

Law Reform Commission of NSW
Identification of Appropriate Early Pleas of Guilty in Indictable Matters
Preliminary Submission by Legal Aid NSW
June 2013

BACKGROUND

Currently the criminal justice system is struggling under the impact of increasing indictable work and delay. This is imposing additional costs and burdens on individuals, relevant agencies and the courts.

A summary of these impacts follows:

District Court Trial Backlog of trials:

Backlog of trials as at 31 December 2011:	977
Backlog of trials as at 31 December 2012:	1019
Backlog of trials as at 30 April 2013:	1397

An increase of approximately 50% in the backlog of trials has occurred since 2012. Listing of trials is now up to 6 months in advance in Sydney and up to 9 months in advance in country NSW.

DPP Committal for Trial Registrations in the Local Court:

The DPP figures for the last 3 financial years disclose:

2010/11:	5300 trials
2011/12:	5200 trials
2012/13:	5800 trials

There has been approximately a 10% increase of indictable matters coming into the Local Court in less than 12 months.

DPP Committals for trial figures from 1 July 2012 to 16 April 2013:

There is currently an increase of 30.5% as compared with 27% for 2011/12.

Numbers are also increasing: 1585 (2011/12) as compared with 1432 (1 July 2012 to 16 April 2013).

Conclusion:

1. From **1 July 2012** more indictable matters have come into the Local Court
2. From **1 July 2012** the DPP are showing an increase in committals for trial (and less disposed of in the Local Court and parity of committals for sentence) from 2011/2012
3. From **1 January 2012** the backlog of trials has increased considerably

EARLY PLEA IDENTIFICATION

The Law Reform Commission (LRC) has received a reference from the Attorney General which addresses "*Encouraging appropriate early guilty pleas in indictable criminal proceedings*". The LRC website indicates "*Specifically the Law Reform Commission is to identify opportunities for legislative and operational reforms to encourage appropriate early pleas of guilty in indictable criminal proceedings.*"

In this regard the LRC is to have regard to:

- the organizational capacities and arrangements for the courts, police, prosecution and defense
- the Trial Efficiency Working Group
- developments in Australia and overseas
- any related matters the Commission considers appropriate

Legal Aid NSW (LA NSW) has identified the 9 essential principles as a prerequisite to encouraging appropriate early guilty pleas in indictable matters. These features require and are predicated on sufficient resourcing for the DPP and LA NSW. These principles can be summarized as follows:

1. Discount for an Early Plea:

- Availability of a statutory discount
- A graduated 3 staged approach to apply for the utilitarian discount (discussed in the "Conclusions" to this submission)

2. Full Brief of Evidence:

- To be served by the prosecution in the Local Court
- Late service to be addressed (sanctions to be imposed)

3. Disclosure Certificate:

- Similar to certificates provided during Criminal Case Conferencing (CCC) and consistent with s 142 of the Criminal Procedure Act
- This certificate binds the Crown and is required at the committal stage as the prosecution certificate under the Mandatory Defence Disclosure regime is not served until close to the trial date

4. Early Involvement of a Prosecutor with Authority to Negotiate:

- Access during the Local Court process to a Crown Prosecutor or designated lawyer with delegation to negotiate is a fundamental requirement

5. Charge Certainty:

- Screening by DPP before/immediately after charge is another fundamental requirement
- Charges not to change after Committal for Trial (or Sentence) without the leave of the Higher Courts
- Clarification of table offences is necessary

6. Access to Clients in Custody:

- Without the immediacy of this requirement negotiations will falter
- AVL/Custody visits need to be fluid and remand prisoners to be located proximate to courts where will appear

7. Designated Courts for listing of Trials:

- This provides an opportunity to access the prosecutor with carriage of the trial if earlier negotiations have not identified a plea of guilty
- This could provide an opportunity for a judge to supervise this last stage
- Designated court (or block) listing provides a more efficient listing regime for the ODPP and LANSW and will assist in allocating respective resources
- The foreknowledge of the presiding judge is a positive ingredient

8. Ample time in the Local Court to negotiate:

- Review of the Chief Magistrates current Practice Note as it applies to committal proceedings

9. Adequately Resourced Front End Criminal Justice System

- More funding is required at the front end of the system whilst cases are in the Local Court, which is a far less expensive process than to continue to fund (and deal with the need for more funding) the conduct of cases in the Higher Courts. One blunt example is the LRC statement in their Briefing Paper that half of the cases that are committed for trial will plead guilty on the day of trial. The DPP and LA NSW are unable to continue to meet the funding necessary for this over servicing.

