <<https://www.gov.uk/government/news/swifter-justice-as-more-committal-hearings-are-abolished>>.

26. See *Magistrates' Court Act 1980* (UK) s 20.

27. See the *Criminal Procedure Rules 2012* (UK) Pt 10.

28. The *Criminal Procedure Rules 2012* (UK) r 10.3: this also occurred where the accused was not legally represented.

29. *Magistrates' Court Act 1980* (UK) s 22.

30. For circumstances in which a magistrates court may or must commit a defendant to the Crown Court for sentence after the defendant has indicated an intention to plead guilty see the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 4, 6.

- **The court is to read the charge to the defendant and ask if the defendant intends to plead guilty.**³¹
- **If the defendant does plead guilty, then the court must treat that as a guilty plea and must sentence the defendant or send the defendant to the Crown Court for sentencing.** A defendant who pleads guilty is treated as if summarily convicted.³² This means the defendant will be sent to the Crown Court for sentencing only where the Magistrates' Court is of the opinion that the offence/s are so serious that greater punishment should be inflicted than the court has power to impose.³³
- **If the defendant does not indicate a guilty plea, the court is to determine whether the offence is more suitable to trial in the Magistrates' or Crown Court.**³⁴ When deciding whether an either way offence is more suitable for summary trial or trial on indictment, the court is to give the prosecutor and the accused the opportunity to make representations as to which court is more suitable for the conduct of the trial.³⁵ This includes the prosecution informing the court of any previous convictions of the defendant.³⁶

During charging or initial review, prosecutors are to identify cases considered not suitable for summary disposal. Prosecutors will only propose a Crown Court trial where the case is clearly not capable of being sentenced within the powers available to the Magistrates' Court.³⁷ In making these representations, prosecutors are to have regard to the *Definitive Guideline on Allocation* issued by the Sentencing Council for England and Wales.

The *Definitive Guideline on Allocation* prescribes that the court must have regard to:

- a) the nature of the case
- b) whether the circumstances make the offence one of a serious character, and
- c) any other circumstances which appear to the court to make the offence more suitable for it to be tried in one way rather than the other.

The court should assess the likely sentence in the light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence.³⁸

- **If the Court determines that the trial is suitable for the Crown Court, the defendant is to be "sent up".** There are no committal proceedings.

31. *Criminal Procedure Rules 2012* (UK) r 9.8.

32. *Criminal Procedure Rules 2012* (UK) r 9.9; L Waine, "The New Mode of Trial and Committal for Sentence Regimes" (2013) *Archbold Review* 7-9.

33. *Definitive Guideline on Allocation, 2; Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 3.

34. *Criminal Procedure Rules 2012* (UK) r 9.10.

35. *Magistrates' Courts Act 1980* (UK) s 19.

36. *Magistrates' Courts Act 1980* (UK) s 19.

37. *Directors Guidance on the Preparation of Crown Court Casework* (2012) 2.

38. *Definitive Guideline on Allocation, 2.*

- **If trial is to be in a Magistrates' court, the defendant is to be asked whether they consent to trial by the magistrate and, if so, are asked to plead guilty or not guilty.**
- **Before being asked to consent to trial, the defendant may ask the magistrate for a sentence indication as to whether a custodial or non-custodial sentence would be imposed if the defendant pleaded guilty.**³⁹ This sentence indication option is distinct from a "Goodyear" indication, where an advance indication of sentence would include the maximum sentence likely for the offence.⁴⁰ Here the advance indication is limited to sentence *type*.

If an indication is given, the defendant is to be asked whether he or she now intends to plead guilty. If the defendant does plead guilty, the Magistrates' Court is bound by the indication.⁴¹ If the defendant does not plead guilty, the indication does not stand, and cannot be the subject of any appeal.⁴²

- **If, after an advance indication of sentence, the defendant does not indicate an intention to plead guilty, the defendant is to be asked if he or she consents to a summary trial.**⁴³
- **If the defendant does not consent to a summary trial, the court will send the case up. If the defendant consents to a summary trial the case proceeds in the Magistrates' Court.** The prosecution may in these circumstances apply to the court before trial or any other summary proceedings for the matter to be sent up.⁴⁴

Prosecution disclosure

7.14 In either-way or summary matters, the prosecution is required to service the "initial details of the prosecution case" on the defendant and the court prior to the first hearing.⁴⁵ The "initial details" must include:

- A summary of the evidence on which the case will be based and/or any statements/documents or extracts setting out the facts or other matters on which the case will be based.
- The defendant's previous convictions.
- Appropriate forms.

7.15 The extent of evidence required in the "initial details of the prosecution case" is less than was required at committal. The primary intention underpinning the "initial

39. *Criminal Procedure Rules 2012* (UK) r 9.11(2)(d); *Magistrate's Court Act 1980* (UK) s 20(3). The court is not required to give an indication.

40. See Chapter 8.

41. A defendant may still be committed to the Crown Court under the *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 3A or where he or she has already been committed for related offences, and the Crown Court will not be bound by the indication: See L Waite, "The New Mode of Trial and Committal for Sentence Regimes" (2013) *Archbold Review* 7-9.

42. L Waite, "The New Mode of Trial and Committal for Sentence Regimes" (2013) *Archbold Review* 7-9.

43. *Magistrate's Court Act 1980* (UK) s 20(8), s 20(9).

44. *Criminal Procedure Rules 2012* (UK) r 9.12; *Magistrate's Court Act 1980* (UK) s 25.

45. *Criminal Procedure Rules 2012* (NSW) Pt 21.

details” requirement is to speed up the criminal justice system by ensuring there is enough evidence for an appropriate plea to be entered on the first hearing without disclosure requirements being too onerous.⁴⁶

- 7.16 The extent of the material to be served will thereafter depend on whether either of the parties requests an Early Guilty Plea Hearing⁴⁷ or whether the case is to proceed to a preliminary or Case Management Hearing (CMH).⁴⁸

What criminal procedure replaced committals in indictable matters?

- 7.17 If the case is indictable-only, the Magistrates’ Court will generally decide whether to grant bail, consider other legal issues such as reporting restrictions, and then send the case on to the Crown Court.⁴⁹ Indictable matters are **sent** to the Crown Court. The process for this is outlined in the *Criminal Procedure Rules 2012* (UK), which prescribes:⁵⁰

- The court must explain to the defendant the nature of the offence and that the offence is one for which the defendant must or may be sent to the Crown Court.
- The prosecutor and the defendant must make any representations regarding ancillary matters, including bail and directions for the management of the case in the Crown Court.
- The court must ask if the defendant is to enter a plea of guilty in the Crown Court and if “yes” make arrangements for the Crown Court to take a plea as soon as possible. If the defendant is not to enter a plea of guilty, the court must make arrangements for a Case Management Hearing or Preliminary Hearing in the Crown Court, and give any other ancillary directions.

- 7.18 There are two categories of either-way offences that can also be **sent** to the Crown Court, without need for allocation. These are matters involving allegations of serious or complex fraud⁵¹ and violent or sexual crime matters involving a child witness.⁵²

Relationship with early guilty pleas

- 7.19 The key objective underpinning the abolition of committals is to speed up the criminal process.⁵³ The allocation program is, however, also attached to the Early Guilty Plea Scheme. Allocation requires early case review by the prosecution. During the case review the prosecution must also identify cases appropriate for the Scheme. The Early Guilty Plea Scheme, and its relationship to allocation, is discussed in Chapter 6.

46. See < <http://www.hse.gov.uk/enforce/enforcementguide/pretrial/procedure-advance.htm#fn2>>.

47. See Chapter 6.

48. *Directors Guidance on the Preparation of Crown Court Casework* (2012). See Chapter 5 and Appendix A regarding preliminary hearings in the Crown Court.

49. *Crime and Disorder Act 1998* (UK) s 51.

50. *Criminal Procedure Rules 2012* (UK) r 9.7.

51. *Crime and Disorder Act 1998* (UK) s 51B.

52. *Crime and Disorder Act 1998* (UK) s 51C.

53. L Waine, “The New Mode of Trial and Committal for Sentence Regimes” (2013) *Archbold Review* 7-9.

Abolition of Committals in Western Australia

- 7.20 Committals were abolished in WA in 2002 following a 1999 report from the Law Reform Commission of Western Australia (LRCWA).⁵⁴ The report found committals to be costly and the cause of delay and unnecessary trauma for victims and witnesses.⁵⁵ The report found that the most important aspect of committal proceedings was that it facilitated prosecutorial disclosure. It considered that this aspect could be achieved in another way.⁵⁶

What criminal procedure replaced committals?

- 7.21 In keeping with the recommendations of the LRCWA report committals were replaced with:
- a “fast-track” sentencing procedure upon a guilty plea (this is discussed in Chapter 6)
 - a committal/disclosure hearing, and
 - an “administrative committal”.

Committal/disclosure hearing

- 7.22 A matter is adjourned to a committal/disclosure hearing where an accused pleads not guilty or does not enter a plea to an indictable offence. The prosecution has a time-limit set by the courts by which to fulfil disclosure requirements, which include:
- any confessional material relevant to the charge
 - any evidential material relevant to the charge,⁵⁷ and
 - any other prescribed document.
- 7.23 At the close of a committal/disclosure hearing the court must be satisfied that the prosecution has complied with the disclosure requirements.⁵⁸ If so, the court will require the defendant to plead to the charge, and commit the defendant for trial or sentence.⁵⁹ If not, the court will adjourn the charge to another hearing on a new date that allows reasonable time for the prosecutor to comply, and order the prosecutor to comply. If the prosecutor does not comply by the next hearing date, the court can dismiss the matter for “want of prosecution”.⁶⁰

54. The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia* (1999) Final Report.

55. *Criminal Law (Procedure) Amendment Act 2002* (WA).

56. See CJ A Kennedy, “Getting Serious About the Causes of Delay and Expense in the Criminal Justice System” (2006) *24th AIJA Annual Conference*, 2-3.

57. *Criminal Procedure Act 2004* (WA) s 42(5); Confessional and evidentiary materials are defined at *Criminal Procedure Act 2004* (WA) s 42(1).

58. *Criminal Procedure Act 2004* (WA) s 44(1).

59. *Criminal Procedure Act 2004* (WA) s 44(1)(a).

60. *Criminal Procedure Act 2004* (WA) s 44(1)(b)(iii).

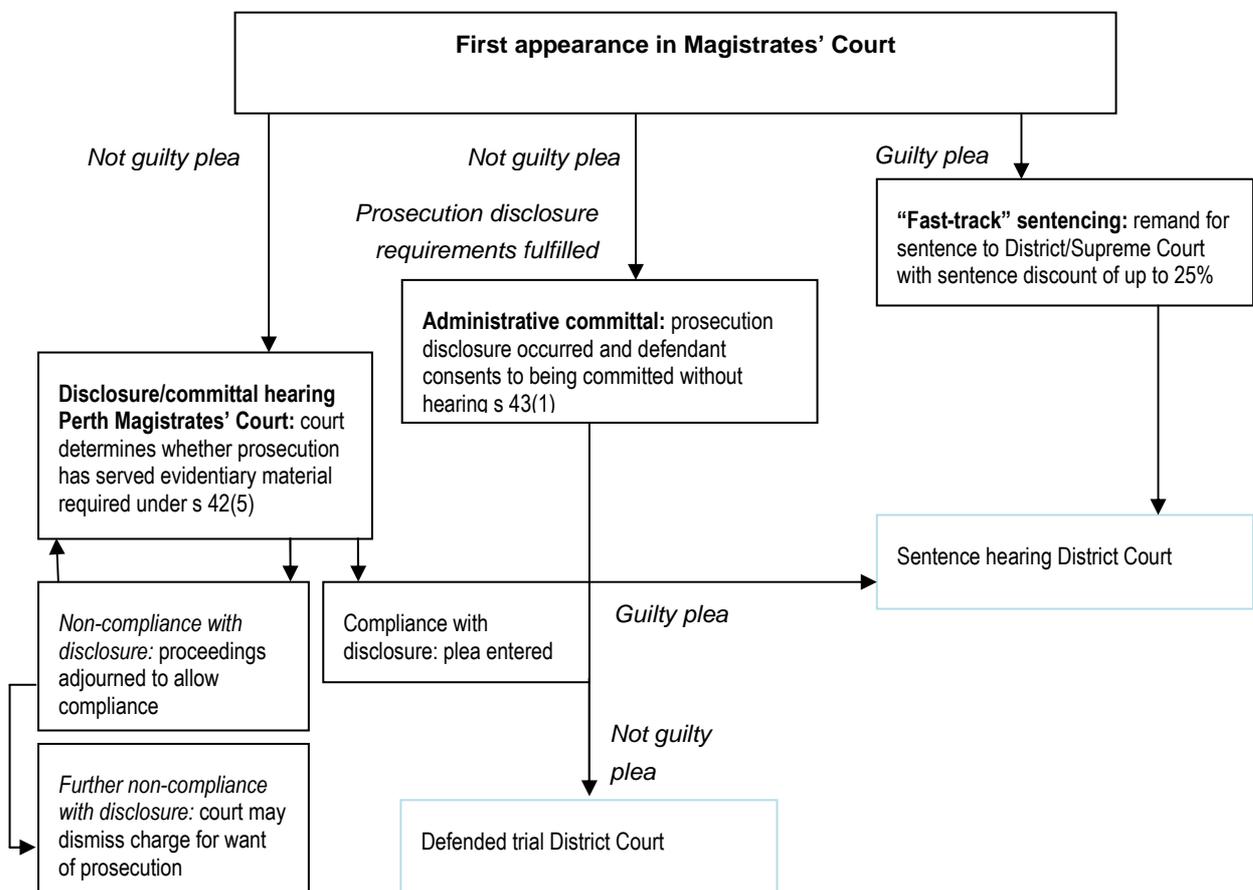
7.24 Committal/disclosure hearings are centralised at the Perth Magistrates' Court.⁶¹

Administrative committal

7.25 Administrative committals occur where the prosecutor complies with disclosure requirements before the date set for the committal/disclosure hearing and the defendant consents to the court committing the accused for sentence or trial to a superior court without a disclosure/committal hearing.⁶²

7.26 Consent must be written, and apply to all the charges and all the defendants.⁶³ It must be lodged at least 5 days prior to the date set for the hearing⁶⁴ or sent by email 2 days prior.⁶⁵

Figure 7.4: Criminal procedures for indictable matters in WA



61. The Magistrates' Court, Practice Direction 2 (2008).
 62. Criminal Procedure Act 2004 (WA) s 43(1).
 63. Criminal Procedure Act 2004 (WA) s 43(2).
 64. Criminal Procedure Act 2004 (WA) s 43(3).
 65. The Magistrates' Court, Practice Direction 1 (2011).