The LRC have indicated the 10 obstacles to achieving early guilty pleas in their briefing paper for the current reference, as follows:

1. The prosecution serves parts of the brief of evidence late.
2. The defence expects further evidence will be disclosed closer to the trial.
3. The defence believes that it is common practice for the DPP to overcharge early, and that the charges will be reduced as the proceedings advance.
4. The prosecution changes the indictment on the first day of the trial.

5. The prosecution accepts a plea to a lesser charge late in the proceedings.
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.
7. The defence is sceptical that sentencing discounts will be conferred to their client.
8. The defence believes that they will obtain better results in negotiations that occur just prior to trial.
9. The parties expect that senior practitioners will become involved in negotiations closer to the trial date.
10. The defendant denies the seriousness of his or her predicament until the first day of trial.

There are many common features across the **principles** outlined by LA NSW and the **obstacles** identified by the LRC.

Criminal Case Conferencing

An administrative process for the conduct of committal proceedings in the Local Court began on 1 January 2006 with these features:

- The DPP will provide a Disclosure Certificate in every matter.
- The DPP representative at the case conference will have delegated authority to make offers to, and accept offers from, the defence representatives.
- The DPP will advise the defence representatives in advance if a Crown Prosecutor has been briefed to appear at a face to face case conference.
- The defence representative is to be fully conversant with the evidence at the conference and able to effectively negotiate.
- Any negotiated pleas will be binding on all other prosecutors.
- The DPP will accede to the defence submission that the plea if entered in the Local Court should attract the maximum utilitarian benefit.

There were some variations to these features over time including the introduction of a limited statutory regime in Sydney towards the end of the conduct of Criminal Case Conferencing which concluded in early 2012.

It is timely to look at the impact of Criminal Case Conferencing during the years 2006 -2011, when it fully operated. These figures are from the District Court.

	Trial caseload at start of year	Registered	Heard	Trial finalised by verdict	Length (days)	51A Sentence caseload at start of year	Registered	Heard
2000	1855	2015	2683		5.69	353	1216	1218
2001	1187	2165	2226		5.58	351	1487	1405
2002	1092	2280	2263		6.00	433	1518	1529
2003	1098	2253	2181		6.45	422	1477	1393
2004	1164	2279	2189		6.52	476	1483	1393
2005	1254	1869	1951	537	7.38	566	1402	1402
2006	1086	1766	1792	467	7.46	566	1448	1464
2007	1027	1713	1747	489	7.87	550	1525	1467
2008	952	1767	1751	453	7.75	608	1780	1736
2009	955	1657	1638	508	7.85	652	1745	1727
2010	945	1606	1584	487	8.64	670	1784	1732
2011	977	1407	1386	506	8.79	722	1702	1787
2012	1019	1828	1514	549	8.71	637	1691	1600
2013	1363					728		
Current at end of January	1417					709		

During the years of CCC (figures shown in red for 2006-2011) 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.

Committal Registrations

The following DPP table reflects a comprehensive breakdown of committal registrations to 16 April, 2012 and 2013, respectively.

Local Court Committal registrations and completions by DPP centre

	1/7/11-16/4/12		1/7/12 – 16/4/13	
	Registered	Completed	Registered	Completed
TOTAL SYDNEY	1198	1372	1251	1257
CAMPBELLTOWN	530	519	584	571
PARRAMATTA	634	643	703	663
PENRITH (includes Bathurst)	443	401	538	500
TOTAL SYDNEY WEST	1607	1563	1825	1634
DUBBO	235	244	253	232
GOSFORD	157	193	186	184
LISMORE	293	291	370	363
NEWCASTLE	509	507	608	530
WAGGA WAGGA	186	177	195	190
WOLLONGONG	357	351	383	304
TOTAL COUNTRY	1737	1763	1995	1803
ALL DPP CENTRES	4542	4698	5071	4694

In the two year comparison to 16 April, 2013 there has been more than a 10% increase in the registration of committals in the Local Court. Completed matters are static. However, the next table breaks this down into Committed for Trial, Committed for Sentence or Local Court Disposal. In percentage terms there is an increase in Committals for Trial and numerically this is tracking in the same direction.