Relationship with early guilty pleas

- 7.27 The WA system operates in conjunction with a “fast-track” stream for guilty pleas.⁶⁶ A defendant who pleads guilty to an indictable offence before the prosecution discloses the prosecution brief is committed to the District or Supreme Court for sentencing, and will generally receive a sentence discount in the highest range – presently set at 25%.

Abolition of committals in New Zealand

- 7.28 In July 2013, New Zealand commenced a new criminal procedure regime. Among other things, the new structure deconstructs the binary summary/indictable offence types; minimises pre-trial hearings, and abolishes the limited committal proceedings that existed from 2009.

Four new categories of offence

- 7.29 The *Criminal Procedure Act 2011* replaces the summary/indictable category of offence with four offence types:
- 7.30 **Category 1** are offences for which the defendant can only be fined. A community based sentence or custodial sentence cannot apply.⁶⁷ Category 1 offences are heard in the District Court by Justices of the Peace or a Community Magistrate.⁶⁸
- 7.31 **Category 2** offences have a maximum penalty of less than 2 years in prison, and are usually heard in the District Court before a judge sitting without a jury. Category 2 offences also include offences by corporations punishable by a fine and offences punishable by community based sentences.⁶⁹
- 7.32 **Category 3** offences include offences with a maximum penalty of a prison term exceeding 2 years, excluding Category 4 offences.⁷⁰ A defendant has the option to be heard by a judge or jury in the District Court.⁷¹
- 7.33 **Category 4** offences are the most serious on the criminal calendar, and include murder, manslaughter, torture and terrorism offences.⁷² They are to be heard in the High Court usually with a jury.⁷³

66. See Chapter 6.

67. *Criminal Procedure Act 2011* (NZ) s 6, s 71.

68. *Criminal Procedure Act 2011* (NZ) s 71.

69. *Criminal Procedure Act 2011* (NZ) s 6, s 72.

70. *Criminal Procedure Act 2011* (NZ) s 6, s 73.

71. *Criminal Procedure Act 2011* (NZ) s 50.

72. *Criminal Procedure Act 2011* (NZ) s 6, s 74.

73. *Criminal Procedure Act 2011* (NZ) s 6, s 75.

What criminal procedures replaced committal proceedings?

- 7.34 Under the new regime, a registrar deals with a process of “case review” on Category 2 offences and above. The case review occurs 30 working days after a defendant pleads not guilty in cases where the matter is to be heard by a judge alone and 45 days after a plea of not guilty for a matter that is to be heard by a jury.⁷⁴
- 7.35 A case review operates by:
- **Disclosure:** prior to a review by the registrar, the prosecution and defence are required to exchange information, discuss procedure issues and file a joint “Case Management Memorandum”.
 - **Case Management Memorandum:** are to be filed 5 working days prior to the review⁷⁵ and include whether:
 - a sentence indication is to be requested by the defendant
 - the defendant would consider pleading guilty to a lesser charge
 - the parties agree on the evidence that is going to be called, and
 - the parties agree to the length of time required for trial and a start date.⁷⁶
 - **Review:** If the Memorandum does not raise issues requiring judicial intervention, the review comes before the registrar who will adjourn the case to the trial date or to a “jury callover” (where there is going to be a jury trial). If the Memorandum requires a judge’s participation – such as where a sentence indication or change of charge is sought - the registrar adjourns for a case review hearing.
 - **Jury Callover:** is an administrative appearance before a judge to check the status of the matter, and must occur within 40 working days of the adjournment.⁷⁷ Each party is to fill another Memorandum regarding any pre-trial applications to be made, which is to be submitted before the callover.⁷⁸ The callover may lead to further pre-trial hearings before a judge to determine any issues.
 - **Case review hearing:** is a hearing before a judge that is required to make an assessment on the case. A case hearing review may encourage negotiation and result in:
 - The judge giving a sentence indication
 - The prosecutor decreasing the charges
 - The defendant pleading guilty

74. *Criminal Procedure Rules 2012* (NZ) r.4.2.

75. *Criminal Procedure Act 2011* (NZ) s 55(1), s 56.

76. *Criminal Procedure Act 2011* (NZ) s 55; *Criminal Procedure Rules 2012* (NZ) r.4.6.

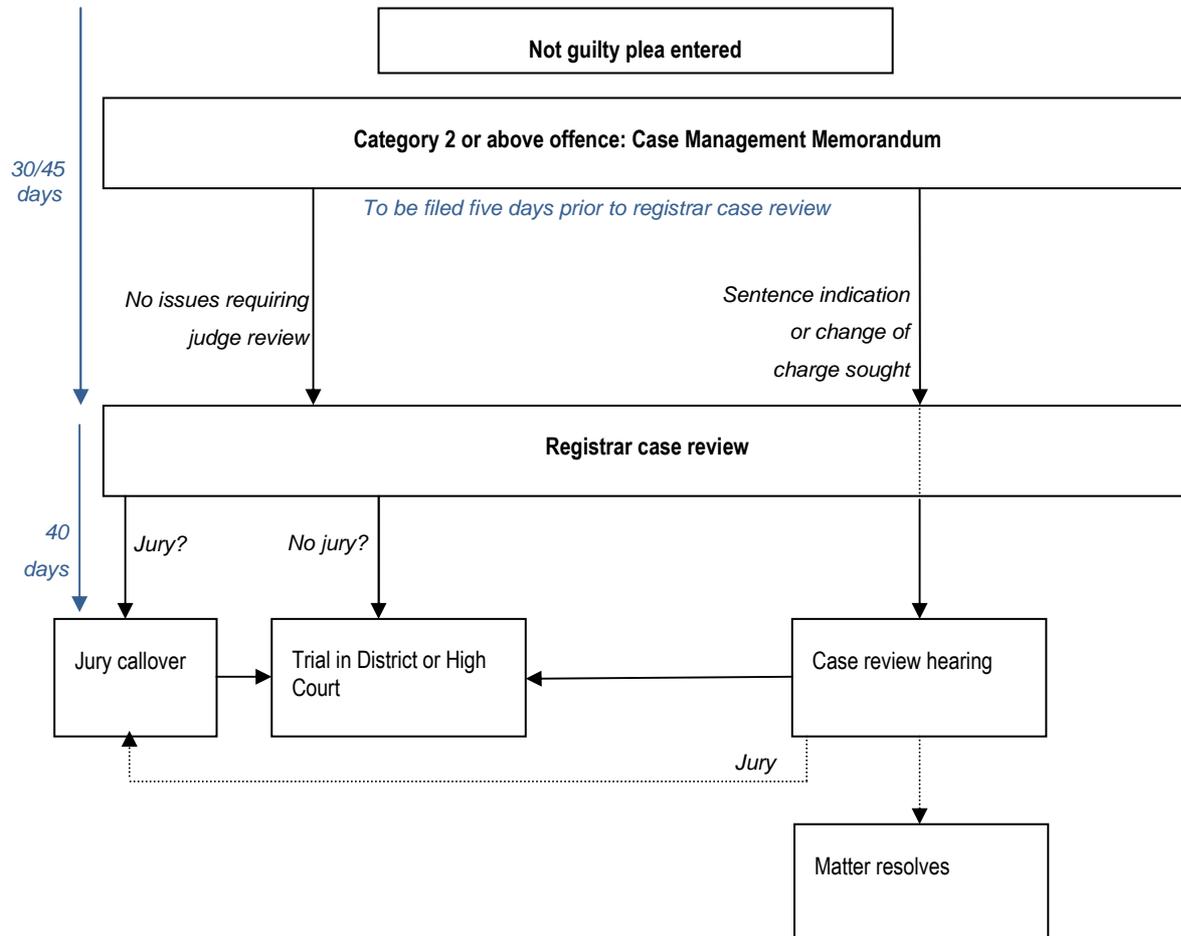
77. *Criminal Procedure Rules 2012* (NZ) r.4.3.

78. 15 days before from the prosecution, 5 days before for the defence: *Criminal Procedure Act 2011* (NZ) s 87, s 88; *Criminal Procedure Rules 2012* (NZ) R.5.6.

- Amendment on the summary of facts.

7.36 The case review hearing may be the last opportunity for the defendant to receive a discount for an early guilty plea, and the judge can advise the defendant of this.⁷⁹

Figure 7.5: New Zealand pre-trial proceedings



79. See <<http://www.communitylaw.org.nz/community-law-manual/chapter-30-criminal-court-proceedings/pre-trial-processes/>>.

Abolish committals in NSW?

- 7.37 Abolition of committals in other jurisdictions has sought to address issues of expediency and court efficiency. The introduction of case management systems and processes aims to bring about an early identification of the issues and prioritise the disclosure requirements of the prosecution. Both of these areas are plainly relevant to attracting early guilty pleas.
- 7.38 Committal proceedings in NSW are the last process to occur in the Local Court. They have a clear capacity to provide a trigger for negotiations between the prosecution and the defence. The ODPP has advised us that in 2012, up to 2000 matters listed for committal were negotiated down to a summary matter.⁸⁰ Further, any guilty plea received at or before committal is likely to attract the maximum sentence discount available.⁸¹
- 7.39 However, the last process in the Local Court need not be a committal hearing, especially if committals are no longer performing an effective screening function. We have been told that in NSW up to 85% of committals occur on “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.
- 7.40 This reference provides an opportunity to question the role and efficacy of committal proceedings in NSW, and to ask whether the criminal justice system would benefit from replacing committals with a more robust case management system.

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?

Disclosure requirements

- 7.41 In NSW, disclosure requirements are managed to varying degrees by the case management practices of the Local and District Court. In the Local Court, practice notes delineate when the police must serve the brief of evidence, depending on whether the matter is to be heard summarily or on indictment.⁸² Disclosure requirements in the District and Supreme Court are prescribed by the *Criminal Procedure Act 1986* (NSW), specifically the recently commenced mandatory disclosure provisions, and implemented by practice notes.⁸³
- 7.42 Under the mandatory disclosure provisions and Practice Note 9 of the District Court of NSW, notice of the prosecution case must be given to the accused no later than

80. See Chapter 4.

81. See Chapter 9.

82. See Figure 7.1.

83. *Criminal Procedure Act 1986* (NSW) s 141-144.

three weeks prior to the trial date in the District Court. The defence response to the prosecution's notice must be given no later than 10 days prior to trial and the prosecution must respond to that before the trial date. These disclosure requirements may impact upon the number of matters where a guilty plea is entered on the first day of trial, but, as disclosure is an often essential element to encouraging guilty pleas, are unlikely to promote "early" guilty pleas.

- 7.43 In WA, 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.⁸⁴ In both jurisdictions, disclosure requirements work in concert with programs developed to encourage early guilty pleas.

Question 7.2

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

84. See Chapter 6.

8. Sentence Indication Schemes

In brief

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. NSW instituted a scheme in 1992, which was discontinued four years later on evidence that it did not increase court efficiencies or the rate of guilty pleas. This chapter presents three recent jurisdictional approaches to sentence indication schemes for consideration.

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What are sentence indication schemes?

- 8.1 A sentence indication scheme provides for the submission of an agreed summary of facts to a judge at any time before the commencement of a trial so that the judge

can give an advance indication of the likely penalty to be imposed if the defendant were to plead guilty at that point.¹

- 8.2 Sentence indications afford some certainty to defendants regarding the type or quantum of sentence they may receive if they plead guilty. An advance indication of sentence is likely to generate an early guilty plea in matters with a variable outcome. Sentence indications are of particular relevance where a prison sentence is likely, but not certain.

The NSW sentence indication scheme 1992 - 1996

- 8.3 The NSW sentence indication scheme was introduced at a time when the District Court was experiencing significant problems with trial court delay. It provided for a defendant who had been committed for trial in the NSW District Court to seek an indication with the Court of the sentence that would be imposed if a guilty plea were entered.² This included sentence type and quantum. The objective of the scheme was to address the influx of District Court matters by attracting appropriate early pleas of guilty in matters that had been committed for trial.³
- 8.4 The scheme was supported by statute,⁴ and implemented in phases. It was first introduced in Parramatta District Court in January 1993, and then four months later it was implemented in the Sydney District Court. In 1994, the scheme was extended to all NSW District Criminal Courts. It was discontinued in 1996.

How did sentence indication work?

- 8.5 The practice note which applied in the Parramatta District Court stated that a person committed for trial was permitted “without prejudice to his or her right to trial, to obtain an indication from a judge of the sentence likely to be imposed should a plea of guilty be entered”.⁵ The practice note then set out the procedure to be followed for sentence indication at that court. The steps are outlined below.

District Court of NSW Practice Note

- 8.6 Applications for a sentence indication hearing were made at the arraignment hearing in the District Court, which took place about 2 months after committal. An application could only be made once.
- 8.7 Sentence indication hearings were held in open court, with the court able to make orders prohibiting publication of those details considered to have the potential to prejudice the fair trial of the matter.

1. A Freiberg and J Wills “Sentence indication” (2003) 27 *Criminal Law Journal* 246, 248.
2. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 1.
3. District Court of NSW, *Practice Note No 22* (1992).
4. The *Criminal Procedure (Sentence Indication) Amendment Act 1992 (No 98)* (NSW); *Criminal Procedure Act 1986* (NSW) s 52, s 53 permitted the Chief Justice of the District Court to introduce a sentence indication scheme.
5. District Court of NSW, *Practice Note No 22* (1992).

- 8.8 The process included:
- The defendant’s legal representative informed the ODPP of the intention to seek a sentence indication.
 - The ODPP advised the Criminal Listing Director of their readiness to have a sentence indication hearing (SIH), which was then listed.
 - If sought at the time of arraignment, the arraignment judge heard the matter immediately or arranged a hearing date.
 - At the SIH, the Crown handed to the judge:
 - The draft indictment (to which the accused will subsequently be required to plead)
 - A statement of the alleged facts of the case, which had been previously discussed with the defence representative
 - Copies of the prosecution witness’s statements
 - Transcript of the committal proceedings (if available), and
 - The defendant’s antecedents.
- 8.9 The defendant was able to have the judge consider statements or other evidence. After hearing submissions from defence counsel, the judge assessed the indicative sentence immediately or stood the matter over for consideration and decision.
- 8.10 After the sentence indication was given, the accused was arraigned and requested to plead. If “guilty” the matter was stood over for a sentence hearing before the judge who presided at the SIH, and any pre-sentencing reports attained. The sentence hearing was to take the “usual form” following a plea of guilty. In practice, however, all relevant material, including the defendant’s evidence, was generally tendered during the sentence indication hearing. Following an indication where a defendant had agreed to plead guilty, the defendant may have been promptly arraigned, the plea recorded and the indicated sentence passed.⁶
- 8.11 If “not guilty” the matter was listed for trial before another judge.

The extent to which an indication bound the court

- 8.12 If the facts and evidence did not alter, the indicative sentence was binding on the judge who formulated it. Should the facts or evidence change, the judge could decide to impose a lesser or greater sentence. The defendant was advised of the new sentence, and if the defendant did not wish to accept that sentence, he or she was entitled to change the plea to “not guilty” and to go to trial before another judge.
- 8.13 Where the prosecution appealed against a sentence indicated in a SIH and passed in a sentencing hearing, and where the Court of Criminal Appeal (CCA) agreed that

6. P Byrne, “Sentence Indication Hearings in New South Wales” (1995) 19 *Criminal Law Journal* 209, 210; J Willis, “The Sentence Indication Hearing” (1997) *Journal of Judicial Administration* 98, 99.

that the sentence was manifestly inadequate, the CCA gave an indication of the revised sentence and delayed formal orders so that the defendant could decide whether to withdraw his or her plea of guilty.⁷

Did the scheme meet its objective regarding early guilty pleas?

- 8.14 The Judicial Commission reported that between 4 June and 5 November 1993, in 31% of new matters arraigned or listed for arraignment, the defendant requested a sentence indication. Of these, 81% accepted the indicated sentence.⁸
- 8.15 The Bureau of Crime Statistics and Research (BOCSAR) 1995 review of the scheme, however, found no evidence that the defendants in those 81% of matters would have otherwise proceeded to trial. Although there had been a decrease in the delay between those committed to trial that entered a plea of guilty – meaning that guilty pleas had been submitted earlier than prior to the scheme - BOCSAR argued that the scheme had not necessarily attributed to the decrease. This was because the decrease in delay was part of an existing trend, and there was no evidence that the rate of decline in case delay for cases finalised on a plea of guilty was greater after sentence indication than before.⁹ This meant that the criminal justice system did experience an increase in earlier guilty pleas during the scheme, but that it was “unclear whether the scheme itself (or earlier initiatives) had produced this result”.¹⁰

The key issues with sentence indication in NSW

- 8.16 **The BOSCAR review found that people who entered a plea of guilty pursuant to a sentence indication received a lesser penalty than those who did prior to committal.**¹¹ Accordingly, there was the potential¹² for defendants to see little advantage in pleading guilty at committal and to instead preserve their right of access to a sentence indication hearing.¹³ The scheme could therefore operate as an effective *disincentive* for defendants to plead guilty before arraignment.
- 8.17 **The success of the scheme depended upon the sentencing practices of individual judges.** Some stakeholders reported that the sentencing practices of individual judges greatly impacted the success of the scheme in different courthouses. Where judges were perceived as “lenient”, sentence indication had a

7. *R v Glass* (Unreported, NSWCCA, 24 May 1994) 11; NSW Judicial Commission, “Sentencing Indication Hearings Pilot Scheme” (December 1994) Monograph Series Number 9, 10.

8. Approximately 99 new matters requested a sentence indication, of which 80 accepted the indication: NSW Judicial Commission, “Sentencing Indication Hearings Pilot Scheme” (December 1994) Monograph Series Number 9, 18.

9. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 20.

10. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 2.

11. This was so only when periodic detention was classified as “non-custodial”: D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 21.

12. This had not yet occurred, as the proportion of matters listed for trial or sentencing during the scheme was unchanged. See D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 28-29.

13. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 3.

greater effect on the rates of early guilty pleas. Although no comprehensive evaluation of this contention has been undertaken, BOCSAR did not dispute this assertion and agreed that it was likely that leniency in sentencing had positively affected the scheme in some areas.¹⁴

- 8.18 **The scheme caused Crown appeals.** The ODPP has observed that the low sentences articulated in the scheme resulted in the Crown appealing sentences on the grounds that they were manifestly inadequate. This generated an increase in cost and resources for the state, and added to the strain of the criminal justice system.¹⁵

The key benefits of sentence indication in NSW

- 8.19 **The scheme was seen to be operating effectively.** Sentence indication did garner stakeholder support for its ability to generate early guilty pleas. The ODPP, in the preliminary submission to this reference, noted that it was the view of many ODPP lawyers that the scheme was highly effective in particular courts.¹⁶ This view mirrors that of the District Court Criminal Registrar who reported at the time of the scheme to BOCSAR that sentence indication had reduced the number of pleas received “on the door of the court”.¹⁷ The extent that these reported successes relied upon the perceived leniency of sentences indicated and passed in some courthouses is not known.

- 8.20 **The scheme was a preferred alternative to plea negotiations.** The Judicial Commission of NSW in its review observed that the primary benefit of the scheme was its transparency.¹⁸ It noted that the real innovation of the scheme was the:

retention of the primary and impartial role of the judge. The system provides for the maintenance of the judge as an untainted decision maker, acting on behalf of the community interest. This structural feature of the scheme is designed to preserve the cherished image of the Australian justice system by allaying concerns of secret deals done behind closed door.¹⁹

Sentence indications in other jurisdictions: A snapshot

- 8.21 Despite the failure of sentence indication in NSW, sentence indication schemes have been implemented in various cognate jurisdictions. In this section we look at schemes in Victoria, New Zealand and the UK. In Victoria, sentence indications in

14. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 30.

15. See the Office of the Director of Public Prosecutions, *Preliminary Submission PEGP06*, 8. Also see Victorian Sentencing Advisory Council, *Sentence Indication: A report on pilot scheme* (2012) 32.

16. The Office of the Director of Public Prosecutions, *Submission PEGP06*, 3.

17. D Weatherburn, E Matka, B Lind, *Sentence Indication Scheme Evaluation* (NSW Bureau of Crime Statistics and Research, 1995) 29.

18. The Judicial Commission was comparing the scheme with the American system of plea negotiations.

19. NSW Judicial Commission, *Sentencing Indication Hearings Pilot Scheme*, Monograph Series Number 9 (1994) 45.

indictable proceedings operate pursuant to statute. Sentence indications are directed by a guideline judgment in the UK. New Zealand statute permits sentence indications across courts and jurisdictions.

Victoria

- 8.22 A sentence indication scheme for indictable matters was recommended for Victoria by the Victorian Sentencing Advisory Council (VSAC) in 2004 and piloted in 2007. The VSAC recommended retaining the scheme in 2010, and it is now embedded in statute.²⁰

How does sentence indication work in Victoria?

- 8.23 Victoria has a sentence indication scheme operating in the County and Supreme Courts.²¹ Sentence indications operate pursuant to the *Criminal Procedures Act 2009*, which prescribes:
- A defendant can request a sentence indication from the court after the filing of the presentment (indictment).²²
 - The decision to grant an indication is subject to a judicial discretion, described in the legislation as “final and conclusive”.²³
 - An indication involves a direction from the judge as to whether the defendant is likely to receive a sentence of imprisonment if a guilty plea were entered.²⁴
 - The prosecution must agree to an indication.²⁵
 - There are no restrictions on the type of crimes that are eligible.

The extent to which an indication binds the court

- 8.24 If a non-custodial (meaning a penalty that excludes prison) indication is given, and the accused pleads guilty at the next available opportunity,²⁶ then this is binding on the judge in later sentencing, so that a penalty of imprisonment cannot be imposed.
- 8.25 If an accused person pleads guilty to a custodial indication, then this can be changed to a non-custodial penalty after the revelation of all material at the later plea hearing.²⁷

20. *Criminal Procedure Act 2009* (Vic) s 207-209; A Flynn, *Jeopardising Justice for What? Keeping Sentence Indications in Victoria* (2010) The Australian and New Zealand Critical Criminology Conference.

21. *Criminal Procedure Act 2009* (Vic) s 208-209.

22. *Criminal Procedure Act 2009* (Vic) s 207.

23. *Criminal Procedure Act 2009* (Vic) s 208(4), s 209(6).

24. *Criminal Procedure Act 2009* (Vic) s 207, s 208.

25. *Criminal Procedure Act 2009* (Vic) s 208(2).

26. Which can be immediately after the indication or at the next pre-trial hearing.

27. *Criminal Procedure Act 2009* (Vic) s 209(1)(a)-(b).

- 8.26 If an indication is given, but the accused does not plead guilty, the case must be relisted before another judge, unless all parties otherwise agree.²⁸ The indication is no longer binding on the court.²⁹ The right to appeal against the sentence is not affected by the scheme.

Evaluation

- 8.27 The decision to retain the sentence indication scheme was influenced by a review undertaken by the Victorian Sentencing Advisory Council (VSAC) in 2010. The review was limited to a small number of matters where a sentence indication was sought.³⁰ It found that 85% of the defendants entered a plea of guilty following the indication. While it is noted that only 27 people had requested an indication during the study period, the VSAC found the high level of guilty pleas to be a “positive indicator that sentence indication has the potential to facilitate the resolution of cases that might otherwise have been resolved at a later stage”.³¹
- 8.28 Of the sentence indications given, 18 indicated that a non-custodial sentence would follow. All these defendants agreed to the indication. Of the 9 where the indication resulted in an immediate custodial sentence, only 5 entered a plea of guilty.³² We do not know the outcome of the 4 matters that proceeded.

Criticism of the sentence indication scheme

- 8.29 The Victorian sentence indication scheme has been criticised by legal academic Dr Asher Flynn because:
- **It may be coercive:** The scheme has the potential to place undue pressure upon accused to plead guilty. This is particularly advanced as the judge may make a statement when giving an indication that a more severe sentence is likely if the case proceeds.³³
 - **It may cause further delay.** Sentence indication hearings can cause delay by:
 - Adding another step to the criminal justice system. The VSAC review of the pilot scheme found that in 22 of the 25 indication requests some delay was created from requiring additional hearings be held, or adjournments given.
 - Providing a mechanism to deliberately prolong the matter. Flynn observes that these concerns were validated when the Office of Public Prosecutions’ internal policy on challenging indication

28. *Criminal Procedure Act 2009* (Vic) s 209(2).

29. *Criminal Procedure Act 2009* (Vic) s 209(3).

30. Note: this review was limited to 25 cases which took place to the County Court: See Victorian Sentencing Advisory Council, *Sentencing Indication: A report on the pilot scheme* (2010) 15.

31. Victorian Sentencing Advisory Council, *Sentencing Indication: A report on the pilot scheme* (2010) 23.

32. Victorian Sentencing Advisory Council, *Sentencing Indication: A report on the pilot scheme* (2010) 25.

33. See Victorian Sentence Advisory Council, *Sentence Indications and Specified Sentence Discounts* (2007) 89.

applications was amended in 2008 to address deliberate delay tactics.³⁴

- The Crown appealing a sentence, which can even result in the plea being withdrawn, and criminal proceedings starting afresh.³⁵
 - **It is of little or no effect in procuring early guilty pleas.** There is no reliable evidence to suggest that sentence indications of this type procure early guilty pleas.
 - **A sentence indication hearing may be misleading:** The limited evidence that is presented before a sentence indication is granted can lead to injustices, especially if the, then unknown, aggravating circumstances reveal it to be more appropriate that a person undergo a custodial penalty.³⁶
 - **The victim is not considered:** sentence indication hearings pay insufficient attention to the needs and concerns of victims.³⁷
- 8.30 Furthermore, as an indication only reveals whether a custodial sentence will be given, the scheme is of limited application. A sentence indication scheme of this type may only be useful to certain classes of cases, and has the potential to induce an early plea only where the judge confirms a non-custodial sentence.