The DPP recently updated Committal registrations data as follows for the State to 29 May for these financial years:

2010/11: 5300

2011/12: 5200

2012/13: 5800

The increase of 10% in 2013 remains constant.

As indicated a more comprehensive breakdown appears in the following DPP table:

	1/7/11 to 30/6/12 Full year			1/7/12 to 16/4/13 79% of financial year		
	Committed for trial DC	Committed for sentence DC	Local Court Disposal	Committed for trial DC	Committed for sentence DC	Local Court Disposal
TOTAL SYDNEY	513 (29.4%)	543 (31%)	689 (39.4%)	401 (32%)	373 (30%)	483 (38%)
TOTAL SYDNEY WEST (TREATED AS ONE DUE TO FILE MOVEMENT)	464 (22%)	525 (25%)	1104 (53%)	453 (28%)	433 (26%)	748 (45%)
DUBBO	72 (22%)	49 (15%)	202 (62.5%)	60 (26%)	39 (17%)	133 (57%)
GOSFORD	55 (23%)	92 (39%)	90 (38%)	48 (26%)	61 (33%)	75 (41%)
LISMORE	62 (17%)	82 (23%)	215 (60%)	109 (30%)	83 (23%)	171 (47%)
NEWCASTLE	197 (30%)	181 (28%)	272 (42%)	200 (38%)	137 (26%)	193 (36%)
WAGGA WAGGA	56 (24%)	68 (29%)	112 (47%)	59 (31%)	36 (19%)	95 (50%)
WOLLONGONG	166 (35%)	122 (26%)	181 (39%)	102 (33.5%)	85 (28%)	117 (29%)
TOTAL COUNTRY	608 (27%)	594 (26%)	1072 (47%)	578 (32%)	441 (24%)	784 (44%)
TOTAL DPP	1585 (26%)	1661 (26.5%)	2865 (47%)	1432 (30.5%)	1247 (26.5%)	2015 (43%)

This last table doesn't compare the same periods (it is only to 16 April not the full 2012/13 year) but the percentages are most relevant. Committals for Sentence are static but Committals for Trial and Local Court Disposals are poor in percentage terms as compared with last financial year's figures.

Both these tables also show various parts of the State with some areas depicting particular concern.

Centralised Committals

The Local Court has centralized committal hearing at most major courts across the State. Some of the impacts from this centralization are:

1. Legal Aid NSW is represented by in-house lawyers in 75% of matters where the accused appears in a Centralised Committal Court
2. State-wide in-house representation of accused in matters before all Local Courts hearing committals is 50%
3. The ODPP indicate that of these state-wide matters an equal number are either Committed for Trial or Committed for Sentence.
4. LANSW reports that in those matters where there is an in-house presence before a Centralised Committal Court a higher number are Committed for Sentence than Committed for Trial.
5. Therefore LA NSW is benefited financially by maximising the retention of matters in-house.

LA NSW and the DPP are currently addressing where it is appropriate to extend Centralised Committal Courts, to allow a submission to be made to the Chief Magistrate. However, it has just been indicated that the Chief Magistrate is considering decentralizing all committals state wide as a consequence of the budget savings that have been imposed on the Local Court. If this was to occur the capacity of LA NSW to maintain the current approach to the early identification of pleas of guilty in the Local Court (and the retention of trials in house) will be seriously impacted. Additionally, our costs will considerably increase to fund committal hearings spread across the state. This proposed abolition of Centralised Committals is therefore an example of the need for a coordinated and "A longer term solution" to the indictable criminal justice process, which is identified below (see "4. Solutions").

CONCLUSIONS

1. Pressures

- More indictable work is coming into the Local Court. A reason given for this is more policing (recently confirmed by the Bureau of Criminal Statistics and Research)
- The District Court trial backlog figure is growing at an alarming rate
- The remand population is equally growing
- District Court listings are "blowing out"
- LA NSW cannot afford to fund more committals for trial to the District Court, noting that half will plead guilty on the first day of trial (as stated by LRC in their Briefing Paper for the current reference). Charges are regularly changed on the eve of trial in the District Court thus allowing an accused to receive the maximum utilitarian discount for a plea to the changed charge. The LRC in their list of 10 obstacles to achieving early guilty pleas (as quoted earlier in this submission) state, "The defence believes that they will obtain better results in negotiations that occur just prior to trial (number 8)"
- LA NSW cannot afford to fund additional sittings of the District Court to reduce the backlog of trials

2. Local Court Best Practice

- The following is a summary of the best practice approach for effective plea/charge negotiations to be followed (albeit only randomly at the current time) for indictable charges:
 1. Full brief of evidence to be served by police on DPP and LA NSW in a timely manner
 2. Thereafter, the DPP to immediately screen the brief and if not discontinued inform the defence of the appropriate charge
 3. DPP to indicate outstanding evidence and when it will be available
 4. The defence to obtain instructions and respond or initiate negotiations if DPP doesn't make first contact. Alternatively, make representations for discontinuation or changes to charges

5. In matters where LA NSW represents the accused, if negotiations have not progressed contact to be made by the DPP or LA NSW lawyer with a more senior lawyer in their respective organizations to progress negotiations including to decide if counsel is to become involved
6. The Local Court to allow appropriate time for the parties to negotiate
7. The charges are finally settled in the Local Court and the evidence is complete when committed for trial

3. District Court Best Practice

- Unfortunately there are no systemic best practice principles in the District Court for plea/charge negotiations. The reason being the late trial briefing of Crown Prosecutors by the DPP. LA NSW accepts that this is due to inadequate funding of the DPP and as a consequence of the current roadblocks and inefficiencies across the whole of the indictable criminal justice process, as discussed below.

4. Solutions

- **The immediate solution** is to adopt the essential principles outlined at the beginning of this submission by LA NSW to encourage appropriate early guilty pleas. These essential principles can be further developed in a dialogue with the LRC and others during a roundtable forum. At that stage it is expected that the regime to apply to Mandatory Defence Disclosure will be known and in that context the capacity to apply a graduated 3 stage statutory utilitarian discount. In those instances where the charge is not changed by the DPP the maximum discount will be available when a plea of guilty is entered in the Local Court to an indictable charge. The lowest discount occurs when the plea is entered on or near the day of trial. However, LA NSW supports an intermediate discount post committal for trial at a time to be determined when the changed listing and associated case management process applying to Mandatory Defence Disclosure are more apparent. However, LA NSW is reluctant to accept an enhanced utilitarian discount being available to an accused without a full brief being served and the charge reflecting the available evidence. The reasoning behind this concern is due to current "roadblocks and inefficiencies" addressed within first two points under "A longer term solution" below.

- LA NSW submits that it is timely and necessary in view of the workload issues and trends identified in this submission to address roadblocks and inefficiencies across the whole of the indictable criminal justice process. Systemic change is urgently required to bring about sustainable and affordable processes. Therefore a broader examination is necessary to deliver enhanced opportunities to identify appropriate early pleas of guilty in indictable matters. **A longer term solution** should involve a total review of:
 - the way police build and serve briefs of evidence, including the use of technology (E Briefs)
 - the pre authorization for indictable charges (DPP sanctioned)
 - the whole of system approach to the case management of indictable matters, rather than the current disconnected Local and the District Court case management practices
 - the committal process to be revamped to provide adequate time for filtering cases (including retention of cases in the Local Court for final disposal). As earlier indicated in this submission more funding should be directed to the front end to save the over servicing of cases in the Higher Courts and the need for additional funding to deal with increasing workloads. Magistrates strictly adhere to the Chief Magistrate's Practice Note for the prompt time management of committal hearings in the Local Court. This can inhibit effective negotiations between the parties. Alternatively, LA NSW suggests that Magistrates should actively case manage the manner in which cases are finalized before them. This includes requiring the parties to indicate if charges have been negotiated to have cases concluded in the Local Court. As shown in the last table depicted earlier in this submission, currently over 40% (in 2011/12 it was close to 50%) of indictable cases before the Local Court are concluded in that jurisdiction. In addition, as at least half of matters committed for trial plead guilty thereafter, Magistrates should be reinforcing the sentencing advantages of appropriately pleading guilty to the appropriate charge and to then be committed for sentence to the Higher Courts. A rigorous prosecution disclosure and sanction regime to limit service of additional evidence and the altering of charges post committal, can equally be supervised and reinforced by Magistrates
 - trial listing (and case management) system that maximizes the use of DPP and LA NSW lawyers/counsel. In our submission this will also create enhanced efficiencies for the court if the listing of trials allows for the advanced identification of who is prosecuting and who is defending. Should the preceding measures be followed there will be fewer late pleas of guilty and greater certainty of charge and available evidence to deliver a more regularized listing system in the District Court.