The United Kingdom

- 8.31 In the UK, sentence indications were expressly prohibited until the 2005 Court of Appeal case of *R v Goodyear*.³⁸ Now a defendant in the UK can seek a sentence indication when deciding whether to choose a summary trial in an either way offence (although this is distinct from *Goodyear* indication);³⁹ in deciding whether to agree to a plea agreement;⁴⁰ and in the course of criminal proceedings.

How does sentence indication work in the UK?

- 8.32 *Goodyear* sentence indications are only available in indictable proceedings, and are normally made at the first or second appearance at the Crown Court (at the plea

34. *Director's Policy 4.7.1 2008 (Vic)*: A Flynn, "Jeopardising Justice for What? Keeping Sentence Indications in Victoria" (2010) The Australian and New Zealand Critical Criminology Conference, 4.

35. A Flynn, "Jeopardising Justice for What? Keeping Sentence Indications in Victoria" (2010) The Australian and New Zealand Critical Criminology Conference. 4.

36. A Flynn, "Jeopardising Justice for What? Keeping Sentence Indications in Victoria" (2010) The Australian and New Zealand Critical Criminology Conference.

37. Also see A Freiberg and J Willis, "Sentence indication" (2003) 27 *Criminal Law Journal* 246, 248.

38. *R v Goodyear* [2005] EEWCA Crim 888.

39. This procedure occurs in the Magistrate's court, where the defendant can request an indication of a custodial or non-custodial sentence: *Criminal Justice Act 2003* (UK), Sch 3, s 20(3). See Chapter 8.

40. See Chapter 4.

and case management hearing).⁴¹ Sentence indication practice and procedure as outlined by *Goodyear* is:

- A sentence indication should not be sought where there is any uncertainty between the prosecution and defence about an acceptable plea or if there are any material facts still in dispute.
- A judge should not give an advance indication of sentence unless one has been sought by the defendant. It is open to the judge, however, to remind the defence advocate that he/she is entitled to seek a *Goodyear* indication.
- An uninvited indication has been ruled to create inappropriate pressure on the defendant, to the extent that freedom of choice was improperly narrowed. An unrepresented defendant can seek a sentence indication, but cannot be informed of his or her rights, as this may be construed as improper pressure.
- The judge cannot indicate levels of sentence depending upon possible different pleas.
- The defendant is given a “reasonable opportunity” to decide whether to enter a plea of guilty or continue with proceedings on the basis of a not guilty plea, in which case the indication will cease to have effect.⁴²
- Any advance indication of sentence should normally be confined to the maximum sentence if a plea of guilty were tendered at the stage at which the indication was sought.⁴³

The extent that a sentence indication binds the court

- 8.33 The judge may decline to give an advance indication of sentence⁴⁴ but, once given, the court is bound not to exceed the sentence previously indicated. A less onerous sentence may be imposed.⁴⁵
- 8.34 The fact that a sentence indication was requested or evidence as to the circumstances in which it was sought, is inadmissible in any subsequent trial. The right of appeal against sentence for the defence or prosecution is unaffected by a sentence indication.

Evaluation

- 8.35 It is not possible to know the effect that the *Goodyear* sentence indication scheme has had on the early guilty plea rate in the UK. The Courts do not include the number of sentence indication hearings in the quarterly or annual statistics. There is no evaluation of the number of people who seek an indication; nor is there any information as to the number of people who sought an indication and then entered a

41. P Darbyshire, “Transparency in getting the accused to plead guilty early” (2006) *Cambridge Law Journal* 48.

42. See <<http://www.hse.gov.uk/enforce/enforcementguide/court/crown-court.htm#advance>>.

43. See CPS Guidelines on sentence indication: <http://www.cps.gov.uk/legal/s_to_u/sentencing_-_general_principles/#a05>.

44. This does not prevent the defendant from seeking a sentence indication at a later stage.

45. *R v Mustafa Nour Kulah* [2007] EWCA Crim 1701.

guilty plea before trial. This information is also not apparent in the published sentencing statistics.

New Zealand

- 8.36 New Zealand has a sentence indication scheme prescribed by the *Criminal Procedure Act 2011*.⁴⁶ This section reviews proceedings for sentence indication hearings on serious offences.⁴⁷

How does sentence indication work in New Zealand?

- 8.37 An indication may be requested anytime before the trial,⁴⁸ though an indication cannot be given in the District Court on an offence triable only in the High Court.⁴⁹ It is held in open court and is valid for five working days unless the court specifies an earlier or later date of expiry.⁵⁰ Indications given must be recorded by the court.⁵¹
- 8.38 A sentence indication may be an indication of particular type of sentence or a particular type within a specified range or quantum.⁵² The judge has discretion whether or not to give an indication, and discretion to determine the nature of the indication on a particular case. A sentence indication that includes the quantum of sentence can only be given if the court has a summary of agreed facts; information on any previous convictions of the defendant; and a copy of any victim impact statement.⁵³

The extent that a sentence indication binds the court

- 8.39 Unless fresh evidence is given to show the indication is inappropriate, the judge that gave the indication will be bound by it, but the indication is not binding on any other judge.⁵⁴ If the indication is to change due to new evidence or because a different judge is conducting the sentence, the judge must allow the defendant to reconsider his or her plea, and the defendant may maintain the plea, vacate it or plead not guilty and proceed to a trial.⁵⁵

46. *Criminal Procedure Act 2011* (NZ) s 60: For an overview of criminal procedure in New Zealand under the *Criminal Procedure Act 2011* see Appendix 2.

47. See category of offences at *Criminal Procedure Act 2011* (NZ) s 6.

48. *Criminal Procedure Act 2011* (NZ) s 61(1).

49. *Criminal Procedure Act 2011* (NZ) s 5.

50. *Criminal Procedure Act 2011* (NZ) s 64(b).

51. *Criminal Procedure Act 2011* (NZ) s 61(2), (3).

52. *Criminal Procedure Act 2011* (NZ) s 60(a)-(c).

53. *Criminal Procedure Act 2011* (NZ) s 61(3)(a)-(c).

54. *Criminal Procedure Act 2011* (NZ) s 16.

55. *Criminal Procedure Act 2011* (NZ) s 115.

Evaluation

- 8.40 From 5 March 2011 to 30 June 2013, 1379 requests for a sentence indication were considered by the court in jury trial cases.⁵⁶ This represents a request being made in 18% of jury trial cases that finalised over that time period (6,181).
- 8.41 Of the 1379 requests, 84% (1,160) were granted (a sentence indication was given), 3% (38) were refused and 13% (181) were withdrawn or discontinued. Of the 1,160 sentence indications given, 77% were accepted (896), 21% refused or expired without being accepted (262), and less than 1% were waiting to be accepted or refused (2).⁵⁷

The attributes of the sentence indication models

- 8.42 Sentence indication hearings differ depending upon the scope of the indication and the extent to which it binds the court.

The scope of the indication

- 8.43 An advance indication of sentence can include:
- **Whether the sentence will be custodial or non-custodial.** This has been adopted in Victoria, and in the Magistrates' Court in the UK. Because it only seeks to settle matters that may be "sitting on the fence" of a potential custodial sentence, it may be of limited application.
 - **Indicating the maximum sentence if a plea of guilty were tendered at the stage at which the indication was sought.** This option as implemented in the UK Crown Court provides for an advance indication of sentence for all matters. The *Goodyear* approach has been well received and, as it is often coupled onto a plea negotiation,⁵⁸ it has been commended as a "quest for transparency" that has embedded important safeguards into the negotiation process.⁵⁹
 - **Indicating the sentence range or quantum.** In the NSW scheme, the court was able to indicate the quantum of sentence likely for the offence charged. This approach proved problematic because the sentence given was, in some circumstances, less than a defendant who pleaded at or before committal in the Local Court. This produced an environment ripe for appeal, and caused further strain on the criminal justice system.

56. This includes the District and High Court.

57. Information supplied by the Ministry of Justice New Zealand (22 October 2013).

58. See Chapter 4.

59. P Darbyshire, "Transparency in getting the accused to plead guilty early" (2006) *Cambridge Law Journal* 51.

Table 8.1: Jurisdictional overview of permitted sentence indications

	NSW 1992 – 1996	UK	NZ	Victoria
Scope of advanced indication per jurisdiction	Type and quantum of sentence.	The maximum sentence (type and quantum) if a plea of guilty tendered immediately.	The nature of the indication (type or quantum of sentence) is at the discretion of the judge	Indication of a custodial or non-custodial sentence.

The scope of the indication: A revised approach for NSW?

- 8.44 It has been claimed, however, that “excessive leniency in sentence indication is not a necessary feature of a sentence indication scheme”,⁶⁰ and stakeholders have expressed support for revisiting a program of sentence indications in NSW.⁶¹ While suggesting that there is no one answer to the current challenges in obtaining early guilty pleas, the ODPP submitted to us that:

The criminal justice landscape in NSW in 2013 is very different to the landscape in 1993 when sentence indications were trialled. We consider that it would be worthwhile to revisit earlier schemes tried in New South Wales and consider some or all of the innovations in other jurisdictions particularly for instance the Victorian sentence indications scheme...⁶²

Question 8.1

- 1) Should NSW reintroduce a sentence indication scheme?
- 2) If a sentence indication scheme were introduced, what form should it take?

The extent to which a sentence indication can bind the court

- 8.45 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.
- 8.46 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.

60. A Freiberg and J Wills “Sentence indication” (2003) 27 *Criminal Law Journal* 246, 252.

61. In consultation and The Public Defender, NSW, *Submission PEGP02*, 2.

62. The Office of the Director of Public Prosecution, *Submission PEGP06*, 3

The operation of an indication: A revised approach for NSW?

- 8.47 In no jurisdiction does an indication affect the Crown's right of appeal. The ODPP observed in their submission to us that Crown appeals complicated the sentence indication scheme in NSW, and that a successful scheme would require a re-think on the right to appeal sentences passed following an advance indication.

Question 8.2

Once a defendant accepts a sentence indication, in what circumstances should it be possible to change it?

9. Sentence discounts for early guilty pleas

In brief

Sentence discounts provide a key incentive for defendants to enter a plea of guilty early. Unlike other jurisdictions, NSW does not have a statutory guideline for providing sentence discounts for guilty pleas. This chapter explores whether the introduction of a statutory guideline would increase the efficacy of sentence discounts in NSW.

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What are sentence discounts?

- 9.1 Sentence discounts represent the amount of a sentence that a person need not serve due to certain mitigating factors attached to the behaviour or actions of the person. Sentence discounts can also take the form of a variation of sentence type.
- 9.2 Sentence discounts for guilty pleas are generally given in recognition of the utilitarian benefits that guilty pleas, especially early guilty pleas, have for the criminal justice system - the earlier the plea the bigger the discount. Sentence discounts currently provide the crux for most schemes and initiatives developed to encourage early guilty pleas.

Sentence discounts in NSW

- 9.3 In NSW, a sentence discount (or sentence variation) in return for an early guilty plea is prescribed by the *Crimes (Sentencing) Procedure Act 1999* (NSW) (CSPA) and the guideline judgments of *R v Thomson and Houlton*¹ and *R v Borkowski*.²

1. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383.
2. *R v Robert Borkowski* [2009] NSWCCA 102.

- 9.4 Early guilty plea discounts and variations are given for the utilitarian value of the plea, and to encourage defendants to enter a plea of guilty at the earliest opportunity.

Crimes (Sentencing) Procedure Act 1999 (NSW)

- 9.5 The 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.³ The result is that a defendant may receive a variation of the sentence that would otherwise be imposed.
- 9.6 If a defendant has pleaded guilty, a sentencing court must take this into account. Specifically, the court must consider the fact that the defendant has pleaded guilty, and the timing and circumstances of the plea or the indication of intention to plead guilty.⁴ The court has a discretion to impose a shorter sentence or variation to the sentence, which must not be unreasonably disproportionate to the nature and circumstances of the offence.⁵ The court must record its reasons if no variation is made to the sentence despite a plea of guilty.⁶

Guideline judgments

- 9.7 In 2000, the Crown requested a guideline judgement from the Court of Criminal Appeal (CCA). It was believed that the objective of the guilty plea provisions in the CSPA – to encourage guilty pleas at the earliest opportunity – was not being attained. Among other things, the CCA was provided with a research study that indicated that a key reason for late pleas was a belief by practitioners that there was no clear sentence benefit to a defendant in pleading earlier in the proceedings.⁷ The CCA agreed that doubt and scepticism regarding the value of an *early* guilty plea was obstructing the submission of early guilty pleas, and considered that a greater degree of transparency in sentencing was required.⁸
- 9.8 In *R v Thomson and Houlton* and the later judgement of *R v Borkowski*, the CCA confirmed the common law principles applicable to sentence discounts for early guilty pleas.

What factors are sentencing courts to consider?

- 9.9 The guideline judgements outline the key considerations to be made when courts consider the impact of a guilty plea on a sentence. These include the utilitarian value of the plea, the timing of the plea and the nature of the offence. The considerations are outlined below.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(k), 22.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1)(a)-(c).

5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(1A).

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22(2).

7. See D Weatherburn and J Baker, *Managing Trial Court Delay: An Analysis of Trial Case Processing in the NSW District Criminal Court*, (NSW Bureau of Crime Statistics and Research, 2000).

8. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [38].

- 9.10 **The utilitarian value of a guilty plea should generally be represented by a sentence discount of 10-25%, depending on the timing of the plea.**⁹ Guilty pleas provide practical benefits in the form of savings to court time and the State's resources in investigating and preparing allegations of criminal offences for committal proceedings and trial. Encouraging guilty pleas via sentence discounts represents a significant contribution to the efficiency and effectiveness of the criminal justice system,¹⁰ particularly by alleviating court delays.
- 9.11 While there are several other potential justifications for providing a discount for a guilty plea – including that it is a manifestation of the defendant's remorse or contrition and that it avoids the need to call witnesses and victims to give evidence,¹¹ the utilitarian value of the plea is the qualifying factor in determining whether a discount should be given and in quantifying the discount. This is because the utilitarian value is a "distinct interest" of the criminal justice system as a whole, whereas the other factors are "much more closely associated" with those factors concerning the particular circumstances of the offender.¹² Further, as remorse is a separate mitigating factor,¹³ and has implications for certain objectives of the sentencing process,¹⁴ it would be double counting to consider it afresh in quantifying a discount for a guilty plea.¹⁵
- 9.12 In cases of multiple offences and pleas at different times, the utilitarian value of the plea should be considered separately for each offence.¹⁶
- 9.13 An offer of a plea by the defendant that is rejected by the Crown but proves to be consistent with a jury verdict after trial can result in a discount even though there is no apparent utilitarian value.¹⁷
- 9.14 **The earlier the guilty plea, the greater the utilitarian value and the greater the discount that will be given by the sentencing court.**¹⁸ The extent of the discount is primarily determined by the timing of the guilty plea (or indication of the defendant's intention to plead guilty), as this corresponds with its utilitarian value.
- 9.15 Whether a guilty plea is early will depend on the circumstances of the case, and is to be determined by the sentencing court.¹⁹ At the same time, the reason for any delay in the plea is generally irrelevant because, if the plea is not forthcoming, the

9. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].

10. See *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [115].

11. See, eg, *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [3].

12. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [115]-[123].

13. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(i).

14. For example, genuine remorse can indicate personal deterrence does not need much weight, and prospects of rehabilitation are good: *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [116].

15. *R v MAK*; *R v MSK* [2006] NSWCCA 381 [41]-[45]. See also *Kite v R* [2009] NSWCCA 12 [10]-[12].

16. *R v SY* [2003] NSWCCA 291 [85]-[88].

17. *R v Oinonen* [1999] NSWCCA 310; *R v Johnson* [2003] NSWCCA 129.

18. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [154], [160].

19. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160]; *R v Forbes* [2005] NSWCCA 377 [116]-[117].

utilitarian value is reduced.²⁰ As the utilitarian value of a delayed plea is less, the discount may be reduced even where:

- there has been a plea bargain²¹
- the defendant is waiting to see what charges are ultimately brought by the Crown,²² or
- the defendant has delayed the plea to obtain some forensic advantage.²³

9.16 The utilitarian value of an early plea of guilty is not fixed, and can be eroded as a result of the manner in which the sentencing hearing was conducted. For example, where there has been a protracted hearing on disputed questions of fact which are resolved adversely to the offender, the utilitarian value of the early plea may be affected.²⁴

9.17 **The offences may be so serious that no discount should be given.**²⁵ A substantial sentence may be required for the protection of the public, notwithstanding the entry of a guilty plea.²⁶

9.18 **The amount of discount does not depend on the administrative arrangements or practices of a particular court or judge.**²⁷ For example, it is not open for a court or judge to establish a practice of determining the discount based on when the guilty plea was made in the District Court, disregarding what may have occurred in committal proceedings in the Local Court.²⁸ Such a practice can lead to courts applying maximum discounts even though the guilty plea was not made at the first opportunity.

9.19 **In addition to timing of the plea, the extent of the discount is also affected by the projected level of difficulty** of assembling the evidence and the length and complexity of the trial.²⁹

9.20 **The strength of the prosecution case is irrelevant and must not be taken into account when calculating the discount.**³⁰ This has been consistently emphasised by the Court of Criminal Appeal.³¹

20. *R v Stambolis* [2006] NSWCCA 56 [8]-[14]; *Giac v R* [2008] NSWCCA 280 [26]-[28].

21. *R v Dib* [2003] NSWCCA 117; *Ahmad v R* [2006] NSWCCA 177.

22. *Sullivan and Skillin v R* [2008] NSWCCA 296 [13]-[16].

23. *R v Stambolis* [2006] NSWCCA 56 [8]-[14]; *Saad v R* [2007] NSWCCA 98. The advantage may be having matters put on a Form 1 (see Chapter 4): *R v Chiekh and Hoete* [2004] NSWCCA 448.

24. *R v AB* [2011] NSWCCA 229 [2], [27]-[33].

25. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [158], [160].

26. *R v El-Andouri* [2004] NSWCCA 178 [34].

27. *R v Robert Borkowski* [2009] NSWCCA 102 [32].

28. *R v Robert Borkowski* [2009] NSWCCA 102 [28]-[31].

29. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [154].

30. *R v Sutton* [2004] NSWCCA 225 [12]-[14].

31. *R v Sutton* [2004] NSWCCA 225 [12]. See, eg, *R v Sullivan* [2004] NSWCCA 99 [56]; *R v Way* [2004] NSWCCA 131 [144]-[150]; *R v Grbin* [2004] NSWCCA 220 [20].

What is required of the sentencing court?

- 9.21 The guideline judgements also outline the practical requirements a sentencing court must meet. These are set out below.
- 9.22 **A sentencing court should explicitly state that a guilty plea has been taken into account.** If the court does not make such a statement, this will generally be taken to indicate that the plea was not given weight in sentencing.³²
- 9.23 **A sentencing court is encouraged, but not required, to quantify the effect of a guilty plea where appropriate.**³³ While the effect of the plea on the sentence might encompass several factors in addition to utilitarian value, including contrition and witness vulnerability, judges are encouraged to quantify the utilitarian value of an early guilty plea.³⁴ There must not be a component in the discount or a separate quantified discount for remorse,³⁵ or for the *Ellis* discount.³⁶
- 9.24 If a discount is being given for assistance to authorities, a single combined quantification will often be appropriate.³⁷ A combined discount for a guilty plea and assistance to authorities should not normally exceed 50%.³⁸
- 9.25 Instead of a shorter sentence, the discount may also result in a different type of sentence, but the resulting sentence should not be reduced again by reason of the discount.³⁹
- 9.26 In our report on sentencing, we recommend that courts be required to quantify a sentence discount given for the utilitarian value of a guilty plea.⁴⁰

Jurisdictional comparison

- 9.27 Except Tasmania, all state and territory jurisdictions in Australia have enacted legislation enabling sentence discounts to be given for guilty pleas. As Table 8.1 illustrates, in these jurisdictions a court must consider a guilty plea in sentencing a defendant and this may result in a lesser penalty. If so, the timing of the plea is relevant to the quantum of the discount.
- 9.28 There are several notable variations in how the discount must be applied:

-
32. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].
33. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].
34. *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].
35. Remorse is relevant to matters in mitigation of sentence, as regulated by *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A, and quantifying remorse in relation to a sentence discount for a guilty plea may lead to double counting: *R v MAK*; *R v MSK* [2006] NSWCCA 381 [41]-[45]. See also *Kite v R* [2009] NSWCCA 12 [10]-[12].
36. *Lewins v R* [2007] NSWCCA 189; *S v R* [2008] NSWCCA 186. An *Ellis* discount may be given where an offender makes a voluntary disclosure of involvement of serious crime of which the police had no knowledge: *R v Ellis* (1986) 6 NSWLR 603, 604.
37. *SZ v R* (2007) 168 A Crim R 249; *R v El Hani* [2004] NSWCCA 162 [69]; *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160]; *R v Gallagher* (1991) 23 NSWLR 220, 228.
38. *SZ v R* (2007) 168 A Crim R 249 [3].
39. This may involve imposing a determinate sentence rather than a life sentence: *R v Lo* [2003] NSWCCA 313.
40. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [5.29].

- **Quantify the discount:** Unlike in NSW, in WA and the ACT a court must indicate the sentence that would have been imposed but for the guilty plea.⁴¹ This is also the case in Victoria, although it is only a requirement for certain sentences.⁴²
- **State the maximum discount:** The maximum discount available is codified in SA and WA, where it is 40% and 25% respectively.⁴³ Judicial guidance has been provided on quantification in other jurisdictions, including NSW, where the maximum discount is 25%.⁴⁴
- **Strength of prosecution case:** In the ACT, the guilty plea must be considered against the strength of the prosecution case,⁴⁵ an approach that has been explicitly rejected in NSW.⁴⁶

Disclosing the discount: Victoria, the ACT and WA

- 9.29 In Victoria, a sentencing court must usually state and record the head sentence and non-parole period, if any, that would have been imposed but for the guilty plea. This is a requirement for certain specified offences, including a custodial order, a fine exceeding 10 penalty units, or an aggregate fine exceeding 20 penalty units. For all other offences, disclosure is at the discretion of the sentencing court.⁴⁷
- 9.30 The requirement to disclose the quantum of the discount in certain offences was introduced in 2008,⁴⁸ following a recommendation made by the Victorian Sentencing Advisory Council.⁴⁹ The Council's view was that the change "would promote clear, transparent and accountable sentencing."⁵⁰ As well as illuminating what was already occurring in practice, it was consistent with the approach taken with regards to a defendant's assistance to law enforcement authorities.⁵¹ Stakeholders and the wider Victorian community provided "unqualified" support for the reform, although views were divided as to whether courts should be permitted or required to state the discount.⁵²
- 9.31 Similar requirements exist in the ACT and WA. When an ACT sentencing court gives a discount for a guilty plea, it must state the head sentence and non-parole

41. *Sentencing Act 1995* (WA) s 9AA(5); *Crimes (Sentencing) Act 2005* (ACT) s 37(2)(b).

42. *Sentencing Act 1991* (Vic) s 6AAA(1)(b).

43. *Criminal Law (Sentencing) Act 1988* (SA) s 10B, s 10C; *Sentencing Act 1995* (WA) s 9AA(4).

44. See *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [160].

45. *Crimes (Sentencing) Act 2005* (ACT) s 35.

46. *R v Sutton* [2004] NSWCCA 225 [12]. It has also been implicitly rejected as a relevant factor: *R v Thomson and Houlton* [2000] NSWCCA 309; 49 NSWLR 383 [154].

47. *Sentencing Act 1991* (Vic) s 6AAA.

48. *Sentencing Act 1991* (Vic) s 6AAA (amended by *Criminal Procedure Legislation Amendment Act 2008* (Vic) s 3, commenced on 1 July 2008).

49. Sentencing Advisory Council of Victoria, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 55.

50. Sentencing Advisory Council of Victoria, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 54.

51. Sentencing Advisory Council of Victoria, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 54.

52. Sentencing Advisory Council of Victoria, *Sentence Indication and Specified Sentence Discounts: Final Report* (2007) 52-3.

period that would have been imposed but for the guilty plea.⁵³ WA sentencing courts must state the extent of any sentence discount given for a guilty plea.⁵⁴

Legislate a sliding scale: SA

9.32 Following amendments in 2012,⁵⁵ SA now has the most comprehensive legislation on sentence discounts of all Australian jurisdictions, expressly intended to codify the proposition “the earlier the plea, the greater the discount”.⁵⁶ The relevant legislation prescribes the maximum discounts available for guilty pleas made in specific stages of proceedings, with one system for the Magistrates Court and another for superior courts.⁵⁷ The hierarchy of discounts available for indictable offences in superior courts is as follows:

Table 9.1 Sentence discounts in South Australia for indictable proceedings in superior courts

Stage of proceedings	Discount available
Up to four weeks after defendant first appears in court	Up to 40%
Over four weeks after defendant first appears in court → before defendant committed for trial	Up to 30%
Day of committal for trial → 12 weeks after arraignment date	Up to 20%
Day of committal for trial → before commencement of trial (where sentencing court satisfied defendant could not have reasonably pleaded guilty at earlier stage because of circumstances outside of defendant’s control)	Up to 30%
Within seven days of: (i) unsuccessful application by defendant to quash or stay proceedings, or (ii) ruling adverse to defendant in hearing of proceedings after committal for trial and within five weeks of trial	Up to 15%
Defendant did not plead within relevant stage but sentencing court satisfied that the reason was: (i) court did not sit during relevant stage (ii) court did not sit during relevant stage at place defendant could reasonably be expected to attend, or (iv) court was unable to hear matter for any other reason outside defendant’s control	Same as if defendant had pleaded guilty within relevant stage
Any other circumstances where sentencing court sees fit to impose a discount	Up to 10%

53. *Crimes (Sentencing) Act 2005* (ACT) s 37(2)(b).

54. *Sentencing Act 1995* (WA) s 9AA(5).

55. *Criminal Law (Sentencing) Act 1988* (SA) s 10B, s 10C (amended by *Criminal Law (Sentencing)(Guilty Pleas) Amendment Act 2012* (ACT) cl 7, commenced on 11 March 2013).

56. SA, *Parliamentary Debates*, Legislative Council, 4 September 2012, 2001.

57. *Criminal Law (Sentencing) Act 1988* (SA) s 10B, s 10C.

- 9.33 The sentencing court has discretion to determine the appropriate discount up to the maximum prescribed by the legislation for the relevant stage of proceedings. The following factors must be taken into account (where applicable):
- Whether the reduction would be so disproportionate to the seriousness of the offence or so inappropriate for the particular defendant that it would “shock public conscience”.
 - The timing (stage in proceedings) of the defendant’s indication of intention to enter a plea of guilty.
 - The circumstances of the plea.
 - Whether the defendant entered a plea of guilty to all offences.
 - Whether the defendant could not enter a plea at an earlier stage because of circumstances outside of his or her control.
 - Whether the defendant was made aware of any matter that would have enabled him or her to enter a plea of guilty at an earlier stage.
 - Any other factor or principle the court thinks relevant.
- 9.34 The second reading speech indicates that the highest discount available (40%) was intended to apply in cases where a defendant pleads guilty at the earliest opportunity, before the prosecution has fully disclosed its case and before a brief of evidence has been prepared.⁵⁸ At the same time, the government was concerned with ensuring that there would be no disadvantage to defendants who enter a late guilty plea through no failure of their own.⁵⁹ This is especially apparent in the inclusion of provisions enabling the sentencing court to overlook delay to the plea caused by the court.⁶⁰
- 9.35 In addition, while there will usually be no discount at all if the guilty plea is entered during the period from 12 weeks after the arraignment date up to the commencement of the trial, a discount may be given if the delay was due to circumstances outside the defendant’s control.⁶¹

England and Wales

- 9.36 As in Australia, sentencing courts in England and Wales must consider any guilty plea a defendant has made.⁶² In determining the appropriate discount, the court must take into account the stage in proceedings during which the defendant indicated his or her intention to plead guilty, and the circumstances of the

58. SA, *Parliamentary Debates*, Legislative Council, 4 September 2012, 2004.

59. SA, *Parliamentary Debates*, Legislative Council, 4 September 2012, 2002.

60. See *Criminal Law (Sentencing) Act 1988* (SA) s 10C(3).

61. See *Criminal Law (Sentencing) Act 1988* (SA) s 10C(2)(d).

62. *Criminal Justice Act 2003* (UK) c 44, s 144(1).

indication.⁶³ A “less severe” sentence may then be imposed and if this occurs, the sentencing court must state that it has occurred.⁶⁴

Sentencing guideline

9.37 In the seminal judgement of *R v Buffrey*⁶⁵ the Court of Appeal indicated that the discount should generally be one third of the sentence that would otherwise be appropriate. This is now reflected in the Sentencing Guidelines Council’s *Reduction in Sentence for a Guilty Plea – Definitive Guidelines*, which stipulates a sliding scale of discounts:

- discount of one third for a guilty plea at the “first opportunity”
- discount of one quarter for a guilty plea after the trial date is set, and
- discount of one tenth for a guilty plea at the “door of the court” or after the trial has begun.⁶⁶

9.38 The hierarchy of discounts for an offence capable of being tried in either the Magistrates’ Court or Crown Court is as follows:

- an indication made in the Magistrates’ Court (one third discount recommended)
- when the defendant is committed to the Crown Court for trial and pleads guilty at the first hearing in that court (30% discount recommended), and
- a guilty plea made after a trial date has been set (one quarter discount recommended).⁶⁷

9.39 For a defendant pleading guilty to a lesser charge (after originally entering a plea of not guilty to a different charge), the amount of the discount will be determined by:

- the stage at which the defendant first formally indicated to the court his or her willingness to plead guilty to the lesser charge, and
- the reason why the lesser charge was preferred over the original charge.⁶⁸

9.40 Where the prosecution case is overwhelming, this may justify departing from the guideline.⁶⁹ In these circumstances, where the guilty plea was indicated at the first available opportunity, a discount of 20% is recommended.⁷⁰ Another exception arises where a guilty plea has been made for an offence with a prescribed minimum

63. See *Criminal Justice Act 2003* (UK) c 44, s 144(1).

64. *Criminal Justice Act 2003* (UK) s 174(2).

65. (1992) 14 Cr App R (S) 511.

66. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) [4.2], see Figure 5.1.

67. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) annexure 1.

68. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) annexure 1.

69. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) [5.3].

70. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) [5.4].

mandatory sentence, for which the sentencing court may give a discount of up to only 20%.⁷¹

- 9.41 In 2010 the government proposed increasing the maximum discount from one third to one half,⁷² but the proposal was abandoned when critical feedback from stakeholders led the government conclude that a discount of one half was too lenient, would send the wrong message to defendants, and would erode public confidence in the criminal justice system.⁷³

“First available opportunity”

- 9.42 In determining the appropriate discount, the guideline identifies as critical the “first available opportunity” for the defendant to indicate a willingness to plead guilty.⁷⁴

- 9.43 Generally, the first available opportunity will be:

- at the police station
- during an interview with authorities
- at the first appearance in Crown Court (for matters which are indictable only),⁷⁵ or
- at an early guilty plea hearing under the Early Guilty Plea Scheme (see Chapter 5).⁷⁶

71. See *Criminal Justice Act 2003* (UK) s 144(2).

72. UK Ministry of Justice, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Green Paper Cm 7972 (2010).

73. House of Commons Library, *Reduction in sentence for a guilty plea*, Standard Note SN05974 (2013) 1.

74. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) annexure 1.

75. Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (2007) annexure 1.

76. See Practice Note, Cambridge, Peterborough and Huntingdon Crown Court: Early Guilty Plea Protocol (March 2012).

Table 9.2: How must a sentencing court take a guilty plea into account?

	Court must take into account:	Discretionary impact of plea on sentence:	Court to state or record:	Other:
NSW ⁷⁷	(i) Fact of plea (ii) Timing of plea or indication of intention to plead guilty (iii) Circumstances of indication of intention to plead guilty	May impose lesser penalty (which must not be unreasonably disproportionate to nature and circumstances of offence).	Court must record reasons if no discount given.	
Victoria ⁷⁸	(i) Fact of plea (ii) Timing (stage in proceedings) of plea or indication of intention to plead guilty	May impose a less severe sentence.	Court to state and record head sentence and NPP that would have been imposed but for guilty plea (must or may, depending on offence type).	
SA ⁷⁹	(i) Whether reduction would be so disproportionate to the seriousness of offence or so inappropriate for particular defendant that it would shock public conscience (ii) Timing (stage in proceedings) of indication of intention to plead guilty (iii) Circumstances of plea (iv) Whether defendant pleaded guilty to all offences (if more than one) (v) Whether defendant could not plead guilty at an earlier stage because of circumstances outside his or her control (vi) Whether defendant was made aware of any matter that would have enabled defendant to plead guilty earlier (vii) Any other relevant factor or principle	May reduce the sentence.		Discount up to 40% depending on the timing and circumstances of the plea (specific periods and percentages outlined in legislation).
Queensland ⁸⁰	(i) Fact of plea (ii) Timing of plea or indication of intention to plead guilty	May reduce sentence.	Court must state that discount was given or no discount was given (and reasons if no discount given).	

77. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22.

78. See *Sentencing Act 1991* (Vic) s 5(2)(e), s 6AAA.

79. See *Criminal Law (Sentencing) Act 1988* (SA) s 10B, s 10C.

80. See *Penalties and Sentences Act 1992* (Qld) s 13.

	Court must take into account:	Discretionary impact of plea on sentence:	Court to state or record:	Other:
WA ⁸¹	(i) Fact of plea (ii) Timing of plea (the earlier in the proceedings the plea is made, the greater the reduction)	May reduce sentence to recognise benefits to the State and any victim or witness.	Court must state that discount was given and state extent of reduction.	Discount no more than 25%.
Tasmania		N/A		
ACT ⁸²	(i) Fact of plea (ii) Timing of plea or indication of intention to plead guilty (the earlier in the proceedings the plea is made, the greater the reduction) (iii) Whether the plea was related to negotiations about the charge (iv) Seriousness of the offence (v) Effect of offence on anyone who can make victim impact statement (including victims and victims' families)	May impose lesser penalty (which must not be unreasonably disproportionate to nature and circumstances of offence).	Court must state that discount was given and state head sentence and NPP that would have been imposed but for guilty plea.	No significant reduction if court considers prosecution case very strong.
NT ⁸³	(i) Fact of plea (ii) Timing (stage in proceedings) of plea or indication of intention to plead guilty			
England and Wales ⁸⁴	(i) Timing (stage of proceedings) of indication of intention to plead guilty (ii) Circumstances of indication to plead guilty	May reduce sentence.	Court must state that discount was given.	

Increase the efficacy of sentence discounts in NSW?

Statutory guideline

9.44 Stakeholders have submitted a preference for a legislative model similar to that of SA or a guideline like in England and Wales. Legal Aid NSW has suggested a

81. See *Sentencing Act 1995* (WA) s 9AA.

82. See *Crimes (Sentencing) Act 2005* (ACT) s 35; s 37(2)(b).

83. See *Sentencing Act* (NT) s 5(2)(j).

84. See *Criminal Justice Act 2003* (UK) s 144; s 174(7).

statutory gradated three-stage approach to discounts for guilty pleas.⁸⁵ The stages are as follows:

- The highest discount is to be for a guilty plea entered in the Local Court for an indictable offence (in cases where the charge is not later changed by the DPP).
- An intermediate discount is to be for a guilty plea entered after committal.
- The lowest discount is to be for a guilty plea that is entered on or near the first trial date.⁸⁶

9.45 Legal Aid NSW did not support any further discount being given for guilty pleas made before a defendant receives a brief of evidence.

9.46 NSW Young Lawyers considered it particularly important to differentiate between pleas entered before service of the prosecution brief of evidence and pleas entered after service but before committal. They observed that while it is currently usual practice for both pleas to attract a full discount of 25%, in fact the difference in utilitarian value can be very significant.⁸⁷

9.47 NSW Young Lawyers have also suggested a statutory guideline on the basis that it would simplify the procedure for courts when determining an appropriate discount for a guilty plea.

9.48 The suggested structure is as follows:

Table 9.3: Statutory guideline suggested by NSW Young Lawyers

Stage of proceedings	Discount available
Before service of brief of evidence	Up to 30%
Before committal (or after service of brief in Local Court)	20%
At first arraignment in trial court	Up to 15%
First day of trial	Up to 10%

Distribution of information about discounts

9.49 An area not canvassed above is the option to mandate that courts and legal practitioners advise defendants of the available discount. Legal practitioners have an ethical obligation to outline the potential advantages that may flow from a guilty plea to their clients,⁸⁸ but this requirement may not be widely known.

85. Legal Aid NSW, *Preliminary Submission PEGP4*, 3.

86. Legal Aid NSW, *Preliminary Submission PEGP4*, 11.

87. NSW Young Lawyers, *Preliminary Submission PEGP10*, 12.

88. *Gaudie v Local Court of NSW and Anor* [2013] NSWSC 1425 [124]-[129].

- 9.50 The NSW Bar Association has suggested that police could also provide defendants with a schedule of the discounts available for guilty pleas made in different stages of proceedings.⁸⁹ In addition, magistrates could be required to inform defendants of the discount available at the Local Court stage for indictable offences, and the lesser discount available at committal.⁹⁰ Similarly, Legal Aid NSW submitted that magistrates should reinforce the sentencing advantages of pleading guilty and being committed for sentence by superior courts, rather than delaying the guilty plea until after committal for trial.⁹¹

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?

89. NSW Bar Association, *Preliminary Submission PEGP8*, 5.

90. NSW Bar Association, *Preliminary Submission PEGP8*, 5.

91. Legal Aid NSW, *Preliminary Submission PEGP4*, 12.

10. Encouraging early guilty pleas in summary proceedings

In brief

To resolve issues and finalise matters prior to trial, most courts of summary jurisdiction in Australia have introduced case conferencing programs. The Local Court of NSW has not incorporated conferencing into its case management practices. This chapter canvasses the programs in other jurisdictions with focus on the Victorian model, and asks whether NSW would benefit from a similar approach.

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What case management practices are used to encourage early guilty pleas in summary jurisdictions?

- 10.1 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.

Victoria: Summary Case Conference and Contest Mention

- 10.2 In summary proceedings in Victoria (including indictable offences dealt with summarily) there are two stages in the pre-contested hearing phase that aim to bring about an early resolution of matters. First, the Summary Case Conference (SCC), which is a mandatory unmediated criminal case conference. Second, the Contest Mention System (CMS), which involves an in-court case conference, and may follow an unsuccessful SCC. The CMS also incorporates sentence indication. Below we give an overview of both systems.

Summary Case Conference

- 10.3 The SCC scheme was introduced into the Victorian Magistrates' Court in 2010.¹ It involves an out of court discussion between the prosecution and defence representative which aims to facilitate the parties to manage the progression of the case and bring about an early resolution where appropriate.

How do summary case conferences operate?

- 10.4 An SCC takes place between a police officer authorised to take part in the conference and the defendant's legal representative early in proceedings, prior to any contest mention. For an SCC to occur:

- the defendant must be legally represented, unless the court is satisfied that the defendant has had a reasonable opportunity to obtain legal advice, and
- the defendant must have received a Preliminary Brief prior to the conference.

- 10.5 The Preliminary Brief will include a comprehensive sworn statement giving details of the alleged facts and the evidence supporting the charges. It must also include:

- A description of the background to and the consequences of the offence.
- An accurate report of statements made by the defendant, including any confession, admission or explanation.
- A list of witnesses, indicating the evidence the witness is to give and whether the witness has made a statement.
- A list of exhibit evidence.
- A list of any orders that are to be sought.

- 10.6 A request for a full police brief cannot be made until an SCC has occurred.²

- 10.7 Evidence of anything said or done in the course of an SCC or any document prepared solely for the purposes of an SCC is not admissible in any proceeding, unless all parties to the SCC agree to the giving of evidence.³ Should a matter not be resolved through an SCC, the matter may proceed to a contest mention.

Evaluation

- 10.8 Statistics provided by Victoria Police indicate that from July 2011-September 2013 44% (24 796) of all matters that underwent a SCC resolved in a plea of guilty. Of matters remaining, over 20% were adjourned for a contest mention.⁴

1. *Criminal Procedure Act 2009* (Vic) s 54.

2. *Criminal Procedure Act 2009* (Vic) s 54(2)(b); Magistrates' Court Practice Direction, *Summary Case Conference Procedure* (2010).

3. *Criminal Procedure Act 2009* (Vic) s 54(7).

4. Information provided by Victoria Police (22 October 2013).

The Contest Mention

- 10.9 CMS is a statutory case management tool,⁵ initially developed by the courts in 1992 to address a backlog of cases.⁶ The contest mention system enables a conference between the defendant and prosecution to be presided over by a magistrate (the same magistrate generally stays on the list for an extended period). It aims to resolve defended criminal cases which are capable of resolution or to narrow the issues in dispute and sufficiently prepare the parties for trial if the case is incapable of resolution.⁷ It occurs in an open court in the presence of the defendant.

How do contest mentions operate?

- 10.10 The CMS differs from the SCC in three key ways:
- A contest mention will not be applicable to all matters.
 - Once listed, the defendant must attend a contest mention.⁸
 - It is managed by a magistrate. (If the contest mention does not resolve the case, the magistrate that heard the contest mention cannot sit on the trial.)
- 10.11 During the course of the contest mention, the prosecution explains the case against the defendant. The defendant's legal representation explains his or her case. The magistrate reviews the strengths and weaknesses of each position. Victim impact statements can be made available to the court. If appropriate, the magistrate can give a **sentence indication**, which can be requested at any point in the pre-contest proceedings.⁹ The indication advises the defendant if the court would be likely to impose an immediate sentence of imprisonment or a sentence of a specified type.¹⁰
- 10.12 For a contest mention to occur:
- The defendant must have received a copy of the prosecution brief, and had sufficient time to obtain legal advice.
 - The defendant must be legally represented.
- 10.13 A contest mention is generally reserved for cases likely to occupy half a day or more to hear and determine.

What are the benefits of a contest mention system?

- 10.14 The Chief Magistrate of Victoria observed that the CMS permits:

5. *Criminal Procedure Act 2009* (Vic) s 55.
 6. Prior to legislation coming into force, the program was piloted through Practice Notes.
 7. Chief Magistrate of Victoria, Speech given to Australian and New Zealand Prosecution Commanders' Conference, information supplied by NSW Police (18 June 2013).
 8. *Criminal Procedure Act 2009* (Vic) s 55(4).
 9. F Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration Incorporated, 2010) 98.
 10. *Criminal Procedure Act 2009* (Vic) s 60, s 61. For more regarding sentence indications in indictable matters, see Chapter 7.

- **Early identification of guilty pleas:** further aided by the giving of sentence indications.
- **Listing certainty regarding matters set for trial:** where a matter is unable to be resolved at contest mention, the number of witnesses, issues in dispute and length of the hearing would have been determined during the course of the mention.
- **Efficient resource allocation:** Police, Legal Aid and the Court are able to channel their resources into matters that are going to run.
- **Reduced backlog:** the success of the CMS has enabled the Magistrates' Court to substantially reduce its backlog in criminal cases.¹¹

Incidence of contest mentions

- 10.15 The number of contest mentions has been in decline since 2009/10, which directly correlates with the introduction of SCC.
- 10.16 In the 2012/13 financial year, 12 002 contest mentions were listed in the Magistrates' Court. Of these 46% (5591) resulted in a plea of guilty. 4437 guilty pleas were dealt with on the day, with another 1154 adjourned for a further guilty plea hearing. Since 2005/6, contest mentions have generated a similar proportion of guilty pleas.

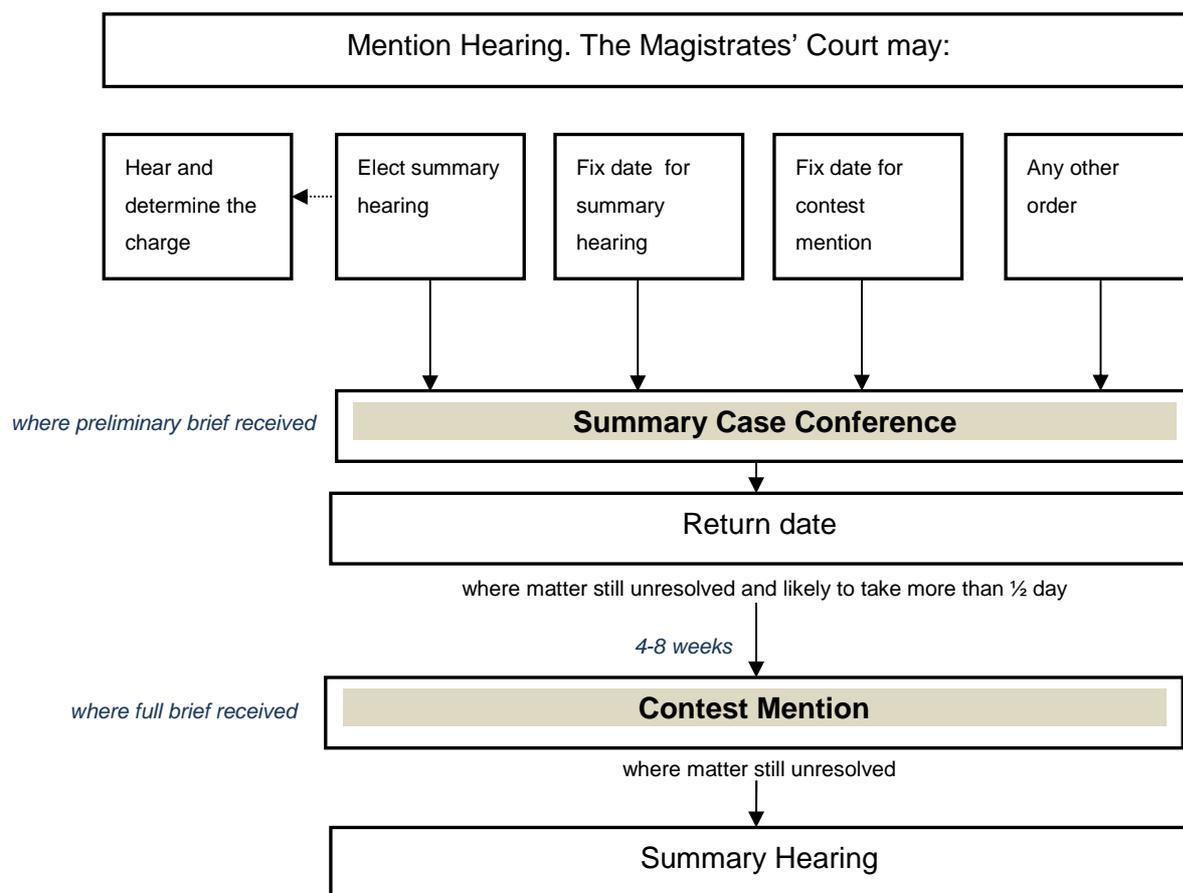
Table 10.1: Results of contest mention hearings by financial year

Financial year	Cases finalised in Magistrates' Court*	Total contest mentions listed	Final orders made (guilty plea)	Adjourned to plea of guilty hearing	Adjourned to contested hearing	Adjourned to further contest mention	Adjourned for other type of mention
2005/6	n/a	23 074	8777 (38%)	2460 (11%)	4180 (18%)	4687 (20%)	2970 (13%)
2006/7	n/a	22 023	8530 (39%)	2367 (11%)	3855 (17%)	4249 (19%)	3022 (14%)
2007/8	156 732	23 101	8910 (39%)	2717 (12%)	3856 (17%)	4380 (19%)	3238 (14%)
2008/9	117 987	23 958	9429 (39%)	2686 (11%)	3759 (16%)	4886 (20%)	3198 (13%)
2009/10	176 132	19 706	7541 (38%)	2092 (11%)	3286 (17%)	3901 (20%)	2886 (15%)
2010/11	180 337	11 006	4109 (37%)	1007 (9%)	1823 (17%)	2314 (21%)	1753 (16%)
2011/12	180 731	12 303	4831 (36%)	1162 (9%)	2048 (17%)	2510 (20%)	2202 (18%)
2012/13	n/a	12 002	4437 (37%)	1154 (10%)	1751 (15%)	2394 (20%)	2266 (18%)

*Source: Information supplied by the Magistrates' Court of Victoria (21 August 2013). * Magistrates' Court of Victoria, Annual Report 2011/12.*

11. Chief Magistrate of Victoria, Speech given to Australian and New Zealand Prosecution Commanders' Conference, information supplied by NSW Police (18 June 2013).

Figure 10.1: Victorian Magistrates' Court summary criminal procedure chart



Case conferences in other Australian jurisdictions

- 10.17 Courts of summary jurisdiction in Queensland, South Australia, Tasmania, the ACT and NT have implemented case conferencing as a case management tool to encourage early guilty pleas and communication between the parties. Below is a brief overview of the practices in each jurisdiction.
- 10.18 **Queensland:** The Queensland Magistrates Court case conference encourages early¹² unmediated negotiations between the prosecution and defence to discuss issues in dispute in order to bring about an early resolution to proceedings. Negotiations aim to amend, substitute or withdraw charges as appropriate, and/or to agree on the sentence range when a guilty plea is submitted.¹³ The case conference follows the protocols prescribed by the Queensland Police Service Policy and the Director's guidelines for charge negotiations.
- 10.19 **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 "fully and frankly"

12. A case conference must occur before the committal or summary call-over: See Magistrates Court of Queensland, Practice Direction No 9 (2010).

13. The prosecution and defence are to advise the court of the result of the case conference concerning any change of charges or factual basis of the plea.

with the aim of disposing of the case other than by way of trial.¹⁴ At third return the parties will be directed to a pre-trial conference.¹⁵ The pre-trial conference is a closed mediated short session, aimed to refine the issues or resolve the matter, by which a sentence indication from the magistrate can be sought. The defence is to receive a full prosecution brief prior to the conference.

- 10.20 **Tasmania:** The Magistrates Court of Tasmania introduced a Contest Mention System (CMS) based on the Victorian CMS in 1996.¹⁶ Contest mentions are held in open court in all matters that have an estimated duration of over 2 hours.¹⁷ During the CMS the magistrate can provide a sentence indication as to sentence type, where appropriate.¹⁸ The sentence indication must be accepted by the prosecution to be valid.¹⁹ An evaluation of the system was completed in November 2012, which recommended the scheme be implemented into statute.²⁰
- 10.21 **Australian Capital Territory:** Following a plea of not guilty in the Magistrates Court, a Case Management Hearing (CMH) date is set. The prosecution must serve a full brief of evidence on the defendant at least 14 days prior to the CMH, and it is expected that the prosecution and defence will undergo “appropriate and constructive” negotiations prior to the CMH.²¹ 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 any pleas offered.²²
- 10.22 **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. If a plea of not guilty is confirmed at the contest mention, then longer matters undergo a Case Management Inquiry, which is held 10 days prior to the hearing date.²³

14. *Magistrates Court Rules 1992* (SA) r 26.

15. See Magistrates Court of South Australia (Criminal Division), Practice Direction No 1 (1999).

16. See Magistrates Court of Tasmania, Contest Mention Guidelines, <http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/contest_mention>.

17. With some exceptions: See Contest Mention Guidelines [2] and [3]: <http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/contest_mention>.

18. Examples of sentence indications include custodial/non-custodial; conviction/non-conviction; licence retained/cancelled etc: Contest Mention Guidelines [5.5]. Although it has been reported that in practice the courts provide sentence indications in specific terms (length of term, amount of fine) See K McConnen and V Stojveski, *Contest Mention Hearings: Evaluation Report* (2012) 28.

19. K McConnen and V Stojveski, *Contest Mention Hearings: Evaluation Report* (2012) 17.

20. K McConnen and V Stojveski, *Contest Mention Hearings: Evaluation Report* (2012).

21. The Magistrates Court of ACT, Practice Direction Number 1 (2009).

22. The Magistrates Court of ACT, Practice Direction Number 1 (2009) [4.3.1].

23. The Court of Summary Jurisdiction NT, Practice Direction, “Court of Summary Jurisdiction Procedure for the Listing of Summary Offences Hearings” (4 October 2010).

Table 10.2: Jurisdictional comparison

	Unmediated case conference	Mediated case conference	Sentence Indication	Case management hearing
NSW				
VIC	✓	✓	✓	
QLD	✓			
SA		✓	✓	
TAS		✓	✓	
ACT		✓		
NT		✓		✓
WA				

The Local Court of NSW

- 10.23 The Local Court hears the majority of criminal matters in NSW, most of which are finalised with a guilty plea. In 2012, the Local Court dealt with 108 528 people on 239 858 charges.²⁴ 67 717 people were sentenced after a guilty plea in the Local Court. Of all people sentenced (including 10% convicted after a defended hearing), 6901 were imprisoned, 12 999 received a bond without conviction, 13 809 received a bond with supervision and 38 782 were fined.²⁵
- 10.24 We do not know at what point in the proceedings guilty pleas were submitted, but BOSCAR reports that guilty pleas which resulted in a sentence being passed generally took 28 days from first appearance to determination, which may indicate that pleas are generally being submitted early in proceedings. Matters that went to a defended hearing generally took 115 days.²⁶ In consultation, it was submitted that the late entry of guilty pleas in summary proceedings at the Local Court is not an issue that causes delay or consumes resources as it does in the District Court.

Local Court Criminal Case Management

- 10.25 Following is a concise overview and flowchart of criminal practice and procedure in the NSW Local Court. The overview is drawn from the Local Court Practice Note Crim 1²⁷ and Local Court Practice Note Comm 1,²⁸ it includes election process.²⁹

24. NSW Bureau of Crime Statistics and Research, *Criminal Statistics* (2012) 23, (Table 1.1).

25. NSW Bureau of Crime Statistics and Research, *Criminal Statistics* (2012) 4.

26. NSW Bureau of Crime Statistics and Research, *Criminal Statistics* (2012) 53, (Table 1.13).

27. Commenced 1 May 2012, amended 1 July 2012.

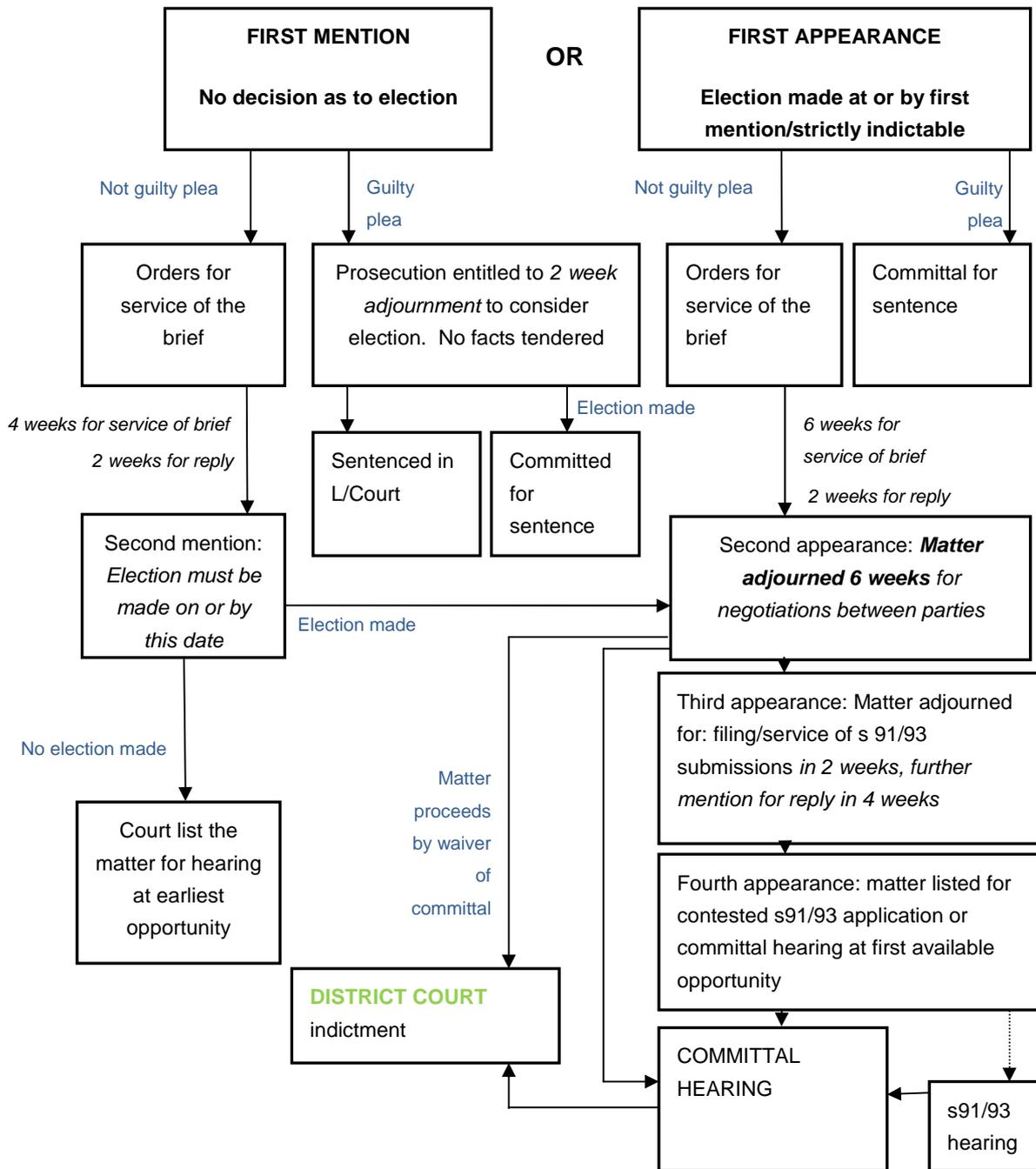
CP 15 Encouraging appropriate early guilty pleas: Models for discussion

- 10.26 At the Local Court on a summary or table offence (an offence that can be heard either summarily or on indictment), a defendant is to attend a first mention and may enter a plea. A plea of not guilty will usually result in the court giving orders regarding service of the brief. Any election on table matters to be heard on indictment must be made by the second mention, which occurs approximately 6 weeks later. If no election is made, the court lists the matter for a hearing at the first available opportunity
- 10.27 Where a plea of guilty is entered to a table matter (the offender making no election), the prosecution may elect to have the sentencing hearing in the higher court, otherwise the offender will be sentenced in the Local Court.

28. Commenced 1 May 2012.

29. *Criminal Procedure Act 1986* (NSW) s 260.

Figure 10.2: The Local Court of NSW criminal procedure (inc. indictable matters)



Case conferencing for NSW Local Court?

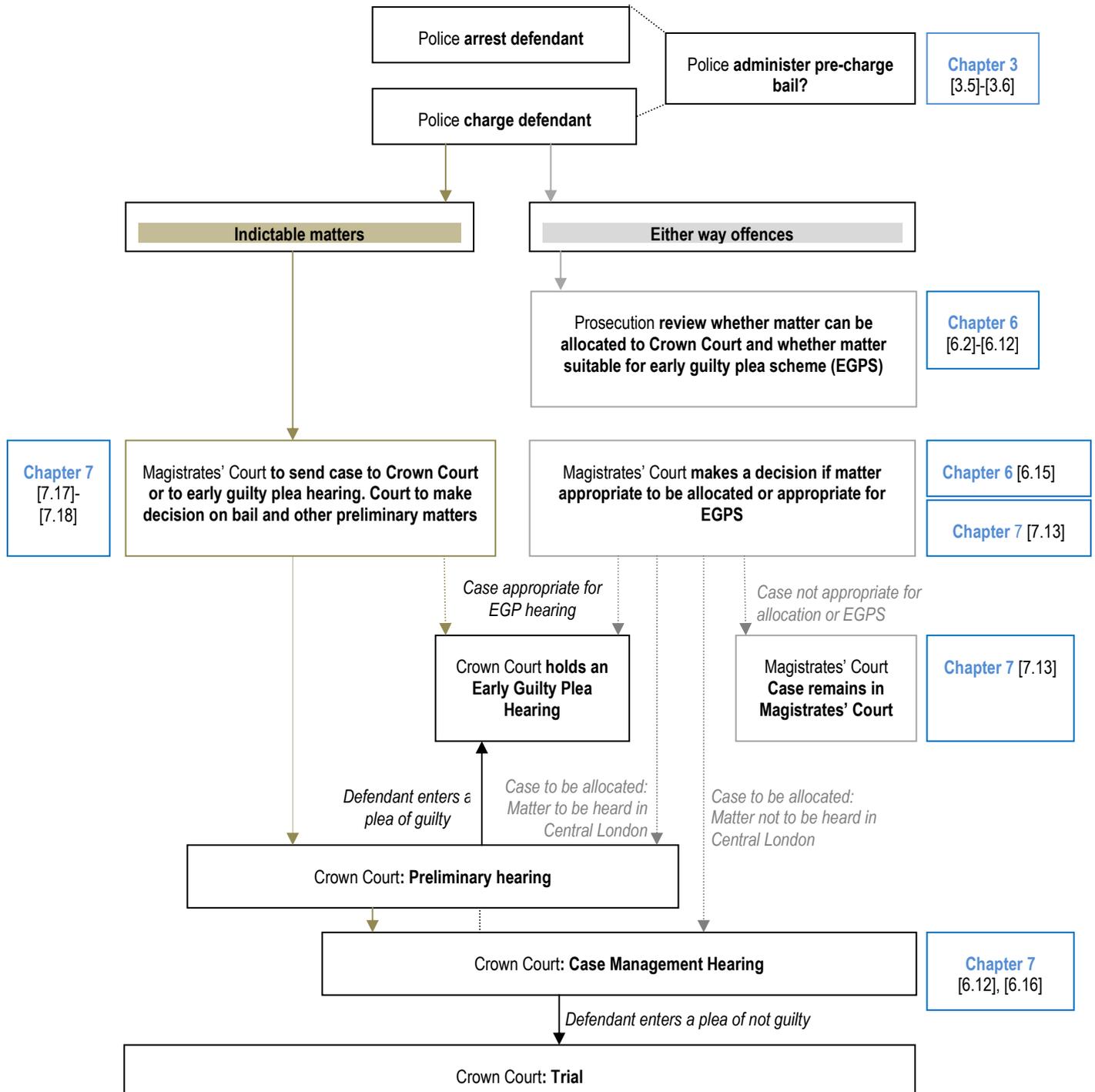
10.28 The NSW Local Court does not incorporate any programs or systems specifically designed to address late guilty pleas. Options that could be adopted include:

1. **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.
2. **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.
3. **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:
 - (a) An indication as to sentence type (custodial or non-custodial), and/or
 - (b) An indication as to quantum of sentence.

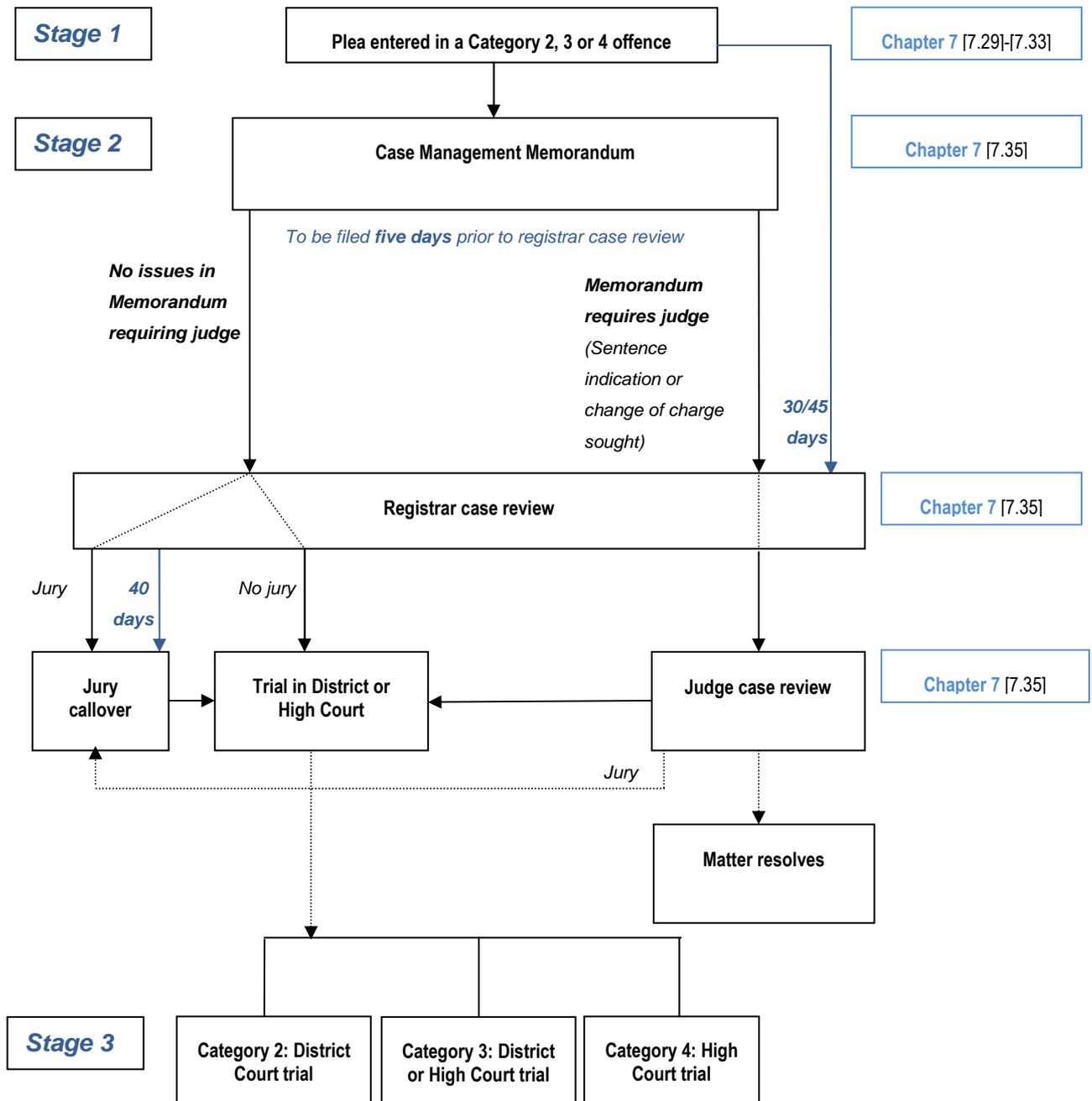
Question 10.1

- 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?

Appendix A: Criminal procedure in England and Wales



Appendix B: Criminal procedure in NZ serious offences





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